IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 172

Originating Summons No 643 of 2016

In the matter of Section 15 of the Legal Profession Act (Cap 161, 2009 Rev Ed)

And

In the matter of Originating Summons No 492 of 2016

And

In the matter of an application by Samuel Sherratt Wordsworth, Queen's Counsel of England

Samuel Sherratt Wordsworth

… *Applicant*

JUDGMENT

[Legal Profession] — [Admission] — [Ad hoc]

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Re Wordsworth, Samuel Sherratt QC

[2016] SGHC 172

High Court — Originating Summons No 643 of 2016
Steven Chong J
2 August 2016

29 August 2016 Judgment reserved.

Steven Chong J:

Introduction

1 As fittingly observed by the Court of Appeal in *Re Beloff Michael Jacob QC* [2014] 3 SLR 424 ("*Re Beloff*") at [42], the suitability of *ad hoc* admissions under the new statutory framework pursuant to the Legal Profession (Amendment) Act 2012 (Act 3 of 2012) ("the 2012 Amendment") is now to be viewed through the prism of "need". While it is true that it is no longer necessary to show that the issues in the case are of "sufficient difficulty and complexity", which was a requirement under s 21 of the Legal Profession Act (Cap 161, 1990 Rev Ed), the correct characterisation of the issues before the court continues to play a vital role in the admission application. After all, the requirement of "need" must necessarily be examined with reference to the issues as that will, in turn, have a direct bearing on the size of the pool of available local counsel to address those issues and, correspondingly, the need for foreign counsel's assistance.

2 Since the introduction of the 2012 Amendment, effectively only one application has been allowed – *Re Andrews Geraldine Mary QC* [2013] 1 SLR 872 ("*Re Andrews*"). I should mention that when Ms Geraldine Andrews QC was elevated to the English Bench after the conclusion of the trial she was admitted to argue, Mr Richard Millet QC was admitted in her place to argue the appeal. His application was largely uncontested as Ms Geraldine Andrews QC's admission was for the trial of the action *and* any appeal therefrom. There have been five other applications, which were not allowed for a variety of reasons: see *Re Caplan Jonathan Michael QC* [2013] 3 SLR 66 ("*Re Caplan*"), *Re Lord Goldsmith Peter Henry PC QC* [2013] 4 SLR 921 ("*Re Lord Goldsmith"), Re Beloff*, *Re Fordham, Michael QC* [2015] 1 SLR 272 ("*Re Fordham*") and *Re Rogers, Heather QC* [2015] 4 SLR 1064 ("*Re Rogers*"). These applications were disallowed because the "special reason" requirement for the ring-fenced areas of legal practice under s 15(2) of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("LPA") was not satisfied (*Re Caplan*, *Re Lord Goldsmith*, and *Re Fordham*), because the issues were "uniquely local" (*Re Rogers*), and because the issues were "well within the range of competent Singapore counsel" (see *Re Beloff* at [80]).

3 The present application is for Mr Samuel Sherratt Wordsworth QC to be admitted to represent the Kingdom of Lesotho ("Lesotho") in Originating Summons No 492 of 2016 ("OS 492"), which is Lesotho's application to set aside a Partial Award on Jurisdiction and the Merits dated 18 April 2016 (the "Award") arising from an investor-state arbitration. Mr Wordsworth was the lead counsel for Lesotho in the arbitration. Apart from the fact that the seat of the arbitration was Singapore, there is nothing "local" about this case at all. All the parties are resident outside jurisdiction. It concerned alleged breaches of international obligations and events which occurred in Lesotho. Fundamentally, the origin of the dispute can partly be traced to a multilateral

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treaty involving 15 States of the Southern African Development Community ("SADC"). It is also common ground that the legal issues which will be fully ventilated in OS 492 are predominantly governed by principles of public international law, which is not a ring-fenced area of legal practice requiring "special reason" to be shown before Mr Wordsworth can be admitted (s 15(2) of the LPA).

4 Typically, the question of necessity is viewed from the perspective of the litigant seeking the admission. However, there is nothing in the 2012 Amendment to limit the court's assessment of necessity only with reference to the needs of that party. This decision will examine the extent to which the question of necessity should *also* be examined from the perspective of the court and if so, how this consideration would feature under the new statutory framework. It is uncontroversial that the setting-aside application in OS 492 is unique in many aspects. The court's eventual decision on the merits of the setting-aside application will undoubtedly have a bearing on the jurisprudence in an emerging area of public international law. It is therefore essential for the court to receive proficient assistance from lawyers with particular expertise in this area of the law. Would this consideration fall within the rubric of the ultimate question, namely "whether having regard to all the circumstances of the case, it is reasonable to admit the foreign counsel" (see *Re Beloff* at [53])?

Background

5 The arbitration concerned the alleged expropriation by Lesotho of mining leases granted to and held by the defendants in OS 492, who were the claimants in the arbitration. They are: (a) Swissborough Diamond Mines (Pty) Limited, (b) Mr Josias Van Zyl, (c) The Josias Van Zyl Family Trust, (d) The Burmilla Trust, (e) Matsoku Diamonds (Pty) Limited, (f) Motete Diamonds

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(Pty) Limited, (g) Orange Diamonds (Pty) Limited, (h) Patiseng Diamonds (Pty) Ltd, and (i) Rampai Diamonds (Pty) Limited (referred to collectively as "the defendants"). The 1st defendant is a company registered under the laws of Lesotho. The 2nd defendant is a South African national who incorporated the 1st defendant and is one of its shareholders. The 3rd and 4th defendants are trusts established under the laws of South Africa; they are alleged to hold the remaining shares in the 1st defendant. The 5th to 9th defendants are companies incorporated under the laws of Lesotho who were the original licensees of the mining leases. [1]

The SADC Treaties

6 As mentioned, this case has a significant public international law dimension to it. In addressing the defendants' claims, the arbitral tribunal had to consider and interpret the following three treaties or international instruments:

(a) The Treaty of the Southern African Development Community, Windhoek, 17 August 1992 (in force 30 September 1993) ("SADC Treaty");

(b) The Protocol on the Tribunal in the Southern African Development Community, Windhoek, 7 August 2000 (in force 14 August 2001) ("SADC Tribunal Protocol"); and

(c) The Protocol on Finance and Investment, Maseru, 18 August 2006 (in force 16 April 2010) ("SADC Investment Protocol").

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[1] Tribunal's Award at para 2.1: Affidavit of Dennis Peter Molyneaux filed in OS 492, dated 17 May 2016, at p 77

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7 The SADC Treaty is a multilateral treaty to which 15 member states, including Lesotho, are parties to.[2] It established the SADC, an international organization with separate personality under international law.

8 Article 9 of the SADC Treaty provides for the establishment of a tribunal ("SADC Tribunal") to adjudicate on disputes which may be referred to it. Article 10 of the SADC Treaty provides for the establishment of a Summit of Heads of State or Government of all member states ("SADC Summit") as the supreme policy-making organ of the SADC.[3] The SADC Tribunal came into being on 14 August 2001 with the incorporation of the SADC Tribunal Protocol as part of the SADC Treaty. The SADC Tribunal Protocol established, among other things, the composition, powers, functions, jurisdiction, and procedures of the SADC Tribunal.

