IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2020 / 17743

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
	DATE: 18.08.2020 SIGNATURE:.....

In the matter between:

IRCON INTERNATIONAL LIMITED	Applicant
and	
TENSION OVERHEAD ELECTRIFICATION (PTY) LTD	First Respondent
THE ARBITRATION FOUNDATION OF SOUTHERN AFRICA	Second Respondent
NIELS SCHIERSING N.O.	Third Respondent

JUDGMENT

BHOOLA AJ:

Introduction

[1] The Applicant (“Ircon”) seeks an urgent stay of the arbitration proceedings set down for 20 and 21 September 2020, pending the outcome of its application under case number 2020 / 11322 ("the jurisdictional review"). In the jurisdictional review it seeks to review and set aside the award of the Third Respondent ("the Arbitrator") of 19 February 2020. In the award, the Arbitrator appointed by the Second Respondent ("AFSA"), dismissed Ircon’s challenge to the jurisdiction of AFSA and the Arbitrator to determine a dispute in which Tension claims just over R 100 million from Ircon. The jurisdictional review is pending and is opposed by the first respondent ("Tension"). This application is opposed by Tension.

[2] It is common cause that the arbitration is governed by the International Arbitration Act, 15 of 2017 (“the IAA”), which incorporates the UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”), and the award was made in terms of the provisions of Article 34(1), 2(b)(ii) and 5(a) of the Model Law.

Urgency

[3] In urgent proceedings before the merits are dealt with the applicants need to firstly satisfy the court that the application warrants enrolment on the grounds of urgency. In this regard Uniform Rule 6(12) (b) provides: *(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.*

[4] Ircon submits that matter must be heard on the basis of urgency, as it cannot seek substantial relief in due course. Tension disputes urgency, takes issue with the timing of the application, and contends that the urgency was manufactured. Having considered the pleadings and submissions of the parties I am of the view that in the circumstances set out below, there are no averments that justify urgency. In fact there seems to be, as was submitted by

Tension, a practice of flouting procedure and causing delays in a deliberate attempt to stave off the arbitration for as long as possible. There is also no genuine attempt to submit to arbitration and it seems that at every stage of the proceedings the applicant used the opportunity not to co-operate in advancing progress with the arbitration.

[5] The conduct of Ircon and its attorneys, as set out in the following summary of events leading up to this application, in my view justifies a conclusion that this application is not urgent and should be struck from the roll.

Delays and the approach of Ircon

[6] On 26 September 2019 Ircon objected to AFSA being the administering body for the arbitration. Its position was that the International Commercial Court in Paris should administer the arbitration. A timetable was agreed for the exchange of submissions on jurisdiction and it was agreed that the Arbitrator would hear the dispute on whether AFSA was the correct administering body. Ircon participated in this process and delivered written submissions, and also participated in the hearing on 9 February 2020, where it was represented by attorneys and counsel.

[7] On 20 February 2020, the Arbitrator published the jurisdictional award in which he found that AFSA was the correct administering body for the arbitration. It is from this date, for the purposes of urgency, that Ircon knew that the arbitration would be administered by AFSA and heard by the Arbitrator. It took no steps to proceed with a stay application.

[8] On 24 February 2020 Tension's attorneys requested the Arbitrator to convene the pre-arbitration meeting to agree the procedural timetable for the arbitration.

[9] On 10 March 2020, Ircon’s attorneys said that Ircon had not provided them with instructions and they would not be participating in any further

process in relation to the arbitration. This is a startling position for Ircon to have adopted. Ircon was aware that the arbitration would be proceeding, its attorneys had asked for instructions and Ircon had simply not provided instructions to its attorneys. In relation to assessing whether this application is urgent Tension submits that by this stage Ircon would have been aware of the events and decided not to instruct its attorneys and not to participate in the arbitration.

[10] On 12 March 2020, the second pre-arbitration meeting with the Arbitrator was held and a timetable for the arbitration was ordered by the Arbitrator. Ircon's attorneys were advised of the pre-arbitration meeting but did not attend.

[11] On 7 May 2020, and in accordance with the procedural timetable set by the Arbitrator, Tension filed its statement of claim. The statement of claim was sent to Ircon's attorneys.

[12] Despite having known that the arbitration would proceed, Ircon only sent an unissued copy of its application in the jurisdictional review to Tension's attorneys on 15 May 2020. This is almost three months after the jurisdictional award had been published. No explanation is forthcoming for this delay. It is also noteworthy that on 10 March 2020 Ircon's attorneys said it was not participating in the arbitration, but then did nothing for months. The review moreover, did not incorporate an interdict to stop the arbitration, which is established practice in this division.

[13] This led to Tension's attorneys on 19 May 2020 advising Ircon's attorneys that the review would not stop the time periods set in the procedural timetable and that it did not stay the arbitration proceedings. Ircon was reminded that its Statement of Defence remained due on 8 June 2020, This was another warning to Ircon that should have alerted it to the need to bring this application sooner but it still took no steps in this regard.

