TIISO HOLDINGS (PTY) LIMITED
versus
ZIMBABWE IRON & STEEL COMPANY LIMITED

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 4 May and 6 July 2010

Opposed Application

E. Morris, for the plaintiff
J. Muchada, for the defendant

PATEL J: The plaintiff in this matter has issued Summons for payment of the sum of EUR 6,640,295.94 together with interest and costs of suit. The claim arises pursuant to a default judgment of the Regional Court of Frankfurt entered in favour of Kreditanstalt fur Wiederaufbau (KFW) as against the defendant on 25 July 2006.

On 20 May 2008, KFW assigned its rights in the judgment to the plaintiff. The latter then obtained judgment on the Frankfurt award for an equivalent sum in the High Court of Botswana on 5 June 2009. The defendant has not satisfied either the Frankfurt or the Botswana judgment.

The plaintiff's claim in this Court is founded on the Frankfurt judgment. The defendant has filed a Plea in Abatement challenging the enforceability of that judgment on various grounds. At the hearing of this matter, counsel for the defendant abandoned several of these grounds relating to, *inter alia*, the impact of the *in duplum* rule on the interest claim, the non-payment of security for costs by the plaintiff as a peregrine suitor, and the non-enforceability of the Botswana judgment. The last aspect was not pursued in light of the concession by counsel for the plaintiff that its claim was premised solely on the Frankfurt award and not on the Botswana judgment.

Following these concessions, the issues for determination *in casu* are as follows:

(a) Whether the deed of assignment between KFW and the plaintiff is a mere sham depriving plaintiff of any *locus standi* to sue on the deed.

(b) Whether the plaintiff has *locus standi* to claim any interest beyond the assigned capital amount.

(c) Whether the Frankfurt judgment is contrary to natural justice because of the failure to serve court process properly or at all.

(d) Whether part of the amount claimed by the plaintiff before the Frankfurt Regional Court had prescribed at the time that the claim was instituted.

(e) Whether the Frankfurt award was unenforceable *ab initio* in the absence of any executable assets belonging to the defendant in Germany.

(f) Whether or not the Frankfurt judgment is final and conclusive for the purposes of its recognition and enforcement in this country.

Recognition and Enforcement of Foreign Judgments

Under the common law, the general requirements for the recognition and enforcement of foreign judgments may be summarised as follows: (i) the foreign court in question had the requisite international jurisdiction or competence according to our law; (ii) the judgment concerned was final and has the effect of *res judicata* according to the law of the forum in which it was pronounced; (iii) the judgment must not have been obtained by fraudulent means; (iv) it must not entail the enforcement of a penal or revenue law of the foreign State; (v) it must not be contrary to public policy in this country; and (vi) the foreign court must have observed the minimum procedural standards of justice in arriving at the judgment.

See Joubert (ed.): *The Law of South Africa* (First Reissue, 1993) Vol. 2 at para. 477. See also *Jones v Krok* 1995 (1) SA 677 (A) at 685B-E; *Purser v Sales* 2001 (3) SA 445 (SCA) at 450D-G; *Gramara (Pvt) Ltd & Another v Government of the Republic of Zimbabwe & Others* HH 169-2009 at pp. 6-8.

Validity of Deed of Assignment

On 21 July 2009, KFW instituted proceedings against the Government of Zimbabwe in the High Court of South Africa to enforce an arbitral award rendered on 5 December 2006 by the International Court of Arbitration. This award relates to repayments due under two loan agreements (Nos. F 2971 and F 3040), including the amount assigned to the plaintiff. In this regard, the defendant contends that, if the assignment were valid and genuine, KFW *qua* assignor would have divested itself of any right or interest in the debt assigned. Therefore, inasmuch as the assignor is

claiming the amount assigned in other litigation, it must be inferred that the deed of assignment between KFW and the plaintiff is a mere sham.

In my view, the defendant's position is clearly misconceived for the following reasons. In the deed of assignment between KFW and the plaintiff, the former has assigned to the latter its rights to the debt claimed as against the defendant. This assignment does not embrace KFW's rights as against the Government of Zimbabwe in its capacity as guarantor under the loan agreements in question. These are separate rights founding a separate cause of action and KFW is undoubtedly entitled to proceed against the Government on its guarantees through separate litigation. This should not entail any double jeopardy to the defendant or unjust enrichment of the plaintiff, as anything recovered on either claim must obviously be set-off against the amount recovered through the other. It follows that there is nothing untoward in the assignment between KFW and the plaintiff and that the latter is duly vested with the requisite *locus standi in judicio* to claim the debt assigned.