9 The SADC Investment Protocol entered into force on 16 April 2010. In the arbitration, the defendants invoked Article 28 to Annex 1 of the SADC Investment Protocol as the provision on which the jurisdiction of the arbitral tribunal was founded. So far as is relevant, Article 28 states:

> 1. Disputes between an investor and a State Party concerning an obligation of the latter in relation to an admitted investment of the former, which have not been amicably settled, and after exhausting local remedies shall, after a period of six (6) months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes.
>
> …
>
> 4. The provisions of this Article shall not apply to a dispute, which arose before entry into force of this Annex.

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2 Affidavit of Dennis Peter Molyneaux at paras 18 – 19

3 Affidavit of Dennis Peter Molyneaux at para 20

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10 The words "investor" and "investment" are defined in Article 1(2) of Annex 1 of the SADC Investment Protocol:[4]

> (a) The word "investor" means "a person that has been admitted to make or has made an investment";
>
> (b) The word "investment" means "the purchase, acquisition or establishment of productive and portfolio investment assets" and includes "shares, stocks and debentures of companies or interest in the property of such companies" and "rights conferred by law or under contract, including licences to search for, cultivate, extract or exploit natural resources".

The defendants' claims

11 The factual narrative out of which the arbitration arose spanned a period of nearly 25 years. It began with the 1st defendant being granted mining leases in respect of five areas in Lesotho sometime in 1988.[5] Between 1989 and 1990 the 1st defendant entered into licensing agreements with the 5th to 9th defendants by which each of the five companies would hold and exercise the rights to one of the five areas covered by the mining leases.[6] Sometime in the middle of 1991, disputes emerged over the validity of the mining leases and the measures taken by Lesotho which purported to cancel them. This led to a further dispute over whether the 1st and 5th to 9th defendants were entitled to compensation from Lesotho. The dispute over Lesotho's purported interference with the defendants' mining leases led to

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4 Affidavit of Dennis Peter Molyneaux at para 67

5 Award at para 5.18: Affidavit of Dennis Peter Molyneaux at p 90

6 Affidavit of Dennis Peter Molyneaux at para 24

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protracted litigation between the defendants and Lesotho or its governmental agencies from 1991 to 2000.[7] The defendants commenced proceedings in the Lesotho High Court to recover damages for Lesotho's expropriation of the five mining leases. However, in separate proceedings, the Lesotho High Court made a declaration that the lease held through the 9th defendant was void *ab initio*. That decision was upheld on appeal on 6 October 2000, after which the defendants did not continue to pursue any of the claims for compensation that they had started in the courts of Lesotho.[8]

12 The defendants then took their claims to the SADC Tribunal. On 12 June 2009, the defendants instituted proceedings against Lesotho before the SADC Tribunal claiming compensation for the alleged expropriation by Lesotho of the mining leases.[9] They alleged that Lesotho had breached a number of provisions in the SADC Treaty as well as its obligations under international law and as a member state of the SADC.[10]

13 The proceedings before the SADC Tribunal came to a halt when the SADC Summit unanimously resolved not to renew the terms of office of five judges of the SADC Tribunal, whose terms were to expire in October 2010. This decision not to renew the terms of office was initiated by the Republic of Zimbabwe as a result of separate proceedings before the SADC Tribunal unrelated to the defendants' claims.[11] The SADC Tribunal thus became inquorate and ceased to function from October 2010. It was then dissolved by

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7 Award at paras 5.28 to 5.49: Affidavit of Dennis Peter Molyneaux at pp 91 – 95

8 Affidavit of Dennis Peter Molyneaux at para 28

9 Affidavit of Dennis Peter Molyneaux at paras 29 and 31

10 Affidavit of Dennis Peter Molyneaux at para 30

11 Affidavit of Dennis Peter Molyneaux at para 32

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the SADC Summit in August 2012, as a result of which it was, and remains, unable to hear the defendants' claims. Although a new protocol governing the functioning of the SADC Tribunal was adopted by the SADC Summit on 19 August 2014, it had not come into force as at the date of the Award.[12]

The arbitration

14 On 20 June 2012, the defendants served a Notice of Arbitration on Lesotho pursuant to Article 28(1) of Annex 1 to the SADC Investment Protocol.[13] The hearing of the arbitration took place in August 2015 in Singapore.[14] The defendants sought the following reliefs from the arbitral tribunal in the first phase of the proceedings:[15]

(a) A declaration that it had jurisdiction to decide the dispute submitted by the defendants;

(b) A declaration that Lesotho had violated its obligations under the SADC Tribunal Protocol, the SADC Investment Protocol and the SADC Treaty;

(c) A declaration that it would award such relief and compensation to the defendants as could have been granted by the SADC Tribunal; and

(d) An award in the defendants' favour of the costs incurred in connection with the arbitration proceedings.

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12 Affidavit of Dennis Peter Molyneaux at para 34

13 Affidavit of Dennis Peter Molyneaux at para 36

14 Award at para 3.38: Affidavit of Dennis Peter Molyneaux at p 83

15 Award at para 4.1: Affidavit of Dennis Peter Molyneaux at p 84

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The defendants also requested that the tribunal issue an award at the conclusion of the second phase of the proceedings awarding such relief and compensation that could have been granted by the SADC Tribunal, along with interest on the sums awarded and costs.

15 Lesotho challenged the jurisdiction of the arbitral tribunal and requested that it dismiss the defendants' claims with costs.

The Award

16 On 18 April 2016, the arbitral tribunal, by a majority of 2-1, rendered the Award. In the Award, the arbitral tribunal:[16]

(a) Held that it had jurisdiction to hear and determine the claims of the 2nd to 4th defendants, but not of the 1st and 5th to 9th defendants, whose claims were accordingly dismissed;

(b) Determined that, as against the 2nd to 4th defendants, Lesotho had breached its obligations in the SADC Treaty, the SADC Investment Protocol and the SADC Tribunal Protocol;

(c) Ordered the parties to establish a new tribunal to hear and determine the defendants' part-heard claims which had been pending before the SADC Tribunal; and

(d) Ordered that Lesotho pay the defendants' costs of the arbitration ("the costs decision").

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[16] Affidavit of Tan Beng Hwee Paul, dated 24 June 2016, at paras 28 – 32

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The dissenting arbitrator issued a separate opinion to explain why he did not agree with the majority as regards its finding that the arbitral tribunal had jurisdiction over the defendants' claims.

17 The arbitral tribunal recently issued an interpretation award dated 27 June 2016 in which it stated that the 1st and 5th to 9th defendants are not precluded from applying to participate in the arbitration of the part-heard claims before the new tribunal. [17]

18 To appreciate Lesotho's arguments in OS 492, it will be useful to outline the different views taken by the majority and the dissenting arbitrator. The differences in views will have a bearing on the question of necessity in having Mr Wordsworth argue the jurisdictional challenge.

