IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 15862/2020

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

28 April 2021 *F. Bezuidenhout*

In the matter between: -

IDS INDUSTRY SERVICE AND PLANT CONSTRUCTION SOUTH AFRICA (PTY) LTD Applicant (Respondent in main application)

and

INDUSTRIUS D.O.O. Respondent (Applicant in main application)

J U D G M E N T

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 28 April 2021.

SUMMARY: International Arbitration Act, 15 of 2017 ("*IAA*")– Application for Security for Costs – whether permissible for a South African Court to apply the Uniform Rules of Court and the usual considerations relating to security for costs when the IAA is applicable.

F. BEZUIDENHOUT AJ:

INTRODUCTION

[1] In these interlocutory proceedings, an *incola* applicant ("*IDS*") applies for security for costs against a *peregrine* respondent (" *Industrius*") in the amount of R500,000.00 ("*the security application*") in terms of rule 47(3) of the Uniform Rules of Court ("*the URC*").

[2] Industrius filed an application to make an arbitral award ("*the award*") published on 9 June 2020 in favour of Industrius, an order of this Court (*"the enforcement application"*).

[3] The enforcement application is premised on article 35 of the UNCITRAL[1] Model law[2] ("*the Model law*") as adapted in Schedule 1 of the International Arbitration Act, 15 of 2017 ("*the IAA*"), read with sections 16 to 18 of the IAA.

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1 United Nations Commission on International Trade Law.

2 Means the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, as amended by the said Commission on 7 July 2006.

[4] IDS admits that there is no substantive legal impediment for the arbitration award to be made an order of court.[3] Nevertheless, IDS instituted a counter-application where it seeks the following relief: -

[a] A stay of the enforcement application pending the finalisation of an action instituted by IDS in this Court against Industrius under case number 19156/2020 (*"the action"*);

[b] In the alternative, an interdict preventing Industrius from making the award an order of Court (*"the order")*, pending the final adjudication of the action;

[c] Further alternatively, a stay of the execution of the order pending the final adjudication of the action.

[5] IDS therefore seeks security on the basis that its counter-application for a stay is a dilatory defence to the ensuing judgment debt, which, it contends needs to be stayed pending the finalisation of its action.

[6] I am called upon to determine the security application only.

FACTUAL MATRIX

[7] Industrius is registered as a limited liability company in terms of the laws of the Republic of Croatia (*"Croatia"*). Its place of business and registered address is in Croatia, and it does not own any unmortgaged immovable property within the Republic of South Africa (*"South Africa")*

[8] IDS is a private company registered in terms of the laws of South Africa,

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[3] Applicant's supplementary practice note dated 5 March 2021: par. 4.3

and with its registered address in South Africa.

[9] Between 2013 and 2017 IDS and Industrius forged a contractual relationship in terms whereof Industrius recruited Croatian welders, fitters and supervisors to work on the Medupi and Kusile power plant projects in South Africa, under the supervision, direction and control of IDS.

[10] A dispute arose between IDS and Industrius on matters concerning their contractual relationship during July 2017 and as a consequence, IDS and Industrius agreed to terms of an arbitration agreement and referred the dispute to an arbitration tribunal in South Africa.

[11] It is not disputed that the arbitration agreement entered into by Industrius and IDS is an agreement defined in article 7 of the Model law and that the arbitration was an international arbitration as contemplated in article 1(3) of the Model law in that at the time of the conclusion of the arbitration agreement, IDS and Industrius had their places of business in different States. The parties agreed to South Africa as the juridical seat in terms of article 20 of the Model law.

[12] The disputes referred to arbitration consisted of a main claim by Industrius and a counterclaim by IDS. Both claims concerned the payment of monies.

[13] On 25 May 2020, the arbitration proceedings took place in the absence of any representation on the part of IDS. Oral evidence was adduced by Industrius.

[14] On 9 June 2020, the award was published. Essentially, the claim brought by Industrius was upheld and the counterclaim brought by IDS, dismissed.

