REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2020/15862

REPORTABLE: **YES**

OF INTEREST TO OTHER JUDGES: **YES**

REVISED: **NO**

20-08-2021

In the matter between:

INDUSTRIUS D.O.O. **Applicant**

and

IDS INDUSTRY SERVICE AND PLANT CONSTRUCTION SOUTH AFRICA (PTY) LTD **Respondent**

JUDGMENT

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 20 August 2021*

SENYATSI J:

[1] This is an opposed application that the arbitral award given on 9 June 2020 in the arbitration proceedings between the applicant ("Industrius") and the respondent

("IDS") be made an order of court. Industrious seeks an order that IDS pay its costs in the main arbitration and counterclaim.

[2] Industrius D. O. O. is a foreign company registered in terms of the laws of the Republic of Croatia as "Drustvo s orgrani-cemon odgovornoscu" that is a limited liability company, with its place of business and registered address at H[....],241 O[....] S[....], B[....] 11, Croatia.

[3] IDS Industry Service and Plant Construction South Africa (Pty) Ltd ("IDS") is a private company registered in terms of the laws of the Republic of South Africa with its registered address at 7 L[....] Park, 83 A[....] Road, D[....], Boksburg.

[4] A dispute arose between the parties during 2017. Consequently, the parties decided to refer the dispute to arbitration and concluded an arbitration agreement. They agreed that the arbitration tribunal would be constituted by a single arbitrator, Mr KJ Trisk SC and that the arbitration would be conducted under the rules of the Association of Arbitrators ("AOA Rules").

[5] The agreement itself is an arbitration agreement as defined in article 7 of the International Commercial Arbitration ("Model Laws") as incorporated by the International Arbitration Act 15 of 2017 ("the Act") for enforcement of an international arbitral award and this is common cause between the parties. In terms of the agreement, which was in writing, the parties agreed to submit certain disputes which had arisen in respect of the parties' contractual relationship. It is also common cause between the parties that the arbitration was contemplated by article 1(3) of the Model Law because at the time of the conclusion of the arbitration agreement the parties had their places of business in different countries. The seat of arbitration in terms of article 20 of the Model Law was South Africa.

[6] The disputes referred to arbitration consisted of a contractual claim by Industrious who was the claimant in the arbitration and a counterclaim by IDS, the defendant in the arbitration.

[7] IDS participated in the arbitration proceedings. These proceedings included several interlocutory applications which were conducted during 2018 and 2019. The arbitration was scheduled to commence on 25 May 2020. IDS ceased participation in the proceedings during January 2020. This was due to a dispute that arose, apparently, between itself and its former attorneys regarding payment of fees. The arbitrator invited IDS to bring an application for postponement of the hearing and the invitation was ignored by IDS. The latter also failed to properly appoint attorneys to represent it.[1]

[8] On 25 May 2020, and in the absence of IDS, the arbitration hearings proceeded. The arbitrator gave his final award in the arbitration on 9 June 2020[2] in terms of which he upheld the Industrius' claim and dismissed IDS's counter-claim. Industrius claimed payment on various unpaid invoices in the sum of € 2,75 million plus interest and costs of suit.

[9] It is the award set out in [8] above that Industrius seeks to be made an order of court which IDS opposes. IDS does not dispute that the award is binding on it.[3] Furthermore, IDS has not challenged the award or applied to have it reviewed and set it aside in terms of Model Law, which is the exclusive recourse to a court against an arbitral award.

[10] IDS's defence to the application for enforcement of the arbitral award is based on a separate action that it has instituted in the High Court under case number 15812/2020 seeking the same relief it bought in its counter-claim in the finalised arbitration, alternatively an interim interdict to the same effect. IDS prays that the enforcement of the arbitral award be stayed pending the finalisation of the action it has instituted against Industrius.

[11] IDS contends that the counterclaim was dismissed by default and avers that the purported dealing with the merits of its counter-claim by the arbitrator, in the absence of IDS is of no force and effect. It contends therefore that the issue of the

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[1] See power of attorney which was provided to the attorneys in this application only on 24 June 2020, p009-82, para 41-2 of Caseline.
[2] See FA2, 001-21 on the Caseline
[3] See FA p001-11, para 15; IDS AA, p009-6, papa10

counter-claim has not been determined at all and that it is free to pursue its counterclaims in the courts of South Africa.[4]

[12] IDS also contends that because the counterclaim was dismissed by default, the arbitrator's award in that regard is not final and that the doctrine of *res judicata* does not apply and that this is a trite principle.

