

SUPREME COURT OF THE NETHERLANDS

CIVIL DIVISION

Number 19/03142 and 19/03144
Date 18 December 2020

JUDGMENT

In the case with number 19-03142 of

THE REPUBLIC OF KAZAKHSTAN,
with its seat in Astana, Kazakhstan,
CLAIMANT in cassation,
hereinafter: Kazakhstan,
counsel: J. de Bie Leuveling Tjeenk and J.W.M.K. Meijer,

v

1. Anatolie STATI,
residing in Chisinau, Moldova,
 2. Gabriel STATI,
residing in Chisinau, Moldova,
 3. the company under foreign law ASCOM GROUP S.A.,
with its registered office in Chisinau, Moldova,
 4. the company under foreign law TERRA RAF TRANS TRADING LTD,
with its registered office in Gibraltar,
- RESPONDENTS in cassation,
hereinafter jointly referred to as: Stati et al.,

counsel: F.E. Vermeulen.

And in the case with number 19/03144

of the legal entity under foreign law SAMRUK-KAZYNA JSC,
with its registered office in Astana, Kazakhstan,

CLAIMANT in cassation,

hereinafter: Samruk,

counsel: A.E.H. van der Voort Maarschalk, B.T.M. van der Wiel and A. Stortelder

v

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residing in Chisinau, Moldova,
 2. Gabriel STATI,
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1. Course of the proceedings

For the course of the proceedings in the factual instances, the Supreme Court refers to:

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

Kazakhstan and Samruk each separately filed an appeal in cassation of the judgment of the Court of Appeal of 7 May 2019.

Stati et al. submitted statements of defence moving to deny the appeal.

The cases were explained for the parties by their counsel, for Samruk also by L. Tolatzis and for Stati et al. also by P.E. Emste and D.J. Verheij.

The opinions of Advocate General P. Vlas advised denying the appeals in cassation.

Kazakhstan's counsel responded in writing to the opinion in the case 19/03142. Samruk's counsel responded in writing to the opinion in the case 19/03144.

2. Points of departure and facts

2.1 In cassation, the following facts apply as points of departure.

- (i) Stati et al. have invested more than USD 1 billion in oil fields in Kazakhstan, among others, and are of the opinion that Kazakhstan has unlawfully appropriated these investments. Stati et al. have filed for arbitration proceedings against Kazakhstan in this matter.
- (ii) Samruk is a Joint Stock Company – a capital company – established under the law of Kazakhstan, of which Kazakhstan is the founder and sole shareholder. Samruk is a fund as referred to in the "Kazakhstan Law on the National Welfare Fund". The provisions of that law include that the shares in Samruk are exclusively owned by Kazakhstan and may not be alienated.
- (iii) Samruk holds shares in the Dutch company KMG Kashagen B.V. (hereinafter: KMGK).
- (iv) By arbitral award of 19 December 2013, as supplemented on 17 January 2014, Kazakhstan was ordered to pay Stati et al. USD 497,685,101.00 and EUR 802,103.24. No appeal may be lodged against this award. By judgment of 9 December 2016, the competent court in Stockholm denied Kazakhstan's claim seeking the setting aside of the arbitral award. Kazakhstan has not complied with the arbitral award.
- (v) Stati et al. applied to the Preliminary Relief Judge seeking leave to levy pre-judgment attachment on, for example, Samruk's shares in KMGK, at Kazakhstan's expense. In the application seeking leave for attachment, it was argued that Samruk is part of the state of Kazakhstan.
- (vi) The Preliminary Relief Judge granted the leave, estimating Stati et al.'s claims at USD 557,656,650.00 and EUR 992,520.00. Stati et al. levied prejudgment attachment on 14 September 2017, at the expense of Samruk, on Samruk's shares in KMGK.

2.2 In these preliminary relief proceedings, Samruk is seeking the lifting of the prejudgment attachment. Samruk has based its claim on the ground that Stati et al. have no claims against Samruk, but only against Kazakhstan, and that there are no grounds for equating Samruk with

Kazakhstan.