19 The majority of the arbitral tribunal, *inter alia*, reached the following conclusions in arriving at its ruling on jurisdiction:

> (a) The defendants had an "investment" within the meaning of Article 1(2) of the SADC Investment Protocol. The investment comprised the shares in the 1st and 5th to 9th defendants, the mining leases and the rights arising thereunder, and the money, effort and resources expended to pursue the exploitation of the mining leases.[18] The defendants' investment survived the termination of the mining leases because the right to bring a claim arising from an investment was a necessary and integral part of the "investment" to be protected under international law.[19]

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17 Minute Sheet (2 August 2016) at p 2

18 Award at para 7.23; Affidavit of Dennis Peter Molyneaux at p 108

19 Award at paras 7.31 – 7.33: Affidavit of Dennis Peter Molyneaux at pp 109 – 110

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(b) Not all the defendants were "investors" within the meaning of Article 1(2) of Annex 1 of the SADC Investment Protocol. The 1st and 5th to 9th defendants were not investors, and hence, not proper parties to pursue the claim against Lesotho, because they had assigned their rights before the current dispute arose. The 2nd to 4th defendants were "investors" by virtue of their ownership of shares and indirect ownership of the mining leases, and hence, the proper parties to pursue the claim.[20]

(c) The investment arising out of the mining leases was an "admitted investment" within the meaning of Article 28(1) of Annex 1 of the SADC Investment Protocol. The tribunal noted that it was the investment created through the mining leases that needed to be "admitted" by Lesotho; the claim for compensation, as an integral part of the underlying investment, did not need to be separately admitted. There was no formal admission procedure in this case. However, the tribunal was satisfied, based on Lesotho's conduct over the years in relation to the mining leases, that it had confirmed, authorised and accepted the investment, and that the investment arising out of the mining leases and related shares were therefore an "admitted investment".[21]

(d) The SADC Investment Protocol would apply to the defendants' "admitted investment" provided that there was a dispute between the defendants and Lesotho after the Protocol entered into force. The tribunal was not persuaded by Lesotho's argument that applying the

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[20] Award at paras 7.72 and 7.77: Affidavit of Dennis Peter Molyneaux at pp 118 – 119

[21] Award at paras 7.104, 7.108, 7.110, and 7.113: Affidavit of Dennis Peter Molyneaux at pp 126 – 128

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SADC Investment Protocol to existing investments at the time it entered into force would result in a retroactive application of its provisions contrary to Article 28 of the Vienna Convention on the Law of Treaties (23 May 1969), 1155 UNTS 331 (entered into force 27 January 1980).[22]

(e) There was a dispute between an "Investor" and a "State Party" in relation to an admitted investment. The dispute here was over the defendants' secondary right to seek relief from the SADC Tribunal. Although the wrongful interference with that right was the shuttering of the SADC Tribunal, which was an act of an international organisation, the tribunal found that the dispute still related to a "State Party" (Lesotho) since the acts of interference were undertaken partly in an international organisation and partly in Lesotho's own separate decisions.[23]

(f) The tribunal had jurisdiction to determine whether the shuttering of the SADC Tribunal violated either the SADC Treaty and SADC Investment Protocol or international law since this dispute arose after the Investment Protocol came into force; it would not have jurisdiction to decide the underlying dispute, which occurred before the SADC Investment Protocol became effective.[24]

(g) Since the tribunal defined the relevant "dispute" as being the shuttering of the SADC Tribunal, the primary remedy available to correct the alleged wrong would have been the re-establishment of an

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22 Award at paras 7.132 and 7.136: Affidavit of Dennis Peter Molyneaux at p 134

23 Award at paras 7.164 – 7.170: Affidavit of Dennis Peter Molyneaux at pp 141 – 142

24 Award at para 7.205: Affidavit of Dennis Peter Molyneaux at p 152

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> international tribunal to hear the part-heard claims, which is not a remedy the domestic courts of Lesotho were empowered to grant. Therefore there was no local remedy to be exhausted and such a requirement could not pose a barrier to the establishment of jurisdiction over the dispute.[25]

20 The dissenting arbitrator essentially rejected the defendants' attempt to re-characterise the relevant "dispute" as being the shuttering of the SADC Tribunal, rather than the expropriation of the mining leases, which the defendants had conceded would not fall within Article 28(1) of Annex 1 to the Investment Protocol. The dissenting arbitrator arrived at a contrary view based on the following premises:

> (a) The shuttering of the SADC Tribunal was not a free-floating wrong but an essential component of the underlying cause of action for the expropriation of mining leases. That expropriation occurred before the SADC Investment Protocol entered into force. Accordingly, the arbitral tribunal had no jurisdiction over any of the defendants' claims under Article 28(4) of Annex 1 to the SADC Investment Protocol.[26]
>
> (b) Even if the shuttering of the SADC Tribunal was a discrete cause of action, the resolution of the SADC Summit to shut down the SADC Tribunal was not concerned with any aspect of the defendants' investment at all – it was not a dispute concerning Lesotho's obligation in relation to any specific investment, but a dispute concerning the legality of the SADC's policy decision. Hence, the shuttering of the SADC Tribunal was not a dispute "concerning an obligation of

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25 Award at paras 7.224 and 229: Affidavit of Dennis Peter Molyneaux at p 159

26 Dissenting Award at paras 2.42 – 2.43: Affidavit of Dennis Peter Molyneaux at p 227

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> [Lesotho] in relation to an admitted investment of [the defendants]" within the meaning of Article 28(1) of Annex 1 to the SADC Investment Protocol, with the result that the arbitral tribunal would still lack jurisdiction over the dispute. [27]
>
> (c) The tribunal also lacked jurisdiction because the condition precedent requiring the exhaustion of local remedies in Article 28(1) of Annex 1 to the SADC Investment Protocol had not been satisfied. The relevant breach was the expropriation of the mining leases, and not the shuttering of the SADC Tribunal, as the majority had found. The defendants had not exhausted local remedies in Lesotho in respect of the expropriation.[28]

Lesotho's application to set aside the Award

21 In OS 492, Lesotho seeks an order that the Award be reversed and/or wholly set aside on the basis that the tribunal did not have jurisdiction to hear the dispute. It relies, in this regard, on s 10(3) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") and, in the alternative, on s 3(1) of the IAA read with Article 34(2)(*a*)(iii) of the UNCITRAL Model Law on International Commercial Arbitration set out in the First Schedule of the IAA.

22 Lesotho also seeks to set aside the costs decision in the Award for lack of due process, but it is unnecessary to say more about this for present purposes as the arguments before me focused principally on whether Mr Wordsworth should be admitted to argue the challenge to the tribunal's

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[27] Dissenting Award at paras 3.1 – 3.4: Affidavit of Dennis Peter Molyneaux at pp 227 – 228

[28] Dissenting Opinion at paras 4.36 – 4.39: Affidavit of Dennis Peter Molyneaux at p 236

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jurisdiction. Counsel for the applicant readily accepted that the due process challenge is fairly straightforward and that if it were the only issue in OS 492, Mr Wordsworth's application would not pass muster. However, if Mr Wordsworth is admitted to argue the jurisdictional challenge, it would then be eminently sensible and expedient for him to address the costs decision as well.

23 Lesotho argues that the tribunal did not have any jurisdiction over the defendants' claims for nine reasons:

(a) First, Annex 1 of the SADC Investment Protocol does not apply to investments which were already in existence at the time of its entry into force.

(b) Second, the defendants' supposed right to bring the mining lease claims in the proceedings before the SADC Tribunal does not constitute a distinct "investment" within the meaning of Article 1(2) of Annex 1 to the SADC Investment Protocol.

(c) Third, the defendants' mining leases claims in the proceedings before the SADC Tribunal, and their ability to bring those claims before the SADC Tribunal, were not "admitted" as an investment within the meaning of Article 28(1) of Annex 1 to the SADC Investment Protocol.

(d) Fourth, the dispute before the tribunal was substantially the same as the one before the SADC Tribunal in 2009. The dispute therefore arose before the SADC Investment Protocol entered into force and is excluded from the tribunal's jurisdiction by virtue of Article 28(4) of Annex 1.

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(e) Fifth, the tribunal's jurisdiction under Article 28(1) of Annex 1 to the SADC Investment Protocol was limited to claims of breaches by Lesotho of obligations deriving from the SADC Investment Protocol only. Claims which were premised on obligations in the SADC Treaty or SADC Tribunal Protocol did not give rise to disputes "concerning an obligation" of Lesotho "in relation to an admitted investment" of the defendants within the meaning of Article 28(1) of Annex 1 to the SADC Investment Protocol.