[15] The enforcement application was instituted on 7 July 2020. On the

5th of August 2020, IDS opposed the enforcement application and on 28 August 2020, it served an answering affidavit and a counter-application.

[16] On the 12th of August 2020 IDS served a notice in terms of rule 47(1) of the URC on Industrius, demanding security for its costs on primarily the following grounds: -

[a] Industrius is a *peregrinus* of this Court, incorporated and with its principal place of business and registered office in the Republic of Croatia.

[b] Industrius does not own any unmortgaged immovable property in the South Africa.

[17] Industrius declined to provide security on the basis that the demand for security constituted an abuse of the process of Court, was an attempt to delay an award in favour of Industrius and to avoid payment. Pursuant to the refusal, IDS brought the security application on the 11th of September 2020. On the 22nd of October 2020 Industrius served an answering affidavit in opposition.

GROUNDS OF OPPOSITION ADVANCED BY INDUSTRIUS

[18] The enforcement application is governed by the Model law which has been adopted in South African law through the IAA. Industrius therefore contends that there is no provision in the IAA or the Model law which empowers this Court to grant security in an application for enforcement. In fact, article 5 of the Model law annexed as schedule 1 to the IAA provides that a Court should not intervene, except where intervention is expressly provided for: -

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

[19] Industrius asserts that the applicable *"Law"* only provides for two instances where a party may be ordered to provide security for costs, namely:

[a] by an **arbitral tribunal**, in terms of chapter IV(A), section 1, article 17 dealing with interim measures, sub-article (2)(e) of the Model law;

[b] by the Court, in terms of section 17(3) of the IAA[4], which provides as follows:

> *"(3) If an application for the setting aside or suspension of an award has been made to a competent authority referred to in subsection (1) (b) (vi), the court where recognition or enforcement is sought may, if it considers it appropriate-*
>
> *(a) adjourn its decision on the enforcement of the award; and*
> *(b) on the application of the* ***party claiming enforcement of the award****, order the other party to provide suitable security."*
> (emphasis added)

[20] In the first instance, IDS applied for security for costs before the arbitral tribunal but failed. In the second instance, only Industrius as the applicant in the enforcement application, is entitled to apply for security against IDS, but did not do so.

[21] Industrius argues that Chapter VIII of the Model law provides that the enforcement of an award can be refused only on the most limited grounds provided for in article 36 and that none of these grounds have been

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4 Mirroring article 36(2) of the Model law

advanced by IDS. Accordingly, IDS has no prospect of succeeding in its counter-application.

[22] Industrius submitted that a Court hearing a security application should also consider whether the action has any prospects of success. Industrius contends that IDS has no prospect in that the claims were dismissed by the arbitrator and are *res judicata*, and to the extent that IDS relies on the alternative claim of enrichment, it is estopped from doing so on the basis that the subcontracts have been held by the arbitrator to be fictitious. In the alternative, Industrius contends that the enrichment claims are subject to the arbitration agreement between the parties, and are by their nature not liquid claims.[5]

[23] In reply, IDS denies, without further explanation, most of the grounds of opposition. In particular, IDS disputes the correctness of Industrius' interpretation of the law and states that unless the statute expressly and specifically excludes portions of South African law from application, then they remain applicable.[6]

ISSUES FOR DETERMINATION

[24] The Court is called upon to determine: -

[a] whether IDS is entitled to seek security under the present circumstances.

[b] whether there is *prima facie* merit in IDS's stay application and if so, whether the issues germane to the security application are sufficiently interlinked to IDS's stay application for this Court to

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5 Answering affidavit, paragraphs 5 to 11.
6 Replying affidavit, paragraph 6.3.

exercise its discretion to order security for costs as claimed.

[c] whether article 5 of the Model law still bears application to stay proceedings brought to prevent the enforcement and execution of an arbitration award.

[b] whether it is permissible for a South African Court to apply the URC and the usual considerations relating to security for costs when the IAA is applicable.

SUBMISSIONS ON BEHALF OF IDS

[25] I summarise IDS's main points of argument.