[14] On 20 May 2020, AFSA sent a letter to Tension's and Ircon's attorneys

pointing out that under Article 16.3 of the Model law the arbitration may proceed pending the decision of the court on a review, and invited submissions from the parties as to whether the arbitration should be stayed pending the outcome of the jurisdictional review.

[15] On 21 May 2020, Tension's attorneys replied to AFSA and provided submissions on why the arbitration should proceed. In its submission Tension's attorneys argued that the Arbitrator did not have the power to grant a stay of the arbitration. This argument was advanced on the basis that AFSA Rule 8.2 was applicable to the arbitration and required a court to stay the arbitration.

[16] On 27 May 2020 Ircon's attorneys replied to AFSA and provided submissions on the question of why the arbitration ought to be stayed. In its submissions Ircon argued that the Arbitrator had the power to grant a stay of the arbitration, and that the power was located in the Model Law. Thus the competence of the arbitrator was not disputed. Ircon rejected Tension's argument that the AFSA Rules prevented an arbitrator from granting a stay of the arbitration. However, for the purposes of urgency the following part of the letter from Ircon's attorneys of 27 May 2020 is relevant:
"Should the Arbitrator not be inclined to grant the order [staying the arbitration], our client's instructions are to bring an application to court for an order staying the arbitration pending our client's application. Pending such application our client will
not participate any further in the arbitration." What this letter puts beyond doubt is that Ircon had already instructed its attorneys to proceed with this application for a stay at that point should the arbitrator's decision not be in their favour.

[17] Thereafter, the Arbitrator dismissed Ircon's application for a stay of proceedings and published his award on 11 June 2020. The Arbitrator requested Ircon to indicate by no later than 16 June 2020 when it would deliver its Statement of Defence. Ircon failed to do so.

[18] On 18 June 2020 Tension's attorneys requested the Arbitrator to convene a further pre-arbitration meeting to adjust the procedural timetable in light of Ircon's non-participation in the arbitration. It had also proposed moving the arbitration dates to September given Ircon's non-participation.

[19] In response Ircon's attorneys made it clear in their email of 19 June 2020 that the stay application would proceed. They said:
"At this stage, we hold instructions to bring an application to the High Court to stay
the arbitration proceedings which will be served in due course. As such, we will not be participating in any further case management meetings at this stage."
Their attitude was clear from this letter but it was a further month before this application was finally brought.

[20] On 23 June 2020, Tension's attorneys sent an email to the Arbitrator and copied it to Ircon's attorneys. In this e-mail Tension's attorneys proposed that the hearing dates for the arbitration be moved to 21 and 22 September 2020. This was proposed because Ircon had made it clear it would not be participating in the arbitration and there was no need for the procedural timetable to accommodate any steps by it.

[21] On 2 July a pre-arbitration meeting was held by teleconference and despite the decision not to participate in pre-arbitration proceedings, Ircon's legal representatives joined the meeting. In his Procedural Order of 9 July 2020, the Arbitrator confirmed that *"[following] the discussions at the pre-arbitration meeting, the Tribunal decided to adopt the amendments proposed by the [Tension]".* This refers to the amendment of the dates of arbitration to September. After communication with Ircon by email thereafter the Arbitrator recorded that he had decided "*to maintain the amendments to the Procedural Timetable communicated on 2 July 2020.* This was confirmed in Procedural Order No. 3 on 17 July 2020. Tension submits that it was clear that the arbitration would proceed in September. However, Ircon's attorney, who is the deponent to the replying affidavit said :*"[the] Arbitrator made no final*

determination during the pre-arbitration meeting as to the arbitration proceedings on 21 and 22 September 2020, and invited Ircon's legal representatives to indicate dates they were available in October 2020".

[22] Ircon thus relies on the 17 July 2020 as being the date relevant to urgency, as they submit that this was the date when the Arbitrator made the final determination that the arbitration would proceed on the September dates. They say it is therefore not correct, as Tension avers, that this decision was made on 2 July 2020 otherwise there would have been no reason for the arbitrator to send the parties an email on 5 July 2020 regarding dates in October. It was clear that at the 2 July 2020 meeting Ircon's attorneys had maintained the view that they had no intention of proposing dates in October and were adamant about the arbitration proceeding in January 2021. Both in the 2 July 2020 meeting and in the email of 4 July 2020 to the Arbitrator the attorneys persisted with the view that they are only available in January 2021 and would proceed with this application for a stay of the arbitration. In his email of 5 July 2020 the arbitrator makes it clear that at the meeting on 2 July 2020 he invited Ircon to propose dates in October should they decide to participate in the arbitration [own emphasis]. He makes it clear he was informed by Ircon's counsel that they had no instructions to agree to dates other than January 2021. He states that he is using the opportunity to once again invite them to indicate, before 8 July 2020, dates that they would be available in October, and should Ircon's counsel be available in October, he would revisit the procedural timetable. This makes it clear that the averments are deliberately obscure in the replying affidavit as there was never any intention to propose October dates or indeed to participate in the arbitration. Also, the threat of an urgent stay application was again made but then finally acted upon a further three weeks later.