(f) Sixth, none of the obligations found to have been breached by the tribunal stand "in relation to an admitted investment" of the defendants.

(g) Seventh, the tribunal's jurisdiction under Article 28(1) of Annex 1 over alleged breaches of obligations was limited to actions taken by Lesotho within its territory, and did not extend to Lesotho's participation in the SADC Summit resolution to shutter the SADC Tribunal.

(h) Eighth, the defendants failed to exhaust local remedies before the courts of Lesotho prior to bringing their claim before the arbitral tribunal, as required by Article 28(1) of Annex 1 to the SADC Investment Protocol. The tribunal found that the relevant breach of Lesotho was the shuttering of the SADC Tribunal for which no local remedies were available.

(i) Ninth, the 1st and 5th to 9th defendants did not qualify as "investors" as defined in Article 1(2) of the SADC Investment Protocol. Although the tribunal already found that it had no jurisdiction over the claims of these six defendants, Lesotho argues that the

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tribunal exceeded its jurisdiction to the extent that it ordered a new tribunal to be established to hear the claims of all the defendants which had been pending before the SADC Tribunal.[29]

The present application

Overview of the admissions regime

24 *Ad hoc* admissions of foreign counsel are governed by s 15 of the LPA, the relevant portions of which are as follows:

> **Ad hoc admissions**
>
> **15.**—(1) Notwithstanding anything to the contrary in this Act, the court may, for the purpose of any one case, admit to practise as an advocate and solicitor any person who —
>
> (*a*) holds —
>
> (i) Her Majesty's Patent as Queen's Counsel; or
>
> (ii) any appointment of equivalent distinction of any jurisdiction;
>
> (*b*) does not ordinarily reside in Singapore or Malaysia, but has come or intends to come to Singapore for the purpose of appearing in the case; and
>
> (*c*) has special qualifications or experience for the purpose of the case.
>
> (2) The court shall not admit a person under this section in any case involving any area of legal practice prescribed under section 10 for the purposes of this subsection, unless the court is satisfied that there is a special reason to do so.
>
> …
>
> (6A) The Chief Justice may, after consulting the Judges of the Supreme Court, by notification published in the Gazette, specify the matters that the court may consider when deciding whether to admit a person under this section.

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[29] Affidavit of Dennis Peter Molyneaux at para 72

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25 Section 15(6A) is to be read with Paragraph 3 of the Legal Profession (Ad Hoc Admissions) Notification 2012 (S 132/2012), which specifies four matters ("Notification matters") the court may consider when deciding whether to admit an applicant under s 15 of the LPA:

> **Matters specified under section 15(6A) of Act**
>
> **3**. For the purposes of section 15(6A) of the Act, the court may consider the following matters, in addition to the matters specified in section 15(1) and (2) of the Act, when deciding whether to admit a person under section 15 of the Act for the purpose of any one case:
>
> (*a*) the nature of the factual and legal issues involved in the case;
>
> (*b*) the necessity for the services of a foreign senior counsel;
>
> (*c*) the availability of any Senior Counsel or other advocate and solicitor with appropriate experience; and
>
> (*d*) whether, having regard to the circumstances of the case, it is reasonable to admit a foreign senior counsel for the purpose of the case.

26 The analytical framework for deciding *ad hoc* admission applications was set out in *Re Beloff*. The court must first be satisfied that the three mandatory requirements in s 15 of the LPA – the formal requirements in ss 15(1)(*a*) and (*b*) and the requirement of special qualifications or experience for the purpose of the case in s 15(1)(*c*) – are satisfied, before it can go on to consider the Notification matters and decide whether to exercise its discretion to admit the applicant (see *Re Beloff* at [54]). If any mandatory requirement is not met, the question of discretion does not arise. There may of course be substantial overlap between the matters to be considered under s 15(1)(*c*) and the Notification matters but they should, for clarity of analysis, remain distinct requirements (see *Re Beloff* at [58]; *Re Rogers* at [9]).

27 The Notification matters do not constitute a strict four-stage test. Rather, each matter is a signpost pointing to the ultimate question of whether it

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is reasonable to admit the applicant (see *Re Beloff* at [53]; *Re Fordham* at [45]). Reasonableness, for this purpose, is synonymous with the overarching requirement of "need". Hence, the court should have regard to the Notification matters but "the broad principle in accordance with which the discretion must be exercised is that foreign senior counsel should only be admitted on the basis of 'need'" (see *Re Beloff* at [65]). The various Notification matters, however, allow the court to assess the question of necessity from various angles (see *Re Rogers* at [49]).

28 It goes without saying that not all the four matters must be satisfied in every application to warrant the *ad hoc* admission (see *Re Andrews* at [45]). The court is duty-bound to consider all four matters, although it has the discretion to attribute the appropriate weight to each factor in the context of the case (see *Re Andrews* at [63]; *Re Beloff* at [65]).

29 It was not disputed that Mr Wordsworth had met the formal requirements in s 15(1)(*a*) and s 15(1)(*b*). It was also undisputed that no "special reason" for admission under s 15(2) of the LPA need be shown here. That leaves two issues for my determination: whether Mr Wordsworth possesses "special qualifications and experience for the purpose of the case" and, if so, whether I should, having considered the Notification matters, exercise my discretion to admit him to represent Lesotho in OS 492.

The parties' arguments

30 At this juncture, it will be useful to first recap the positions taken by the parties in this application.

31 Broadly speaking, the applicant made the following submissions:

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(a) Mr Wordsworth satisfies the requirement in s 15(1)(*c*) of the LPA. His expertise in public international law and investor-state arbitration are highly relevant to the specific issues in this case.[30] As lead counsel for Lesotho in the arbitration, Mr Wordsworth has specific knowledge of the issues raised in OS 492. In addition, he has general experience arguing, in other investor-state arbitrations, the specific jurisdictional arguments raised by Lesotho in OS 492, in particular, what constitutes an "investment" in international investment law.[31]

(b) Having regard to the Notification matters, it is reasonable to admit Mr Wordsworth. The factual and legal issues involved in this case are complex, novel, and of unusual importance. For example, the extent of a member state's liability for the acts of an international organisation is unsettled at international law.[32] The jurisdictional challenge in OS 492 also involves a highly complex and lengthy factual matrix. The court's resolution of that challenge would entail the interpretation and application of a set of multilateral treaties and its decision would have implications for the rights and obligations of other sovereign states.[33] It follows, based on the factual complexity and precedential value of OS 492, that it is necessary to have Mr Wordsworth, with his breadth of expertise, argue the jurisdictional challenge, and that the pool of local practitioners having comparable experience is very limited.[34]

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30 Applicant's Submissions at para 36

31 Applicant's Submissions at para 39

32 Applicant's Submissions at para 66

33 Applicant's Submissions at para 71

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32 The defendants opposed the application on the following grounds:

(a) Mr Wordsworth does not satisfy the requirement in s 15(1)(*c*) of the LPA. The defendants submitted that the court's decision in OS 492 would turn on the interpretation of the IAA, and not the public international law issues that the applicant had identified. There is a dispute as to whether Lesotho can even resort to the relevant provisions of the IAA to challenge the Award, in particular, whether s 10(3) of the IAA permits a challenge to a decision on jurisdiction and the merits of a case, like the Award, as opposed to only "pure jurisdictional rulings".[35] Accordingly, Mr Wordsworth's experience would not be especially relevant to the issues in OS 492.[36]