[26] IDS relies on two main facts in support of its contention in favour of security for costs and those are that Industrius is a *peregrinus* of this Court and has no movable or immovable assets, nor any interests, in the Republic capable of satisfying an award of costs.

[27] Neither IAA nor the Model law contain provisions which regulate or prescribe the manner in which a competent Court is to handle an application brought for the enforcement of an award. It is implied that a competent Court would follow the procedures usually adopted by such Court. The contrary would lead to a *lacuna* in which no procedure would exist in terms of which a party could approach a Court for enforcement. Accordingly, the internal procedure of any competent Court in an application for enforcement is not governed by article 5 of the Model law.

[28] It cannot be said therefore that a Court is *"intervening"* in circumstances where a competent Court is approached by one of the parties for enforcement made pursuant to a concluded arbitration proceeding.

[29] Rule 47 of URC regulates procedural issues only relating to security for costs. The substantive provisions of when a court may and should award security for costs is regulated by the provisions of common law. IDS approached this Court for resolution of the dispute pertaining to its contended right to security for costs and in this regard the provisions of sections 34 and 8(3) of the South African Bill of Rights are applicable, which provide that: -

[a] everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court;

[b] when applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a Court, in order to give effect to a right in the Bill, must apply the common law to the extent that legislation does not give effect to that right.

[30] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely: -

[a] that statutory provisions should always be interpreted purposively;

[b] the relevant statutory provision must be properly contextualised; and

[c] all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.

[31] When interpreting IAA, a South African Court is obliged to apply the common law when it is applicable in matters relating to the IAA.

[32] If the intention of the South African legislature in giving effect to the Model law was to preclude the provisions for an application for security for costs, then the exclusion would have been catered for in the legislation. A proper interpretation of the legislative regime leads to a conclusion that the legislature never intended to preclude a Court from regulating its own processes, including issues relating to security for costs and by necessary implication a Court would have to consider the common law when considering an award for security for costs.

[33] The authority for an arbitral tribunal to grant an award for security for costs is dependent upon the instrument empowering the arbitrator. The same does not apply to a South African Court since such Court is not regulated by the Model law, although it is obliged to appropriately apply its provisions.

[34] The absence of a provision in the Model law does not stand as a prohibition to a South African Court to consider costs since the Court is not regulated by the Model law. As such, a Court cannot be said to be intervening in the application when security for costs is considered after the award.

[35] On the prospects of success of the counter-application it is not an appropriate factor as it would require an interlocutory Court to hold a dress rehearsal on the prospects of success in the main suit. It is more appropriate for the Court hearing the main application to make those determinations.

[36] The right of an *incola* to claim security for costs against a *peregrinus* does not flow from substantive law, but is rather a question of practice.

[37] The Court has a discretion to order security for costs, even in a case where the *peregrinus* is a defendant.

[38] It is trite that a Court will not in applications for security for costs enquire into the merits of the dispute or the *bona fides* of the parties.[7]

[39] The very nature and purpose for seeking security for costs is the uncertainty and inconvenience and expense in attempting to recover costs orders in foreign jurisdictions.[8]

SUBMISSIONS ON BEHALF OF INDUSTRIUS

[40] I summarise Industrius' main points of argument.

[41] There is no defence to the application by Industrius for enforcement of the award and IDS raises none.

[42] The Court has a discretion whether a *peregrinus* applicant should be ordered to give security for costs.[9]

[43] The Court should not order security where the *peregrinus* seeks to enforce a valid arbitral award. To do so would undermine the international arbitral process and its functioning in South Africa.

[44] Article 34 of the Model law sets out the exclusive recourse to a Court against an international arbitral award. IDS has not sought to employ any such remedy. Nor does IDS dispute that the award is binding on it.

[45] The proper time for an *incola* to seek security from a *peregrinus* is in the

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7 Arkell & Douglas v Berold 1922 CPD at 198; Estate Fawcus v Wood 1934 CPD 234 at 249; Banks v Henshaw 1962 (3) SA 464 (D).

