IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 12451/2014

In the matter between:

ELAN BOULEVARD (PTY) LIMITED **APPLICANT**

and

T MAHOMED **RESPONDENT**

J U D G M E N T

Delivered on: MONDAY, 07 NOVEMBER 2016

OLSEN J

[1] This application concerns the recognition and enforcement of a judgment handed down in favour of the applicant (as plaintiff) against the respondent (as defendant) by the District Court of Queensland, Southport, Australia. The applicant is Elan Boulevard (Proprietary) Limited, an Australian company. The respondent, Ms T Mahomed, is a resident of Durban.

[2] A foreign judgment sounding in money cannot without more be enforced in South Africa. Save for a judgment which can be brought within the Enforcement of Foreign Civil Judgments Act, 32 of 1988 (which cannot be done in this case) such a foreign judgment must first be recognised for enforcement in this country by order of a South African court.

[3] The requirements which must be met to sanction the enforcement in this country of a foreign judgment sounding in money may be summarised briefly as follows.

(a) The foreign court must have had what South African law would regard as international jurisdiction or competence, which exists:

(i) when the defendant was domiciled or resident within the foreign State in which the foreign court exercised jurisdiction at the time of commencement of the foreign proceedings; or
(ii) when the defendant submitted to the jurisdiction of the foreign court.

(b) The judgment sought to be enforced must have become final and conclusive, and must not have become superannuated.

(c) The recognition and enforcement of the foreign judgment must not be contrary to public policy.

(d) The judgment must not have been obtained by fraudulent means.

(e) The judgment must not involve the enforcement of a penal or revenue law of the foreign State.

(f) The enforcement of the judgment must not be precluded by the Protection of Businesses Act, 99 of 1978.

As to the aforegoing, see *Jones v Krok* 1995 (1) SA 677 (A) at 685B-D; *Purser v Sales; Purser and Another v Sales and Another* 2001 (3) SA 445 (SCA) paras 11-12; and *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) para 38. If these requirements are met, "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". (*Jones v Krok* at 685D-E, referring to *Joffe v Salmon* 1904 TS 317 at 319 where Innes

CJ observed that it is a clear rule of our law that when a question has been settled finally by a competent foreign court the local court will not go into the merits of the case.)

[4] The judgment in issue in this case was granted in favour of the applicant against the respondent on 30 July 2014. It was for payment of a sum of Aus$714 217.19, which amount included interest calculated up to 30 July 2014 in an amount of Aus$404 810.79. According to the certificate of judgment the amount bears interest from the date of judgment at 8.5% per annum. The court also dismissed a counterclaim which the respondent had made and ordered the respondent to pay the applicant's costs. The applicant seeks an order recognising the judgment in its favour, and, the Australian order as to costs aside, an order enforcing the judgment.

[5] The papers in this matter contain a mass of material. (They run to some 800 pages.) Unfortunately the respondent's opposing papers advance some extravagant defences to the applicant's claim to be entitled to enforce its judgment; but fortunately counsel who argued the matter for the respondent confined the case to the issues of jurisdiction, public policy and the alleged employment of fraudulent means in order to secure the judgment. (As will be seen, the latter two of these issues overlap somewhat.) Some of the defences not pressed by counsel are said to rest on our Constitution. The respondent cites her right to privacy, her right to property (alleging that granting the present application will allow a process of execution which will amount to an arbitrary deprivation of property), and her right of access to court and a fair hearing; and she asserts that if the applicant is entitled to relief in this application at common law, then the common law must be developed in an unspecified manner in order to avoid that outcome and achieve consistency with the Constitution. There is no need to deal with these matters. But as to the harmony between the Constitution and our law relating to the enforcement of foreign judgments, paragraphs 54 to 57 of the judgment in *Government of Republic of Zimbabwe v Fick* are instructive.

[6] An account of the facts is necessary in order to deal with the bases upon which the respondent resists the application.

(a) On 9 December 2007 the respondent and her husband left South Africa for Brisbane, Australia, to attend a family wedding. A number of families attending that wedding became excited about the prospect of buying a unit in a proposed development known as "3113 Surfers Paradise Boulevard". The respondent attended a presentation and, together with her husband, at the least expressed an interest in purchasing such a unit.

