IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

Case No: 17/2020

In the matter between:

USA DISTILLERS (Proprietary) Ltd

Appellant

And

IMPROCHEM (Proprietary) Ltd

Respondent

Neutral Citation: *USA Distillers (Proprietary) Ltd vs Improchem (Proprietary) Ltd (17/2020)[2020] SZSC...51 (4 June, 2021)*

Coram : **MJ Dlamini JA; SJK Matsebula JA; MJ Manzini AJA**

Heard : **17 and 26 March, 2021 (Via ZOOM)**

Delivered : **4 June, 2021**

Summary: *Private International Law – Foreign judgments – Recognition and enforcement of – Common Law requirements – The Reciprocal Enforcement of Judgments Act (Act No. 4 of 1922) discussed – Act does not oust the Common Law – Appeal dismissed.*

JUDGMENT

Introduction

[1] The Agreement at the centre of this appeal was entered into between the parties in 2001. The appellant was an eSwatini registered company while the respondent was a South African registered company. In terms of the agreement, the respondent was to perform work for the appellant at appellant's location at Big Bend, eSwatini. A dispute between the parties arose in 2005 and was duly referred to arbitration in terms of the Agreement. The arbitration took place in Johannesburg as provided under the Agreement. On or about 24 March 2006, at Johannesburg, the parties, duly represented, concluded a written arbitration agreement called "Submission to Arbitration", in terms of which the parties referred 'arbitrable disputes' which had arisen, to arbitration. In terms of clause 2 of the arbitration agreement, the submission constituted an amendment of clause 24 of the TWM agreement. After agreeing that Advocate Andrew Redding SC would be the arbitrator, the parties, under paragraph 3 of the arbitration agreement, also agreed that *"the arbitration would be conducted in terms of the Arbitration Act 42 of 1965, a South African national statute (....) save in respect of such provisions expressly provided for in the arbitration agreement"*.

[2] In January 2014 the arbitrator, Advocate Redding SC, delivered his award in favour of the respondent and dismissed the counterclaim by the appellant. The parties had also agreed in terms of clause 9 of the arbitration agreement that *"each party had the right to appeal against the arbitrator's award"*. On 12 February 2014, the appellant lodged an appeal *"against the whole of the [Redding] award"* and the respondent also lodged a cross-appeal. The appeals were heard by former Supreme Court of Appeal Judge LTC Harms

and Advocates DM Fine SC and WHG Van der Linde SC, constituting an appeal panel or tribunal. The appeal award, dismissing the appellant's appeal with costs and upholding the cross-appeal, was handed down in September 2014. The Redding award was set aside and substituted with the appeal award.

[3] After the appeal award was handed down, the respondent applied to the Johannesburg High Court to have the award made an order of court. The appellant opposed the application. On 31 August 2016 Judge Keightley granted the application and on 11 November 2016, the learned Judge dismissed the appellant's application for leave to appeal and on 6 March 2017 the Supreme Court of Appeal dismissed the appellant's application for appeal. There being no appeal to the Constitutional Court, on 8 August 2017, the respondent applied to the High Court of eSwatini for the recognition as an order of the eSwatini High Court and enforcement accordingly in eSwatini of the Keightley judgment (which incorporated the appeal award).

[4] Specifically, the respondent (as applicant in Court below) applied to have the Keightley Judgment recognized and made an order of the High Court of ESwatini. Since the Keightley judgment is a foreign judgment and the Reciprocal Enforcement of Judgments Act, 1922 does not operate between eSwatini and South Africa, the application for the recognition was brought under the common law. The domestication of foreign judgments is not automatic. In paragraph 63 of its founding affidavit, the respondent alleged in support of its application that the South African High Court had *"international jurisdiction or competence"* to hand down the judgment; that the Keightley judgment was *"final and conclusive"*, with no pending appeal; and that its recognition and enforcement would *"not offend against public policy"* or rules of natural justice in eSwatini.

[5] The primary purpose of the application in the Court *a quo* was to have the judgment of the High Court of South Africa dated and revised on 31 August 2016, incorporating the appeal award dated 17 September 2014, recognised and made an order of the High Court of eSwatini to be enforceable as such against the appellant in eSwatini. In the alternative,

the respondent (as plaintiff) had prayed that the Registrar of the Court *a quo "be granted leave in terms of section 3 of the Reciprocal Enforcement of Judgments Act, No.4 of 1922, to register in this Court the arbitration appeal award"* or that the appeal award be recognized and enforced as an order of the High Court against the appellant in eSwatini. The appellant, as defendant, had opposed all the prayers.

[6] The application came before the learned Justice Mlangeni at the High Court, who granted it with costs on the attorney and client scale to include costs of counsel certified in terms of Rule 68(2). The learned Judge also dismissed the conditional counter-application by the appellant. Appellant has appealed to this Court.

Some general observations

[7] Before proceeding with the appeal, it is noted, in passing, that the judgment of Mlangeni J does not clearly reflect in what form the judgment sought to be recognized and made an order of the High Court of eSwatini was presented before that Court. Was the South African judgment, for instance, attached to the respondent's application? Justice Mlangeni cites the full order of Keightley J as follows:

> *"1. The arbitration appeal award of the Honourable Justice LTC Harms, DM Fine SC and WHG Van der Linde SC dated 17th September 2014, is made an order of court.*
>
> *2. The Respondent is directed to pay the costs of the application on an attorney and client scale".*

By means of a footnote it is then reflected that the quoted court order is to be found on p. 28, at paragraph [80] of the judgment of Keightley J. The trouble is that the judgment *a quo* does not state if in fact the order it had cited was the order of court granted by Justice Keightley and duly signed and certified by the Registrar or equivalent official of the issuing Court and duly authenticated as a true document of what it purports to be (and not a fake order or judgment). Unfortunately, the Appeal Record is a bulky and cumbersome

document of over 400 pages and omits a number of the annexures referred to in the case. The Appeal Record was certainly not prepared in terms of the Rules of this Court.

[8] From the founding affidavit, it appears that the judgment of Keightley J was annexed by the respondent as annexure FA10, but that annexure was not part of the bulky Appeal Record certified by the Registrar of the High Court. On p.417 (the penultimate page) of the Appeal Record it is recorded that Annexure FA10 is one of the 21 documents omitted from the record. In the result, this Court can only assume that the copy of the judgment (annexure FA10) was a certified and authenticated copy of the Keightley Judgment, the basis of the application in the Court *a quo*. The authenticity of the foreign judgment or award should not be in doubt and this ought to be reflected in the judgment of the Court *a quo*, so that the Keightley Judgment that is sought to be made an order of the High Court is indeed the judgment of Keightley J as alleged.

[9] I make the foregoing remarks on legal principle and as informed by the judgment of Stegmann J in **Barclays Bank of Swaziland**[1] where the learned Judge stated:

> *"The plaintiff seeks provisional sentence against the defendant on the strength of a judgment entered against the defendant on 16 March 1990 on the order of Dunn J in the High Court of Swaziland. The written order of that Court's Registrar, has been identified by the affidavit of the Registrar, Mr. Mark Fakudzi (sic). In his affidavit the Registrar has confirmed that the judgment was a final judgment and that neither an application to rescind the judgment nor an appeal against it had been lodged. The Registrar's affidavit was sworn before a notary public of the Kingdom of Swaziland, one Stanley Bungani Mnesi (sic), who both attested the affidavit and applied the stamp of his office as notary public. I am satisfied as to the authenticity of these documents.*
>
> *The order of the Swazi Court reads:*

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[1] **Barclays Bank of Swaziland v Mnyeketi** 1992 (3) SA 425 (WLD)

'Upon hearing Counsel for the plaintiff, it is ordered that the defendant will make–

1. *Payment of the sum of E15, 419.19;*
2. *Interest thereon at the rate of 18.25% per annum from 28 December 1989 to date of payment,*
3. *Costs of suit'".*

[10] I take it that the purpose of my remarks is self-evident in a matter of this kind. It must be acknowledged that applications such as the present one are of scarce precedence in our jurisdiction; but we must learn and keep moving.

The Appeal

[11] The appellant (as respondent *a quo*) opposed the application at the High Court on a number of grounds, pertinently, *inter alia,* that the South African High Court of the Gauteng Local Division did not have international jurisdiction to decide the matter since the appellant was a *peregrinus* in South Africa, and that the appeal award fell outside of the jurisdiction of the Appeal Panel, that is, the appeal panel exceeded its powers or jurisdiction, in particular, in that Claim D was not part of the dispute submitted to arbitration in terms of the Submission. In paragraph 2 of its heads of argument, the appellant stated that *". . . at the heart of the matter is the USAD's (. . .) dissatisfaction with not having received the performance that it bargained for under the relevant contract"*. In effect the USAD claimed to have been overcharged contrary to the terms of the agreement. The appellant continues:

"3. The reason why USAD is aggrieved by the award of the Appeal Panel is that the Appeal Panel made two findings that go to the heart of its decision and which USAD contends could not lawfully have been made. The first is that USAD is liable to pay the full amount of the contract price despite mal-performance by Improchem ('the Respondent'). The second is that USAD is required to make

payment of Claim D despite the fact that it was not the subject of the dispute referred to arbitration – indeed, it is common cause that the Claim was an afterthought introduced by Improchem during the course of the arbitration".

[12] The appellant appealed against the judgment of Mlangeni J. dated 21 February 2020. Justice Mlangeni had upheld the recognition application brought by the respondent in which was sought that the Keightley Judgment of the Gauteng Local Division of the High Court of South Africa dated and revised on 31 August 2016, [incorporating the appeal award of Judge LTC Harms, Advocates D.M. Fine S.C and WHG van der Linde S.C. dated 17 September 2014 which was made an order of the said Gauteng Local Division] be made an order of the High Court of eSwatini. As a *first alternative* to the foregoing prayer, the respondent initially sought that the Registrar of the High Court be granted leave *"in terms of section 3 of the Reciprocal Enforcement of Judgments Act No.4 of 1922"* to have registered in the High Court the aforementioned arbitration award ("the appeal award"). As a *second alternative,* the High Court was prayed to recognize the appeal award and have it enforced as an Order of the High Court of eSwatini against the appellant. The alternative prayers were abandoned.

[13] The appellant has presented nine grounds of appeal against the judgment of Mlangeni J. These grounds have sub-grounds and in all cover some seven pages. I do not find it necessary to reproduce all the grounds here. The essence of the appeal is that Justice Mlangeni erred to recognize the South African judgment and make it an order of court in this country. The appellant asserted, *inter alia*, that the existence of the Reciprocal Enforcement of Judgments Act, 4 of 1922, meant that the common law jurisdiction of the High Court to enforce foreign judgments was superseded and replaced by the Act. According to the appellant, the legislature ought to have expressly provided for the retention of the common law when the Act was passed, if that was the intention. Failure to so provide meant that the common law was superseded. Accordingly, appellant argued, the Act replaced the common law in this regard regardless of whether as between eSwatini and any foreign country there were any reciprocal arrangements for the enforcement of

judgments. In the result, also, a foreign arbitration award must only be enforced in terms of the Act where the Act applies: otherwise, nothing doing. That line of argument is a dead end. The argument is unrealistic in light of the small number of states to which it applies.

[14] An abridged version of the grounds of appeal is as follows:

1. The Court a quo erred in law in not finding that the Arbitral Appeal Tribunal exceeded its jurisdiction.

2. The Court a quo erred in law in not finding that the South African High Court did not have the jurisdiction to grant an order enforcing the arbitral appeal award and accordingly the Courts of eSwatini also lack the requisite jurisdiction to enforce that judgment.

3. The Court a quo erred in law in failing to find that an arbitration award has a life of its own, and the eSwatini courts were on their own whether to enforce or not to enforce the said arbitration award without looking to the judgment of the South African High Court.

4. The Court a quo erred in law in failing to find that clause 6.3 as interpreted by the Arbitral Appeal Tribunal offends against public policy of eSwatini and consequently unenforceable in eSwatini.

5. The Court a quo erred in law in finding that there is no basis in law upon which the Court can enquire into the merits of the arbitral appeal award ..... The Roman Dutch common law incorporated into the law of the Kingdom of eSwatini included the process of reductie.

6. The Court a quo erred in law in failing to find that it has the power to set aside the appeal award and to refer it back to a new appeal tribunal under the South African Arbitration Act (No. 42 of 1965) and common law.