- 2.3 The Preliminary Relief Judge denied the relief sought on the ground, briefly put, that in its relationship with Kazakhstan, Samruk has no factual economic independence and that within the meaning of Article 8 of the Civil Code of Kazakhstan, Samruk is abusing its authority that exists in principle to invoke its legal independence in respect of Stati et al. (paras. 4.7 and 4.9).¹
- 2.4 The Court of Appeal, when requested, allowed Kazakhstan to join on the side of Samruk in the appeal, by virtue of Article 217 DCCP.
- 2.5 The Court of Appeal upheld the judgment of the Preliminary Relief Judge.² To the extent relevant in cassation, the Court of Appeal held as follows:

"3.7 Lastly, the preliminary question must be answered of whether Samruk is rightly invoking co-immunity from execution. According to Samruk, it presented this argument exclusively in the event that Samruk is equated with Kazakhstan. Thus asserted, this argument lacks any basis in the facts, because the Preliminary Relief Judge – from the rulings of which Samruk has apparently derived this interpretation – did not equate Samruk and Kazakhstan but, on the contrary, ruled for the time being that Samruk, being a separate legal entity, is abusing its authority, which exists in principle, to invoke its legal independence in respect of Stati et al. To this the Court of Appeal adds, superfluously, that even if it is assumed that (the rulings of the Preliminary Relief Judge should be interpreted to mean that) Samruk and Kazakhstan should be equated, the Court of Appeal cannot concur with Samruk's argument that it is entitled to invoke immunity from execution. In this the Court of Appeal puts first and foremost that property of a foreign state are not eligible for attachment and execution except when, and in so far as, it has been established that this property is intended for use that cannot be reconciled with this, in respect of which the creditor is the party required to furnish facts on the basis of which it can be established that the goods are used by the foreign state or are intended for use other than for public purposes, briefly put (cf. Supreme Court 30 September 2016, NJ 2017/190). Regardless of whether it is imaginable, as in this case, that Samruk – and not Kazakhstan – is entitled to invoke immunity from execution along this route, in that event such reliance must always be deemed to have been invoked as if on behalf of, or also on behalf of, Kazakhstan. According to the Court of Appeal, it is up to Stati et al. to plausibly show, briefly put, that not the ultimate but the direct use of the goods – here: Samruk's shares in KMGK – is other than for public purposes, if only because any other interpretation of the rules encompassed in the aforementioned premise makes it impossible de facto for individual attachors like Stati et al. to enforce their rights. Also in light of what Samruk and Kazakhstan themselves had already asserted regarding Samruk's commercial object (...), Stati et al. (...) have sufficiently done so. All this means that Ground for Appeal 14 fails."

3. Assessment of the grounds for appeal

- 3.1.1 Ground for Appeal 2 in the case with number 19/03142 and Ground for Appeal 3 in the case with number 19/03144 are firstly directed against the Court of Appeal's opinion in para. 3.7 that Samruk only invoked immunity from execution in the event that Samruk is equated with Kazakhstan. These grounds for appeal complain that the Court of Appeal failed to appreciate that Samruk's Ground for Appeal 14 and the explanation to it cannot be interpreted to mean anything but the reliance on immunity from execution was made in the event that the Court of Appeal upholds the opinion of the Preliminary Relief Judge that Stati et al. may seek to recover their claims against Kazakhstan from Samruk's assets.

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

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

- 3.1.2 This complaint is well-founded. What Samruk put forward in Ground for Appeal 14 and the explanation of it in its Grounds for Appeal allows no interpretation other than that Samruk invoked immunity from execution in the event that the Court of Appeal were to uphold the opinion of the Preliminary Relief Judge that Stati et al. may seek to recover their claims against Kazakhstan from Samruk's assets, regardless of whether they do so on the basis of the equation of Kazakhstan and Samruk or on the basis of abuse of Samruk's authority to rely on its legal independence. This means that the opinion of the Court of Appeal is incomprehensible.
- 3.2.1 In para. 3.7, the Court of Appeal ruled, already assuming that Samruk may rely on the immunity from execution of the State of Kazakhstan, that this reliance must also be considered as having been invoked on behalf of Kazakhstan. However, the Court of Appeal nevertheless rejected the reliance on immunity from execution in para. 3.7 on the basis of its opinions (i) that it is sufficient for rejection of the reliance on immunity from execution for Stati et al. to plausibly show that the direct use of the attached goods – Samruk's shares in KMGK – is other than for public purposes, and (ii) that Stati et al. have made this sufficiently plausible.
- 3.2.2 The grounds for appeal mentioned above in 3.1.1 also oppose these opinions as being incorrect or insufficiently reasoned. Against the opinion at (i), the grounds for appeal argue that decisive in determining whether reliance on immunity from execution is well-founded is whether the attached goods, in part or in full, are destined to be used other than for public purposes, and that this does not exclusively concern the direct use of the attached goods.
In respect of the opinion at (ii), the grounds for appeal rely on Samruk's and Kazakhstan's assertions that Samruk is a legal entity set up by way of the State, that it is a Sovereign Wealth Fund that has the object of enhancing the national prosperity of Kazakhstan, that the return on its investments is therefore destined for that purpose, and that this also applies to the return that it receives on the shares in KMGK, which is a state enterprise that is involved in the development, management and operation of oil fields situated in the Caspian Sea. According to the grounds for appeal, it ensues from these assertions that the shares are intended for public purposes.
- 3.2.3 It is in accordance with the purport of the immunity from execution – aimed at respecting the sovereignty of foreign states – to take as a starting point the principle that property belonging to foreign states is not eligible for attachment and execution unless and to the extent that it has been established that their intended use is not incompatible with attachment and execution. This is in line with Article 19(c) of the UN Convention, which can be deemed on this point to be a rule of customary international law. It is furthermore in keeping with the aforementioned purport of the immunity from execution that foreign States are not required to submit data from which it follows that the intended use of their property opposes attachment and execution. Also in line with the foregoing is that the obligation to furnish facts and the burden of proof in respect of eligibility for attachment and execution lie with the creditor that is attaching or intends to attach property of the foreign state, and that even if the foreign state fails to appear before the court, it must always be established whether the property in question is eligible for attachment. The creditor will therefore always have to submit data on the basis of which it can be established that the foreign state is using or intends to use the property other than for, briefly put, public

