Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 19118/2015

In the matter between:

AARON KEVEN DANIELSON **Applicant**

and

ALBERTUS JOHANNES HUMAN **First Respondent**

JAN PETRUS HUMAN **Second Respondent**

Court: Justice J Cloete

Heard: 30 May 2016

Delivered: 1 August 2016

JUDGMENT

CLOETE J:

Introduction

[1] The applicant seeks an order recognising and enforcing a judgment against the respondents of the United States District Court, Western District of North Carolina (Charlotte Division) handed down in his favour on 2 May 2014 (*'the judgment'*).

[2] The respondents admit the judgment and the amounts awarded therein; that it is final and conclusive and no appeal is pending; that they are out of time to apply for its rescission; and that they have made no attempt to have it rescinded.

[3] There is also no suggestion that the judgment has become superannuated or was obtained by fraudulent means; or that it involves the enforcement of any penal or revenue law of the United States of America (the six jurisdictional requirements for enforcement of a foreign judgment are set out in *Jones v Krok* 1995 (1) SA 677 (A) at 685B-E).

[4] The respondents raised four grounds of opposition to the relief sought. Of these, two were fairly not pursued in argument (they pertained to whether the respondents had notice of the proceedings against them which culminated in the judgment and whether the American court had international competence over them).

[5] The only issues which therefore remain to be determined are: (a) whether the provisions of the Protection of Businesses Act 99 of 1978 (*'the Act'*) apply to the recognition and enforcement of the judgment (and consequently, whether ministerial permission is required as a jurisdictional fact for the relief sought); and (b) whether the judgment contains a *'punitive element'* which for this reason makes its recognition and enforcement contrary to South African public policy.

Background

[6] The applicant is a businessman residing in Colorado Springs, United States of America. The respondents, who are brothers, are businessmen residing in Strand and Somerset West respectively.

[7] The applicant and respondents previously concluded various contracts in a joint venture to develop and market hybrid battery technology in the United States. The respondents were the inventors of the technology as well as its marketers. The applicant invested USD 1 million in the venture and in return acquired various ownership interests, the position of managing director in one of the entities involved, and exclusive licencing rights to the hybrid battery technology.

[8] The business relationship soured and on 12 December 2012 the applicant (in person) instituted civil proceedings against the respondents, which culminated in the judgment (granted by default) in which the applicant was awarded damages of USD 859 595.51, trebled to USD 2 578 786.51 as well as costs of USD 492.14.

The judgment

[9] As is apparent from the judgment the applicant's award was based on the American court finding that the respondents breached certain provisions of the Racketeer Influenced and Corrupt Organizations Act (Stat 922 codified at 18 U.S. vols 1961-1968) more commonly known as RICO, and more particularly those provisions falling under what the judge termed "Civil RICO".

[10] In referring to various United States judgments pronouncing on the issue the judge stated that damages violations of Civil RICO *'include treble damages, costs and attorney's fees…'* and further that:

> *'Punitive damages are not available because "Statutory damages under RICO already contain a punitive component in the form of the trebling provision"'.*

[11] In respect of *'treble damages'* the judge stated that:

> *'Because treble damages are designed to fully compensate a plaintiff for intangible injuries where actual damages are often speculative or difficult to prove, the Court declines to assess damages for the exclusive patent rights promised to plaintiff…the Court also declines to award pre-judgment interest because of the treble damages award. Like treble damages and punitive damages interest functions as a remedial sanction, and the statutory damages multiplier in this case already serves the corrective purpose.'*
>
> [emphasis supplied]

[12] The judge also declined to award the applicant any amount based on violations of State Law (arising from the same facts) for two reasons: (a) a party is prohibited from duplicate recovery for the same damages; and (b) the damages recoverable pursuant to the Civil RICO claims were inclusive of those recoverable under the State Claims.

[13] It is not this court's function to *'go into the merits of the case adjudicated upon by the foreign court'* or *'to attempt to review or set aside its findings of fact or law'*: *Jones v Krok* supra at 685D-E.

The first issue: applicability of the Protection of Businesses Act 99 of 1978 (*'the Act'*)

[14] S 1(1)(a) of the Act provides that:

> *'1. **Prohibition of enforcement of certain foreign judgments, orders, directions, arbitration awards and letters of request and furnishing of information relating to businesses in compliance with foreign orders, directions or letters of request.** ---(1) Notwithstanding anything to the contrary contained in any law or other legal rule, and except with the permission of the Minister of Economic Affairs ---*
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> *(a) no judgment, order, direction, arbitration award, interrogatory, commission rogatoire, letters of request or any other request delivered, given or issued or emanating from outside the Republic in connection with any civil proceedings and arising from any act or transaction contemplated in subsection (3), shall be enforced in the Republic;'*

and s 1(3) that:

> *(3) In the application of subsection (1)(a) an act or transaction shall be an act or transaction which took place at any time, whether before or after the commencement of this Act, and is connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into or from the Republic.'*

[15] In *Fattouche v Khumalo* (an unreported judgment of Weiner J of 6 May 2014, South Gauteng High Court, case no 508/12) the learned judge set out the approach of our courts in determining whether the transaction in issue falls within the ambit of s 1 of the Act as follows:

'[21] Section 1(3) of the Businesses Act which, with a cross-reference to section 1(1), requires Ministerial consent for "any act or transaction connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership (sic) to any matter or material, of whatever nature, whether within, outside, into or from the Republic"*. (emphasis added).*

[22] The words "connected with" *in section 1(3) are open to a very wide interpretation. Courts have held that the application of this section is considerably narrowed by the proper interpretation of the words "*matter or material"*. A restrictive interpretation has accordingly been adopted.*

[23] In Tradex Ocean Transportation SA v MV Silvergate (Astyanax) and Others *1994 (4) SA 119 (D), Section 1(3) of the Businesses Act was raised as a defence to a Greek judgment and London arbitration awards relating to the charter of a ship. After analysing the dictionary definitions of* "matter" *and* "material"*, Howard JP concluded that 'matter or material' was limited to 'raw materials or substances from which physical things are made and not manufactured things'. At 120J – 121C:-*

> *"the dictionary definitions indicate clearly enough that 'matter or 'material' in this context means raw materials or substances from which physical things are made and not a manufactured thing such as a ship. The reference in s 1(3) to the mining, production, importation, exportation and refinement of 'matter or material' (with no reference to manufacture) is a further pointer to the meaning which that expression is intended to bear: cognoscitur a sociis. I do not think that the words 'of whatever nature' justify an extension of the ordinary meaning of 'matter and material'. If that expression ordinarily denotes raw materials or substances, the words 'of whatever nature' merely indicate that it embraces everything within that category. I therefore conclude that the ship which features in this case is not `matter or material' within the meaning of that expression as used in s 1(3) of the Act. It follows that the foreign judgment and awards which the plaintiff seeks to enforce do not arise from any act or transaction contemplated in s 1(3) and that the plea in bar does not disclose a defence."*

[24] In Chinatex Oriental Trading Co v Erskine *1998 (4) SA 1087 (C), Chetty J stated at 1095I – 1096C:-*

> *"Howard JP in Tradex ... found that the expression 'any matter or material' means 'raw materials or substances' for two reasons: (i) it was supported by the dictionary definition of the word 'matter' and 'material' and (ii) the Legislature pertinently in*

> *s 1(3) referred to a transaction connected with the mining, production, importation, exportation and refinement of any matter or material but did not refer to manufacture. In my view the above reasoning is convincing and the matter correctly decided. The wording of the section evidences a clear indication that the Legislature intended to refer to raw materials or substances and not manufactured goods such as garments. Consequently the plaintiff is not precluded by the provisions of the Protection of Businesses Act ... from seeking to enforce the judgment of the English court."*

[25] The restrictive approach was subsequently approved in Richman v Ben-Tovim *2007 (2) SA 283 (SCA), which held that the Act was not applicable to a claim for money due for professional services. In consideration of Section 1(3) of the Act, Zulman J held at 11:-*

> *"The wording of the section refers to transactions connected with raw materials or substances. Even manufactured goods are excluded from the operation of the Act. The plaintiff's claim is for services and disbursements related to negotiations, advice, drafting of contract documents and incidental matters pertaining to a restructuring, re-arrangement (and ultimately) dissolution of joint ventures between the respondent, on the one hand, and various affiliates of the De Beers group of companies. If manufactured goods are sufficiently remote from 'matter' and `material' within the meaning of the Act by parity of reasoning there can be no scope for applying it to a claim for payment sounding in money where the claim is one for professional services rendered. I accordingly consider that this defence is without merit." (emphasis added).'*

[16] The respondents contend that underpinning the contracts concluded (and from which the applicant's claims in the American court arose) was the application of the hybrid battery technology. They submit that this technology relates directly to mining, production and refinement of matter or materials in that: (a) electro-extraction methods are employed in the production and refinement of lead, copper, gold, silver, zinc and various other raw materials; and (b) the hybrid battery technology is used in the production of hydrogen gas from raw materials as well as the extraction of oxygen from a solid lead fuel cell. They accordingly argue that the

judgment relates directly to a transaction referred to in s 1(3) of the Act and, given the lack of ministerial permission, this application must fail.