7. *The Court a quo ought to have dismissed the main application with costs and granted the counter-application.*

[15] As a general comment to some of the above grounds, it was not shown on the pleadings or at the hearing how a *foreign award* could directly be made an order of court in eSwatini. The Arbitration Act of 1904 does not apply to foreign awards. The Reciprocal Enforcement of Foreign Judgments of 1922 also does not apply as there is no reciprocity between eSwatini and South Africa in this area. Nor has it been clearly shown how the foreign award could be recognised under the common law save in the manner done by the respondent. When in Holland an award was made a rule of court during the time of the *reductie* the awards affected were local and not foreign awards. There was no other judicial recourse open to the respondent, and making the award an order of the South African High Court was a reasonable way of averting the procedural quandary of possibly having the naked award unenforceable in eSwatini.

The Reciprocal Enforcement of Judgments Act, No. 4 of 1922

[16] The appellant has submitted that the High Court of eSwatini has *"the power to enforce a foreign arbitral award (whether in terms of or outside the provisions of the Reciprocal Enforcement Act), it does so in terms of the common law"*. The 1922 Act admits a foreign award for enforcement *"if such award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in such place"*. Even then reciprocity is still required. What this means is that, if the Act applied between South Africa and eSwatini, the arbitral award would still have had to be first made an order of Court in South Africa before application could be made for its recognition and enforcement in eSwatini. It seems to me that the registration of foreign judgments under the Act is in effect not different from the order by which a foreign judgment or award is recognized and enforced under the common law. It's only that the statute procedure is cheaper and quicker. The appellant's foregoing statement is therefore

only conditionally correct. It may then be convenient to begin by looking at what the Act provides pertinent to this matter, if anything.

[17] The recognition and enforcement of foreign judgments in eSwatini is partly regulated by statute and partly by the (Roman-Dutch) common law. By statute law the enforcement is reciprocal but not necessarily so on the common law platform. From its *long title* it is clear that the Act was mainly intended to *"facilitate the reciprocal enforcement of judgments and awards in the United Kingdom and Swaziland"*. Section 3(1) of the Act provides as follows:

> *"If a judgment has been obtained in the High Court in England or Ireland or in the Court of Session in Scotland the judgment creditor may apply to the Court at any time within twelve months after the date of the judgment, or such longer period as may be allowed by such Court to have the judgment registered in such Court, and on any such application the Court may, if in all the circumstances of the case it thinks it is just and convenient that the judgment should be enforced in Swaziland, and subject to this section, order the judgment to be registered accordingly".*

[18] The Act is applicable in civil proceedings *"whereby any sum of money is made payable"* and includes arbitration awards. The enforceable judgments or awards would be judgments and awards obtained overseas and registered in eSwatini for purposes of enforcement as such. By judgment obtained overseas *"the Act refers to the High Court in England, or Ireland or in the Court of Session in Scotland"*. Section 3(2) provides for judgments and awards which are not registrable under the Act such as, *inter alia,* where the original court acted without jurisdiction and where the judgment was obtained by fraud or where the judgment debtor not being ordinarily resident or doing business within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to the jurisdiction of such original court or the judgment *"for reasons of public policy or some similar reason could not have been entertained by the [High] Court [of eSwatini]"*.

[19] Of critical importance is that the Act would not apply in the absence of reciprocal arrangement. The absence of such arrangement, however, does not mean that as between eSwatini and the foreign state there can be no mutual recognition and enforcement of judgments otherwise meeting certain requirements under the Roman Dutch common law applicable in eSwatini since 22 February 1907.[2] At date of commencement, the Act applied only to England, Ireland and Scotland and, as appears on the Schedule, the Act was extended to apply to a number of Commonwealth countries, but not to South Africa. We must then look elsewhere for the status or fate of foreign judgments sought to be enforced in eSwatini outside the three countries mentioned above and those which are listed under the Schedule. The Act proceeds to provide as follows:[3]

> *"6 (1) Where the High Court is satisfied that reciprocal provisions have been made by the legislature of any part of Her Majesty's Dominions outside the United Kingdom for the enforcement within that part of Her Dominions of judgments obtained in the High Court, the High Commissioner may by notice in the Gazette declare that this Proclamation shall extend to judgments obtained in a Superior Court in that part of Her Majesty's dominions in the like manner as it extends to judgments obtained in a Superior Court in the United Kingdom, and on any such notice being published this Proclamation shall extend accordingly".*

The agreements between the parties

[20] The agreements leading to the dispute and the arbitration proceedings have been set out by the respondent in its founding affidavit and in paragraphs 13 and 14 it averred:

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[2] See section 252 of the ***Swaziland Constitution Act, 2005***. It is noteworthy that the Roman Dutch common law had been applicable in eSwatini since about 1890.

[3] For some inexplicable reason, this section, and possibly a few other sections too, does not appear under the currently published **Statutes of Swaziland**. This is probably an error as there would be no basis for the countries appearing in the Schedule. The sec. 6 (which is in fact sec. 5 appearing under the Schedule) is found under the earlier version on the laws published under **The Laws of Swaziland**. I checked with the Attorney General's office but there was no immediate answer or explanation. There is no evidence that the Act has recently been amended.

"13. In terms of Clause 25 of the TWM Agreement, the applicant and respondent (now appellant) consented to the non-exclusive jurisdiction of the Witwatersrand Local Division of the High Court of South Africa (...) in regard to all matters arising from the agreement (....).

"14. In terms of clause 24.1 of the TWM Agreement, the applicant and respondent agreed that any dispute in regard to the interpretation, the effect of, the parties' respective rights and obligations under, a breach of, and any matter arising out of the TWM Agreement, would be decided by arbitration".

[21] In particular, the TWM agreement provided as follows:

> *"24. **Arbitration***
>
> ***24.1 Any dispute between the parties in regard to the interpretation of; the effect of; the parties' rights and obligations under; a breach of; any matter arising out of this Agreement shall be decided by arbitration in the manner set out in this clause.***
>
> ***24.2 The said arbitration shall be held subject to the provisions of this clause at Johannesburg; informally; otherwise in accordance with the provisions of the Arbitration Act No. 42 of 1965, as amended, it being the intention that if possible it shall be held and concluded within 21 (twenty-one) working days after it has been demanded.***
>
> ***24.5 The parties irrevocably agree that the decision in these arbitration proceedings shall be binding on them; shall be carried into effect; may be made an order of any Court of competent jurisdiction.***
>
> *"25. **Governing Law***

The entire provisions of this Agreement shall be governed by and construed in accordance with the laws of South Africa. Furthermore, the Parties hereto hereby irrevocably and unconditionally consent to the non-exclusive jurisdiction of the Witwatersrand Local Division of the High Court of South Africa in regard to all matters arising from this Agreement.

"26. ***Costs***

26.2 All legal costs incurred by either Party in consequence of any default of provisions of this Agreement by the other Party shall be payable on the scale as between attorney and client ....

"27. ***General***

27.1 This document contains the entire agreement between the Parties in regard to the subject matter hereof; ..."

In the South African High Court, Gauteng

[22] Following the noting of the appeal, the parties appointed the appeal panel (arbitrators), being Advocate DM Fine SC and Advocate WHG Van der Linde SC, both of whom then appointed Retired Judge LTC Harms as the chairperson. The appellant's appeal was dismissed with costs while the respondent's cross-appeal was upheld. The Redding award was set aside and replaced. The appeal panel's award (the appeal award) included claim D in terms of which the appellant was ordered to pay an amount of R392,562.00 plus interest. When the appellant failed to pay in terms of the appeal award, notwithstanding demand, the respondent applied to the South African High Court to have the *"appeal award made an order of court in terms of section 31 of the South African Arbitration Act in order to render it enforceable in South Africa"*. Having been served with the application at its place of business in eSwatini the appellant entered an appearance to defend. The matter was heard by Keightley J. of the South African High Court where both parties were

represented. Judgment was delivered on 31 August, 2016 (the Keightley Judgment) granting the application. Paragraph 80 of that judgment records the specific order making the appeal award an order of court.

[23] Following the Keightley judgment, the appellant applied for leave to appeal that judgment to the Supreme Court of Appeal. Keightley J. found no merit in the appellant's submission and dismissed the application for leave. In December 2016, the appellant applied to the Supreme Court of Appeal for the grant of leave to appeal the Keightley judgment. On 6 March 2017 the Supreme Court of Appeal also dismissed with costs the appellant's application for no show of reasonable prospects of success and there being no other compelling reasons for granting the appeal. In paragraph 60 of its founding affidavit respondent averred that *"the right to apply for leave to appeal to the Constitutional Court of South Africa against the Keightley judgment.... has actually lapsed"*. In the result, the Keightley judgment as revised on 31 August 2016 has become final and conclusive.

The Roman-Dutch Common Law

[24] Proclamation No.1 of 1904 was the first local law to be issued under the authority of the Swaziland Order in Council of June 1903 following the end of the Anglo-Boer war. By the said Order in Council, eSwatini became a British protectorate under the administrative control of the (British) Governor of the Transvaal. Among other things, the Proclamation established the Special Criminal Court of Swaziland. The said Proclamation was replaced by the Swaziland Administration Proclamation No. 3 of 1904. That Proclamation provided among other things that *"the laws of the Transvaal and the statutory regulations thereunder shall* mutatis mutandis *and as far as they may be applicable be in force in [Swaziland] and shall be administered as if [Swaziland] were a district of the Transvaal"*. The Proclamation also provided for the establishment of Courts having the same powers and jurisdiction as those of the Transvaal, headed by a Circuit Court held by

one of the Judges of the Transvaal Supreme Court.[4] The Circuit Court was held twice a year and appeals from it lay to the Supreme Court of the Transvaal. It was Proclamation No. 4 of 1907 which amended Proclamation No. 3 and established the Special Court of Swaziland exercising civil and criminal jurisdiction over Europeans. Of present relevance, Proclamation No. 4 in part provided as follows:

> *"2 (1) The Roman-Dutch Common Law save in so far as the same has been heretofore or may from time to time hereafter be modified by statute shall be law in Swaziland and all statute law which is in force in Swaziland immediately prior to the date of the taking effect of this Proclamation shall save in so far as the same is hereby amended or altered or is inconsistent herewith or may hereafter be amended or altered shall be the Statute Law of Swaziland."*

[25] Significantly, the Governor of the Transvaal was replaced by the High Commissioner when the Transvaal (the then South African Republic) obtained self-government in 1906 and, together with the other three British colonies, prepared to form the Union of South Africa in 1910. Since the High Commissioner resided in South Africa (Cape Town) he was represented by the Resident Commissioner in eSwatini until 1963. As far as the operation of the Roman-Dutch common law in eSwatini is concerned, the *Convention* of 1890 (July 24, 1890) between Great Britain and the South African Republic, in Article 2, had provided as follows:

> *"(g) The laws to be administered by all Courts of Justice to be the Roman-Dutch Law (sic) as in force in South Africa, but subject to such alterations, additions or amendments as may be made....."*

[26] As provided under Proclamation No. 3 of 1904, appeals from judgments and sentences of the Circuit Court went to the *"Supreme Court of the Transvaal in the same manner and form as (was) prescribed in the [Superior Courts Criminal Jurisdiction*

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[4] Lord Hailey, **Native Administration in the British African Territories, Part V: The High Commission Territories: Basutoland, Bechuanaland Protectorate and Swaziland,** 1953, p371-2

Ordinance 1903] for appeals from a Circuit Court and the provisions of the said Ordinance relating to Circuit Courts and the rules and procedures in such Courts made by Judges of the Supreme Court were made to apply mutatis mutandis to the Court holden under this section", that is, section 3 of the Proclamation. The officers of that Court including the Judicial Officers were all qualified in terms of Transvaal law and regulations. The Organic Proclamation of 1890 issued by the Swazi King Bhunu provided in article 8 that laws to be administered by all courts of justice was to be the Roman Dutch law as in force in South Africa, but subject to such alternations, additions....as may be proclaimed.

[27] By Article 3 of *Proclamation of the Queen Regent* of 1889, it was provided that the Committee of Management for the Administration of the Affairs of Europeans in Swaziland shall have power and jurisdiction *"acting in accordance with the principles of the Roman Dutch Law as administered in South Africa..."* Act No. 4 of 1922 did not establish something entirely new. This is shown by the provisions of that Act. The Act only somewhat tidied the somewhat cumbersome common law procedure. In light of the close relationship between the two countries spanning from the 1840s, in my view, it is not surprising that in 1922 South Africa was not included in the schedule to the Reciprocal Enforcement of Judgments Act. Firstly, in the early days of the relationship before 1900, many laws (statutes) of the Transvaal were directly applicable in eSwatini and appeals went to the Transvaal Supreme Court. Secondly, for a long time – in fact until the 1960s when it became clear that eSwatini was inexorably heading for independence – South African leadership had wanted and entertained hopes that eSwatini would be part of South Africa.