(b) It is not reasonable to admit Mr Wordsworth. The arguments on jurisdiction raised by Lesotho in OS 492 are not especially complex and can be resolved applying well-established principles of treaty interpretation, investment treaty jurisprudence, and the decisions of the SADC Tribunal.[37] The multilateral nature of the treaties does not of itself create any additional layer of difficulty or complexity.[38] Further, Lesotho has not taken reasonable steps to ascertain the availability of appropriate local counsel. Therefore, it is not open to Lesotho to argue that there is any necessity for foreign counsel given that it had failed to undertake a genuine search for local counsel in the first place. Lesotho

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34 Applicant's Submissions at paras 82 and 88

35 Defendants' Submissions at para 19

36 Defendants' Submissions at para 20

37 Defendants' Submissions at para 26

38 Defendants' Submissions at para 28

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would not suffer substantial prejudice in its conduct of OS 492 if it is represented by local counsel instead of Mr Wordsworth.[39]

33 The Attorney-General supported the application. While agreeing largely with the applicant that the balance is in favour of admitting Mr Wordsworth, the Attorney-General also urged the court to consider the wider public interest in enhancing the attractiveness of Singapore as a venue for international arbitration. The Attorney-General submitted that it would be an assurance to parties who arbitrate in Singapore that their lead counsel could continue, provided he had sufficient expertise and experience, to appear on their behalf should the arbitral award be challenged in court.[40]

34 The application was opposed by the Law Society of Singapore. As regards the s 15(1)(*c*) requirement, it noted that there is no indication of how Mr Wordsworth's experience would relate to the specific issues surrounding the various SADC Treaties.[41] With regard to the Notification matters, it stressed that the absence of any effort by Lesotho to consider the availability of local counsel failed to give "due credit to the experience and quality of the local Bar".[42] On the whole, it is not reasonable, and would in fact be "dangerous", to admit Mr Wordsworth simply because he was lead counsel in the underlying matter.[43]

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39 Defendant's Submissions at para 42

40 Attorney-General's Submissions at paras 58 – 59

41 Law Society's Submissions at para 38

42 Law Society's Submissions at para 56

43 Law Society's Submissions at para 67

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Underlying rationale of the admissions regime

35 Under the admissions regime following the 2012 Amendment, foreign counsel will only be admitted on the basis of "need". The word "need" has many shades of meaning. One particular "need" which Parliament sought to address with the 2012 Amendment was that of litigants in commercial cases who were unable to secure the services of Senior Counsel ("SC"). This difficulty arose from the frequency with which local SCs, who were mainly clustered in a few large firms, were prevented from acting against local banks or corporate clients due to potential conflicts of interest (see *Singapore Parliamentary Debates, Official Report* (14 February 2012) vol 88 at p 1106 (Mr K Shanmugam, Minister for Law) and *Re Beloff* at [41]). Parliament therefore intended, by the 2012 Amendment, "to give the courts greater discretion" to admit foreign counsel in such "complex civil matters". However, Parliament did not intend this illustration to be exhaustive of all the circumstances in which a need for foreign counsel would arise (see *Re Andrews* at [37]), though it would nonetheless be the "paradigm example" of need (see *Re Beloff* at [43]). Hence, the Court of Appeal explained in *Re Beloff* that the rationale underlying the 2012 Amendment was a broader proposition than the paradigmatic example Parliament gave. That broader proposition was embodied in the Minister for Law's comment that foreign counsel would be admitted on the basis of need, but that it would not be a free for all. The Court of Appeal, however, made clear in *Re Beloff* at [42] that "need" was a stringent standard and that admitting foreign counsel based on "need" was not the same as admitting foreign counsel merely because it was "desirable or convenient or sought as a matter of choice". In their view, the threshold of "need" would be met if the litigant seeking admission of foreign counsel would be prejudiced should the application be disallowed.

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36 It is essential to be clear what "need" and "prejudice" mean in this context. The Court of Appeal's observation at *Re Beloff* at [42] may be read to imply that "need" is to be viewed *only* from the perspective of the litigant. However, Parliament did not intend to limit the inquiry into the question of necessity only to the needs of the litigant. In my view, "need" should be broadly construed to also encompass the need of the court to receive proficient assistance from counsel with the requisite expertise and experience. This seems to be the import of two observations in *Re Beloff*.

37 First, the Court of Appeal noted at [49], in relation to the requirement that "special reason" be shown for ring-fenced areas of law under s 15(2) of the LPA, that these areas of law were directly related to local societal norms and shared values. As a result, "it would *presumptively* be the case that in these areas, the court would be best assisted by local counsel" (emphasis in original) save where special reasons are shown. It stands to reason that even when dealing with areas of law which are not ring-fenced, the guiding question is still whether the court would be best assisted by local or foreign counsel, although there should be no presumption either way.

38 Second, the Court of Appeal noted at [43] that there might be a need for foreign counsel even where a litigant was able to select from a substantial pool of local SCs if, for example, the case involved "an area of law so esoteric that no local lawyer [could] claim any expertise in it". The potential prejudice to such a litigant would stem from the lack of access to foreign counsel with the relevant broad and wide-ranging experience in that area of law. If the litigant has access to such expertise, the court too would benefit from the assistance of foreign counsel to adroitly address such esoteric issues of law. Such "need" must necessarily be assessed with reference to the specific issues of the case for which the applicant seeks admission. This is entirely in line

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with the Court of Appeal's observation (at [44]) that the focus under the new admissions regime is no longer on the complexity and difficulty of the issues *per se* but whether, "having regard to the *issues* which do arise and all other relevant considerations, there is a *need* for foreign counsel to be admitted in a given case because of a lack of available and appropriate local counsel" (emphasis added).

39 There are therefore two overarching concerns: identifying the issues in contention, and assessing whether there is a need for foreign counsel's assistance with reference to those issues. The need for foreign counsel's assistance is to be assessed from both the litigant's and the court's perspective. Typically, the court, when viewing the matter through both lenses, should in almost all cases arrive at the same outcome, since the competent presentation of the litigant's case would invariably assist both the litigant and the court. I should add that in cases involving areas of law which the court may not be fully *au fait* with, the need for competent representation assumes, from the court's perspective, even greater significance. This should be self-evident since the court's decision will not only have direct bearing on the case at hand but will have wider implications for future cases. As will be seen below, these overarching concerns inform each step of the analytical framework.

40 With these considerations in mind, I turn to address the present application.

Special qualifications and experience for the purpose of the case

41 In relation to s 15(1)(*c*) of the LPA, I observed in *Re Rogers* (at [17]) that an applicant must possess special qualifications or experience relevant to the *specific issues* which arise in the case at hand, and not just expertise in a generic practice area. This requires the issues to be clearly identified (see *Re*

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Fordham at [50]). The identification of those issues must be fair. They should not be framed too narrowly or too generally; the process of identification must strive to capture the essence of the underlying dispute while remaining neutral as regards the outcome of the admission application (see *Re Rogers* at [22]).