Claim for Interest

In terms of clause 1.1 of the deed of assignment, KFW transferred to the plaintiff by way of assignment "*the claim for payment of the Assignor under the loan agreements Nos. F 2971 and F 3040 …… up to an amount not exceeding EUR 6,640,295.94 against Zimbabwe Iron & Steel Company, …… as awarded by the judgment of the District Court in Frankfurt am Main dated July 25, 2006*". In the instant case, the plaintiff claims the entirety of the Frankfurt award, *i.e.* the capital sum of EUR 6,640,295.94 as well as interest at varying rates on diverse amounts from 30 December 1999.

It is axiomatic that a litigant is only entitled to claim that in which he has a legal right or interest. The plaintiff herein clearly has no *locus standi* whatsoever to claim anything more than the assigned amount of EUR 6,640,295.94. Adv. *Morris* quite correctly conceded this point and abandoned the plaintiff's claim for interest as set out in the Summons and Declaration. However, he then sought to substitute a claim for interest at the prescribed rate of 5% per annum, calculated from 25 July 2006, being the date of the Frankfurt ruling. Mr. *Muchada* did not appear to raise any objection to the proposed amendment.

Despite this apparent consensus between counsel, I perceive one particular difficulty with the revised claim for interest. What is essentially sought *in casu* is the

recognition and enforcement of a foreign judgment as embodied in a private treaty in the form of a deed of assignment. Any such recognition and enforcement may only be granted on the face of the judgment as translated into the deed of assignment. Accepting the original unamended claim for interest, as I have already stated, involves granting to the plaintiff more than what it owns. Acceding to the amended claim for interest entails having to modify the express terms of the foreign judgment sought to be recognised and enforced. In my view, neither of these avenues is available to the plaintiff. It must be confined to the amount awarded by the Frankfurt court as recast and transferred to it through the deed of assignment.

For the sake of completeness, I should add that I might have been prepared to accede to a revised claim for interest at the prescribed rate, either from the date of issuance of the Summons or from the date of judgment *in casu*. However, that is not what was specifically sought before me and I am not at liberty to entertain any such claim *mero motu*.

Service of Court Process

As I have indicated earlier, a foreign judgment will not be recognised or enforced where it is shown on a balance of probabilities that it was obtained contrary to the rules of natural justice. See Van Winsen, Cilliers & Loots: *The Civil Practice of the Supreme Court of South Africa* (4th ed. 1997) at p. 999; *Corona v Zimbabwe Iron & Steel Co. Ltd* 1985 (2) SA 423 (TkA) at 425-426. In particular, although a mere procedural irregularity will not debar recognition, there must have been reasonable notice of the proceedings to the persons affected and adherence to the *audi alteram partem* principle. See Joubert, *op. cit.*, at para. 477.

The defendant herein avers that it was not properly served with legal process instituting KFW's claim in the Frankfurt court. However, this averment is clearly belied by the certified translation of the Frankfurt court's ruling (at p. 5), wherein it is explicitly stated that the defendant was served with the Complaint on 10 April 2005 and, having been required to answer the Complaint within 7 weeks, did not give any indication of its willingness to defend within that time limit. There is nothing in the papers to counter this position. It follows that the defendant has failed to establish on a balance of probabilities any fundamental violation of the rules of natural justice such as to warrant the non-recognition of the Frankfurt judgment.

Prescription of Claim

According to the defendant, part of the loans founding KFW's claim had prescribed under the law of Zimbabwe by the time that KFW instituted proceedings in the Frankfurt court. In this regard, the defendant refers the Court to the loan repayment schedules set out in the two loan agreements (Nos. F 2971 and F 3040) and contends that all the amounts due for repayment on or before 31 September 2001 had prescribed at the relevant time. The defendant further contends that the judgment of the Frankfurt court itself, delivered on 25 July 2006, had prescribed within 3 years and that the plaintiff's action in this Court, filed on 15 October 2009, was instituted out of time.