[28] In light of the foregoing regard, Forsyth writes:[5]

> *"South Africa's neighbours, save one, share with her the Roman Dutch legal heritage, and retain the Roman-Dutch common law. South African advocates and judges frequently accept appointments to the bench in such countries. South African law reports are invariably cited as authoritative in the courts of her neighbours. In*

[5] **Private International Law** 4th Ed. (2003) at pages 104-105

such circumstances is it not artificial in the extreme to consider that the laws of these neighbouring states are foreign laws and that South African judges cannot, without formal proof, ascertain those laws?

"The countries concerned, however, are all, in South African law, foreign countries; and thus, in theory at any rate, their laws must be pleaded and proved. Such an inconvenient and unnecessary proposition in unlikely to commend itself to many".

[29] It has been said that 'foreign law is a question of fact and must be proved': See **Schlesinger v Commissioner for Inland Revenue** 1964 (3) SA 389(A) at 396G per Van Wyk JA; **South African Ltd & Anor v Quan Commodities Inc & Ors** 1983(1) SA 276 (A) at 294G per Corbett JA: **MV Alam Tenggiri Golden Seabird Inc v alam Tenggiri Sda Bhd** 2001(2) SA 1329 (A) at 1335E per Conradie AJA. The same position would be true of eSwatini.

[30] On the recognition and enforcement of foreign judgments under the common law Forsyth writes.[6]

"There are four conditions that need to be fulfilled before a foreign judgment will be recognized under the modern Roman Dutch common law: First, that the foreign court had international jurisdiction (or competence) to decide the case. Secondly, that the judgment rendered was final and conclusive and has not become superannuated. Thirdly, the recognition and enforcement of the judgment must not be against public policy (enforcement might be against public policy if the rules of natural justice were not observed, if judgment was obtained fraudulently or if it involves the enforcement of a foreign penal or revenue law). And, fourthly, ..."

[31] In **Jones v Krok** [7] Corbett CJ stated the common law requirements which must be satisfied before the foreign judgment is recognised as follows:

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[6] **Private International Law**, 4th edition p.391. The fourth condition is not relevant to eSwatini

[7] 1995(1) SA 677 (A) at p. 685B-E; See also **Purser v Sales** 2001 (3) SA 445 (A) at 450 D-G

*". . . (T)he present position in South Africa is that a foreign judgment is not directly enforceable, but constitutes a cause of action and will be enforced by our Courts provided (i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognized by our law with reference to the jurisdiction of foreign courts (sometimes referred to as international jurisdiction or competence); (ii) that the judgment is final and conclusive in its effect and has not become superannuated; (iii) that the recognition and enforcement of the judgment by our Courts would not be contrary to public policy; (iv) that the judgment was not obtained by fraudulent means; (v) that the judgment does not involve the enforcement of a penal or revenue law of the foreign State; and (vi) that enforcement of the judgment is not precluded by the provision of the Protection of Business Act 99 of 1978, . . . Apart from this, our Courts will not go into the merits of the case adjudicated upon by the foreign court and will not attempt to review or set aside its findings of fact or law (**Joffe v Salmon** 1904 TS 317 at 319; . . . .)"*

[32] Forsyth also writes: *"Although the common law continues to dominate the determination of international competence in claims sounding in money, statutory provision (which generally overlaps with rather than replaces the common law) has been made in several jurisdictions to facilitate the enforcement of money judgments"* (at p.392). The foregoing statement is generally true. The Reciprocal Enforcement of Judgments Act 1922 does not replace the common law. It only facilitates the registration and enforcement of judgments and awards between eSwatini and Commonwealth states where the necessary reciprocal arrangements have been made. Even though the Act was initially between eSwatini and England, Ireland and Scotland, the scope of the Act is enlarged under section 6 [5], even though limited to Commonwealth countries. I cannot understand why the Act has not been extended to more Commonwealth states beyond the fifteen states it was extended to by 1927. The Act may very well be in need of modernization (renewal) in light of developments in international trade and commerce.

[33] Wille and Millin also note that *"neither the provincial statutes nor the Arbitration Act have repealed the common law"* so that *"if persons agree to go to arbitration in any manner other than as provided by statute, their arbitration will not be under the Act, but will be valid at common law"*.[8] The awards are enforced by being made an order of court of competent jurisdiction: *"In other words"*, say Wille and Millin, *"the court, if satisfied that an arbitration has been held and an award duly given, will make the arbitrator's award its own judgment, so that execution can be levied and the award satisfied"*, (at 523). Thus, an arbitration statute and the common law coexist in most of the countries.

The Parties' contentions

[34] As his primary holding, Justice Mlangeni ordered that the judgment of the Gauteng Local Division of the High Court of South Africa, dated 31st August 2016 as revised on 31st August 2016, whereby the arbitration appeal award of Judge LTC Harms, Advocate DM Fine SC and WHG Van der Linde SC dated 17 September 2014 which was made an order of that Court, be recognized as a judgment of the High Court of eSwatini, and accordingly rendered enforceable against the appellant in eSwatini. In justification of his holding Justice Mlangeni found that the requirements to be met under the Roman Dutch common law were all present, namely that (1) the foreign court which had issued the judgment had the requisite international competence to issue the judgment; (2) the judgment was final and conclusive; (3) to recognize and enforce the judgment would not be against public policy including observance of the rules of natural justice. These requirements were set out by Dunn J in the **Economa** case.[9]

[35] It is noteworthy that before Justice Mlangeni there were essentially three prayers for determination. These were the first, second and fourth prayers. The first prayer was for the recognition in eSwatini of the judgment of the Gauteng Local Division of the High Court of South Africa and the second prayer sought an order to enforce in eSwatini against

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[8] **Mercantile Law of South Africa**, 17th Ed. At 522

[9] **Economa Proprietary Ltd v. Hudson (NULL),** Civil Case No 1594/1993[1994] SZHC 40

the appellant the said judgment of the High Court of South Africa referred to in the first prayer. The third prayer was an alternative to the first two prayers, that is, an order by the High Court recognizing and enforcing in eSwatini the appeal award against the appellant. (A fourth prayer was for costs at attorney and client scale). But as is apparent, the appellant has framed about nine grounds of appeal for consideration by this Court. It will not be necessary to deal with all the nine grounds and I take it that the reason for not specifically dealing with any other will be self-evident in light of the conclusion reached in this appeal.

[36] Forsyth[10] enlists several grounds which are sometimes considered sufficient to establish international jurisdiction or competence under the Roman Dutch common law. It is also generally accepted that residence is a ground of international competence in claims sounding in money. See Mphati AJA in **Purser v Sales** [11]. One of the grounds referred to by Forsyth is *"Where the defendant has submitted to the jurisdiction of the foreign court"*. In this regard the learned author states: *"It is widely recognized...that submission by the defendant to the jurisdiction of the foreign court grants to that court international competence even if it would not otherwise enjoy that competence"*[12]. Submission may be by agreement or conduct. It is not necessary that the several grounds be all proved to be satisfied for the jurisdiction or competence of the original court to be established in any particular case. For instance, *in casu,* the agreement between the parties prescribing that the arbitration should take place in Johannesburg under South African law is sufficient proof of submission to the jurisdiction of the South African High Court. In the absence of such an agreement, attendance and participation in the arbitration proceedings in South Africa by the appellant would be evidence of submission by conduct or acquiescence. In light of the express provision to that end, the appellant can hardly be heard to complain about the jurisdiction of the South African High Court. Both Clauses 24 and 25 of the Agreement attest to consent to the same jurisdiction. And clause 24.5 states that the parties

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[10] **Op. cit.**, at 393 et seq.
[11] 2001 (3) SA 445 (A) at 451A
[12] **Op. cit.** at p.395

irrevocably agree that the arbitration award shall be binding to the parties and shall be given effect and may be made an order of any court of competent jurisdiction.

[37] In **Barclays Bank of Swaziland**[13] it appears that a money order made by Dunn J. in Mbabane was enforced in South Africa without much issue about it being a foreign judgment except for the currency in which the order was payable, that is, "E15,419.96". Stegmann J. said the following:

> *"The provisional sentence summons issued out of Court had the Swazi Court's order and the identifying and authenticating documents attached to it. It was served on the defendant in person on 7 August 1991 and it called on her, on the strength of that order, to make payment to the plaintiff".*

[38] The Reciprocal Enforcement of Civil Judgments Act, 1966 of South Africa had not come into force in 1991. For some reason I cannot understand, the enforcement of the eSwatini judgment in South Africa did not raise the usual jurisdictional issues. What was taken up from the outset was the issue of enforcing the amount presented in foreign currency. That, however, is not the issue in the present matter. In the same way, the amount sought to be enforced in this matter is expressed in South African currency. However, the enforceability as such has not been challenged or made an issue in the local courts. The fact that the exchange rate between the South African and eSwatini currencies is 'one to one' was not good enough for the South African Court and in this regard Stegmann J. expressed his concern with the foreign currency in these terms: *"The first question is whether, in a matter of this kind, the court has power to enter judgment for payment to be made in a foreign currency".*

[39] The issue arising from the enforcement of a foreign currency is one of principle. It may not have been raised in this matter but the Court *mero motu* may well be justified in raising it if not for decision but for comment and noting in passing. As between eSwatini

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[13] **Barclays Bank of Swaziland Ltd v Mnyeketi** 1992 (3) SA 425 (WLD) at p.427 B-C

and the Republic of South Africa the question may be hidden or neutralised at least from the eSwatini side because the rand exchanges at par with Lilangeni and is legal tender in eSwatini which is not necessarily true of Lilangeni from the South African side. However, the issue could easily arise between eSwatini and at least two of its not so distant neighbours, namely, the Republic of Mozambique and the Republic of Botswana.

[40] Section 21 of the Central Bank of eSwatini Order No.6 of 1974, provides for parity between the eSwatini 'Lilangeni' and the South African 'Rand'. Ultimately, however, in the **Swaziland Barclays Bank** case Stegmann J granted the order in the amount payable in lilangeni currency. That is, the South African Court determined that it had the power to grant a monetary order expressed in foreign currency. This was not due to consideration of parity rate but because after surveying various decided cases in South Africa and England the Court came to the conclusion that the Roman Dutch common law did not preclude such decisions and orders by a South African court. Our position should substantially be the same should such an issue arise. The exercise of the Court's discretion should be guided by a consideration to ensure that a successful plaintiff does not suffer loss, either in consequence of delay by the defendant or in consequence of fluctuations in the rate of exchange. See **Elgin Brown and Hamer** case.[14]

General

[41] It seems to me that full payment in the face of mal-performance or payment for an after-thought claim are matters which the parties must be understood to have agreed upon to abide by as judgment of their chosen arbitrator or appeal tribunal flowing from the Agreement. Merely being wrong in their determination is no basis for challenging the arbitral award which is otherwise final. And whether Claim D arose as an afterthought or not it makes no difference because so long as it arose from the contract it would most probably have been referred to arbitration sooner or later.

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[14] **Elgin Brown and Hamer (Pty) Ltd v Damp-skibsselskabet Torm Ltd** 1988 (4) SA 671 (N).

[42] The real issue is whether what the appellant was disgruntled with was not a matter or dispute arising or envisaged under the clause referring disputes to arbitration. If it is a dispute or matter covered under and by the arbitration clause, then the decision of the arbitrator as upheld or set aside and substituted by the appeal panel's award is final and conclusive. In this regard, the words of Dove-Wilson JP are instructive: *"The question of Mr. Greig's right in the ratoon crops was a question in the sense of section 10 of the original agreement. The question of what compensation he was to receive in lieu of his rights in those ratoon crops was, in my opinion, also a dispute in the sense of section 10;....Therefore, I think that ground must fail".*

[43] *In casu,* as part of the governing law the parties 'irrevocably and unconditionally' consented and bound themselves to submit "all matters arising from [the] agreement" to arbitration in South Africa. In the result, the simple question is: Whether the two findings made by the Appeal Panel as expressed in paragraph 3 of appellant's heads of argument are not "matters arising out of the agreement" or, as it were, matters in the sense of the agreement and as such the subject of decision by arbitration at Johannesburg as provided in terms of the arbitration clause (Clause 24) and the governing law (Clause 25). If they are such matters, as I consider them to be, then the appellant has an unenviable task to persuade this Court why the findings of the appeal panel should not be upheld as final and conclusive and binding on the parties as the Court *a quo* held.