42 It is apparent from the survey of the parties' submissions that there is no common ground as to what the specific issues are before the court in OS 492. The characterisation of the underlying issues will therefore be pivotal in resolving the question of whether Mr Wordsworth possesses special qualifications and experience for the purpose of s 15(1)(*c*). This much was agreed by counsel for the respective parties during the oral hearing. Indeed, the approach taken by the Court of Appeal in *Re Beloff* was to consider the nature of the legal and factual issues in order to assess whether the foreign counsel in question had the requisite and particular experience (at [58]). There will be an unavoidable overlap between this inquiry and the first Notification matter – *ie*, the nature of the factual and legal issues in the case. However, it is important to remember that the focus of the s 15(1)(*c*) requirement is on the *relevance* of counsel's qualifications and experience to the specific issues and not on whether those issues are difficult or complex (see *Re Fordham* at [50]).

43 In my assessment, the specific issues in OS 492 are intrinsically in the realm of public international law. The interpretation of Article 28(1) of Annex 1 to the SADC Investment Protocol is at the core of Lesotho's challenge to the Award. The arbitral tribunal relied on Article 28(1) in founding its jurisdiction to hear the dispute. The main question, as I see it, is whether the tribunal was right in interpreting the term "investment" as encompassing both a right to exploit the mining leases and a right to a remedy for interference with that underlying investment. That was a crucial point of departure between the majority of the tribunal and the dissenting arbitrator.

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Addressing this issue calls for expertise in the field of investor-state arbitration. The interpretation of Article 28(1) also engages three subsidiary questions of public international law. The first is whether there is any retroactive application of the SADC Investment Protocol contrary to Article 28(4) of Annex 1 to the Protocol. Additionally, given the majority's characterisation of the relevant "dispute" as being the SADC's Summit's shuttering of the SADC Tribunal, two critical and related questions arise for consideration: the liability of Lesotho for the acts of the SADC Summit, and consequently, whether and how the requirement to exhaust local remedies can apply in the circumstances of the dispute. Addressing these questions inevitably requires extensive expertise in public international law.

44 In this regard, I disagree with the defendants' attempt to characterise the issues as engaging largely with the interpretation of the IAA. Pertinently, counsel for the applicant highlighted the fact that the court will not be able to avoid the public international law dimension in OS 492 for the simple reason that jurisdictional challenges are determined by the court on a *de novo* standard of review (see *AQZ v ARA* [2015] 2 SLR 972 at [49]; *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 at [162]–[163]).[44] Hence, the court, for the purposes of OS 492, can and will fully rehear the arguments that were made before the tribunal on the question of its jurisdiction. It follows that the arguments which the defendants will raise on the applicability of the IAA are additional issues that counsel for Lesotho in OS 492 will have to address as well. But the presence of those additional issues does not cause the public international law issues to fall away or fade into the background. They remain very much the principal issues in OS 492.

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[44] Applicant's Submissions at para 50

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45 I also do not accept the Law Society's argument that the applicant's qualifications and expertise must be relevant to the specific issues surrounding the SADC treaties. As I indicated at the oral hearing, that would be framing the issues far too narrowly. In any event, Mr Wordsworth does have particular expertise in relation to the SADC treaties as he was the lead counsel in the underlying arbitration where the interpretation of the treaties occupied centre stage.

46 I turn to consider Mr Wordsworth's special qualifications and expertise for the purpose of the specific issues in OS 492. In doing so, I bear in mind a number of observations that have been made in previous cases. The Court of Appeal has noted that it is sufficient that the applicant has a "notable and particular expertise" relevant to the issues in the case at hand; there is no additional demand that the applicant must be among the foremost specialists in that area of law (see *Re Beloff* at [57]). It has also been said that the special qualifications and expertise must indicate that the foreign counsel "will be able to expertly discharge his or her duties to the client *and the court* 'for the purpose' of the case for which *ad hoc* admission is sought" (see *Re Andrews* at [39]) (emphasis added). This statement illustrates once again that the overarching concept of "need" must be looked at both from the perspective of the client and the court.

47 In his affidavit in support of this application, Mr Wordsworth described his qualifications and experience in this manner:[45]

> I am widely-regarded as a leading practitioner in the fields of public international law and international arbitration, and am regularly instructed by Governments in international cases. I

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[45] Affidavit of Samuel Sherratt Wordsworth QC, dated 30 June 2016, at paras 6(d) and 7

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> regularly appear before various international tribunals, including the International Court of Justice, and the International Tribunal for the Law of the Sea. Apart from my professional practice, I am also presently a Visiting Professor teaching investment arbitration at Kings College, London. I believe that my expertise in public international law is relevant to, and will assist the Honourable Court in determining the issues concerning Lesotho's jurisdictional challenge in OS 492 … the issues concerning Lesotho's jurisdictional challenge in OS 492 do raise extremely fine, intricate and novel public international law principles and concepts.
>
> …
>
> In addition to the above, I would emphasise that I was lead counsel for Lesotho in the underlying arbitration proceedings to OS 492. As such, I am intimately familiar with the complex factual and legal issues underlying Lesotho's case, and am fully aware of the material, factual and legal points arising therein.

48 I have no doubt that Mr Wordsworth possesses special qualifications and experience for the purpose of OS 492. He has broad experience in public international law, being regularly instructed by states both in cases before the International Court of Justice and before arbitral tribunals. He also has expertise in investor-state arbitrations, where he has been instructed both by investors in their claims for expropriation against states, and by states in their defences to such claims.[46] Having approached investor-state disputes from both the state's and the claimant's perspective, Mr Wordsworth would no doubt have built up considerable expertise which he can bring to bear on the issues in OS 492. More importantly, as pointed out by counsel for the applicant, Mr Wordsworth has argued the specific issues raised in OS 492 in cases which he had previously argued – such as the core dispute in OS 492 of how an "investment" is to be characterised. I am satisfied, therefore, that Mr Wordsworth meets the mandatory requirement in s 15(1)(*c*).

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[46] Affidavit of Samuel Sherratt Wordsworth at pp 17 – 18

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49 That brings me to an observation on a point of practice. The linkage between the cases Mr Wordsworth had previously handled and the specific issues in OS 492 was not made explicit in his supporting affidavit. That supporting affidavit only contained a short overview of Mr Wordsworth's experience (see [47] above) and a *curriculum vitae* listing his past cases along with a brief description of their subject matter. The link between his experience and the issues in the present case was only fleshed out in the applicant's submissions. I expressed some concern in *Re Rogers* (at [35]) that the supporting affidavit in that case did not show the nexus between the identified issues and the applicant's expertise. Mr Wordsworth's affidavit only appended his *curriculum vitae* listing the cases he had previously conducted; it was only in the applicant's submissions that the precise issues in some of these cases were identified, and the relevance of the expertise gleaned from those cases explained. I should reiterate that it is good practice to furnish such details in the *supporting affidavit itself* rather than in the submissions. In addition, it is incumbent upon the local instructing solicitor, and not the applicant, to ensure that the supporting affidavit contains sufficient information to assist the court, particularly on whether the identified issues fall within the domain of the applicant's expertise (see *Re Rogers* at [43]). In this case, however, the lack of detail in the supporting affidavit was eventually and sufficiently addressed in counsel's submissions.

The Notification matters

50 I now come to the question of whether, having regard to the Notification matters, I should admit Mr Wordsworth for the purpose of OS 492. The ultimate question, as mentioned, is whether, having regard to all the circumstances of the cases, it is reasonable that I do so.

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Nature of the factual and legal issues

51 The court's task when considering the first Notification matter is to undertake a qualitative evaluation of the issues in order to determine whether they are complex, or difficult, or novel, or of significant precedential value. The more this is so, the smaller might be the pool of local counsel able and available to handle the case and the greater might be the need to admit foreign counsel (see *Re Beloff* at [61]; *Re Rogers* at [57]). There may well be a need for foreign counsel to assist in a case which may not be particularly complex, but which will be of significant precedential value or of significant public interest (see *Re Andrews* at [48]; *Re Rogers* at [51]).

