

SUPREME COURTS OF THE NETHERLANDS

CIVIL DIVISION

Number 19/03142 and 19/03144

Date December 18, 2020

JUDGMENT

In the case with number 19/03142 of REPUBLIC

KAZAKHSTAN,

Based in Astana, Kazakhstan,

CLAIMANT in cassation,

hereinafter referred to as: Kazakhstan

lawyers: J. de Bie Leuveling Tjeenk and J.W.M.K. Meijer,

against

1. Anatoli STATI,
living in Chisinau, Moldova,
2. Gabriel STATI,
living in Chisinau, Moldova,
3. the company incorporated under foreign law ASCOM GROUP S.A.,
having its registered office in Chisinau, Moldova,
4. the company incorporated under foreign law TERRA RAF TRANS TRADING LTD,
having its registered office in Gibraltar,

DEFENDANTS in cassation

hereinafter jointly: Stati et al

lawyer: F.E. Vermeulen

And in the case with number 19/03144 of

the legal person under foreign law SAMRUK-KAZYNA JSC,

having its registered office in Astana, Kazakhstan,

CLAIMANT to cassation,

hereinafter: Samruk,

Lawyers: A.E.H. van der Voort Maarschalk, B.T.M. van der Wiel en A.

Stortelder

against

1. Anatoli STATI,
living in Chisinau, Moldova,
2. Gabriel STATI,
living in Chisinau, Moldova,
3. the company incorporated under foreign law ASCOM GROUP S.A.,
having its registered office in Chisinau, Moldova,
4. the company incorporated under foreign law TERRA RAF TRANS TRADING LTD,
having its registered office in Gibraltar,

DEFENDANTS in cassation
hereinafter jointly: Stati et al
lawyer: F.E. Vermeulen

1. Course of the proceedings

The Supreme Court refers to the Supreme Court for the conduct of proceedings in factual bodies:

- a. the judgment in case C/13/638381 / KG ZA 17-1217 of the Interim Relief Judge in the District Court of Amsterdam of 5 January 2018;
- b. the judgment in the case 200.234.096/01 KG of the Amsterdam Court of Appeal of 5 June 2018 and 7 May 2019.

Kazakhstan and Samruk have lodged separate appeals in cassation against the judgment of the Court of Appeal of 7 May 2019.

Stati et al have filed a statement of defence to dismiss the case.

The cases have been pleaded for the parties by their lawyers, for Samruk partly by L. Tolatzis and for Stati et al partly by P.E. Emste and D.J. Verheij.

The non-binding opinions of Attorney-General P. Vlas extend to the dismissal of the cassation appeals.

Kazakhstan's lawyers responded in writing to the conclusion in case 19/03142. The lawyers of Samruk have responded in writing to the conclusion in case 19/03144.

2. Starting points and facts

2.1 In cassation the following can be assumed.

- (i) Stati et al have invested more than one billion American dollars in (among other things) oil fields in Kazakhstan and believe that Kazakhstan has unlawfully appropriated these investments. Stati et al have initiated arbitral proceedings against Kazakhstan.
- (ii) Samruk is a Joint Stock Company incorporated under the laws of Kazakhstan, of which Kazakhstan is founder and sole shareholder. Samruk is a fund referred to in the 'Kazakhstan Law on the National Welfare Fund'. This states, among other things, that the shares in Samruk are the exclusive property of Kazakhstan and cannot be disposed of.
- (iii) Samruk holds shares in the Dutch company KMG Kashagan B.V. (hereinafter: KMGK).
- (iv) By arbitral award of 19 December 2013, as supplemented on 17 January 2014, Kazakhstan

has been ordered to pay Stati c.s. USD 497,685,101 and € 802.103,24. There is no right to appeal arbitral award. By judgment dated 9 December 2016, the competent court in Stockholm rejected Kazakhstan's claim to have the arbitral award set aside. Kazakhstan has not complied with the arbitral award.

- (v) Stati et al applied to the Interim Relief Judge for leave to attach, at the expense of Kazakhstan and Samruk, the shares of Samruk in KMGK. In the request for leave for attachment, It has been argued that Samruk is part of the state Kazakhstan.
 - (vi) The judge in interim relief proceedings granted the leave, estimating the claims of Stati et al at USD 557,656,650 and € 992,520. On 14 September 2017, Stati et al have levied prejudgment attachment on Samruk's shares in KMGK.
- 2.2 In these summary proceedings, Samruk requested the lifting of the prejudgment attachment. Samruk has based this claim on the fact that Stati et al has no claims against Samruk, but only against Kazakhstan and that there are no grounds to equate Samruk with Kazakhstan.
- 2.3 The District Court in preliminary relief proceedings refused the requested injunction on the ground, in short, that Samruk lacks factual-economic independence in its relation to Kazakhstan and that Samruk abuses, in the sense of art. 8 of the Civil Code of Kazakhstan, its in principle existing power to invoke its legal independence vis-à-vis Stati et al (para. 4.7 and 4.9).¹
- 2.4 The Court of Appeal has allowed Kazakhstan on appeal to join Samruk on the basis of Article 217 DCCP.
- 2.5 The Court of Appeal has confirmed the judgment of the interim relief judge.² Insofar as relevant in cassation, the Court of Appeal has considered the following:

"The final preliminary question to be answered is whether Samruk is entitled to (partly) invoke the immunity from enforcement. According to Samruk, this claim is being made only in the event that Samruk is identified with Kazakhstan. Thus argued, this argument lacks any factual basis, because the court in preliminary relief proceedings, in whose considerations this view has apparently been inferred by Samruk, did not identify Samruk and Kazakhstan jointly, but, on the contrary, (for the time being) ruled that Samruk, as a separate legal entity, is abusing its - in principle - existing power to invoke its legal independence vis-à-vis Stati et al. To this the court of appeals would like to add, somewhat superfluously, that even if it is assumed (which by no means is that the case) that (the considerations of the provisions of the court must be understood in such a way that) Samruk and Kazakhstan must be identified jointly, the court of appeals does not agree with Samruk's argument that it may invoke immunity from enforcement. In doing so, the court of appeals has argued that the starting point in this respect should be that assets of foreign states are not subject to seizure and execution unless and insofar as it has been established that they have a purpose that is not incompatible with this, in which case it is always the creditor who has to provide information which can be used to determine that the goods are being used by the foreign state or are intended for, in short, something other than public purposes (cf. Supreme Court, September 30, 2016, NJ 2017/190). Leaving aside whether or not it is conceivable that, as in this case, Samruk, and not Kazakhstan, may invoke immunity from enforcement in this way, such an invocation would, in any case, (also) have to be considered as having been made on behalf of Kazakhstan. According to the court of appeals, it is then up to Stati et al. to make a plausible argument that, in short, not the final (ultimate), but the immediate purpose of the goods – in this case, the shares held by Samruk in KMGK - is a

¹ Amsterdam District Court 5 January 2018, ECLI:NL:RBAMS:2018:795.

² Amsterdam Court of Appeal 7 May 2019, ECLI:NL:GHAMS:2019:1566

nonpublic purpose, if only because a different interpretation of the rules contained in the aforementioned basic principle would make it de facto impossible for individual parties imposing seizures, such as Stati et al. to assert their rights. Stati et al. have done this to a sufficient extent, also in view of what Samruk and Kazakhstan themselves already sufficiently addressed (defense on appeal under 170) Samruk's commercial purpose (...). This means that ground 14 also fails.

3. The review of the complaints

- 3.1.1 Part 2 of the complaints in the case with number 19/03142 and part 3 of the complaints in the case with number 19/03144 are in the first place directed against the judgment of the Court of Appeal in para. 3.7 that Samruk only invoked immunity of execution in case Samruk is equated with Kazakhstan. These parts of the complaints that the Court of Appeal has misunderstood that grievance 14 of Samruk and the explanation thereof cannot reasonably be interpreted other than that the appeal on immunity of execution has been made in case the Court of Appeal endorses the judgment of the Interim Relief Judge that Stati et al can seek recourse against the assets of Samruk for their claims against Kazakhstan.
- 3.1.2 This complaint is well-founded. What Samruk put forward in grievance 14 and the explanation thereof in her statement of appeal, allows no other explanation than that Samruk has invoked immunity from execution in case the Court of Appeal agrees with the judgment of the Interim Relief Judge that Stati et al can seek recourse against the assets of Samruk for their claims against Kazakhstan, regardless of whether they can do so on the basis of equation between Kazakhstan and Samruk or on the basis of misuse of power of Samruk to invoke its legal independence. The judgment of the Court of Appeal is therefore incomprehensible.
- 3.2.1 In para. 3.7, the Court of Appeal has ruled that, already assuming that Samruk may invoke the immunity of execution of the state of Kazakhstan, such an invocation should (also) be considered as having been made on behalf of Kazakhstan. However, in para. 3.7, the Court of Appeal has rejected the reliance on immunity of execution based on on the opinions (i) that for rejection of the reliance on immunity of execution it is sufficient that Stati et al have made it plausible that the immediate purpose of the attached goods (the shares of Samruk in KMGK) is other than a public purpose, and (ii) that Stati et al have made it sufficiently plausible.
- 3.2.2 The parts mentioned in 3.1.1 above also dispute these judgments as incorrect or insufficiently motivated. Against opinion (i), parts of the complaint argue that for an appeal to immunity from execution to be well-founded, it is decisive whether the attached goods, in whole or in part, are intended for other than public purposes and that this does not exclusively concern the immediate purpose of the attached goods.
With regard to opinion (ii), parts of the complaint invoke the statements of Samruk and Kazakhstan that Samruk is a state-established legal entity, a so-called "Sovereign Wealth Fund", which aims to increase the national prosperity of Kazakhstan, that the proceeds of its investments are therefore earmarked for this purpose, as are the proceeds from its shares in KMGK, which is a state participation engaged in the development, administration and exploitation of oil fields located in Kazakhstan's territorial waters of the Caspian Sea. According to parts of the complaint, it follows from these statements that the shares have a public purpose.
- 3.2.3 It is in accordance with the - aimed at respecting the sovereignty of foreign states - purpose of the immunity of execution to take as a starting point that property of foreign states is not subject to