8 Exploitatie-EN Beleggings Maatschappij Argonauten 11 BNV and Another v Honig 2012 (1) SA 247 (SCA) at 255.

9 Magida v Minister of Police 1987 (1) SA 1 (A).

arbitration, which was in fact done, albeit unsuccessfully.

[46] When an award against the *incola* has been made, the enforcement process should be allowed to proceed unimpeded, barring any application to set aside the award on the limited grounds set out in article 34 of the Model law.

[47] IDS is the applicant in the counter-application. IDS thus cannot seek costs from a *peregrinus* respondent.[10]

[48] The counter-application to stay has no basis in law or in fact. IDS should not be allowed to frustrate the payment of the award.

[49] The arbitrator decided the case on the merits in dismissing the counter-application. In reaching the conclusion, the arbitrator held that the purported Medupi and Kusile subcontracts on which IDS relied, were a fiction and did not govern or have any application to the relationship between the parties.

[50] In terms of the arbitration agreement there was no appeal against the award and the award was thus final. IDS has not sought to review the award, nor would there be any basis in the IAA or the Model law to do so.

[51] 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). No such application has been made or is pending. The action is not an application for the setting aside or suspension of the award, nor could it be since there is no dispute that the award is binding.

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10 Banks v Henshaw 1962 (3) SA 464 (D).

DELIBERATION

INTERNATIONAL ARBITRATIONS

[52] For arbitration to function as an effective alternative dispute resolution mechanism for international commercial disputes, the recognition and enforcement of foreign arbitral awards are fundamental.

[53] Within the present context of this matter, section 39(1) of the Constitution specifically provides that *"[W]hen interpreting the Bill of Rights, a court… must consider international law*." The IAA provides for the recognition and enforcement of foreign arbitral awards in South Africa and explicitly states that the provisions of both the convention and the model law are subject to the Constitution.[11]

[54] The IAA incorporates the Model law as well as the full text of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*"the convention"*). South Africa acceded to the convention on the recognition and enforcement of foreign arbitral awards in 1976 and enacted the Recognition and Enforcement of Foreign Arbitral Awards Act, 40 of 1977 (repealed) to comply with its international law obligations as a contracting state of the convention. The convention is incorporated into the IAA in schedule 3 and the Model law as schedule 1.

[55] It is therefore quite clear that the IAA, Model law and convention not only form part of the laws of South Africa, but South African Courts *"must"* consider the IAA (and therefore also the Model law and convention) when interpreting the Bill of Rights.

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[11] Sections 2 and 3(d) of the IAA; Constitution of the Republic of South Africa, 1996.

[56] IDS's argument that South African Courts, when interpreting the IAA, are obliged to apply the common law when it is applicable in matters relating to the IAA is an inaccurate and general proposition made without due regard to the wording of section 8(3) of the Bill of Rights which states that a court "*must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right*" and the provisions of section 39(1).

[57] Firstly, the IAA provides for security for costs in specific instances. The fact that it does not provide for security for costs within the context of the present application, does not render the IAA unconstitutional or oblige the Court to turn to the common law.

[58] Moreover, IDS's reliance on section 34 (access to court and fair public hearings) of the Bill of Rights is similarly misplaced. IDS is a contracting party to an arbitration agreement in terms whereof the parties elected to have their disputes resolved, not through a court, but through a private arbitral tribunal. Therefore, in accordance with Chapter 3 of the IIA, South African Courts must enforce and recognize arbitration agreements.

[59] The principle of party autonomy is also linked to freedom to contract and to upholding the terms of the arbitration agreement.[12] It is well-known that arbitration is the preferred mechanism employed in resolving international commercial disputes in that the parties can effectively regulate their own process.