52 It appears that the focus of OS 492 will be primarily on legal issues. The only factual dispute seems to be over the correctness of the tribunal's finding that the defendants' investment was "admitted" by Lesotho through its conduct (see [19(c)] above), although that factual dispute does not appear to me easy to resolve given that the tribunal founded its decision on a broad range of conduct by Lesotho and its governmental authorities.[47] The rest of the tribunal's findings, and Lesotho's challenge, will largely engage the interpretation of the SADC Treaties and the application of principles of public international law. Some of these legal issues are fairly complex, which resulted in the divergence of views between the majority of the arbitral tribunal and the dissenting arbitrator. The defendants' reliance on the SADC Summit's shuttering of the SADC Tribunal as giving rise to Lesotho's breaches of its international obligations led to a fundamental disagreement on what the relevant dispute was. Apart from complexity, the issues in OS 492 are novel and will no doubt be of significant precedential value in interpreting

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[47] Award at para 7.110: Affidavit of Dennis Peter Molyneaux at p 127

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the SADC Treaties. The court's decision in OS 492 will therefore be of significant public interest, possibly even internationally. The issues in OS 492 therefore tick all four boxes of complexity, difficulty, novelty, and precedential value. This militates strongly in favour of admitting Mr Wordsworth.

Necessity for foreign counsel and availability of local counsel

53 It has been the practice of the court to consider the second and third Notification matters together (see *Re Caplan* at [66]; *Re Rogers* at [55]). This is due to the inevitable overlap between the two: if there are fewer local counsel with appropriate experience, the necessity of having the services of a foreign counsel would naturally be greater (see *Re Andrews* at [52]).

54 It will be crucial to have the services of foreign counsel in cases where there are no local lawyers with appropriate expertise or experience; in this context, appropriate expertise refers to experience which allows foreign counsel to put forward and argue the litigant's case competently, having regard to the specific issues raised in the underlying case (see *Re Andrews* at [52]). Conversely, there is no need for foreign counsel to conduct a case if the issues are "not unduly complex and well within the range of competent Singapore counsel" (see *Re Beloff* at [82]).

55 I should emphasise that there is strictly no need for a litigant to exhaust *all* options in approaching local counsel before a court will consider his application for the *ad hoc* admission of foreign legal counsel (see *Re Andrews* at [77]). The inquiry is whether there has been *reasonably* conscientious effort to secure the services of competent local counsel (see *Re Caplan* at [69]).

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56 I accept the applicant's submission that the pool of Singapore counsel having experience in the fields of public international law and investor-state arbitrations is limited.[48] I note that the Attorney-General also took the view that the pool of local advocates able and available to deal with OS 492 is relatively small.[49] Hence, the need for the services of Mr Wordsworth, who has the appropriate expertise to assist the court on the jurisdictional challenge in OS 492, essentially speaks for itself.

57 At this juncture, I should deal with a number of arguments concerning the necessity of foreign counsel and the availability of local counsel.

58 The defendants put forth two arguments why there is no necessity for the services of Mr Wordsworth in this case.

59 First, the defendants argued that the present case is similar to *Re Beloff*, where the Court of Appeal found that there was no necessity for foreign counsel because, as in this case, the litigant was already represented by one of Singapore's largest law firms. Even if Mr Wordsworth's experience made him more qualified than local counsel, it would not be a sufficient reason for his application to be granted. The defendants relied on this observation by the Court of Appeal in *Re Beloff* at [87]:

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48 Applicant's Submissions at para 88

49 Attorney-General's Submissions at para 43

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> The question is not whether the litigant will find assistance from foreign counsel who might seem in some way more capable than available local counsel. The real question is whether the litigant can find good and adequate assistance here, or from the other viewpoint, whether the litigant would be materially prejudiced if deprived of the services of the foreign counsel.

They also relied on *Re Lord Goldsmith*, where the court noted that the argument that foreign counsel would do "an even better job" than available local counsel did not address the question of necessity, for necessity "would imply that there was some chance that the issues in a case would not be properly ventilated or framed without the participation of foreign senior counsel" (at [54]).

60 I accept that the requirement of necessity is not made out just because foreign counsel has more impressive qualifications or credentials than local counsel. However, the courts' conclusions that there was no necessity for foreign counsel in *Re Beloff* and *Re Lord Goldsmith* have to be understood with reference to the *issues* in those cases. In *Re Lord Goldsmith*, the issues in that case were entirely related to the Singapore context – the applicant sought admission to argue a constitutional challenge to a *local* penal provision. It was therefore sufficient that the litigants were represented by an SC. The local-centric nature of the issues substantially decreased the need for foreign counsel. In *Re Beloff*, the court found that two of the issues concerned matters of Singapore law; therefore, "Singapore counsel would ordinarily be best placed to deal with such issues". The third issue, while uncommon, had been settled by a decision of the Court of Appeal and any argument on that front "would be well within the range of competent Singapore counsel" (at [80]). Owing to the fact that the issues engaged questions of Singapore law, the litigants in those cases naturally faced an uphill task in persuading the court of the necessity for foreign counsel. It was therefore unsurprising that the

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argument that foreign counsel would be *more capable* than local counsel was not favourably received. In this case, Lesotho's position is *not* that Mr Wordsworth should be admitted *even though* there are local counsel with the appropriate expertise to handle OS 492. It is the converse: Mr Wordsworth should be admitted *because* local counsel with such expertise is very limited. That Mr Wordsworth is more qualified than local counsel to argue the case is in favour of, and not against, admission.

61 Second, the defendants suggested that an application to set aside an arbitral award was akin to an appeal in that strong written advocacy would usually be determinative of the result rather than oral advocacy.[50] This submission was also advanced by the Law Society.[51] It is correct that, in the main, written submissions are more useful in appellate advocacy and, more generally, in proceedings which are focused squarely on issues of law rather than fact. Because of the wider scope for foreign counsel in the preparation of written advocacy, the need to admit foreign counsel to present the case orally may be less compelling, as noted in *Re Lord Goldsmith* at [37]. I was also referred to my decision in *Re Fordham*, where I said that this observation applied with equal force to judicial review proceedings, which are centred entirely on issues of law. I found that there was no need for the applicant to be admitted in that case because he could provide input in crafting the written submissions which could then be presented in court by local counsel (at [86]).

62 The preceding observations on written advocacy must not be taken out of context. The issues in *Re Lord Goldsmith* and *Re Rogers* centred on questions of Singapore law. In both these decisions, there was nothing

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50 Defendants' submissions at para 44

51 Law Society's submissions at para 63

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peculiarly complex about the case which made them out of the ordinary from a legal perspective (see *Re Lord Goldsmith* at [64]; *Re Fordham* at [83]–[84]). In fact, the underlying case in *Re Lord Goldsmith* involved a ring-fenced area of Singapore law. The court had already found in both cases that local counsel would be well-placed to argue the issues without the need for foreign counsel. The question was whether anything would be gained by having foreign counsel present the case orally even though all the issues were within the range of local counsel's expertise. The court expectedly held that there was no such need. While it added that foreign counsel could still assist with the preparation of the written submissions, that should be read as no more than a suggestion that foreign counsel could supplement the efforts of local counsel who would be doing most of the preparation since the issues were local-centric in nature. That suggestion resonates less strongly in this case where, as I have found, the issues are complex and of an international nature, and there are probably few local advocates with the requisite expertise to address them. On the other hand, the issues are well within the range of Mr Wordsworth's expertise. To limit his involvement to assisting in the preparation of written submissions even though he is best-placed to assist the court would not productively serve the needs of the litigant and the court.