(b) The proposed standard form contract documents for such a purchase were not at that stage yet ready. According to the respondent she was informed that a deposit of 10% of the proposed purchase price was required by the applicant (as seller of the development of which the proposed unit formed a part) in order to secure a right to purchase. On the applicant's case such a deposit (which amounted to Aus$103 500) was payable only as an obligation under the contract of sale which, according to the applicant, was actually subsequently concluded. Aus$64 000 was paid to the applicant's lawyers on 9 January 2008 before the respondent left Australia on 12 January 2008, still not having signed the proposed sale contract. Neither had she signed an associated contract which was for the provision of a furniture package for installation in the unit upon its completion.

(c) On 21 January 2008 the applicant's selling agents forwarded the contracts and associated documents required for the transaction to R Sabdia and Associates of Robertson, Queensland, a firm of solicitors who had been appointed by the respondent to assist her. This was done under cover of a letter which gave instructions as to the execution of the two contracts (one for the unit and one for the furniture) and the associated documents apparently required by Australian law. According to how these documents were dated they were signed in Australia on 23 January 2008 and 4 February 2008. The respondent's

name appears where her signature was required, and her initials where those were required. Her solicitor, Mr Sabdia, returned the documents to the applicant's agent, whereafter, upon signature by the applicant, the applicant regarded the two contracts as binding.

(d) The respondent says that "sometime in 2008", as a result of a communication from Mr Sabdia, she learnt that he was in possession of copies of the signed binding contracts. She learnt that they had been witnessed by her sister. Her affidavit is replete with expressions of "shock" at this revelation. The respondent's coyness about disclosing when it is that she learnt of this allegedly shocking disclosure, and of the fact that her sister had witnessed her signature, is disturbing. This is especially so because she has not produced any affidavit from Mr Sabdia explaining how unsigned documents which were received in his office (as the respondent's agent) left his office duly signed, on the face of it by the respondent, when she was in fact in South Africa at the time. That in turn is all the more disturbing because of the respondent's allegation (which is not accepted by the applicant, although it cannot have any direct knowledge of the truth of it) that she had not authorised anybody to sign in her name and on her behalf, something which would have been permitted according to law in Queensland. However, in the view I take of this matter, nothing turns on these misgivings about this aspect of the factual matrix.

(e) According to the respondent, being concerned (allegedly on the advice of Mr Sabdia) that her sister could get into trouble with the Australian authorities for having falsely witnessed the signature, the respondent asked Mr Sabdia to go ahead and attempt to obtain finance to meet her obligations in terms of the contract.

(f) The final instalment of the deposit required by the contract was eventually paid on 12 June 2008 after the respondent (through Mr Sabdia) had made four requests for an extension of time. (The balance of the deposit ought to have been paid on 25 February 2008,

the contract having recorded what had been paid before the contract signature date.)

(g) Clause 50 of the contract of sale gave the applicant a right of first refusal in the event that the respondent wished to sell her unit or her interest in the unit. In March 2010 Mr Sabdia sent a letter to the applicant's attorneys offering to sell the unit back to the applicant for the price at which it had been sold to the respondent. That offer was declined.

(h) The unit was put in a condition to be transferred in October 2010. That meant that the balance of the purchase price had to be paid. Notice of this was furnished, but the respondent failed to pay. Four extensions of time to pay were sought by her. After more than one notice demanding performance, the applicant eventually terminated both contracts on 16 June 2011.

(i) A summons issued out of the Queensland court by the applicant was served upon the respondent in South Africa in May 2012. In it the applicant claimed damages for breach of both contracts, including interest on the various amounts in question at the rate of 15% per annum, as provided for in those contracts. In her first plea the respondent admitted that the written documents upon which she was sued were valid binding contracts. Later she amended her plea withdrawing that admission, and expressly denying that either she or anyone authorised by her to sign on her behalf, had signed the contract documents. She counterclaimed, seeking to have her deposit repaid, relying on the same contention. It was accordingly some four years after the signed agreements were returned to the applicant that it learned for the first time that the respondent repudiated the contracts upon the basis that they had not been signed by her, or on her behalf; this despite her prior conduct consistent only with the validity of the contract documents.

(j) Early in 2014 the case was set down to run for three days commencing 30 July 2014. It appears that more than one attempt was made in advance of that date to get the court to delay the trial. It would not. On 30 July 2014 counsel appeared on behalf of the respondent to move and argue an application for an adjournment upon the basis that the respondent had been unable to get to Australia in time for the trial. The learned Judge was not impressed with her application and dismissed it. Counsel withdrew, his brief having been confined to the application for an adjournment.

(k) The learned Judge then required the applicant to establish the matters upon proof of which its claim rested. That was done and judgment was entered for the applicant against the respondent as set out earlier in this judgment.