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[12] Burton, "The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate" (2006) Journal of Dispute Resolution 469 at 470; See also Baboolal-Frank, Judicial Hostility towards International Arbitration Disputes in South Africa: Case Reflections" (2019) South Africa Mercantile Law Journal 31 at 373

[60] Judicial intervention is limited and discouraged to safeguard party autonomy, the foundation of international commerce.[13] It is therefore not surprising that article III of the convention is peremptory in that *"each contracting State shall recognise arbitral awards and enforce them"* is often referred to as the convention's *"pro-enforcement bias*".[14]

[61] The IAA contains two sets of provisions on recognition and enforcement, namely those contained in the convention and those in the Model law. Significantly, subsection 16(1) of the IAA requires that an arbitration agreement and foreign arbitral award "*must"* be recognised and enforced in South Africa as required by the convention, subject to section 18 of the IAA which provides exhaustive grounds for the refusal of the recognition and enforcement of foreign judgments.

[62] The grounds for an application to set aside an arbitral award in the jurisdiction where the award was made, as provided for in article 34 of the Model law, also correspond with the grounds for the refusal of recognition and enforcement as set out in article 36 of the model law and article V of the convention. Christie commented that: -

> *"The advantage of such an alignment is obvious: An award that cannot be set aside cannot be refused recognition and enforcement in any of the … states which have become parties to the Convention, and an award that can be set aside can also be refused recognition and enforcement."*[15]

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13 De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being & Another 2015 (1) SA 106 (SCA); Bidoli v Bidoli 2011 (5) SA 247 (SCA)

14 UNCITRAL Secretariat Guide (2016), p 78.

15 Christie, Arbitration: Party Autonomy or Curial Intervention II: International Commercial Arbitrations (1994) 111 SALJ 360 at 369.

[63] While it is not expressly so provided, the Courts have considered the burden of proof under article V(2) of the convention to rest with the party opposing recognition and enforcement.[16] It would also explain why a party who challenges the enforcement and recognition may be called upon to provide security.

[64] IDS on its own version does not challenge the recognition and enforcement of the award. The award has not been set aside or suspended either. In any event, even if IDS did challenge the award, it could only do so on limited grounds and only Industrius, and not IDS, would be entitled to apply for security for costs. The intention of the security provision under article VI of the convention is quite clear - to prevent an abuse of the setting aside/suspension provision by the losing party which may have started annulment proceedings without a valid reason purely to delay or frustrate the enforcement of the award.[17] The permissive language used in article VI as mirrored in section 18(3) of the IAA is also instructive. It indicates that the application for adjournment (and so also the providing of security)[18] is a matter of discretion.[19]

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16 UNCITRAL Secretariat Guide (2016), p 129.

17 Travaux préparatoires, United Nations Conference on International Commercial Arbitration, Summary Record of the Seventeenth Meeting, E/CONF.26/SR.17, p. 4

18 Spier v. Calzaturificio Tecnica S.p.A, District Court, Southern District of New York, United States of America, 29 June 1987, 663 F. Supp. 871; Consorcio Rive, S.A. de C.V. v. Briggs of Cancun, Inc., David Briggs Enterprises, Inc., District Court, Eastern District of Louisiana, United States of America, 26 January 2000, 99-2205, XXV Y.B. Com. Arb. 1115 (2000); Yukos Oil Co. v. Dardana Ltd., Court of Appeal, England and Wales, 18 April 2002, [2002] EWCA Civ 543; IPCO v. Nigeria (NNPC), High Court of Justice, England and Wales, 27 April 2005, [2005] EWHC 726 (Comm); The Republic of Gabon v. Swiss Oil Corporation, Grand Court, Cayman Island, 17 June 1988, XIV Y.B. Com. Arb. 621 (1989).

19 Hebei Import & Export Corp v. Polytek Engineering Co. Ltd., High Court, Supreme Court of Hong Kong, Hong Kong, 1 November 1996, [1996] 3 HKC 725

[65] Under article VI, only the party opposing enforcement can be ordered to provide security. In one reported case, a court decided that it was "justified that the claimants give security [...] for the case of anticipatory enforcement."[20] Several years later, another court in the same jurisdiction held that the Convention offers no basis to order security from the party seeking enforcement.[21] In 1993, a court in Germany held that pursuant to article VI of the Convention, a court may only order the party opposing enforcement to provide adequate security, but not the party seeking enforcement.[22] Since then, it appears that courts have consistently refused to order the party seeking enforcement to provide security as a condition for enforcing the award.[23]