seizure and execution unless and for to the extent that it has been established that they have a purpose that is not incompatible therewith. This is in accordance with Article 19(c) UN Convention, which on this point can be regarded as a rule of customary international law. It is also in keeping with this aim of immunity from execution that foreign States are not obliged to produce evidence which show that their property has a use which oppose to seizure and execution.

It is consistent with the foregoing that the obligation to furnish facts and the burden of proof with regard to the capability of the seizure and execution of the assets rest on the creditor who is seizing or wishes to seize the assets of the foreign State and that, even if the foreign State fails to act, it must always be established that the assets in question are capable of seizure. The creditor will therefore always have to provide information enabling it to be established that the goods are being used by the foreign State or are intended, in short, for purposes other than public use.³

3.2.4 The requirement applied by the Court of Appeal that it is decisive whether the immediate purpose of the attached goods is other than a public purpose does not correspond to the rules set out in 3.2.3 above and is therefore erroneous in law. These rules amount to a presumption of immunity from execution under international law that assets of a foreign State are subject to a presumption of immunity from execution, which deviates only if it is established that the assets in question are used or intended by the foreign State for purposes other than public ones, and that it is up to the party invoking an exception to the immunity from execution to provide evidence on the basis of which that can be established.⁴ It follows from these rules that immunity from execution is not limited to assets which immediate purpose is a public one.

3.2.5 Furthermore, the opinion of the Court of Appeal that the allocation of the shares in KMGK held by Samruk is other than a public allocation, shows an error of law or is insufficiently reasoned. In the light of the circumstances put forward by Samruk and Kazakhstan in connection with the statements referred to above in 3.2.2 - which statements have in part been established (see above in 2.1 under (ii)) and in part have not been rejected by the Court of Appeal and whose accuracy must therefore be the starting point in the cassation proceedings - without further explanation it is not clear why it can be assumed that the shares held by Samruk in KMGK have a different purpose than a public purpose. After all, the fact that the proceeds from the shares in KMGK are intended to increase the national prosperity of Kazakhstan indicates in principle that they have a public purpose.⁵

3.2.6 Parts of the complaints shown in 3.2.2 above are therefore also successful.

3.2.7 In order to further assess the appeal for immunity from execution, it will be necessary, after referral, to examine whether the attached goods (Samruk's shares in KMGK) should be classified as 'property' ('properties') of the State of Kazakhstan in the sense of Article 19(c) UN Convention, which on this point can be regarded as a rule of customary international law.

3.3 The other complaints do not need discussion.

4. Decision

³ Supreme Court 30 September 2016, ECLI:NL:HR:2016:2236 (MSI/Gabon en Staat), para 3.5.3-3.5.3.

⁴ Cf. Supreme Court 30 September 2016, ECLI:NL:HR:2016:2236 (MSI/Gabon en Staat), para. 3.5.5 and para. 3.3.

⁵ Cf. Supreme Court 11 July 2008, ECLI:NL:HR:2008:BD1387 (Azeta/JCR en Staat), para. 3.5.

The Supreme Court:

- nullifies the judgment of the Amsterdam Court of Appeal of 7 May 2019;
- refers the case to the Court of Appeal of The Hague for further consideration and decision;
- Condemns Stati et al to pay the costs of the proceedings in cassation in the case number 19/03142, until this judgment on the part of Kazakhstan estimated at € 991,19 in out-of-pocket expenses and € 2,600 for salary, increased by the statutory interest on these costs if Stati et al have not paid these within fourteen days after today;
- Condemns Stati et al to pay the costs of the proceedings in cassation in the case number 19/03144, until this judgment on the part of Samruk estimated at € 991,19 in out-of-pocket expenses and € 2,600 for salary, increased by the statutory interest on these costs if Stati et al have not paid these within fourteen days after today.

This judgment was handed down by President G. de Groot as chair, the vice president C.A. Streefkerk and the justice G. Snijders, M.J. Kroeze and A.E.B. ter Heide, and in public pronounced by justice M.J. Kroeze on 18 December 2020.