[13] IDS furthermore contends that having dismissed the counterclaim for non-appearance, the arbitrator was precluded from deciding the counter-claim on its merits[5] as this was an error.[6]

[14] In addition, it was IDS's submission that its claims in case no 15862/2020 have been set off and the prospects of success at trial are good[7] and relies on article 36(1)(a)(ii) of the Model Law as the source of the Court's power to grant the stay of the arbitral award.

[15] The issues that require determination are whether the grounds contended by IDS are good in law to suspend the enforcement of the arbitral award. To deal with each ground raised, I shall restate the legal principles governing the arbitral award in terms of the Model Law as set out below.

[16] International commercial dispute resolutions are governed by the Model Law, that is United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration which was adopted into South African law in terms of the International Arbitration Act, No15 of 2017 (" the Act"). Accordingly, this dispute is regulated in terms thereof.

[17] The preamble of the Act provides as follows:

> "To provide for the incorporation of the Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on

[4] See AA, P007-7, para 21-2
[5] See IDS RA, p010-11, para16
[6] See IDS RA, P010-10, para9
[7] See AA, p009-10, para 40

International Trade Law, into South African law; to provide anew for the recognition and enforcement of foreign arbitral awards; to repeal the Recognition and Enforcement of Foreign Arbitral Awards Act, 1977; to amend the Protection of Businesses Act, 1978, so as to delete an expression; and to provide for matters connected therewith."

[18] In terms of s3 of the Act, the objects thereof are to[8]-

"(a) facilitate the use of arbitration as a method of resolving international commercial disputes;

(b) adopt the Model Law for use in international commercial disputes;

(c) facilitate the recognition and enforcement of certain arbitration agreements and arbitral awards; and

(d) give effect to the obligations of the Republic under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the text of which is set out in Schedule 3 to this Act, subject to the provisions of the Constitution."

[19] It is without doubt therefore that the Model Law has been incorporated in our law and applies in the Republic subject to the provisions of the Act.[9] The parties to an international commercial dispute may refer such dispute to arbitration in terms of an arbitration agreement.

[20] The arbitration is an international arbitration as contemplated by Article 1(3) of the Model Law because, as already stated, at the time of conclusion of the arbitration agreement the parties' business locations were in different countries, namely Croatia and South Africa.

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[8] See s3 of the Act
[9] s3(d) of the Act

[21] The arbitral award made in terms of the Model Law can only become impermissible to enforce under certain conditions contained in s18 of the Act, such as:

> "(a) If the court finds that-
>
> (i) a reference to arbitration of the subject matter of the dispute is not permissible under the law of the Republic; or
>
> (ii) the recognition or enforcement of the award is contrary to the public policy of the Republic; or
>
> (b) the party against whom the award is invoked, proves to the satisfaction of the court that—
>
> (i) a party to the arbitration agreement had no capacity to contract under the law applicable to that party;
>
> (ii) the arbitration agreement is invalid under the law to which the parties have subjected it, or where the parties have not subjected it to any law, the arbitration agreement is invalid under the law of the country in which the award was made;
>
> (iii) that he or she did not receive the required notice regarding the appointment of the arbitrator or of the arbitration proceedings or was otherwise not able to present his or her case;
>
> (iv) the award deals with a dispute not contemplated by, or not falling within the terms of the reference to arbitration, or contains decisions on matters beyond the scope of the reference to arbitration, subject to the provisions of subsection (2);
>
> (v) the constitution of the arbitration tribunal or the arbitration procedure was not in accordance with the relevant arbitration agreement or, if the

agreement does not provide for such matters, with the law of the country in which the arbitration took place; or

(vi) the award is not yet binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made."

The onus is on the party seeking the resistance of the enforcement of the arbitral award to allege and prove any of the grounds set out in s18 of the Act and the Model Law. There is no record of the averment and proof of any of the grounds as set out in s18 of the Act that is before me to prove and to persuade me that the refusal to make the arbitral award an order of this court would be justified. That alone must be the reason for the IDS's defence to fail. I will demonstrate later why the defence as averred by IDS finds no support on the facts and the law.