63 On the third Notification matter, the defendants submitted that the bare assertion by counsel for the applicant that they had considered the available local counsel was insufficient to discharge their burden of proving they had taken reasonable steps to ascertain the availability of competent local counsel[52] – this bare assertion fell short of the standard established in *Re Caplan* where this court noted (at [23]) that full details of efforts to secure local counsel had to be furnished in the supporting affidavits for *ad hoc* admission, including (a)

[52] Defendants' submissions at para 33

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the nature of the contact between the party and local counsel; (b) the mode of contact; (c) the date(s) and duration(s) of any meetings; and (d) a summary of the discussions with local counsel. In addition, date of local counsel's refusal to take up the case and the reasons given should also be specified.

64 The procedural requirement in *Re Caplan* enables the court to answer the broader question of whether there has been a "reasonably conscientious" search for local counsel. What constitutes a reasonably conscientious search would naturally depend on the nature of the issues in each case. Although this procedural requirement does not appear to have been fulfilled on the face of the supporting affidavit, I have already taken cognisance of the lack of available local counsel in the field of public international law – see [56] above. In these *unique* circumstances, there might have been little utility in formally approaching local counsel and recording the details of their inability or unavailability to accept the brief. This might have been an exercise in futility. That counsel for the applicant omitted to do so is hence understandable. I should however caution that the dispensation of the requirement to take steps to ascertain the availability of competent local counsel would only be permitted in exceptional circumstances of which the present case is one.

65 As regards the third Notification matter, the Law Society submitted that "[t]he nurturing and growth of our local bar should not be impeded in the absence of good reasons to do so" and that parties should not be allowed simply to apply for the admission of a foreign legal counsel as a first port of call.[53] While I accept that this is a relevant consideration in the *ad hoc* admission process, this concern does not arise in this application. It only assumes significance in situations where competent local counsel with the

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[53] Law Society's Submissions at para 69

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requisite expertise and experience *for the purposes of the case* are available. It does not come into play where the issues before the court involve areas of law for which there is a discernible lack of suitable local counsel. In my view, the admission of Mr Wordsworth would in fact further the objective in "nurturing" the local Bar in the area of public international law. I am sure the experience of working with Mr Wordsworth on these issues will be beneficial to at least the instructing solicitors.

Reasonableness

66 I should mention two other considerations which have featured in the parties' submissions: first, the significance of Mr Wordsworth having been lead counsel in the underlying arbitration; second, the Attorney-General's submission that the admissions regime should be consistent with the wider public interest in promoting the attractiveness of Singapore as a venue for arbitration.

67 Both these considerations found favour with the court in *Re David Joseph QC* [2012] 1 SLR 791 ("*Re Joseph*"). That was the last occasion on which foreign QCs were admitted to appear in an arbitration-related matter. That was an application under the admissions regime prior to the 2012 Amendment. Nonetheless, the outcome in that case illustrates that the court's real concern is with the underlying issues and whether the court would, along with the litigant, benefit from foreign counsel's assistance. The court in that case noted that since Mr Joseph QC was overall lead counsel in the arbitration, he would "be much better placed to address the court" on the legal issues in light of his familiarity with the case and his considerable expertise (at [52(a)]). That having been said, the court nevertheless added the following words of caution (at [59]):

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> In view of the strong emphasis on developing international arbitration law in Singapore, it would be very much in line with the wider public interests to admit the Applicant in relation to the pending matters before the High Court. It must, however, be stressed that this does not mean that in future every application involving the same Queen's Counsel who has been the lead counsel in the arbitration proceedings below will be favourably viewed. Not only must the legal issues be of sufficient difficulty and complexity, the Court must also be convinced that *the issues argued are inextricably linked to the arbitration proceedings and that there will be a real benefit in having the same counsel assist the Court*. A matter centric approach that pays particular attention to the sufficiency of complexity and difficulty of the issues raised will have to be adopted. [emphasis added].

68 In my view, under the present legislative framework, the applicant's prior involvement in a case is not *per se* a decisive factor. In other words, if the nature of the issues is "well within the range of competent Singapore counsel", the applicant's prior involvement in the underlying dispute would not make it any more reasonable to admit him. It would be, at best, a residual factor which can be considered under the fourth Notification matter, under the rubric of "reasonableness". In the present case, Mr Wordsworth's prior involvement is a factor in favour of admission because his expertise in the public international law issues arising from the arbitration will be directly relevant in OS 492 – see [48] above. His prior involvement alone would not have been sufficient to warrant his admission. It only had a positive bearing on his admission owing to the lack of suitable local counsel to address those issues.

69 As to the Attorney-General's submission on the policy consideration in promoting Singapore as a venue for international arbitration, I do not think that, in itself, would *directly* address the primary question of "need". In the context of the present dispute, because of the potential impact of the court's decision in the setting-aside application coupled with the lack of suitable local

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counsel to address the issues thereunder, it is a relevant consideration under the current admissions regime that parties who opt to use Singapore as a venue for international arbitration should have the assurance that our courts will adopt a robust approach to achieve a just outcome in challenges to arbitral awards. In doing so, the court must be willing to recognise the need for foreign legal representation particularly to meet the needs of litigants in situations where suitable local counsel with the requisite expertise and experience are limited or unavailable. However, the increase in Singapore's attractiveness as a venue for international arbitration is a positive effect of robust judicial rulings on such challenges; it was never intended to be nor should it be the dominant reason for admitting foreign counsel as that would dilute the legislative emphasis on "need" as the basis of admission. In my judgment, under the current legislative framework, such considerations would be better placed as factors which the court *may* take into account, when considering the fourth Notification matter, to determine the overall reasonableness of admitting the applicant. But as mentioned earlier (at [28]), the court may decide the appropriate weight to accord to each of the Notification matters. In this case, I placed greater weight on the first three Notification matters in deciding to admit Mr Wordsworth. The policy consideration of promoting Singapore as a venue for international arbitration was less germane to my decision.

70 I add a final point. The defendants submitted that admitting Mr Wordsworth would prejudice them since they would not have the benefit of being represented by a QC. Given my view that the nature of the issues warrant the admission of the applicant, it is open to the defendants, should they wish to do so, to seek admission of a suitable foreign counsel provided their prospective applicant satisfies the three mandatory requirements under s 15 of the LPA. The defendants are already represented by a team led by an

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SC but there is no rule against a party being represented by both an SC and a QC (see *Re Joseph* at [52(b)]; *Re Beloff Michael Jacob QC* [2000] 1 SLR(R) 943 at [13]).

Conclusion

71 For the foregoing reasons, I allow the application with no order as to costs.

72 I wish to record my gratitude to all counsel, particularly counsel for the Attorney-General and for the Law Society, for their assistance in arriving at this decision.

Steven Chong
Judge

Paul Tan and Alessa Pang (Rajah & Tann Singapore LLP)
for the applicant;
Smitha Menon, Oh Sheng Loong and Tara Radakrishnan
(WongPartnership LLP) for the defendants;
Jeyendran Jeyapal, Elaine Liew and Jocelyn Teo (Attorney-General's
Chambers) for the Attorney-General;
Christopher Anand Daniel and Harjean Kaur (Advocatus Law LLP)
for the Law Society of Singapore.

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