I must confess that I find it somewhat difficult to comprehend the defendant's contentions on prescription. First and foremost, the defendant is unable to state with any certainty when the proceedings in the Frankfurt court were instituted and, therefore, what the cut-off date should be for the purposes of prescription before that court. Secondly, even if the cut-off date argued for by the defendant is accepted, I note that the repayments due on or before that date constitute only about 20% of all the repayments owing to KFW. Thirdly, the schedules referred to deal only with capital repayments and there is no indication as to the quantum of interest payable on the loans and the due dates for payment of such interest. Finally, the ruling of the Frankfurt court (at p. 4 of the certified translation) refers to a letter of demand for all amounts owed by the defendant exceeding Euro 50 million, while the amount actually claimed by KFW in the Frankfurt court is no more than Euro 6.6 million (together with interest). On these facts, it seems to me virtually impossible to ascertain precisely what amounts were owed under the loan agreements and when such amounts became due and payable. Therefore, without further documentary and oral evidence being lead, any attempt at this stage to determine what has prescribed would be an exercise in utter futility.

In any event, quite apart from the aforementioned evidential difficulties, there is considerable merit in the plaintiff's submission that prescription is a substantive matter and, as such, falls to be determined by the *lex causae* and not the *lex fori*. See *Laurens N.O. v Von Hohne* 1993 (2) SA 104 (W) at 121. Under the loan agreements *in casu* (Article 10.2 of Loan No. F 2971 and Article 9.2 of Loan No. F 3040) the loans are governed by the law of the Federal Republic of Germany. It is that law that

is the *lex causae* and it is that law that determines the question of prescription. In this regard, the defendant has not adduced any evidence as to the German law of prescription. In any event, it is not competent for this Court to review the correctness or otherwise of the Frankfurt court's determination, if any, as to whether or not KFW's claim had prescribed under the law of Germany. In proceedings for the recognition of a foreign judgment, it would be quite improper to pronounce upon the merits of any issue of fact or law tried by the foreign court and to review or set aside its findings. See Joubert, *op. cit.*, at para. 476.

As regards the prescription of the Frankfurt judgment itself, I concur with counsel for the plaintiff that the effect of that judgment was a *novatio necessaria* of the original debt sued upon. However, contrary to counsel's submission, such *novatio* does not necessarily entail the creation of a new obligation. Nevertheless, the clear effect of the judgment is to provide a new right of action enforceable as such. See *Commercial Bank of Zimbabwe Ltd v MM Builders & Suppliers (Pvt) Ltd & Others* 1996 (2) ZLR 420 (H) at 436-437. If one applies the prescription law of Zimbabwe to this new right, *i.e.* section 15(a)(ii) of the Prescription Act [*Cap 8:11*], it is evident that a judgment debt only prescribes after 30 years. In this context, given the all-embracing definition of "debt" in s 2, there is nothing in the Act to suggest that the prescription period of 30 years applies only to local judgments and does not extend to foreign judgments. Thus, even as regards the Frankfurt judgment, it is abundantly clear that the plea of prescription does not avail the defendant.

Enforceability without Executable Assets

Under the loan agreements in question (Article 10.3 of Loan No. F 2971 and Article 9.3 of Loan No. F 3040) the parties expressly agreed that the place of jurisdiction for all litigation in connection with the loans would be Frankfurt/Main in the Federal Republic of Germany. It is therefore perfectly clear that the defendant specifically submitted to the jurisdiction of the Frankfurt court.

The defendant avers that the Frankfurt judgment could not have been enforced by execution in Germany as the defendant had no executable assets in that country at that time to satisfy the judgment in whole or in part. In this regard, Mr. *Muchada* contends that the mere submission of the defendant to the jurisdiction of the Frankfurt court is not enough to render its judgment effective. Mr. *Morris* counters that submission to the Frankfurt court is sufficient and that the defendant should have

raised the effectiveness of its ruling before that court and not in the present proceedings.