[22] IDS has relied on the fact that it has issued a counterclaim as the basis that this court should consider refusal of the enforcement of the arbitral award. After proper inspection of the counterclaim, it is clear that it deals with the same cause of action which was before the arbitrator. The counterclaim was properly considered by the arbitrator when he made an arbitral award on 9 June 2020.

[23] This is evident from the award itself[10] because on its face, the arbitrator held as follows:

"It will be apparent from the aforegoing that I dismiss the defendant's Counterclaim not only on the basis of there having been no appearance on behalf of the Defendant at the hearing before me on 25 May 2020 but also on the basis that the version advanced by the Defendant in its Counterclaim given the evidence which was adduced before me, it seems to me, is so improbable as to warrant rejection."

[10] Para 47 of the arbitral award

Based on this finding by the arbitrator, I find that the contention by IDS that the counterclaim was not dealt with on merits is without any factual basis as the arbitrator clearly dealt with the merits of that counterclaim. The arbitrator was required to deal with all the disputes of the parties and in my respectful view, he did precisely that.

[24] If IDS was aggrieved by the arbitral award, it ought to have taken steps to challenge it and this was not done. It follows that the enforcement of the arbitral award cannot be delayed as doing that would cause an injustice to Industrius.

[25] On the issue whether the counterclaim can be considered to have been decided on merits the Court in *United Enterprise Corporation v STX Pan Ocean Company Ltd*[11] held that a dismissal of an application can give rise to the successful raising of the exception *rei judicata* where regard being had to the judgment of the court which dismissed the application, the import of the order [was] clearly that on issues raised the Court found against the party which in this case is IDS in the previous proceedings and in favour of Industrius in the counterclaim arbitration proceedings. The Court furthermore held it is not the form of the order granted but the substantive question (did it deceive on the merits or merely grant absolution?) that is decisive in our law and that what is required for the defence to succeed is a decision on the merits.[12]

[26] Furthermore, IDS also contends as already stated that the arbitrator erred when he made a finding on the counterclaim in the arbitral award. In *Phalabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd*[13] the court held as follows:

> "The party alleging the gross irregularity (of the arbitrator) must establish it. Where an arbitrator engages in the correct enquiry but errs either on the facts or the law, that is not an irregularity and is not a basis for setting aside an award. If parties choose arbitration, courts endeavour to uphold their choice

[11] [2008] 3 All SA 111 (SCA) at para [9]
[12] Same para [9]
[13] 2008(3) SA 585 (SCA) para [8]

and do not lightly disturb it. The attack on the award must be measured against these standards."

I am of the respectful view that contending simply that the arbitrator has erred in dealing with the counterclaim on merits in the absence of IDS is not a valid ground to refuse enforcement of an arbitral award.

[27] From the evidence adduced by IDS in the instant application based on the subcontracts that are used in support of the counterclaim in the pending High Court action, case number 15862/2020, the subcontracts have been found by the arbitrator to be a fiction. The defence of the *res judicata* in those proceedings is likely to succeed against IDS.

[28] In dealing with the arbitrator's ability to hear evidence as part of the process of resolving the dispute between the parties the Court in *Wilton v Gatonby*[14] held as follows:

> "…tribunal should not simply issue an award as though entering judgment under the Rules of Court but rather should proceed to hear such evidence as may be tendered. Short of an express agreement between the parties, any award resolving the dispute between the parties should be made only on the available evidence. The arbitrator's decision to hear no evidence at all resulted in an award being made simply as a procedural consequence of the respondent's wilful absence from the arbitration and without the arbitrator bringing his mind to bear upon the issues between the parties as defined in the pleadings."

The same conclusion cannot be made in the present case because as already stated, the arbitrator clearly articulated and dealt with all the issues before him. It can be inferred from the IDS's inability to attack the award, that procedurally, the arbitrator cannot be faulted in the instant case.

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[14] 1994 (4) SA 1690 (W) at 166H-167B

[29] Over and above the grounds that IDS can raise in terms of section 18 of the Act, to ask the Court to refuse to make an award the order of this court, IDS also has recourse in terms of article 36 of the Model Law which is a mirror of section 18 of the Act.