[66] Articles III and IV of the convention concern the formalities of the enforcement procedure under the convention. The simplicity of the formal enforcement procedures is instructive. It provides insight as to why an application for security for costs is only provided for in limited instances such as in the case of setting aside and suspension of arbitral awards. This has the effect that courts are seldom faced with matters in which they have to rule on non-compliance with these two articles.[24]

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20 Henri Lièvremont and v. Adolphe Cominassi, Maatschappij voor Industriele Research en Ontwikkeling B.V., President of Rechtbank, Court of First Instance of Zutphen, Netherlands, 9 December 1981, VII Y.B. Com. Arb. 399 (1982)

21 Southern Pacific Properties v. Arab Republic of Egypt, President of the District Court of Amsterdam, Netherlands, 12 July 1984, X Y.B. Com. Arb. 487 (1985)

22 Oberlandesgericht [OLG] Frankfurt, Germany, 10 November 1993, 27 W 57/93. See also Powerex Corp., formerly British Columbia Power Exchange Corporation v. Alcan Inc., formerly Alcan Aluminum Ltd., Court of Appeal of British Columbia, Canada, 4 October 2004, 2004 BCCA 504.

23 See, e.g., Gater Assets Ltd. v. Nak Naftogaz Ukrainiy, Court of Appeal, England and Wales, 17 October 2007, [2007] EWCA Civ 988; Yukos Oil Co. v. Dardana Ltd., Court of Appeal, England and Wales, 18 April 2002, [2002] EWCA Civ 543.

24 Di Pietro & Platte, (Cameron May 2001) 128

[67] Article III further prohibits a Court from imposing *"substantially more onerous conditions or higher fees or charges on the recognition and enforcement of arbitral awards to which this convention applies than are imposed on the recognition and enforcement of domestic arbitral awards"*. In my view this would include an instance where a successful party applies to Court for the enforcement of an arbitral award only to be faced with an application for security for costs. Such judicial intervention would discourage parties from choosing South Africa as a juridical seat in international arbitrations which, in turn, will have a negative effect on the country's economy.

[68] The Supreme Court of Appeal has recognised the need to favour party autonomy and avoid judicial intervention in commercial arbitration matters and South Africa in this regard therefore aligns itself with the stance taken by other jurisdictions such as Australia[25]. In Zhongij Development Construction Engineering Company Ltd v Kamoto Copper Company SARL,[26] Willis JA (for the majority) stated that there is a duty to recognise international arbitration:

"South African courts not only have a legal but also a socio-economic and political duty to encourage the selection of South Africa as a venue for international arbitrations. International arbitration in South Africa will not only foster our comity among the nations of the world, as well as international trade but also bring about the influx of foreign spending to our country."

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25 TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia [2013] HCA 5

26 2015 (1) SA 345 (SCA) 345; par 30

[69] Gorven AJA emphasized the sanctity of contract and party autonomy[27] by stating:

"[59] With reference to the rules and the international trend referred to and relied on by both parties, it is clear that if courts arrogate to themselves the right to decide matters which parties have agreed should be dealt with by arbitration, the likelihood of this country being chosen as an international arbitration venue in future is remote in the extreme. Persons wishing to have their disputes resolved by arbitration do not wish the process to be retarded by constant recourse to courts."

[70] I therefore find that:

[a] IDS is not entitled to seek security under the present circumstances.

[b] article 5 of the Model law still finds application.

[c] the URC and the usual considerations relating to security for costs do not apply in matters concerning international arbitrations and the IAA.

SECURITY FOR COSTS

[71] Even if I am wrong in my finding that IDS is not entitled to seek security and that the URC does not apply, the security application still has no merit in my view.

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[27] Wethmar-Lemmer & Schoeman, "The International Arbitration Act 15 of 2017: Impetus for Development on the Cross-Border Commercial Front", (2019) TSAR 1 127 at 130

[72] The Court has a discretion whether or not to order security to be lodged in any given case, a discretion which is to be exercised by having regard to all the relevant facts, as well as considerations of equity and fairness to both parties.