[44] The grounds recognized by eSwatini law respecting the jurisdiction of foreign courts for the enforcements of judgments sounding in money are those principles emanating from the common law. The three common law grounds are set out in Forsyth's book as already referred to and adopted by Dunn J in his *obiter* judgment in **Economa** case. See also **Purser v Sales** 2001(3) SA 445(A) paras [11] and [12]. It appears in this appeal that appellant's objection to the order prayed for by the respondent challenges all three grounds usually relied upon for the enforcement of foreign judgments. Appellant asserts that the appeal panel had no jurisdiction to make the determination or it 'exceeded its powers in granting the award'; secondly, that on public policy grounds the judgment sought to be

made an order of court cannot be enforced in eSwatini, and thirdly, that the award or judgment is not final and conclusive on account of it having been determined by a panel or court which lacked requisite jurisdiction.

[45] I agree with the contention and determination that the decision of Justice Ota in the **Mamba**[15]case was wrong as far as it concerned the recognition and enforcement of foreign judgments in eSwatini. There is no need to belabour the issue. Rather, uncharacteristically, Justice Ota misconstrued the Reciprocal Enforcement of Judgments Act, No.4 of 1922 read with section 252 of the Constitution Act, 2005. Whilst the learned Judge referred to the *ipsissima verba* of the 1922 Act and its expressly limited scope of application in which the United States of America is excluded, the learned Judge did not say how the other states like the United States falling outside the ambit of section 3 and 5 of that Act were to be relieved when even the common law was declared inapplicable. It appears that the earlier case **Economa**[16] decided by Dunn J was not brought to the attention of Ota J.

[46] The **Economa** case was a simple application for summary judgment based on a judgment obtained by the plaintiff in the Durban and Cost Local Division of the Supreme Court of South Africa. A certified true copy of the original order was attached to the application. It appears therefore that the application was not brought under the Reciprocal Enforcement of Judgments Act, 1922 or under the common law. Whatever Justice Dunn said about the Act or the common law does not seem to have been specifically pleaded. That would probably explain why the **Economa** case was not mentioned before Justice Ota in **Mamba** case in 2011. The **Mamba** case was apparently brought under the Act since it sought to "register and make an order of this Honourable Court" the judgment of the County Court for Montgomery County of the State of Maryland, USA obtained in favour of the plaintiff. But the **Mamba** case did not involve a judgment sounding in money. That, being the case, neither the Act nor the common law was available to the plaintiff.

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[15] **Mamba v Mamba** (1451/09) [2011] SZSC 43

[16] **Economa Proprietary Limited v Hudson (NULL)** (1594/93) [1994] SZHC 40

[47] Realising that the 1922 Act applied only to those countries to which it was expressly extended, Justice Dunn correctly stated that the High Court of eSwatini under the Roman Dutch common law was possessed of the necessary jurisdiction to recognize and enforce foreign judgments so long as certain requirements were established. In the **Economa** case Dunn J referred to these requirements, namely, (1) that the foreign court had international jurisdiction or competence; (2) that the judgment sought to be recognized or enforced was final and conclusive and (3) the recognition and enforcement of the judgment is not against public policy including observance of the rules of natural justice. But it was not necessary for Justice Dunn to go that far since it does not appear that the plaintiff had relied on the Act or the common law. This is inferred from the fact that the defendant did not refer to the Act or the common law.

[48] In paragraphs 15 and 16 of its heads of argument, the Appellant states that the appeal tribunal did not have the power to come to the conclusion it reached and that Claim D was not part of the dispute referred to arbitration and accordingly should not have been considered for the award. Appellant further argues, in paragraph 64 and following paragraphs that "arbitrators are strictly confined to deciding the dispute that the parties have agreed to place before them", as further defined by the pleadings. According to USAD *"as the award did not fall within the jurisdiction of the Appeal Panel, it should not be enforced in eSwatini"*. But for this Court to open the award would be to open a can of worms: that would be acting beyond protocol and comity. This Court has no power to review the award as determined or to act as a court of appeal to the determination of the arbitrator or Appeal Panel. The jurisdiction of this Court in this matter is very limited.

[49] The application in the Court *a quo* was not a review or an appeal: it was an application for an order to recognize and enforce the judgment reached and settled in South Africa. Leave to appeal the order making the appeal award an order of court was rejected by Keightley J and the Supreme Court of Appeal. It is not for this Court to question whether the appeal award was right or wrong. This Court can only entertain issues connected with public policy on the enforcement of the judgment incorporating the award.

This aspect of the matter has nothing to do with whether the award was right or wrong. By not appealing directly to the Constitutional Court the appellant must be held to have accepted and to be bound by the decision of Keightley J. Any right to appeal against the award has accordingly perempted. The result is that the judgment in question was final and conclusive unless it can be shown to have become superannuated.

[50] In its answering affidavit, the appellant admitted that the judgment of Keighlepy J. was final and conclusive but contended that the South African High Court lacked the requisite international jurisdiction and that its enforcement in eSwatini would offend public policy. In paragraph 2.15 of its answer, the appellant's deponent asserted:

> *"2.15 I will demonstrate that the South African Court did not have international jurisdiction or competence. USAD objected to the South African Court purporting to exercise jurisdiction in the enforcement application. The South African court applied South African law and concluded that it had jurisdiction. USAD submits that it did so wrongly. Accordingly the judgment should not be recognised or enforced in the Kingdom of Swaziland.*
>
> *"2.16. Moreover, there are a number of reasons why the recognition and enforcement must not offend against public policy in the Kingdom of Swaziland. In summary, these are as follows:*
>
> > *2.16.1 The appeal panel exceeded their jurisdiction in at least two respects.*
> > *2.16.1.1 They held that, despite the fact that Improchem had not performed in terms of the TWM agreement, it was entitled to full payment for its services. This was contrary to Improchem's pleaded case.*
> >
> > *2.16.2 They allowed a claim that did not form part of the dispute referred to arbitration.*
>
> *"2.17 USAD is advised and submits that public policy in the Kingdom of Swaziland in respect of the enforcement of foreign arbitration awards differs from public*

policy in respect of the enforcement of arbitration awards in South Africa, England and other countries that are parties to the New York Convention and / or have adopted the UNCITRAL model law ('the model law').

"2.18 Swaziland has elected not to be party to the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958 ('The New York Convention'). It has not adopted the model law".

[51] Asserting that the respondent in this application is seeking recognition and enforcement of a foreign judgment, the appellant submits that the respondent (2.4) *"cannot circumvent the law of this Kingdom by relying on the judgment. In reality Improchem is seeking recognition and enforcement of a foreign arbitration award. The fact that this has been made an order of the South African courts simply means that the South African courts recognize the award".* And, *"2.5 The usual procedure for the enforcement of foreign arbitration awards in the Kingdom of Swaziland is to apply for the recognition and enforcement of the award".* But not a single example of the so-called 'usual procedure' specific to eSwatini is cited by the appellant. Nor does the appellant specify where exactly not having adopted the Model Law leaves eSwatini in arbitration proceedings.

[52] It may be true only in a manner of speaking that 'in reality' Improchem is seeking the enforcement of the arbitration award, but in the nature of court proceedings, in the present case, the alleged 'reality' is immaterial as it is sufficiently justified by the form of procedure by which the matter was brought to court. To do otherwise would fundamentally change and distort the proceedings. For purposes of the present application the fact that the arbitration award was made an order of court in South Africa makes for a fundamental difference between the bare award and the judgment bearing the award. To argue that the application is "in reality" the enforcement of the award is to pretend that the Keightley judgment as such does not exist and the court proceedings were and are nothing but a sham. In my opinion, the question of enforcing a foreign arbitration award is a matter not before this Court and not worth pursuing. Appellant's arguments lack substance. In any case, as I

stated above, there was no way of enforcing the appeal award in eSwatini except via a court order of the South African High Court as respondent did.

[53] That the arbitrator and the appeal panel exceeded their powers is, in my opinion, adequately answered by Justice Keightley, where the learned Judge states:

> *[74] The subsequent conduct of the parties is a further indication that they did not intend to limit the dispute, or the arbitrator's powers to specific, fixed issues existing at the time that the Arbitration Agreement was signed. Claim D was opposed by USAD and was fully argued before both the arbitrator and the appeal arbitrators. The* ***exceptio*** *issue was also opposed and argued. This was an argument based on the interpretation of clauses 6.2 and 6.3 of the Water agreement. Procedurally, the arbitrator was, under the Rules, entitled to make a determination on this issue. In essence, it depended on the interpretation of these clauses and the application of legal principles to that interpretation. Both clauses had been pleaded as being material to the dispute in the statement of claim. The arbitrator cannot be said to have exceeded his powers by making a finding on this issue in this award".*

[54] In paragraph [75] Judge Keightley observed that *"USAD did not contend before the arbitrator that [the arbitrator] had no power to rule on either of [the above] issues. Nor did [USAD] do so before the appeal arbitrators"*. In that case, in my opinion, USAD acquiesced and consented to the arbitration proceedings as presented. USAD cannot now be allowed to blow hot and cold. If the appellant did not understand and had misconstrued the pleadings, it can hardly be the concern of the respondent or basis to challenge the award.

[55] On the contention by appellant based on Claim D in that that Claim was not part of the referral for arbitration but an afterthought by the respondent, the learned Judge Keightley dismissed that contention. In para [75] the learned Judge continued:

> *".....The arbitrator had considered and ruled on Claim D. He had also made a determination on the meaning and import of clauses 6.2 and 6.3 of the Water agreement (the exceptio issue). The cross-appeal was directed expressly at the*

latter issue, and on his finding in respect of Claim D. As stated in the minutes, both parties were in agreement that the appeal and cross-appeal had been properly noted, and that the issues canvassed before the arbitrator were to be canvased in the appeal. In these circumstances, USAD's contentions that the parties did not clothe the arbitrator and the appeal panel with the powers to determine Claim D and the exceptio issue exceed even the most generous bounds of rationality".

[56] Justice Keithtley's answer to the appellant's foregoing complaint is sound and unimpeachable. This is so because as the learned Judge pointed out *'both parties were in agreement that the appeal and cross-appeal had been properly noted'* and covered Claim D. Furthermore, if the arbitrator had exceeded his authority, the appellant had a remedy under the Arbitration Act, 1965, which appellant did not have recourse to. The appellant cannot now complain when it acquiesced in the finding of the arbitrator. And it may fairly be argued that the appellant did not apply to impugn the findings of the arbitrator because the findings were matters arising from the agreement within the scope of the governing law and the arbitration clause. It seems clear that the appellant consented expressly or impliedly on the matters dealt with by the arbitrator and which appellant is now appealing against or wants the award stopped from enforcement. The appellant agreed to the jurisdiction of the arbitrator and the law applicable to the settlement of disputes.

[57] It was part of the agreement or understanding between the parties that the arbitration award may be made an order of court in terms of the South African Arbitration Act under section 31. It is, with respect, disingenuous of the appellant to now turn around and argue that the award should not be enforced in eSwatini because it was not enforceable in South Africa since appellant was not resident within South Africa. The application to make the award an order of court in South Africa was well within the terms of the agreement between the parties. Justice Keightley was correct in dismissing this argument and opposition to the application as being without merit. The enrolment of the award in South Africa was part of an enforcement process that did not end in South Africa but proceeded to be duly carried out where the appellant was a resident and had the means to satisfy the award.

[58] On the appellant's contention that the appeal panel exceeded its powers and that Claim D was not part of the referral or submission to arbitration, assistance may be sought from **Tedder and Another**[17] where Dove-Wilson JP said the following:

> *"In any case, it was quite competent for the parties to agree, whether that original agreement was at an end or not, to go to arbitration upon disputes arising out of that agreement, and to do so in terms of Section 10 of that agreement, and that is, in my opinion, exactly what they did. I am not concerned whether or not the original agreement was put an end to. They agreed to go to arbitration upon the matters in dispute between them arising out of that agreement, and they did so having regard to the powers conferred upon [the arbitrators] by Section 10 of that agreement"*. (My emphasis)

Referring to Section 10 as "exceedingly wide in its terms" the learned Judge President continued : *"It is: 'Should any dispute arise which is not provided for in Clause 9 the same shall be decided by arbitration, and the decision of the arbitrators shall be final'. That, therefore, is the submission that any dispute, which means all disputes, arising out of the original agreement, and not provided for by Clause 9 (. . .), shall be submitted for arbitration. The one limitation is that it must be a matter of dispute – if it can be said to be a limitation - because unless there is a dispute there can be no call for arbitration"*.