[30] Under Article 36 (2) the Court may adjourn a decision on enforcement under the Model Law only where an application for setting aside or suspension of an award has been made to another court in terms of Article 36(1)(a)(v). There is no evidence on record that such application has been made or is pending.[15]

[31] It is evident from the authorities quoted above that the basic principle articulated in the Act is that the Model Law is pro-enforcement of arbitral awards. The academic literature surveying judicial policy regarding arbitration in Australia and Asian-Pacific[16] regions extrapolate this pro-enforcement approach as follows:

> "In a Federal Court of Australia decision, *ESCO Corporation v Brandken Resources (Pty) Ltd*, Foster J interpreted these provisions in accordance with international norms:
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> > "… a foreign arbitral award is to be enforced in Australia unless one of the grounds in s8(5) of the [International Arbitration Act] is made out by the party against whom the award is sought to be enforced or unless the public policy of Australia requires that the award not be enforced. The pro-enforcement bias of the [New York] Convention and its domestic surrogate, the IAA, requires that this Court weigh very carefully all relevant factors when considering whether to adjourn a proceeding pursuant to s8(8) of the IAA. The discretion must be exercised against the obligation of the Court to pay due regard to the objects of the IAA and the spirit and intendment of the Convention.

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[15] See *Admart AG v Stephen and Mary Birch Foundation Inc.* US Court of Appeals for the 2nd circuit, 8 August 2006 where request for adjournment pending outcome of an arbitration in Switzerland was refused because the arbitration was not an attempt to set aside or suspend the Award.
[16] See Also, Justice James- Judicial Support or arbitration (FCA) [2014] FedJSchol

The pro-arbitration approach has been highlighted by a number of judges speaking and writing extra-curially. For example, Chief Justice Marilyn Warren of the Supreme Court of Victoria has said:

> 'In arbitration, the directive role of the Court needs to be minimised. The focus instead, turn to ways in which the Court can support the arbitration process and enforce arbitral awards in a timely and cost effective manner.'

Additionally, Justice James Allsop observed at CIArbs Asia Pacific Conference in 2011:

> 'The clear trend in judicial decision-making about arbitration in Australia [has transformed] from suspicion, to respect and support…In terms of intervention [by the judiciary], restraint is essential. Arbitration depends for its success on the informed and sympathetic attitude of the court.'

[32] In Australia Courts have held that in accordance with this pro-enforcement of international arbitral award in terms of the Model Law, recognition and enforcement of an arbitral award could only be denied in limited circumstances which are clearly spelt out in article 36 (1) of the Model Law:

> "…which provides for the only grounds on which recognition or enforcement of an award may be refused by a competent court. The grounds are primarily, but not exclusively, concerned with independence and impartiality of the arbitrator and the fairness of the arbitral process…They do, however, include a competent court finding that the recognition or enforcement of the award would be contrary to the public policy of [Australia]
>
> For avoidance of doubt, s19 of the IA Act states that an award is contrary to the public policy of Australia if its making was induced or affected by fraud or corruption or a breach of the rules of natural justice occurred in connection with the making of the …award. Article 5 limits the power of the court to

> Intervene in matters governed by the Model Law to those categories of curial intervention provided for in the Model Law.
>
> Article 34 (1) relied upon by ICL in its separate proceedings in the Federal Court to set aside the awards, provides that recourse to a court against an arbitral award may be made only by an application for setting aside the award and only on the grounds set out in Art 34 (2), which substantially mirror those in Art 36 (1) limiting the grounds upon which a court may refuse to recognise or enforce a foreign award."

I am of the view that our courts should have a similar approach when seized with an application for enforcement of foreign arbitral award as the Model Law is part of the laws of the Republic.

[33] It follows therefore, in my view, that the Act and the Model Law do not provide for the court to refuse or delay to enforcement of the award on the basis that a party has instituted other proceedings that are not related to the arbitral award or have no bearing on the finality or enforceability of the arbitral award. Equally not applicable, is an attempt by a party to set off a proven debt in terms of the arbitral award against its unproven claim in the unrelated proceedings. Staying the enforcement of an international arbitral ward under those circumstances would not accord with the spirit of the Model Law in our Republic.

[34] Allowing the delaying tactics in the enforcement of the arbitral award under these circumstances would be counter-productive and create an imbalance in international trade.

[35] Although IDS had conceded that the arbitrator was entitled to dismiss its counterclaim by default, I find it difficult to understand the basis upon which it contends that the same action which failed at the arbitration hearing can properly be pursued through action proceedings. The parties agreed to an arbitration process and once an arbitral award was made, that brought the arbitration to an end unless and until the arbitral award is set aside.