The principle of effectiveness that underlies the law of jurisdiction, in its absolute sense, is that the court will only have jurisdiction if it controls the person or property of the defendant, as the mere consent or submission of the defendant to the jurisdiction of the court affords no absolute guarantee that the court's judgment will be effective. See Forsyth: *Private International Law* (4th ed.) at p. 215. However, as is further explained by the learned author, at pp. 215-216:

> "today the doctrine of effectiveness is artificial and conceptual rather than realistic. And indeed even those cases that would most severely restrict submission do not reject it altogether. Moreover, submission is widely recognised in legal systems across the world as a ground of international competence justifying the enforcement of the judgment of a foreign court to which the defendant has submitted. Thus, on the whole, a judgment based on submission will be effective. It is submitted that effectiveness in this slightly attenuated sense should suffice to justify the exercise of jurisdiction on the grounds of submission. The fact is that most other legal systems …… give wide recognition to and encourage submission as a ground of jurisdiction. …… It is to the benefit of international commerce that this should be so. …….. As economic development in Southern and Central Africa proceeds, there is no reason, other than archaic restrictions on the exercise of jurisdiction, why the local courts should not develop an international role akin to that of the Commercial Court in London."

Similar sentiments predicated on policy grounds were expressed in *Richman v Ben-Tovim* 2007 (2) SA 283 (SCA) at 289, where ZULMAN JA observed that:

> "there are compelling reasons why …… in this modern age, traditional grounds of international competence should be extended, within reason, to cater for itinerant international businessmen. In addition, it is now well established that the exigencies of international trade and commerce require 'that final foreign judgments be recognised as far as is reasonably possible in our courts, and that effect be given thereto'."

As I have stated earlier, the enforcement of a foreign judgment requires that the foreign court had jurisdiction in the international sense according to the principles of our law on the jurisdiction of foreign courts. See Joubert, *op. cit.*, at para. 477; Schulze: *International Jurisdiction in Claims Sounding in Money* 2008 20 SA Merc. LJ at pp. 61-62. Thus, the mere fact that the foreign court may have had jurisdiction under its own laws is not conclusive. See *Reiss Engineering Co Ltd v Insamcor (Pty) Ltd* 1983 (1) SA 1033 (W) at 1037.

The rules for assessing the international jurisdiction of a foreign court are expounded by Pollak: *The South African Law of Jurisdiction* (1937) at p. 206 ff. The overall position is summarised, at p. 219, as follows. A foreign court has jurisdiction to entertain an action for a judgment sounding in money against a natural person if, at the time of the commencement of the action, the defendant is physically present in the state to which the court belongs **or** is domiciled or resident within that State **or** has submitted to the jurisdiction of that court. According to Pollak, there are no other grounds for jurisdiction. This summation was cited with approval in the *Reiss Engineering* case, *supra*, at 1037-1038, and followed in *Richman's* case, *supra*, at 289.

With specific reference to submission as a basis of jurisdiction, the position is reiterated by Pistorius: *Pollak on Jurisdiction* (2nd ed. 1993) at pp. 162-163:

> "Submission has been accepted in our law as an acceptable basis for international competence. As in the case of local jurisdiction submission may be by way of agreement or by a defendant acquiescing by his conduct in such jurisdiction after litigation against him has commenced. In the case of agreement, this may be pursuant to a contract between the parties which specifically provides for submission in the event of disputes or by an express or tacit submission after litigation. Submission by conduct may be difficult to prove and …… the conduct must be of such a nature that it is consistent only with acquiescence."

Again, in relation to claims sounding in money, Forsyth, *op. cit.*, at p. 395, encapsulates the modern law as follows:

> "It is widely recognised, by both writers and the decided cases, 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."

As regards submission by agreement, the learned author, at pp. 399-400, states that:

> "In accordance with the general principles of the law of contract, parties may, either expressly or impliedly, enter into binding agreements to submit their dispute to a particular court which might otherwise lack jurisdiction…….
> ……express submission where the parties agree to submit in the *ipsissma verba* of their contract. Provided such submission is valid under its proper law, such an agreement is undoubtedly effective."

Having regard to the foregoing cases and commentaries, I conclude that a defendant's express submission to the jurisdiction of a foreign court suffices, *ipso facto*, and without any further jurisdictional ground, to endow that court with the

requisite international competence, enabling and allowing the recognition and enforcement of its judgments under the common law. I am fortified in that conclusion by the policy considerations that I have cited earlier, which are obviously germane to any analysis of international competence according to the principles of our law governing the jurisdiction of foreign courts. In that context, the tenets of international comity, informed by the inexorable trans-nationalisation of trade and commerce, dictate that our courts should be astute to extend rather than constrict the scope of international jurisdiction and competence as regards claims sounding in money. On that basis, there can be no objection to a more liberal approach that recognises the enforceability of a foreign judgment founded on the submission of the defendant, whether it be a natural person or an artificial entity, to the jurisdiction of the foreign court in question.