INTERNATIONAL JURISDICTION OR COMPETENCE

[7] The contracts upon which the respondent was sued in Queensland contained clauses under which she submitted to the jurisdiction of the courts of Queensland. As I understand her answering affidavit, the respondent's challenge to the contention that the Queensland court had international jurisdiction or competence went along the following lines.

(a) Her signature to the contracts was a forgery.

(b) If this court accepts her allegation that her signature was forged, then there was no submission to the jurisdiction of the foreign court.

(c) This court must accept her allegation that her signature was forged as the applicant is unable successfully to contradict that proposition, these being motion proceedings.

(d) Accordingly, as she was neither resident nor domiciled in Australia when the foreign proceedings commenced, the Queensland court

cannot be regarded as having had international jurisdiction or competence.

[8] The respondent accordingly asks this court to re-examine the issue of the allegedly forged signatures, not to overturn the findings made by the foreign court, but to reach a decision on the question as to whether that court had international competence. That this is a feasible request seems apparent from the judgment in *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA), para 35 and the cases cited in fn35. However in that case the court went on to observe in para 41 that the "validity of a submission to jurisdiction agreement should be tested with reference to the proper law of the contract in question." The court observed further that there is authority for the proposition that the applicable law is that "which would govern the contract or any term thereof if it were valid." Whether those propositions would have any bearing on the decision in this case was not argued before me. However I do not believe that I need concern myself with the question, because in my view the respondent's argument misses the real point.

[9] Whilst it is so that in her amended plea the respondent asserted that the buyer's signatures on the contract documents were not hers, nor those of someone authorised by her, she did not plead that the Queensland court lacked jurisdiction over her for that reason. (She raised no plea as to the jurisdiction of the court at all, domestic or international.) On a plain reading of the respondent's plea the issue between her and the applicant, as to whether the buyer's signatures brought about the existence of binding contracts, was submitted by her for decision by the Queensland court. At the very least she acquiesced in the applicant's claim to have the issue tried in Queensland. (See *Du Preez v Philip-King* 1963 (1) SA 801 (W) at 803B-C.)

[10] Furthermore, and most importantly, the respondent's counterclaim constituted an indisputable submission to the jurisdiction of the Queensland court. She asked the court to find that there were no contracts (for want of signature by her or on her behalf), and on that ground to grant judgment in her favour for return of the deposit she had paid. Counsel for the respondent

conceded that he was unable to advance any argument against the proposition that the making of the counterclaim puts it beyond question that the respondent submitted to the jurisdiction of the court in Queensland.

PUBLIC POLICY AND THE EMPLOYMENT OF FRAUDULENT MEANS TO SECURE A JUDGMENT

[11] In order to succeed in its action in Queensland, the applicant had to establish to the satisfaction of the Judge that the contracts upon which it relied had indeed been concluded. The respondent's admission of that fact having been withdrawn, the learned Judge considered the circumstances in which the signed agreements had been returned to the selling agent, and the conduct of the respondent thereafter and up to the time when she delivered her amended plea some four years after the contract dates, and found it proved that the contracts were entered into. In making that finding the learned Judge impliedly rejected the proposition that the contracts were false documents (false in the sense that they were products of forgery). That finding justified the dismissal of the counterclaim and, upon being satisfied of the other elements of the applicant's case, the grant of the judgment now sought to be enforced.

[12] Before this court the respondent contends that she is entitled to raise the question of the alleged forgery again, arguing that the enforcement of the Queensland judgment in South Africa would be against public policy because it was based on forged documents; and asking that a finding should be made that the judgment in Queensland was, because of the forgery, "obtained by fraudulent means". The respondent contends that these conclusions can be reached because, on the papers before me, she has testified that the signatures were forged; and because the applicant is unable successfully to contradict that evidence in motion proceedings.

[13] In my view, whatever else may be said to gainsay the propositions advanced by the respondent, the position is that the question as to whether the contracts were false documents was submitted for the decision of the

Queensland court, and decided by it. On the authorities already mentioned this court has no business re-opening that issue.

[14] The learned author C F Forsyth (*Private International Law*, 5ed at 463) draws a distinction between extrinsic and intrinsic fraud. Extrinsic fraud occurs during the trial. It may be a case of forgery, perjury or suppression of material documents. A touchstone of the classification is that it concerns fraud of a kind "as would allow a South African court to set aside its own judgment if apprised of the true position". A judgment obtained in that fashion will not be recognised. Intrinsic fraud is fraud that has been raised before and rejected by an internationally competent court. The local court, according to the learned author, must in that case refuse to go into the matter. I am in respectful agreement with that analysis.