[59] In the same way, *in casu*, article 24 (Arbitration clause) provided that *"Any dispute between the parties in regard to ... any matter arising out of this agreement shall be decided by arbitration..."* In my opinion, as the parties irrevocably agreed that the decision resulting from the arbitration proceedings shall be binding on them, the parties also agreed that the decision shall be final; for how else would the decision be carried into effect or even made an order of court without it being final. There has been no intimation that the objections raised by appellant are anything but matters arising out of the agreement between the parties and as such within the contemplation of the arbitration clause. Dove-

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[17] **Tedder and Another v Greig and Another** 1912 AD 73 at 81, 82

Wilson JP also stated: *"The ordinary rule is that parties who have agreed to go to arbitration cannot, so long as an award is good upon its face, object to it as erroneous in law or in fact, and the onus is upon the objector to show that on its face the award is bad".*

[60] In the **Tedder and another** case, on the question that the umpire exceeded his authority by making certain awards to the applicants in respect of ratoon or recurring crops on certain Lots, even though the question of the right to these crops was one of the matters which had to be determined by the arbitrators and the umpire that did not extend to the award of compensation *in lieu* of the rights to the recurring crops, which was not in dispute. Dove-Wilson JP responded as follows:

> *"So far as I have been able to follow the argument that is the only ground upon which it can be said that the umpire, in awarding the same which he has awarded, went outside the scope of his authority. The question of Mr. Greig's right in the ratoon crops was a question in dispute in the sense of Section 10 of the original agreement. The question of what compensation he was to receive in lieu of his rights in those ratoon crops was, in my opinion, also a dispute in the sense of Section 10; it appears from the correspondence and the record that it was a question which had been debated, and was at issue between the parties; and there is nothing suggested to show that if that is so, any objection can be taken on this ground to the award of the umpire. Therefore, I think that ground must fail"* (pp 85-86).

[61] In other words, so long as the issue can be characterized as a dispute lying within the terms of the agreement, it cannot, in the absence of anything to the contrary, be excluded from arbitration under the agreement. Likewise, appellant's contention in the present matter should fail. There is no provision in the agreement which excludes from arbitration a dispute between the parties on the basis that it was not part of the initial disputes referred for arbitration even though it arose in the course of and became a part of the arbitration proceedings and could be described as an afterthought. Dove-Wilson JP further says in defence of the umpire:

"The question is not whether he was wrong, but whether he has exceeded his authority. I do not know what ground he proceeded on, but I am not prepared to interfere with his decision. I may refer, in support of what I have said with regard to the umpire's immunity from revision either as to law or fact, to the dictum of Lord Halsbury in ***Caledonian Railways v Turcan*** *(L.R. 1898 A.C. 256) at p265: 'The parties have selected him as the judge both of law and fact, and if he be ever so erroneous in the decision at which he has arrived, it is conclusive upon the parties.... his award be right or wrong in point of law, it is a matter with which I am not entitled to deal'.*

I think, therefore, that all the grounds for objection to this award fail. In dealing with an award, in a voluntary submission more especially, the Court ought to make every fair and reasonable assumption that it is good; and it should only upon a clear case interfere with the decision of the man whom the parties themselves have chosen to be final as to matters in dispute;...." (at pp 86, 87).

[62] On appeal against the judgment of Dove-Wilson JP in the **Tedder and Another** case, Lord de Villiers CJ firmly stated: *"I am of opinion that this appeal should be dismissed, and I agree so entirely with the reasons given by the learned Judge President in the Court below and I do not wish to add much to what he said"* (p.89). The learned Chief Justice conclusively stated (p.91):

"If the argument of Counsel for the appellants meant anything, it meant that the award was on wrong lines and excessive. It is unnecessary to go into the authorities on the question of interfering with awards on the ground of their being excessive. There are cases where the amount awarded had been so excessive as to point to irregularity or partiality on the part of the arbitrator. The amount awarded in this case does seem large, and I am inclined to think that the basis of the award was the amount that would arise from the profits from these ratoon crops. But on the face of the award it is not so stated, and even if it had been stated, I am not prepared to

say that this Court could have interfered with it on that ground.... The arbitrators had made an estimate. It was a rough-and-ready estimate, but there is no doubt that they acted fairly and without partiality, and I am not prepared to interfere with their award simply on the ground that it appears to be somewhat excessive".

And, similarly, in the present case, it would not be proper for this Court to interfere with the appeal award on the basis that the appellant has been charged for work allegedly not performed or for a claim allegedly not part of the submission. Accordingly, in the absence of any proof of gross irregularity or partiality or corruption on the part of the appeal arbitrators, the award cannot be set aside as being excessive or outside the scope of the appeal arbitrators. This Court cannot come to the assistance of the appellant.

Foreign Court must have international jurisdiction

[63] Considering the arbitration and its relation to the parties, the appellant argues: *"35....the South African Court did not have jurisdiction to make the arbitration award an order of court because the Appellant is a peregrinus in South Africa and its submission to the South African Courts ended when the award was handed down... 36 The reason for this is that the usual procedure when enforcing an international award is for Improchem to seek to enforce the award itself and not to rely on a foreign court order...."* Appellant justifies its argument by asserting that 'international decisions' are to the effect that *"once the award is made, it has a life of its own. It can be enforced in any country in which USAD has assets...."*

[64] To begin with, the appellant asserts that *"its submission to the South African Courts"* ended with the handing down of the arbitration award presumably by the Appeal Panel. Surely, this argument cannot stand for the simple reason that arbitration does not end with the handing down of the award. In terms of clause 24 of the agreement, the award is not only final and binding on the parties but must be given effect and, importantly for present purposes, may be made an order of any Court of competent jurisdiction. This last condition clearly shows that submission cannot end with the delivery of the award, but

must continue until the award is made an order of a competent court if any of the parties so desires. I would say that the arbitration ends when the award is fully given effect. That the award has a life of its own does not relieve appellant from the express terms of the agreement. Van Heerden J once said: *"Submission to the jurisdiction of a court is a wide concept and may be expressed in words or come about by agreement between the parties. Voet 2. 1. 18. It may arise through unilateral conduct following upon citation before a court which would ordinarily not be competent to give judgment against that particular defendant. Voet 2. 1. 20. Thus where a person not otherwise subject to the jurisdiction of a court submits himself by positive act or negatively by not objecting to the [jurisdiction] of that court, he may, in cases as actions sounding in money, confer jurisdiction on that court.* Herbstein and Van Winsen ***The Civil Practice of the Supreme Courts in South Africa*** 3rd ed at 30; Pollak ***The South African Law of Jurisdiction*** *at 84 et seq.*" [18]

[65] If I understand appellant correctly, then I do not agree with its contention that the award can be enforced in eSwatini without first clearing the ground for it. The award being foreign to eSwatini an attempt to directly enforce it could result in the **Economa** case debacle. In this regard Forsyth states: *"Recognition, therefore, implies only that the local court declares that the foreign judgment has 'the legal effect which the foreign court intended it to have; while enforcement requires that the local court will in addition 'compel the judgment debtor to comply with [the foreign judgment]...Recognition is therefore always a* conditio sine qua non*'"* (at 390).

[66] It seems to me therefore that the arbitration award cannot be directly enforced in eSwatini without it being first recognized. But the eSwatini courts have no competence to recognize the arbitration award as such. Nor do the eSwatini courts have the competence to make the award an order of court. That is the function for the South African courts where the award was made in terms of the laws of that country as prescribed in the agreement. As Forsyth says, recognition is a precondition for the enforcement of a foreign

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[18] **Mediterranean Shipping Co v Speedwell Shipping Co. Ltd and Another** 1986 (4) SA 329 (D) at 333 E-G

judgment. From a practical point it is neater to recognize the judgment of a foreign court than an award of a foreign arbitration. For once the foreign court is shown to have had the relevant international jurisdiction or competence, recognition of its judgment is virtually assured. Now, if the award has a life of its own, making it an order of court has the added advantage of arresting or 'capturing' it by making it a part of a court judgment.

[67] Appellant's argument that the South African court had no jurisdiction to make the award an order of court must also fail. Even though appellant is a *peregrinus* in South Africa, in terms of the Agreement as set out in the arbitration and governing law clauses, appellant submitted to the jurisdiction of the South African courts. This is a case of submission by agreement as inferred from the signing of the agreement as well as by conduct by appellant's presence before the arbitrator and the High Court including the Supreme Court of Appeal. On the other hand, appellant has conceded that the judgment of Keightley J is final and conclusive. That being the case, why retreat from the decision of the Judge to the decision of the Arbitrator. What value or benefit does this retreat add or bring to the proceedings, bearing in mind the necessity for expeditious termination of the proceedings. Nothing that I can see or imagine. The 'governing law' prescribed irrevocable and unconditional submission of the parties to the (non-exclusive) jurisdiction of the Witwatersrand Local Division of the High Court of South Africa. This clause also endows the South African High Court with the required international jurisdiction which is, however, denied by the appellant. Appellant expressly submitted to the South African jurisdiction and that submission proceeds from the appeal tribunal to the South African courts of justice.

[68] Appellant's reason that the arbitral award should not be enforced in eSwatini 'as a matter of common law' because the appeal tribunal exceeded its jurisdiction or powers is a matter I cannot properly entertain. That was a point adequately dealt with and answered by Justice Keightley and the appeal tribunal itself. Worse still, the argument based on the alleged absence of jurisdiction on the part of the South African High Court has the potential to reopen and review the award. That cannot be allowed even if at a distance there may be

some justification for appellant's plea. The award is a product of mutual agreement between the parties as to the law and the persons of the arbitrators; their decision or determination is binding on the parties. Even errors on the face of the award are binding on the parties unless corrected by the process and law by which the parties have bound themselves. My opinion in this regard will include and dispose of claim D as well.

[69] The other and last condition for the recognition of foreign judgments under the common law is that the enforcement of the foreign judgment should not offend against public policy. In effect, this condition says that even if international jurisdiction or competence be present or the foreign judgment be final and conclusive, that will not be sufficient to enforce the foreign judgment if in so doing public policy will be negatively affected. In support of its argument regarding the alleged absence of jurisdiction on the part of the arbitrator (appeal tribunal) and in turn the High Court, the appellant records that *"the legal basis for the jurisdiction point is that arbitrators are strictly confined to deciding the dispute that the parties have agreed to place before them"* and that the parties and arbitrators are bound by the dispute submitted to arbitration[19]. Whilst this paragraph may seem to support the appellant's contention, it also states that it is possible for parties in an arbitration *"to amend the terms of the reference by agreement, even possibly by one concluded tacitly, or by conduct"*. *In casu,* however, the alleged amendments to the reference were, as contended by the respondent, all subsumed in the arbitration proceedings and fully argued by both parties before the arbitrators. Keightley J came to the same conclusion. That was in line with the holding in the **Hosmed** case, *supra,* (para 31) that an arbitral tribunal may be entitled to go beyond the pleadings where the issue had been traversed in evidence; so that 'the importance of pleadings should not be unduly magnified'.

[70] If the jurisdiction point raised by the appellant had any substance, it is not clear to me how the Supreme Court of Appeal missed it when they came to the conclusion that the

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[19] **Hos + Med Medical Aid Scheme v Thebe ya Bophelo Healthcare and Others** 2008 (2) SA 608 (SCA) paras 30 / 31

appellant had no prospects of success. To avoid and side-step the effect and impact of the decision of the Supreme Court of Appeal, appellant insists that not the Keightley judgment but the arbitrator's award ought to be the subject of application for an order of court in this country. With respect, this rather devious approach should not be allowed. To allow this would render the administration of justice a mockery.

[71] In support of its contention the appellant has also made reference to Nolan and Aitelaj article [20] where the learned authors write:

> *"The focus of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), and other similar instruments, is chiefly procedural infirmity in the making of arbitral awards. Among these infirmities, one commonly raised ground to challenge the validity of an arbitral award is lack of jurisdiction of the tribunal whether due to invalidity of an arbitration agreement or action by the tribunal in excess of the parties' consent to arbitration.*
>
> *As a preliminary matter, it is beyond debate in most - if not all – jurisdictions that a tribunal is generally competent to rule on its own jurisdiction, . . .This cardinal rule of modern arbitration law is fundamental to the stability of the arbitral process. By the same token, however, it offers a window of opportunity for award debtors to challenge an award, based on the argument that the tribunal was not vested with the powers to adjudicate the way it did, or at all".*

[72] Rehashed, appellant's contention is that: "the Appeal Tribunal exceeded its powers in granting the award; enforcement of the award in eSwatini would offend against public policy and would perpetuate a wrong against USAD". This contention has been answered more than is adequate and from different angles. With respect, the reliance on **Hos + Med** case and Nolan and Aitelaj does not change the position reached here. In effect, both

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[20] Nolan and Aitelaj ***"Jurisdictional challenges"***: the Guide to Challenging and Enforcing Arbitration Awards (in the Global Arbitration Review), 2019, at page 43.

references confirm the position reached that the agreement, *in casu,* conferred sufficient authority or power on the arbitrator to determine not just a specific issue but all and any issues or matters arising from the understanding and operation of the agreement. In terms of the agreement all disputes arising were subject to arbitration. Since there was no alternative resolution method, it did not matter at what point of the process of arbitration the dispute arose it could still be added to the referral by express or tacit agreement between the parties.