I accordingly take the view, in keeping with principle as well as policy, that the explicit contractual submission of the defendant *in casu* to the jurisdiction of the Frankfurt court suffices for the purpose of recognising its judgment. This is so regardless of the fact that the defendant may or may not have had any executable assets in Germany at the time of the commencement of the plaintiff's action in Frankfurt.

Finality and Conclusiveness of Frankfurt Judgment

The defendant avers that the judgment that the plaintiff seeks to enforce is *ex facie* not one that is final and conclusive and, as such, it cannot be enforced *in casu*. In this respect, it is specifically pleaded by the plaintiff, in paragraph 4 of its Declaration, that the Frankfurt judgment "*is final in its terms and remains valid and effective*". Consequently, it is submitted by counsel for the plaintiff that the defendant cannot challenge the validity and finality of the judgment by way of special plea and can only raise that issue on the merits. It is further argued by Mr. *Morris* that the finality or otherwise of the judgment under German law is a matter for the defendant to establish. This contention is disputed by Mr. *Muchada* who submits that the burden in this regard falls squarely on the plaintiff.

The requirement of finality and the burden of proof in that regard are lucidly adumbrated by Joubert, *op. cit.*, at para. 477:

> "A foreign judgment will not be enforced unless it is a final judgment and has the effect of *res judicata* according to the law of the forum that pronounced

the judgment. The fact that it is subject to appeal does not affect its finality for the purposes of recognition, but if an appeal is actually pending the South African court will probably exercise its discretion not to recognise the judgment. Finality must be alleged and proved by the party seeking to enforce the judgment."

According to Forsyth, *op. cit.*, at pp. 427-428:

"A provisional judgment of an internationally competent foreign court will not be enforced or recognised. After all, it would be undesirable if the foreign court's judgment were enforced and thereafter the foreign judgment was set aside or altered by the court which made it in the first place. Consequently, any foreign judgment must be final and conclusive before it will be recognised or enforced.

Our courts have largely accepted the English principles in this regard; thus what is required is that the judgment was unalterable by the court which pronounced it. But it need not be absolutely unalterable. Indeed, the fact that a particular judgment is appealable or has been appealed against in the legal system from which it comes does not affect the finality of the judgment. Although the original judgment may be upset on appeal it is not then altered by the court which made it. It appears further, however, that where the rendering court has suspended its judgment pending an appeal, such a judgment will not be enforced locally, and, moreover, where an appeal is pending although the effect of the judgment has not been suspended the court has a discretion not to enforce the judgment. …… The onus of establishing that a foreign judgment is final rests, naturally, on the party seeking to enforce it; but once this is shown the 'defendant must place before the Court the facts relating to the impending appeal and such other relevant facts as may persuade the Court to exercise its discretion in granting a stay of proceedings.' [per *Jones v Krog* 1995 (1) SA 677 (A) at 692]."

With reference to default judgments, the learned author opines as follows, at pp. 428-430:

"The position in regard to default judgments – which may or may not be rescinded by the court which rendered them – is less clear. Under German law, for example, a defendant against whom a default judgment has been given has the privilege of *Einspruch* available (if exercised within two weeks of the judgment being served on him) in terms of which the case against him is automatically reopened without the defendant needing to excuse the default. Such a judgment is certainly not final while the defendant can exercise this privilege; but thereafter it must be considered final. Other legal systems, however, do not build time limits into their rules. In our own law, for example, it appears that, notwithstanding certain cases to the contrary, a High Court judgment can be rescinded at any time on grounds that would normally entitle defendant to *restitutio in integrum* or 'some other just cause'. Such judgments are in theory not final for they may still be altered by the court which made them.

…… there is a strong case for creating an exception to the 'final and conclusive' rule in the case of default judgments. If this is not done default

> judgments, even when granted by an internationally competent court, will often be worthless outside the territory of that court. Moreover, in the absence of a time limit after which the default judgment cannot be set aside by the court which pronounced it, only an application by the defendant to have the judgment set aside can, when dismissed, transmute the judgment into an internationally enforceable one. …… The courts in several jurisdictions have been creating such an exception (subject to safeguards) and the local courts should do so too."