[23] In addition to the relevance of the above circumstances, Tension further contends that the circumstances around the date of issue and date of service of this application also puts urgency in doubt. Tension submits that not only is Ircon's delay in bringing this application inexcusable, but the circumstances surrounding the institution of this application and its service

invite censure. In this regard it is common cause that the application was issued by the Registrar at 9h24 on 22 July 2020, and that prior to this no unissued or even unsigned copy was sent to Tension's attorneys as is the normal courtesy amongst practitioners and the practice in this division, more particularly under conditions of lockdown. The application was only served on Tension's attorneys by email at 14h35 on 23 July 2020, a day and a half later. This afforded Tension only six court days to file an answering affidavit. Ircon did not commit to a date by when it would deliver a replying affidavit. It eventually delivered its replying affidavit at 9h22 on 7 August 2020 – seven days after receiving Tension's answering affidavit.

[24] Ircon attempts to suggest that its failure to serve the unissued application sooner was "*nothing more than an oversight*". But this, Tension submits, is not true because in the next paragraph in the replying affidavit Ircon's attorney says that Ircon took a conscious decision to wait for the application to be issued before serving a copy of Tension, which the attorney accepts in hindsight "*was a mistake*". I agree with Tension's submission that this explanation is wholly unacceptable. In an urgent application time is of the essence and the issue simply cannot be dispensed with by saying it was an oversight, without further explanation being forthcoming.

[25] This point leads me to Tension's submission that this application is just another step in a long stream of attempts by Ircon to delay the arbitration and other proceedings that have been brought against it. It reinforces the contention that there is no genuine purpose behind this application, save to delay the arbitration. If this is correct then it is another reason why in the circumstances there is no urgency.

Conclusion

[26] In relation to the test for urgency, Ircon submits it has acted with reasonable expedition in bringing this application. It submits that it will not be able to seek substantial redress in due course in that, *inter alia,* the arbitration would have been concluded by the time the review application is heard in the

ordinary course. It advances the following reasons in its founding affidavit as to why this application is urgent and it will not be able to obtain substantial redress in due course:

"77.2 If the arbitration is not stayed pending the outcome of the review application then Ircon 77.2.1 will be forced to participate in a process where there may ultimately be no jurisdiction in respect of AFSA and the Arbitrator;

77.2.2. will incur and had already incurred, substantial legal costs in respect of the arbitration in circumstances where ultimately neither AFSA or the Arbitrator have jurisdiction and Ircon will not be able to recover its costs from Tension;

77.2.3 if not ultimately successful in the arbitration proceedings, would then be faced with an arbitration award against it that should not have been granted against it in the first place by virtue of the lack of jurisdiction of AFSA and the Arbitrator which has caused and will cause substantial prejudice to Ircon."

[27] It is so that it will incur costs and might be faced with an award where the arbitrator has no jurisdiction. However, as was submitted by Tension, this is a situation contemplated in the Model law as article 36 (iv) of which states ;
"(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: .....
(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; ..."
It thus remains open to Ircon to challenge jurisdiction when attempts are made to execute the award. This on its own renders this application wholly unnecessary and premature on Ircon's own averments.

[28] The relief Ircon seeks in this application is a stay of the arbitration pending its jurisdictional review. Ircon also applied to the arbitrator for exactly the same relief that it seeks in this application. The arbitrator dismissed that application and issued an award to this effect. Ircon has not sought to review or challenge the arbitrator's award refusing to stay the arbitration, and that award is, according to Tension, valid, binding and operative. That being so, Tension submits, Ircon cannot now, having failed before the arbitrator, ask this court to grant relief that it did not get from the arbitrator. What it is really doing is "forum shopping", and trying to get a decision that suits its purpose. This is not a genuine reason for urgency.

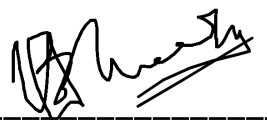
[29] It is clear that if Ircon had been genuinely concerned about the arbitration progressing it ought to have taken steps to interdict at the earliest after the jurisdictional decision in February 2020, or at the very least after the stay was refused on 11 June 2020 and as indicated in its attorney's letter of 19 June 2020. Instead it waited until late July 2020, and then imposed very short time periods on Tension to deal with this application. This is in circumstances where Ircon's attorneys had indicated from 19 June 2020 that they had instructions to bring this application. The delays in bringing this application, based mainly on the decision not to participate in the arbitration proceedings, do not warrant an urgent hearing and Ircon is not precluded from seeking substantial redress in due course.

Order

[30] In the result, I make the following order:

30.1 The application is struck off the roll.

30.2 The applicant is to pay the costs of the first respondent, including the costs of two counsel.



U. BHOOLA

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

Date of hearing : Heard by videoconference on 11 August 2020 as per agreement between the parties in terms of the Judge President's extended Consolidated Directive of 11 May 2020 extended to 15 August 2020.

Date of judgment: Judgment handed down electronically by circulation to the parties' legal representatives by email on 18 August 2020.

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