[73] I do not understand the agreement to have provided that 'if the parties agreed' then and only then could a dispute be referred to arbitration. Surely, the very disagreement or failure to agree to a referral could be a dispute fit for arbitration under the agreement. I see no reason why a reluctant party would not be compelled to attend arbitration in the face of a dispute raised by the other party, even where the party does not think that the issue is a dispute but the parties are not *ad idem* on the matter. In the present case it is pointed out that appellant did not raise the issue of jurisdiction or excess of authority on the part of the arbitrator or appeal tribunal. Recorded *minutes* were produced showing that the parties agreed on all the issues that were the subject of arbitration. In the circumstances, the issue of the enforcement of the award being likely to offend against public policy in eSwatini does not arise and should be dismissed as being unmeritorious. The window of opportunity for award debtors referred to by Nolan and Aitelaj is unavailing in this matter. In the result, it is my opinion that the arbitrators did not act in excess of their power and on the contrary strictly adhered to the terms of the agreement. And even if they exceeded their powers, unless that excess is shown to have been motivated by some misconduct, fraud or partiality I would not interfere with the arbitration award.

[74] By not raising the issue of excess jurisdiction or the hearing of any issue not being part of the (original) reference, the appellant may fairly be said to have acquiesced to the jurisdiction and power of the arbitrators, and short of reopening the arbitration process – if that may be allowed – the appellant is not allowed to raise the issue which it failed to raise

at the appropriate forum. In the case of **Hlatshwayo v Mare and Deas,**[21] Lord de Villiers CJ remarked as follows: *"The principle to be extracted from the passage in the Code appears to me to be this, that a person may, by reason of conduct which is wholly inconsistent with any intention to attack it, be held to have acquiesced in it and waived his right of appealing against it"*. The law report also states that the above principle of Roman law (the Code 7, 52, 5) was adopted by Voet (49, 1, 2) 'without any comment" and is accordingly part of our Roman Dutch common law. J. de Villiers JP spoke as follows: *"Whether then we base the doctrine of acquiescence on the consent which is implied or the choice which is exercised, or call it waiver makes no difference. At bottom the doctrine is based upon the application of the principle that no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate"*, (at p. 247).

[75] As I have intimated elsewhere in this judgment, the appellant's failure to appeal to the Constitutional Court meant acquiescence to the judgment of the Supreme Court of Appeal and that of the High Court of South Africa. If appellant had the right to appeal directly to the Constitutional Court but failed to do so that right has been perempted and appellant is bound by the decision of the Supreme Court of Appeal upholding, as it were, the judgment of Keightley J. It is not correct for the appellant to raise in these recognition proceedings the same or similar issues it had unsuccessfully raised elsewhere. Whether by peremption of the appeal or otherwise, the issues raised by way of objection to the recognition application must fail. Further on the question of acquiescence Solomon J in the above case said (at p.241): *"As to the law, I accept it as an established principle of the Civil Law that a person who has acquiesced in a judgment cannot thereafter appeal from it. The rule is laid down in the well-known passage of the Code (7, 52, 5), which has already been referred to. . . . So that in my opinion we are bound to hold that under our law, by acquiescence in a judgment the right to appeal from it is perempted. And when once the*

[21] **Hlatshwayo v Mare and Deas** 1912 AD 232 at p.237

appeal has been perempted, there is an end of the matter; there is no going back from that position".

[76] I am clear in my mind that the agreement between the parties, in clause 24.5, did invest the South African High Court with competent jurisdiction. The clause states that the decision of the arbitration proceedings *"may be made an order of any court of competent jurisdiction"*. In this regard I read 'any' to imply one of many or "whichever of a specified class might be chosen" (Concise Oxford English Dictionary, 12th edition). The respondent's preference to apply to Johannesburg cannot be impugned on the ground of irrelevance. In fact the preference is more in line with the letter and spirit of the agreement making South African law the law of choice for the arbitration proceedings, as Clause 25 refers to the "entire provisions" of the agreement.

[77] In saying that the judgment of the South African Court was irrelevant, the appellant is by no means saying that the judgment is illegal. Appellant has conceded that the judgment is final and conclusive. To put up such a fierce and expensive opposition to the application as appellant has done seems artificial and not worth it. There must be a difference between the judgment and the award. If there was no such difference appellant would not put up such a strong resistance. The reason advanced by the appellant that the South African judgment is irrelevant because it cannot be executed in South Africa without attachment since the appellant has assets only in eSwatini is no concern for the respondent. Indeed, the appellant did not have to oppose the application in South Africa if it was that irrelevant. On a closer examination of the issues, however, it is clear that appellant opposed the application in South Africa because it narrowed – if not effectively shut – the door for the appellant to further question and pick issues with the award, as appellant has done alleging excess power by the arbitrator which no longer arises or should not arise in this application.

[78] On its face, it could be said that by applying to the South African High Court, the respondent wanted to have recognized and enforced in eSwatini the judgment of a court of

justice as against the award of an arbitrator or arbitral tribunal. An award has to be upgraded by application to court for it to pass as a judicial judgment. Thus, strictly speaking, an award and a judgment are not on exactly the same footing. On the other hand, the respondent may have considered the relative ease of enforcing a foreign judgment which has been duly domesticated to enforcing a foreign arbitral award, likely to raise unknown questions such as for instance whether an 'award' is a 'judgment' for purposes of recognition and enforcement under the common law. The Reciprocal Enforcement of Judgments Act of 1922 which does not apply in present matter is instructive in its definition of judgment: *"Judgment means any judgment or order given or made by a court in any civil proceedings....whereby any sum of money is made payable, and includes any award in proceedings on an arbitration if such award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in such place"*. In my view, whatever may be the status of a foreign award under the common law, it was safe for the respondent to convert the arbitral award to a judgment to have it recognized and enforced in eSwatini.

[79] It seems to me that, in the absence of any other relevant guide, a foreign arbitration award cannot be enforced in eSwatini directly from the hand of the arbitrator. I do not believe that in this respect, the Act could require that the award first be made an order of court in the country where the award was given and that on the other hand the common law would sanction a direct enforcement of the raw award. Indeed, as the **Economa** and the **Mamba** cases (supra) indirectly reflect, even a foreign court judgment is not directly enforceable in this country, but "constitutes a cause of action" in the same way as Corbett CJ pointed out in **Jones v Krok** [1985 (1) SA 677 (A), 685. See also **Purser v Sales** 2001 (3) SA 445 (A) para 11]. In the situation where the law is not clear it makes a lot of sense and reasonable precaution, as respondent did, *in casu*, to first secure the award as an order of the foreign court before venturing out to have it enforced (as a judgment) another country. In my view, the respondent cannot be faulted for having acted as it did. The appellant's preferred approach must on the various grounds and considerations fail.

Mandament van reductie

[80] Purportedly drawing from the **Economa** case, appellant asserts that in enforcing an international arbitral award under the common law the *"applicant must show that the award fell within the jurisdiction of the arbitral tribunal in terms of the submission to arbitration"*; applicant must also show that enforcing the award will not offend any public policy. But in all the showing under the common law, *"the [High] Court retains the power of* ***reductie*** *– i.e. the power to set aside, refuse to enforce or correct the award"*. Appellant asserts that it has placed reliance for its demand on the ***mandament van reductie,*** a *"principal of Roman – Dutch law* [which] *essentially allows the Court which is being asked to enforce an arbitration award to reconsider the award as if it were considering an appeal against a decision of a lower Court"*. Due to the palpable dearth of relevant authorities on the international enforcement of arbitration awards on the local scene, reference was made to the **Dutch Reformed Church** [22]case of 1898 in the Cape Colony. It will be recalled that while Roman Dutch law was officially adopted in 1844 in the Transvaal, it had been in existence in the Cape since about the middle of the 17th century when Jan van Riebeeck landed at the Cape of Good Hope[23]. As shown above, eSwatini had been under the influence of Roman Dutch common law since about 1890, as a result of Boer presence in eSwatini and their involvement in Swati affairs.

[81] The case involved an application by the Church to have the award of certain arbitrators made a rule of law. After the award had been made in favour of the Church, the Council

> *"filed a counter-petition praying that the matters in dispute may be remitted to the reconsideration and redetermination of the arbitrators, on the ground that they admitted evidence of the value of the land based upon the assumption that it could be legally used as a building site for shops and offices. Such evidence, the*

[22] **Dutch Reformed Church vs Town Council of Cape Town** (1898) 15SC 14
[23] See **USA Distillers (Pty) Ltd v Umcebo Mining (Pty) Ltd** (89/2017) [2018] SZSC 28 (24 August 2018)

respondents say, ought to have been excluded.... The respondents also ask for a reconsideration of those portions of the award which adjudge the payment of interest, as being ***ultra vires****, and which adjudge the payment of such sum as the architect may be entitled to, as rendering the award vague and uncertain*".

The Council wanted to expropriate certain land belonging to the Church but the parties could not agree on the amount of compensation, hence the reference to arbitration giving rise to the award being challenged. The arbitrators were selected by the parties. The parties had proceeded to arbitration in terms of Act 26 of 1893 and Act 6 of 1882, upon the question of the amount of compensation to be paid in respect of the expropriation by the Council.

[82] It was appellant's submission that in 1898, in the **Dutch Reformed Church** case Lord de Villiers CJ recognized the process of *reductie* as a part of the Roman Dutch common law and that it was still in use at the time the Cape Colony was ceded to Great Britain. Reference was then made to the Roman Dutch jurist Van der Linden in his ***Institutes of (the Law of) Holland***, first published in 1806 with a 3rd edition in 1897 and a 5th edition in 1906. Van der Linden's ***Institutes*** was first translated into English by Sir Henry Juta in 1884 (Cape Town). Van der Linden died in 1835.[24] History also records that the Cape Colony was ceded to Britain in 1814(?). That would be the time or period referred to by Lord de Villiers CJ as when *"the procedure of* ***reductie*** *was still in full use in Holland"*. The learned Chief Justice did not say or imply that in 1898 the *reductie* was still alive in Holland or anywhere in the African colonies.

[83] In his judgment, in the **Dutch Reformed Church** case, Lord de Villiers was clearly referring to a time in the past in Holland when the *reductie* procedure was often resorted to. But, even then, no example of it could be pointed out. The implication is that, to all intents and purposes, the Dutch process of *reductie* was history by the turn of the 19th century – it had *"become entirely obsolete"* in the Cape colony. In the Cape Colony (Act

[24] See Hahlo and Kahn ***The South African Legal System*** (1968), Chapter XVI

29 of 1898), in Natal (Act 24 of 1898) and the Transvaal (the South African Republic) (Act 24 of 1904) statute law regulated arbitration proceedings except in the Orange Free State where the common law continued until 1965 (Act 42 of 1965)[25]. Even in the Free State no case of *reductie* has been raised. In my assessment the so-called Dutch process of *reductie* never reached the Cape of Good Hope even as Jansen JA speaks of it *"at the end of the 18th century"*[26]. In fact, there is nothing new to derive from the **Theron** case as Jansen JA was also referring to the **Dutch Reformed Church** case of 1898.

[84] Wille and Millin write of the South African position on arbitration as follows:

> *"As regards arbitration within South Africa most of the principles are today regulated by statute. In three of the four provinces of the Republic there was legislation, based on that existing in England and intended still further to facilitate and encourage references to arbitration. These laws were Act 29 of 1898, in the Cape Province; Act 24 of 1898, in Natal; and Ordinance 24 of 1904, in the Transvaal. These three enactments closely resembled one another. Their place was taken by the Arbitration Act 42 of 1965, which applies in the three provinces named, and also in the Orange Free State, where arbitrations were previously held under the common law,* (at p.521-2).
>
> *"It should be noted that neither the provincial statutes nor the Arbitration Act [42 of 1965] have repealed the common law. . . . (I)f persons agree to go to arbitration in any manner other than as provided by statute, their arbitration will not be under the Act, but will be valid at common law.",* (at p. 522). And further, *". . . the court, if satisfied that an arbitration has been duly held and an award duly given, will make the arbitrator's award its own judgment, so that execution can be levied and the award satisfied*", (at p. 523).