[36] Rule 39 (3) of the Uniform Rules provides that:

> "If, when a trial is called, the defendant appears and the plaintiff does not appear, the defendant shall be entitled to an order granting absolution from the instance with costs but may lead evidence with a view to satisfying the court that the final judgment should be granted in his favour and the court, if so satisfied, may grant such judgment."

This rule has no application to arbitrations. There is no provision under the AOL Rules permitting the arbitrator to grant absolution from the instance and in the instant case, he rightfully did not grant or purport to grant absolution from the instance and concluded the arbitration to finally resolve the parties' disputes.

[37] The arbitrator was enjoined with the duty to resolve the disputes between the parties before him. In *Termico (Pty) Ltd v SPX Technologies (Pty) Ltd*[17] it was held that all issues submitted to the arbitrator must be resolved in a manner that achieves finality and certainty. The award may not reserve a decision on an issue before the arbitrator or expert for another or for the court to resolve. It follows therefore that to bring a failed counterclaim before court by way of action proceedings is a proverbial flogging of a dead horse and cannot as already stated, be used as a ground to delay the enforcement of the arbitral award.

[38] In *Telcordia Technologies Inc v Telkom SA Ltd*[18], the court held, in considering whether an error on the side of the arbitrator in his award can be used as a ground to oppose the enforcement of the award, that:

> "The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind

[17] 2020 (2) SA 295 (SCA) [13]
[18] 2007 (3) SA 266 (SCA) at [85]

as a misconception of the *nature of the inquiry* – they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry."

The dismissal of IDS's counterclaim has been brought to finality and whether or not the arbitrator was correct in doing that should not and cannot be used as a ground to challenge the enforcement of the arbitral award.

[39] Another point that has been raised by IDS is that Industrius must provide security for costs before the award can be enforced. This submission must fail because it runs against the provisions of article 5 of the Model Law which provides as follows:

> "In matters governed by this Law, no court shall intervene except where so provided in this Law."

I have already dealt with instances where the court can intervene and none of those grounds find application in the matter before me.

[40] Based on the reasons already stated, I hold the view that Industrius has made out a case for the enforcement of the arbitral award.

ORDER

[41] Having read the documents filed of record and having heard the submissions made by Counsel and considered the matter:

It is ordered that:

1. The arbitral award given on 9 June 2020 in the arbitration proceedings between Industrious and IDS is made an order of court. As a consequence thereof:

    1.1. IDS must pay the Industrius the amount of € 2 775 853.08;

1.2. IDS must pay Industrius interest on the amount in paragraph 1.1 above calculated in accordance with the following table with effect from the dates reflected in the column immediately adjacent to the amount in question and at the rate allocated in regard thereto, until date of payment:

Amount	Due date	Rate of Interest
€ 2 100.00	31 July 2016	10.5%
€ 3 648.00	31 July 2016	10.5%
€ 91 210.00	31 October 2016	10.5%
€ 23 104.00	31 January 2017	10.5%
€ 66 395.00	31 May 2017	10.5%
€ 297 785.30	30 June 2017	10.5%
€ 683 395.40	30 June 2017	10.5%
€ 604 319.17	31 July 2017	10.5%
€ 261 407.95	31 July 2017	10.5%
€ 629 641.90	31 August 2017	10.5%
€ 247 920.61	31 August 2017	10.5%
€ 258 794.50	30 September 2017	10.25%
€ 101 955.25	30 September 2017	10.25%

1.3. IDS must pay Industrius's costs in the counterclaim instituted in the arbitration proceedings between Industrius and IDS.

1.4. IDS must pay Industrius's costs in the arbitration proceedings between Industrius and IDS including:

1.4.1. The costs associated Industrius's preparation of its defence to the counterclaim insofar as such costs are not covered by the Award set out in subparagraph 1.3 above; and

1.4.2. the costs of the arbitration; and

1.4.3. the costs incurred by Industrius in consequence of the employment of two counsel.

2. IDS must pay the costs of this application.

SENYATSI ML

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

REPRESENTATION

Date of hearing: 28 April 2021

Date of Judgment: 20 August 2021

Applicant's Counsel: Adv S Du Toit

Adv I Currie

Instructed by: Knowles Husain Lindsay Inc.

Respondent's Counsel: Adv HJ Fischer

Instructed by: Spellas Lengert Kuebler Braun Inc.