[73] It is an established practice and not part of the substantive law that a Court may order security for the judgment on the counterclaim of the resident defendant against the foreign plaintiff.[28] Africar (Rhodesia) Ltd v Interocean Airways SA[29] and Prentice and Mackie v Bells Assignee [30] and Schunke v Taylor and Symonds [31] and Taylor v Merrington[32] are all authority for the proposition that a *peregrinus* plaintiff can be ordered to give security for a claim in reconvention.

[74] However, a Court should be slow to conclude that considerations of fairness and equity favour the granting of security and should do so only in the most exceptional of circumstances, if at all[33] *"particularly in present-day circumstances"*[34] where intercontinental travel and communication has become infinitely swifter and more convenient. *"Legal practice should not stand aloof from such changes but should recognise them and their impact."* As it was put by Goldstone J in Elscint (Pty) Ltd v Mobile Medical Scanners (Pty) Ltd:[35] -

> *"Considerations of fairness and justice and the reality of modern international commerce and efficient means of travel and*

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28 Saker & Co Ltd v Grainger at 227.

29 1964 (3) SA 114 (SR).

30 1960 H 29.

31 (1891) 8 SC 103.

32 (1885) 2 SAR 30.

33 See B&W Industrial Technology (Pty) Ltd and Others v Baroutsos, paragraphs 38 to 42.

34 B & W; paragraph 38, p 143.

35 1986 (4) SA 552 (W) at 557H.

communication militate against treating foreign defendants who have submitted to the jurisdiction more harshly than incola defendants."

[75] Milne J in Sandock Austral Ltd v Exploitation Industrielle et Commerciale-Bretic[36] pointed out the ease of suing in the peregrine's own forum at 286H: -

"[I]t is not suggested that the French Courts would not enforce the plaintiff's claim and it does not seem to me a totally irrelevant consideration that international travel is a great deal easier and quicker nowadays and the task of following the peregrinus to his own forum is accordingly less arduous than before."

[76] In Compair SA (Pty) Ltd v Global Chemical Co (Pty) Ltd[37] Aaron AJ said: -

"A counterclaim is technically separate and distinct from the claim in convention, and it is probably competent to order, in a proper case, that a defendant gives security for the costs of the counterclaim. Nevertheless the issues in the conventional action and the reconventional action may be so closely related that, if the court orders a plaintiff in reconvention to give security for costs, it may in effect be ordering it to give security for the costs brought about by its defence of the action in convention. Accordingly, although it may be competent for a court to order security to be given by a plaintiff in reconvention, the court may in the exercise of its discretion decline to do so in such cases."

[77] In B&W Industrial Technology (Pty) Ltd and Others v Baroutsos[38] the Full Bench of this Court had opportunity to deal with an appeal concerning two applications against a *peregrine* respondent. In the first application, the

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36 1974 (2) SA 280 (D).

37 1985 (1) SA 532 (C) at 532I - 533A.

38 2006 (5) SA 135 (W).

appellants sought security for costs of the respondent's claim against them and in the second application which related to a separate action they sought security for costs and for the potential value of their counterclaims, should they succeed. I pause to state that the applications were dismissed primarily on the grounds of substantial delay, which is not one the grounds of opposition in the present matter.

[78] More importantly for present purposes, in the second application the Court was of the view that in modern commercial actions it was undesirable and not generally in the interest of justice to order security in respect of claims in reconvention. The Full Bench fortified its finding as follows at paragraph 37 of the judgment: -

> *"The equity and fairness of directing security for costs where an incola is sued by a peregrine plaintiff is far more readily apparent than the equity and fairness of requiring a peregrine plaintiff to give security for the judgment likely to be obtained against him on a counterclaim by an incola. In the first instance, the claim has been brought by the peregrinus; he has chosen to litigate against the incola. In the second case, the claim for which security is sought is brought by the incola and not the peregrinus; it is the incola who has chosen to litigate insofar as his claim is concerned. Where the incola is a defendant in convention, he is such involuntarily. He has no choice in the matter. In the case of a counterclaim, the incola acts voluntarily and chooses to sue. Having done so, he now turns to his peregrine opponent and requires that the latter secures the incola's counterclaim."*

[79] The Full Bench in B&W, correctly in my view, stated that: -

> *"It is not in accordance with modern commercial needs, nor is it just or equitable to impose such a burden on peregrine plaintiffs who*

chose to sue their alleged debtors in South African courts."[39]

[80] This is now even more so in the case of international commercial arbitration conducted with South Africa as its juridical seat.