[2525] See Wille and Millin's ***Mercantile Law of South Africa***, 17th ed. pp521-2

[26] **Theron en Andere v Ring van Wellington van die NG Sendingkerk in SA en Andere 1976 (2) SA 1 (A) at 23B**

[85] Of notable interest is that the arbitration legislation in the three colonies were more or less contemporaneous: two in 1898 and the other in 1904. No wonder these statutes are said by Wille and Millin to have *"closely resembled one another"*. The eSwatini Arbitration Act is Act Number 24 of 1904. This was the Arbitration Act of the Transvaal applied to Swaziland. Since, by the terms of these three statutes which made arbitral awards final and conclusive, following the English law, the *reductie* could not survive and continue to apply or be in force in these colonies, the *reductie* could not have been or continued to be a part of the common law of Swaziland in 1904 or after 1904, in 1907. Whilst it may be said that the arbitration statutes did not repeal the common law, nevertheless, the *reductie* which allowed appeals against arbitral awards could not continue to apply. Accordingly, in my view, the appellant's argument in this appeal relying on the process of *reductie* as continuing to be effective as part of our common law is, with respect, mere speculation on which no Court of law could premise its judgment. Ultimately, even if the *reductie* was part of the common law received in 1907, appellant's contention would still not succeed. As already intimated, since the 1904 Act has provisions substantially similar to the South African law, it is difficult to see how appellant can successfully argue that the provisions of the Act should be trumped by the common law process of *reductie*. Section 2(1) of Proclamation No. 4 of 1907 is very clear that the common law that was adopted was the common law from time to time modified by statute law. On its face, the *reductie,* as a form of appeal against an award, stands opposed to the provision of the Act which banishes appeal against arbitration awards. That is section 4 read with paragraph 9 of the Schedule to the Act, which says, an award given under the Act shall be final and binding on the parties. And this provision is understood to mean that there will be no appeal to an award under the Act. Thus even if the award were an eSwatini award, the appellant would still find it hard to unlock the paddle which firmly holds the judgment as final and conclusive and in turn the award itself.

[86] A Transvaal judgment of the time delivered by Innes CJ, in part, reads as follows:

"Now, it is a clear rule of law that when a court in a foreign jurisdiction has definitely settled a question, which it was a competent tribunal to decide, the Courts of this country will not go into the merits of the case, except on certain special grounds . . . An instructive case upon the point is ***The Bank of Australasia v Mas*** *(20 LJ QB 248). A portion of the headnote reads as follows: 'A foreign judgment is examinable, and is only* prima facie *evidence of debt here, . . .Any pleas which might have been pleaded to the original action cannot be pleaded to the action upon the judgment'. That seems both good law and sound sense. The principle has been followed in later cases also, and it is one which we should recognize".*[27]

And if there is any doubt, I would recognize and recommend that approach for our jurisdiction on foreign judgments presented for recognition in our Courts.

[87] The Honourable de Villiers CJ expressed himself as follows, after observing that under English law and practice the Council would fail in its counter-application (p 20):

"There is no mistake of fact or of law apparent on the face of the award or admitted by the arbitrators; there is no allegation of irregularity in their proceedings; there is no charge against them of bias, corruption, or other form of misbehavior; there is no imputation of fraud or concealment of evidence on the part of the [Church]; and there is no insufficiency in the reward itself nor any allegation of the discovery of new evidence since the publication of the award. In the absence of any of these grounds for reopening an award or impugning its validity no English Court would refer it back to the arbitrators. Even where an arbitrator has come to a wrong decision as to the competency of a witness, the admission of evidence, or the propriety of allowing proof of particular facts, it is, according to Russell *(**Arbitration,** 7th edition p 200), settled law in England that the Court will not review his decision, or set aside the award for the mistake. ...."*

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[27] **Joffe v Salmon** 1904 TS 317 at 318-9

[88] The learned Chief Justice proceeded:

> *"The practical convenience of allowing persons to select their own judges for the settlement of their disputes was recognized by the Roman law, which, according to more than one Imperial rescript, did not allow an appeal against a regular award (Code 2,55,1). According to Voet (4, 8, 1) submissions to arbitration were frequent in the Netherlands in his time, and were resorted to by those who wished to avoid the heavier expenses of litigation, the din and strife of the courts, the law's delay, and the anxiety caused by the uncertainty as to the result. Strangely enough, however, a practice had already been introduced which, by encroaching upon the principle of finality, must have had the effect of reproducing the very delay, expense, and uncertainty which it was the object of submission to arbitration to avoid. The practice was that a party who deemed himself aggrieved by the award might, within ten days after the publication thereof, give notice to the opposite party that he repudiated the award and might by legal process claim a so-called* ***'reductie'****, that is to say, such an amendment of the award as would be approved of by a man of good sense and judgment. This* ***'mandament van reductie'*** *was but another name for an appeal against the award. In order to obviate as far as possible the want of certainty and finality thus introduced, it became customary to insert into deeds of submission a clause whereby both parties agreed irrevocably to abide by the awards, and to have the same made a rule of court. The procedure of* ***reductie*** *was still in full use in Holland at the time of the cession of this colony to Great Britain, and is mentioned by Van der Linden (*Institutes *3, 1, 7) as one of the different kinds of appeal to the higher courts. It is a remarkable instance of the great but silent influence of English procedure upon the practice of this court that no case can be found in which the Dutch process of* ***reductie*** *has been resorted to in this colony"*[28].

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[28] Ibid, at 20 – 21.

[89] Considering the time before and after de Villiers CJ delivered his judgment, I would say in a period of over a century and half, there has been no case decided on the procedure of *reductie*, so much so that in my opinion the procedure has become extinct. De Villiers CJ himself seemed to suggest this where he said that since about 1828 "*the principle of the finality of awards became firmly established in our Courts*". Indeed, at this very time, the finality of arbitral awards is the single dominant feature of arbitration agreements. Arbitration legislations, no doubt largely influenced by English law, have a provision entrenching the finality of arbitral awards, so much so that even where an appeal is allowed, it must be to an arbitral tribunal or umpire and not to a court of law. Paragraph 9 of the Schedule to the Arbitration Act 1904 provides for the finality and binding effect of arbitration awards. And, the position is generally the same in South Africa. In that regard Schulze *et al* write of the 1965 Act: [29] "*The Act stipulates that an arbitration award is final and not subject to appeal to a court of law. Because it is final, the parties to the proceedings must abide by and comply with the award in accordance with its terms. ...Even if the parties agree contractually to appeal to the High Court against an arbitrator's award, this clause will be null and void*".

[90] Indeed, de Villiers CJ went on to state in connection with the procedure of *reductie* (at p. 21):

> "*In the case, for instance, of an award which in so grossly disproportionate to the value or damages to be decided upon as to bear on the face of it, proof of partiality, I should not feel bound by the rule of the English Courts requiring proof* aliunde *before they will interfere. But where there is no charge of misconduct or of irregularity the practice of allowing appeals on the mere ground that the amount awarded is excessive or inadequate must be considered to have become entirely obsolete in this colony*".

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[29] Schulze *et al* ***General Principles of Commercial Law***, 8th Edn (2014) at page 302

Even the Arbitration Act of 1882 in terms of which the arbitration had been conducted provided that an award *"shall be final and binding on all the parties to the reference"*.

[91] The judgment in the **Dutch Reformed Church** case informs us that even Roman law "did not allow an appeal against a regular award", and English law also was generally against the revisitation of arbitral awards by way of appeals. The process of *reductie* in South Africa was and has been virtually without precedent for succor. At any rate, the Arbitration Acts, since 1882, have rendered some of the more obscure Roman Dutch principles unsustainable. For once statute law intervenes covering the same area formerly covered by the common law, the latter must give way. I should think that to a large extent this has been the fate of the process of *reductive,* if it ever reached Southern Africa.

[92] Reading carefully the judgment of de Villiers CJ in the **Dutch Reformed Church** case, it is clear that the *reductie* was counter-productive. By permitting appeal even on uncertain grounds such as just being aggrieved, the procedure delayed finality, the very purpose for submission to arbitration. To ensure that the process of arbitration was not stymied by the *reductie* process, parties inserted into their deeds of submission a provision for irrevocable fidelity to the award as published and secured by being made a rule of court. By so doing it made it hard for a party to repudiate the finality of an award. The learned Chief Justice does not say that the *reductie* was still in full use in his time in the Cape Colony or anywhere in the other sister colonies, or for that matter in Holland, its place of birth, but refers to a past period in Holland when the procedure was 'in full use'. De Villiers CJ seems to blame the influence of English law that there was no evident presence of or resort to the process of *reductie* in the Cape Colony. It seems clear that there was little, if any, benefit derived from a process which allowed amendment or challenge to an award on unpredictable grounds merely described as grounds that *"would be approved of by a man of good sense and judgment"*. It is not surprising that the *reductie* seems to have demised without fanfare; business-minded parties would not tolerate it.

[93] As Appellant also affirms, it was the appearance of arbitration legislation that assured finality of arbitration awards in many jurisdictions, leaving scant room for the process of *reductie*, to set aside and refuse to enforce an award. Arbitral awards are of course not oracular prophecies written on stone. It all depends on the applicable law and the intention of the parties. The Court's intervention is generally limited, as appeal to the courts of justice is generally prohibited. *In casu*, the application was under the common law for the sole purpose of recognizing the Keightley judgment and rendering it an order of court for its enforcement in eSwatini. In terms of our common law, recognition can fail if any of the grounds stated in **Economa** is not established. Our Arbitration Act dates from 1904 and the Roman Dutch law was formally adopted with effect from 1907 (22 February). In my opinion, the appellant must show that the common law that eSwatini received in 1907 carried with it the process of *reductie*. In other words, the appellant must show that the common law received in 1907 being the common law of the then South African Republic of the Transvaal was still and continued to be affected by the *reductie*.

[94] *Reductie* was a practice whereby *"a party who deemed himself aggrieved by the award might, within ten days after the publication thereof, give notice to the opposite party that he repudiated the award"* and might by legal process seek *"an amendment of the award as would be approved of by a man of good sense and judgment"*. The *reductie* was but another name for an appeal against an award, a form of appeal to the higher courts which had the effect of encroaching on the principle of finality of awards, thereby compromising the expeditious conclusion of arbitration proceedings. Van der Linden also mentioned the *reductie* but no case could be found in which the *reductie* was employed in the Cape Colony in 1898 when Lord de Villiers CJ delivered judgment in the **Dutch Reformed Church**. Because of the absence of any example in Southern African in 1898, there was some doubt as to the real status of the Roman Dutch law practice regarding arbitration awards. Lord de Villiers CJ tells the story (pp. 21-22):

> *"But where there is no charge of misconduct or of irregularity the practice of allowing appeals on the mere ground that the amount awarded is excessive or*

inadequate must be considered to have become entirely obsolete in this colony. And whatever doubts might exist as to the general law, there can be none as to the practice which should be observed in the case of arbitrations which, like the one now under consideration, take place under the Act of 1882. The 12th sub-section of section 3 is unambiguous in its terms, and enacts that the award 'shall be final and binding on all parties to the reference'."

[95] Remarking on the issue of some 'doubts' mentioned by Lord de Villiers CJ, in the above statement, Solomon JA, in **Dickenson and Brown,** observed: *"Now it is not, I think, open to question that as a general rule where parties have referred their disputes to an arbitrator, his award is final and conclusive and no appeal lies from his decision"*. And, specifically to the matter of 'doubts', Solomon JA stated: *"That was so before any legislation had been introduced on the subject, and since that time the question is placed beyond doubt"*, (as to the principle of finality of awards). And per Smalberger ADP in **Total Support Management**: [30] *"In light of the authorities referred to below this remains the position in our law today"*. To be sure, in **Dickenson and Brown,** Solomon JA had pointed out, following from English authorities cited: "*And that the law of Natal on this subject is to the same effect is, I think quite clear. For that law we have to look now not to the principles of our common law but to the statute law as it is set forth in the Arbitration Act 1898*" [31]. The Natal Act 24 of 1898 provided in section 7 that "*a submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the Schedule to this Act, so far as they are applicable to the reference under the submission*". And sec (o) of the Schedule provided: *"The award to be made by the arbitrator, arbitrators or umpire shall be in writing, and shall if made in terms of the submission, be final and binding on the parties and the persons claiming under them respectively"*.

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[30] **Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd** 2002 (4) SA 661 (SCA) at 671F
[31] **Op. cit.** at page 174

[96] In my opinion, the appellant has not shown that the *reductie* was part and still is part of the Roman Dutch Common Law adopted in 1907. It is also my opinion that the process of *reductie* spoken of by the learned de Villiers CJ had long become obsolete and was not part of the common law of the Cape Colony in 1898 or of eSwatini in 1907. If I am wrong in this conclusion, I am of the firm opinion that the *reductie* had been overridden by statute law, the Arbitration Act, 1904, and that it was not part of our common law in 1907. Our Arbitration Act provides for finality of arbitral awards with appeal if any to an umpire and not to a court of law. *In casu*, by their Agreement the parties laid down the law and procedure to regulate their relationship while the agreement lasted. It is to that Agreement that questions of performance or non-performance, full or part payment, issues submitted or not submitted to arbitration, including the powers of the arbitrator, ought to be referred for resolution. The authorities already referred to are clear as to the limited role the Court has over arbitration awards. The power to make an award lies with the arbitrator, the judge chosen by the parties themselves.