As regards proof of the finality of a foreign judgment, Van Winsen, Cilliers & Loots, *op. cit*, at pp. 998-999, enunciate the position concisely:

> "The foreign judgment must, however, be a final and conclusive one, and the finality and conclusiveness of the judgment should appear *ex facie* the record. It should be alleged in the summons that the judgment is a final one, and the law and facts which make it final should be stated if on the face of it the judgment appears to be provisional."

With reference to the requisite formalities, the learned authors continue, at pp. 1000-1001:

> "It is essential that all the papers should be in order before a foreign judgment will be enforced. The plaintiff must therefore have before the court a properly authenticated copy of the judgment upon which provisional sentence is sought, and if it does not appear from that that the judgment is a final one, the plaintiff should annex a certificate from the competent authority in the foreign tribunal to show that the judgment is or has become final. If the judgment is in a foreign language, a due and proper translation of it must be annexed to the summons. The documents must show that the translation was made either by a sworn translator of the court or by a person otherwise qualified to translate the judgment."

In the instant matter, the plaintiff has annexed to its Declaration certified copies of the original judgment and what purports to be a certified translation of that judgment. However, it is not clear that the copy of the original judgment has been properly authenticated. Moreover, there is no indication on the papers that that the translation was made by a sworn translator of the Frankfurt court or by a person otherwise qualified to translate the judgment. Be that as it may, these are technical issues that may well be addressed and rectified should the matter proceed to trial.

What is more significant at the present stage of the proceedings is the content of the record as it stands and what appears on the face of the Frankfurt judgment itself. It is not in dispute that the judgment was granted by default and that the defendant has neither applied for its rescission nor appealed against it. In that regard, nothing has been placed before this Court as to whether or not the period for

appealing against the judgment or for seeking its rescission has expired (*cf.* Forsyth, *op.cit.*, at p. 428) and, without such clarification, I am not at liberty to assume the correct position under German law at the present time.

In any event, quite apart from the possibility that the judgment may be susceptible to appeal or rescission (which seems unlikely given the passage of time since it was delivered in July 2006) what is more crucial for present purposes are the actual words employed in the judgment itself. At page 2 of the certified translation, it is decreed that "*The judgment is provisionally enforceable*" and, at page 6 of the judgment, it is declared that "*The decision about preliminary enforceability is based on §§ 708 No. 2 ZPO (*) "*.

What then emerges *ex facie* the Frankfurt judgment is that it is provisional or preliminary and only provisionally enforceable. The word "preliminary" normally denotes something that is initial, first, opening or introductory; the term "provisional" in ordinary parlance means temporary, interim, conditional or impermanent. In legal jargon "provisional" is similarly defined in *Black's Law Dictionary* (6th ed.) as:

> "temporary, preliminary, acceptable in the existing situation but subject to change or nullification".

Having regard to all of these connotations, it seems unequivocally clear from the record that the Frankfurt judgment is purely provisional in nature and, therefore, subject to change or nullification. In this regard, the plaintiff has failed to discharge the onus upon it to demonstrate that the ruling is final and conclusive or to explain the esoteric reference to "§§ 708 No. 2 ZPO (*)" upon which it appears to have been based. The plaintiff has merely proffered the bald assertion in its Declaration to the effect that the judgment is final. It has not furnished any certificate from a competent authority in the Frankfurt court to show that the judgment is or has become final. Nor has it adduced anything to counter the defendant's special plea, explaining the relevant law of Germany, by way of written law or judicial decisions, as would conform with the requirements of section 25 of the Civil Evidence Act [*Chapter 8:01*]. In the premises, it must be held that the judgment *in casu* is not final and conclusive for the purposes of its recognition and enforcement in this jurisdiction and that, for that reason, this Court must decline to recognise and enforce the judgment.

<u>Disposition</u>

In the final analysis, many of the issues for determination *in casu* must be answered in favour of the plaintiff, save for the second question, pertaining to its claim for interest, and the last question, relating to the finality and conclusiveness of the judgment that it seeks to enforce. This last issue is critical to the plaintiff's case and it is one that the plaintiff has clearly failed to establish on the record.

Accordingly, the defendant's Plea in Abatement challenging the enforceability of the Frankfurt judgment succeeds on that single ground and must therefore be upheld. In the result, the plaintiff's claim is dismissed with costs.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners
Dube, Manikai & Hwacha, defendant's legal practitioners