[81] It is neither in accordance with modern commercial needs, nor just and equitable to impose the burden of having to give security, for the amount of an *incola* defendant's counterclaim, on a *peregrinus* plaintiff particularly in circumstances where the *peregrinus* plaintiff resides in a civilized country with a civilized legal system and where there is nothing preventing the *incola* defendant, given the present ease of travel and communication, from suing the *peregrinus* plaintiff in his/her own country.[40]

[82] In Shuncke v Taylor and Symonds the Court held that a defendant is sufficiently protected from being unduly harassed by unfounded claims by compelling a foreign plaintiff to give full security for costs either expressly or by being possessed of property available in case of his failing in his action. To compel such plaintiff, who follows his debtor to such debtor's *domicile*, and sues him in his own forum, to furnish security for any amount of damages which such debtor alleges he intends to claim by way of reconvention would open the way to a denial of justice.

[83] The factors which the Court will consider in the exercise of its discretion to determine an application for security for costs are case-specific. No list of factors to be rigidly followed exists indicating which factors weigh more heavily than others. Some guidelines exist that may influence the Court in the exercise of its discretion. These include whether the plaintiff's claim is

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39 Paragraph 42.

40 Silvercraft Helicopters (Switzerland) Ltd and Another v Zonnekus Mansions (Pty) Ltd and two other cases 2009 (5) SA 602 (C), paragraph 46, p 611.

made in good faith or whether it is *mala fide*, whether it can be concluded that plaintiff has a reasonable prospect of success and whether the application for security was used to stifle a genuine claim.

[84] Williams AJ held in Alexander v Jokl and Others:[41] -

"The bona fides or the soundness of the claim of the peregrinus is at no time a factor which influences the discretion to be exercised in deciding whether or not an incola should be protected against possible loss in regard to the costs of defending the claim brought against him. The court in ordering security for such a purpose does not in any way anticipate the eventual decision on the claim by investigating and weighing up at that stage the probabilities of success or the bona fides of the claim…"

[85] Apart from stating that Industrius is a *peregrine* and has no unmortgaged immovable property in South Africa, IDS has failed to establish any exceptional circumstances to justify an order for security for costs. It was most certainly not argued that Croatia is anything but a civilized country with a civilized legal system nor that there is anything preventing IDS, given the present ease of travel and communication, from enforcing in Croatia any costs order that may be granted in its favour. Furthermore, Croatia is a party to all the relevant treaties for the enforcement of foreign arbitral awards.

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41 1948(3) SA 269 (W) at 281.

[86] In view of my finding on the absence of exceptional circumstances I am not required to consider whether there is *prima facie* merit in IDS's stay application and therefore defer this issue to the Court hearing the enforcement and stay application.

COSTS

[87] It was argued on behalf of IDS that I should not allow the costs of two counsel, should I find in favour of Industrius. It is not disputed that Industrius was represented by two counsel throughout the arbitration proceedings. Complex matters of law were argued which justify the employ of senior and junior counsel. I therefore do not find any reason why I should limit Industrius from recovering the costs of one counsel only.

ORDER

[88] In the circumstances I make the following order: -

[a] The application for security for costs is dismissed.

[b] The applicant (IDS) shall pay the respondent's (Industrius) costs, including the costs consequent upon the employment of two counsel.

F. Bezuidenhout

F BEZUIDENHOUT

ACTING JUDGE OF
THE HIGH COURT

Date of Hearing: 15 March 2021

Date of Judgment: 28 April 2021

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(With him IB Currie)

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