[15] Putting Professor Forsyth's views aside, and assuming that intrinsic fraud can be raised in these proceedings (a proposition I do not endorse), what would disqualify a foreign judgment from recognition is that it was "obtained by fraudulent means"; which to my mind means that the fault with regard to the fraud, or responsibility for its employment, must lie with the party who secured the judgment. In the answering affidavit in these proceedings the respondent presents her case upon the basis that the applicant was responsible for the alleged forgery. She ignores altogether the fact that the documents she provided illustrate that if her signature was indeed forged (i.e. placed upon the documents with fraudulent intent) then it happened while those documents were in the possession of her own solicitor. In his heads of argument placed before the court in Queensland, counsel for the applicant conceded that it appears correct that the signatures and initials of the buyer were not placed on the documents by the respondent herself. His primary argument was accordingly to the effect that, given the respondent's conduct from January 2008, which evidenced her acceptance of the validity of the contracts, the signatures to the documents must have been placed there by someone authorised thereto, a submission which the Queensland court accepted. If I were permitted to re-examine and reconsider that finding made by the Queensland court, I would be hard pressed to find any fault in the

reasoning it followed in concluding that the contracts were valid and binding. Accordingly, on the respondent's own version, it was ultimately her false representations to the effect that she regarded the contracts as valid which generated the judgment against her.

[16] Counsel for the respondent has also argued that the enforcement of the judgment would be contrary to public policy because the larger portion of the ultimate award is an interest component. However he did not go so far as to say that the award was one of punitive or exemplary damages which, by our law, might be regarded as contrary to public policy. (See *Jones v Krok* at 696.)

[17] An examination of the record and the manner in which the interest portion of the judgment was calculated reveals that the device of interest was employed in order to determine fair compensation to the applicant for the losses it suffered as a result of the respondent's breach of contract. (This method is not unknown in our law. See *Ethekwini Municipality v Verulam Medicentre (Pty) Limited* [2006] 3 All SA 325 (SCA) para 15.) This portion of the compensation was calculated at the stipulated rate (15% per annum) on:

(a) the full purchase prices from when they were due to have been paid to the date upon which the contracts were cancelled;
(b) the full purchase prices less the forfeited deposit from then until the unit was resold; and
(c) the difference between the original contract prices (less the deposit) and what was achieved upon re-sale (that difference being some Aus$310 000) up to the date of judgment.

The course of the history of the transaction, long largely because of the respondent's own misconduct, explains how the applicant's losses mounted up as they did. In my view a contention that the outcome is contrary to public policy has no foundation.

CONCLUSION

[18] There having been no other objections to the proposition that the Australian judgment is enforceable in South Africa, I conclude that the application must succeed. In those circumstances the following order is made.

1. The judgment handed down in favour of the applicant (as plaintiff) against the respondent (as defendant) by the District Court of Queensland, Southport, Australia under case number SD83/2012 on 30 July 2014 is recognised and enforceable in South Africa.

2. Consequently, the respondent is ordered to pay the applicant:

   (a) Aus$714 217.19;
   (b) interest on the sum of Aus$714 217.19 from 30 July 2014 to date of payment at the rate of 8.5% per annum;
   (c) the costs of this application.

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OLSEN J

Date of Hearing:	MONDAY, 24 OCTOBER 2016
Date of Judgment: :	MONDAY, 07 NOVEMBER 2016
For the Applicant :	MR MJ FITZGERALD SC
Instructed by:	WERKSMAN ATTORNEYS APPLICANT'S ATTORNEYS 155 5th Street Sandown, Sandton (Tel.: 011 535 8209) (Ref.: Mr R Wakefield/HICK 28020.1) **c/o COX YEATS ATTORNEYS** 21 Richefond Circle, Ridgeside Office Park Umhlanga Ridge Durban (Tel : 031 – 536 8500) (Ref.: Mr A Clark / Ms L Mairte / ps/ 09 W620 003)
For the Respondent :	MR A POTGIETER SC with MR H GANI
Instructed by:	SHABEER JOOSAB ATTORNEYS RESPONDENT'S ATTORNEYS Suite 1, Ground Floor 582 Ridge Road Overport Durban (Tel.: 031 – 207 8337) (Ref.: Mr Joosab / Taazmin Mahomed)