purposes.³

- 3.2.4 The requirement applied by the Court of Appeal that determinant is whether the direct use of the attached good is other than for public purposes is not in line with the rules reflected above in 3.2.3, and therefore reflects an incorrect interpretation of the law. These rules basically mean that based on international law, goods of a foreign state are presumed to be exempt from execution, and that this applies unless it has been established that the goods concerned are used or intended for use by the foreign state other than for public purposes, and that it is up to the party relying on any exception from immunity from execution to provide data on the basis of which this can be established.⁴ From these rules it follows that immunity from execution is not limited to goods of which the direct use is for public purposes.
- 3.2.5 Moreover, the opinion of the Court of Appeal that the use of the shares in KMGK held by Samruk is other than for public purposes reflects an incorrect interpretation of the law, or that opinion is insufficiently reasoned. In light of the circumstances adduced by Samruk and Kazakhstan for the assertions mentioned above at 3.2.2 – which assertions have been established in part (see in this regard 2.1 at (ii)) and in part were not rejected by the Court of Appeal, as a result of which their correctness must be presumed in cassation – it is unclear without further reasons why it may be presumed as established that the shares in KMGK held by Samruk are used other than for public purposes. After all, in principle the circumstance that the return on the shares in KMGK is intended to enhance Kazakhstan's national prosperity indicates in principle that they are intended for public purposes.⁵
- 3.2.6 The complaints reflected above in 3.2.2 from the grounds of appeal are therefore also successful.
- 3.2.7 In further assessing the reliance on immunity from execution, after referral it will need to be investigated whether, for example, the attached goods (Samruk's shares in KMGK) should be designated as "property" of the State of Kazakhstan within the meaning of Article 19(c) of the UN Convention, which can be deemed a rule of customary international law on this point.
- 3.3 The other complaints of the grounds for appeal need no discussion.

4. Decision

The Supreme Court:

- sets aside the judgment of the Court of Appeal of Amsterdam of 7 May 2019;
- refers the dispute to the Court of Appeal of The Hague for further assessment and a decision;
- orders Stati et al. to pay the costs of the dispute in cassation in the case with number 19/03142, estimated to this day on the side of Kazakhstan at EUR 991.19 in disbursements and EUR 2,600.00 in salary, to be increased by the statutory interest on these costs if Stati

³ Supreme Court 30 September 2016, ECLI:NL:HR:2016:2236 (*MSI/ Gabon and State*), paras. 3.5.2-3.5.3.

⁴ Supreme Court 30 September 2016, ECLI:NL:HR:2016:2236 (*MSI/ Gabon and State*), paras. 3.5.5 and 3.3.

⁵ Supreme Court 11 July 2008, ECLI:NL:HR:2008: BD1387 (*Azeta/ JCR and State*), para. 3.5.

- et al. has not paid these within fourteen days after today;
- orders Stati et al. to pay the costs of the dispute in cassation in the case with number 19/03144, estimated to this day on the side of Samruk at EUR 991.19 in disbursements and EUR 2,600.00 in salary, to be increased by the statutory interest on these costs if Stati et al. has not paid these within fourteen days after today.

This judgment was rendered by the President G. de Groot, the Vice President C.A. Streefkerk, and the Justices G. Snijders, M.J. Koreze and A.E.B. ter Heide, and pronounced in public by Justice M.J. Kroeze on 18 December 2020.

Signing of Judgment

ECLI:NL:HR:2020:2103

Signatures

Kroeze, M.J.

Versteeg, E.E.J.