[97] Proceeding from paragraph 48 of appellant's heads of argument, where it is pointed out by Robertson that Roman Dutch law did not provide a complete arbitration system, one wonders how the appellant can now rely on the *reductie* for its claims. Clearly, in my view, the *reductie* was a product and procedure of a still developing system of arbitration. That is why the *reductie* does not appear to have reached the African shores at the Cape of Good Hope. It would seem that even in Holland the *reductie* had not been fully developed at the turn of the 19th century, even though de Villiers CJ also says the procedure was in full use in Holland at about that time. That is why, as De Villiers CJ also says (at p.21), the arbitration proceedings in the **Dutch Reformed Church** case occurred under the Act of 1882, thereby obviating any doubts associated with the common law.

[98] Placing one's reliance on the *reductie*, as the appellant has done, must be a doubtful enterprise from the outset. And, moreover, the *reductie* was a form of appeal. That appeal ought to have been raised elsewhere. Before Keightley J, the appellant had objected to the application by respondent on, *inter alia*, ground [5.4], in that the arbitrators exceeded their

powers. The point on the *reductie* is premised on the same assertion. And that submission was rejected by the learned Judge. Why should it succeed here? In fact that point does not belong to this Court at all as it seeks to reopen the merits of the award. Wille and Millin succinctly state (p541):

> *"What is most important of all and lies at the very root of every submission to arbitration, is the provision in section 28 that unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of the Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award. This is dependent only upon the award being a complete, certain and conclusive determination of all matters submitted".*

[99] If the point of excess power raised by appellant could not be appealed before Keightley J then definitely, it cannot be appealed, however indirectly, in the High Court of eSwatini. At any rate, is it correct to use the process of *reductie* for purposes of objection to the application instead of an appeal? I very much doubt. There is no intimation of such a use of the *reductie* in the **Dutch Reformed Church** case. If the appellant could have appealed the decision of the appeal panel to the Constitutional Court but did not do so, it must be presumed that appellant acquiesced to the judgment of the panel. Indeed, the application to make the award an order of court meant that the award was final and conclusive and the right to appeal had since perempted:

> *"That is the law as it is laid down in the Code (7, 52, 5) and by Voet (49, 1, 2). Voet's actual words are: 'A person cannot prosecute an appeal when he has approved* ***(comprobaverint)*** *of the sentence'. Van der Linden, on the other hand, uses the word* ***'homologatie'****, which also means an agreement. Merlin, in his Repertoire de Jurisprudence (vol 1 p.132 sub voce* ***'acquiescement'****), defines acquiescence generally as the agreement which one or other of the parties has come to in regard to a proposition, a clause, a condition, a judgment, or any other act whatever, and he goes on to say that no formal act is necessary to constitute*

acquiescence; it is sufficient if it results necessarily from the conduct of the parties"[32] (See **Hlatshwayo v Mare Deas**, supra, at pp 246-7).

[100] Regarding the contention founded on the appeal panel having allegedly exercised powers it did not have and allegedly determined Claim D without it being part of the reference, I have no reason to disagree with the respondent in that the statement of claim which initially did not contain Claim D was amended during the pleadings after the dispute had been declared. Importantly, respondent submits that Claim D was *"fully argued before the arbitrator"* and appellant had then not raised any objection to the proceedings before the arbitrator based on the arbitrator having no power to deal with the claim or the claim not being part of the dispute referred for arbitration. In paragraphs 74, 75 and 76 Keightley J stated as follows:

"74 The subsequent conduct of the parties is a further indication that they did not intend to limit the dispute, or the arbitrator's powers to specific, fixed issues existing at the time that the Arbitration agreement was signed. Claim D was opposed by USAD and was fully argued before both the arbitrator and the appeal arbitrators. The exceptio issue was also opposed and argued....

"75 USAD did not contend before the arbitrator that he had no power to rule on either of these issues. Nor did it do so before the appeal arbitrators. Of particular significance is the pre-arbitration appeal meeting minute between the parties. All three arbitration appeal panel members as well as counsel and the attorneys for both parties were in attendance at the meeting. Critically, the minutes record the following:

'2.2 The parties agreed that the appeal and cross-appeal have been timeously and properly noted;

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[32] **Clarke v Bethel Cooperative Society** 1911 TPD 1152 at 1158 (per De Villiers J.P.)

2.3 All issues that were before (the arbitrator) are to be canvassed on appeal'.

The arbitrator had considered and ruled on Claim D....

"76 USAD raises the point only now, after both Claim D and the exceptio issue went against it, and when Improchem wishes to exercise its right to have the award made an order of court. Although section 33 (1) (b) of the Arbitration Act provided USAD with a remedy to apply to have the award set aside on the basis that the appeal arbitrators had exceeded their powers it never did so. Their conduct as a whole convincingly underscores the lack of merit in their case on this issue.

[101] The award was South African and, the Johannesburg High Court, by consent of the parties, had the necessary jurisdiction. It would be very wrong of this Court to pretend to exercise review powers over the judgment of Justice Keightley even without considering the ruling of the Supreme Court of Appeal which also refused appellant leave to appeal. In my view if appellant did not object to the matter on Claim D being argued on its merits, it must be assumed that appellant consented or acquiesced to the jurisdiction of the appeal panel. In her judgment Keightley J. again gave a firm stand on the issues then raised by the appellant, being the issues the appellant has again raised in opposition to the application in this matter. I wholeheartedly agree with Keightley J that *"Their conduct as a whole convincingly underscores the lack of merit in their case on this issue"*. I have no doubt in my mind that had appellant raised the troubling issues in South Africa before the appeal panel, the issues complained of would possibly have been caught in the arbitral net. Having missed that opportunity and allowed the issues to pass, the appellant cannot now reverse the clock and stem the tide. This Court is not in a position to reverse the wheel of progress.

The counter- application

[102] To the extent that the counter- application relies on the Redding Award, I entirely agree with the respondent that the counter-application cannot stand as the Redding Award was set aside. There is no way this Court can reopen or reinstate the Redding Award; so

to do would make nonsense of the agreement and the arbitration proceedings that have taken place between the parties and backed up by the Court decisions.

Conclusion

[103] Of the three grounds supporting recognition of foreign judgments, the appellant conceded to only one, namely, that the Keightley judgment is final and conclusive. There is a bit of conflict here: if the South African High Court did not possess the international jurisdiction or competence I do not see how its judgment could be final and conclusive. In fact, the purported judgment would possibly be a nullity. Were that the case, I have no doubt that the Supreme Court of Appeal would have smelt that out and done the right thing. The challenge to enforcement arises only where the court had jurisdiction and its judgment was final and conclusive. It is the jurisdiction of the South African Court and the enforceability of the judgment in eSwatini that was challenged by appellant. The absence of jurisdiction is based on the fact that appellant was a peregrinus in South Africa and its submission to South African jurisdiction was allegedly limited to the arbitration proceedings and did not extend to the subsequent application to the SA High Court and that the judgment made an order of the SA Court was irrelevant since it could not be enforced in South Africa. According to the submission of the appellant, it is the appeal award that should have been the subject matter of the respondent's application to the High Court of eSwatini. It is true that eSwatini will not recognize and enforce the judgment just because it is valid, final and conclusive in SA. But it must be shown why it should not be recognized and enforced. The argument based on public policy was interwoven with the argument that the appeal panel exceeded its mandate and dealt with issues not submitted to it. Our consideration and dismissal of that argument also answered and discharged the point that the enforcement of the appeal award in eSwatini would offend against public policy.

[104] On all the argument challenging the Mlangeni judgment and in turn impugning the Keightley judgment, I find no merit. The appeal tribunal, supported by the Keightley

judgment explained and justified its award, all in terms of the agreement and the applicable law and procedure. The cited authorities are replete with statements when an arbitral award may be impugned and set aside. With respect none of the usual grounds for challenging the award has been shown to be present in this matter. When all is said and done it would appear that the only basis for challenging the desired enforcement of the award was that the award is unfair in that appellant is required to pay in full for work not done by the respondent under the Agreement. To that end, the appellant says enforcing the award would flout public policy. The contention is based on the judgment of Shabangu AJ in the **G.S Franco** case [33] delivered in 2003.

[105] In the **GS Franco** case, Shabangu AJ held: *"....to order the defendant to render full counter-performance in return for the plaintiff's defective performance will be unfair to the defendant"*. The appellant then contends that that is *"precisely what the Appeal Panel ordered"*, in this matter. And that this is *"not merely an error of law, it creates a fundamental unfairness. It offends against Sections 20 and 21 of the Constitution"*, and accordingly offends against public policy. To be sure, this issue has not been raised as a constitutional issue but is only somewhat collateral. To the extent that it has not been raised as a constitutional issue then it must be treated as *"merely an error of law"* that will not impugn the award, unless the unfairness is *"so gross as to bear on the face of it clear proof of partiality or corruption"* as De Villiers CJ[34] emphasised. And, moreover, *". . . There is nothing to show that the arbitrators did not give full consideration to all these matters before deciding upon their award. . . The award is framed on a somewhat liberal scale, but there is a vast mass of evidence to support it, and there is no allegation that the arbitrators were guilty of any bias, partiality, or other form of misbehavior,"* said Lord de Villiers in rejecting the challenge.

[106] There has been no allegation of irregularity in the arbitration proceedings or that the award is so grossly disproportionate or excessive it could not be a regular and *bona fide*

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[33] **G.S. Franco Investments (Pty) Ltd v Carr Corp Investment (Pty) Ltd**....[2003] SZHC 98 (21 Oct 2003) at p. 14

[34] **Dutch Reformed Church v Town Council of Cape Town,** at pp 21 and 25.

award binding on the parties. But where, as de Villiers CJ pointed out, there is shown evidence of partiality, corruption or gross irregularity the Court may interfere with the award. To the extent then that the award is un-impeachable, the question of it violating public policy does not seriously arise. The issue of excess jurisdiction on the part of the appeal panel was sufficiently dealt with in the Keightley judgment which refers to the minutes which reflect that the parties were *ad idem* on the matters referred for arbitration. For that reason, the issue of the appeal panel having exercised jurisdiction or power that it did not have cannot continue to arise having regard to the decision of the Supreme Court of Appeal which in the circumstances of the case makes the award final and conclusive.

[107] It will be noted that an arbitral tribunal is not a court of law: *"Litigation proceedings allow for appeal against a decision, while in the case of arbitration there is no right of appeal to the courts if a party is unhappy with an arbitrator's award. The arbitrator's award is final unless it can be overturned by the courts on fairly narrow grounds, such as bias on the part of the arbitrator"*. (Schulze *et al* p. 297). Accordingly, what may be described as fair or unfair in a court of law need not be so described in the case of an arbitration proceeding or award. In my view, when Shabangu AJ said granting the order sought by the plaintiff would be "unfair" to the defendant the learned Judge was speaking from a court of law forum. The present matter arises from an arbitration proceeding; what is fair or unfair will be circumscribed by the terms of the agreement between the parties – terms which the parties themselves willingly assumed as binding on them. The agreement binds the parties exclusively. For the appellant to have been required in terms of the award to pay in full in a situation appellant considers to be unfair that, in my opinion, would not impact negatively on public policy.

[108] The matter having exited the South African jurisdictional platform, I do not see how the appeal panel or arbitrator would be expected to reconsider the award without the Keightley judgment having first been reviewed and set aside – a thing which this Court cannot do. Accordingly, even assuming appellant is correct in its contention on this point, the error would be beyond remedy: it must lie where it has fallen. The appeal panel would

be difficult to order to revisit its award, unless, may be, it also conceded to have erred. The appeal panel is not before this Court nor anywhere within the Court's jurisdiction.

[109] In the result, on all the grounds raised by the appellant, the appeal must fail. It is accordingly ordered -

1. The appeal is dismissed with costs at Attorney and Client scale to include certified costs of counsel.

2. The order of Mlangeni J. in the Court *a quo* is upheld.

M.J. Dlamini JA

I agree

S.J.K. Matsebula JA

I agree

M.J. Manzini AJA

For Appellant Adv. S. Vivian SC (With Z. Jele)

For Respondent Adv. M. Antonie SC (With JE Henwood)