[17] However, although the technology might arguably have its foundation in *'raw materials or substances from which physical things are made'* (*Tradex* supra) the *'act or transaction'* giving rise to the applicant's case in the American court was not the technology itself but rather – as the respondents themselves acknowledge – contracts concerning the application of that technology. The application of that technology was limited, in the applicant's case, to him acquiring certain ownership interests in various entities as well as exclusive licencing rights in respect of the technology.

[18] The position is thus comparable to that in *Fattouche* supra where the court found at para [29]:

> *'[29] Having regard,* inter alia*, to the underlined portion of the* Richman *judgment above and the restrictive approach of the courts, I am of the view that Section 1(3) of the Businesses Act would not be applicable to an arbitral award arising from a dispute regarding the sale of shares since the shares cannot be classified as raw matter or material (notwithstanding that such shares are shares in the mining company).'*

[19] It follows that the *'act or transaction'* in question falls outside the scope of s 1(3) of the Act and it was thus not incumbent upon the applicant to obtain ministerial permission.

The second issue: whether the judgment contains a *'punitive element'*

[20] S 1A(1) of the Act reads as follows:

> *'No judgment delivered by a court outside the Republic, arising from any act or transaction referred to in section 1(3) and directing the payment of multiple or punitive damages shall be recognised or enforced in the Republic, irrespective of whether or not the Minister has in terms of s 1 granted his consent as contemplated in that section.'*

[21] S 1A(1) has no application in the present matter, given that the *'act or transaction'* falls outside the scope of s 1(3). It is thus necessary to consider the common law position.

[22] In *Jones v Krok* 1996 (1) SA 504 (T) [which for reasons not relevant for present purposes followed on the decision of the former Appellate Division in the same matter] Kirk-Cohen J held that: (a) it is the policy of South African law and practice that for breach of contract the injured party is entitled to no more than compensation for the damages actually suffered, irrespective of reprehensible behaviour of a defendant or the flagrancy of the breach [at 516G]; (b) the mere fact that awards are made by a foreign court on a basis not recognised in South Africa does not mean that they are necessarily contrary to public policy, and whether a judgment or award is contrary to public policy depends largely on the facts of each case [at 515H]; and (c) in principle it would be wrong to refuse to enforce a foreign order of punitive damages merely because it is unknown in South Africa, and it cannot be said that this principle is necessarily unconscionable [at 516E].

[23] Having regard to the aforegoing it seems to me that scrutiny of the facts of a particular case should include a consideration of the true nature of the damages award contained in the judgment at issue, and not merely the label given to that award by the prevailing law of the foreign jurisdiction.

[24] The foreign award which Kirk-Cohen J had to consider was comprised of two elements, namely compensatory damages arising from breach of contract and punitive damages based on the defendant's *'fraud and conversion of assets'* [at 509B-C]. An expert on Californian law (which applied in the foreign court) explained that:

> *'In addition to seeking compensatory damages plaintiff also sought punitive damages against defendant … and his daughters for fraud and for conversion of … assets. Under California Civil Code s 3294 an award of punitive or exemplary damages is only permitted in an action for breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice.'* [at 509B]

[25] After reviewing the authorities the learned judge concluded that it would be contrary to public policy to allow the foreign judgment to be enforced for the following reasons:

> *'The punitive damages awarded amount, for all practical purposes, to granting the plaintiff double the amount of damages she claimed and was awarded. The fact that the trial Judge reduced the jury's subjective calculation does not assist the plaintiff. The award was granted because of the reprehensible behaviour of the defendant. On a parity of reasoning with the facts in Taylor's case the award is so excessive and exorbitant that, in my view, it is contrary to public policy in this country; by that I mean that to double an already high award which was adequate compensation cannot be countenanced.'* [at 517F-H]

[26] The respondents contend that the *'trebling'* component of the judgment at issue is, of itself, evidence of a punitive element, the enforcement of which would be contrary to South African public policy.

[27] To my mind however this is not the proper enquiry. It is rather whether or not the damages awarded are in fact compensatory (as opposed to strictly punitive) in nature. As was stated by Ackermann J in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para [62]:

> *'It must of course be borne in mind that it is not always easy to draw the line between an award of aggravated but still basically compensatory damages, where the particular circumstances of or surrounding the infliction of the* injuria *have justified a substantial award, and the award of punitive damages in the strict and narrow sense of the word.'*

[28] It must of course immediately be stated that in *Fose* the Constitutional Court was considering the issue within the context of delictual, and not contractual damages. However, to my mind, what the learned judge expressed has equal relevance to the considerations at issue in the present matter.

[29] In support of the relief which he seeks, the applicant filed an affidavit by Professor George Blakey, who is a professor of law at Notre Dame Law School, United States of America. His curriculum vitae reveals his competence to provide an expert opinion to this court, and his expertise was correctly not challenged by the respondents. Prof Blakey was asked to provide an opinion on the legal character of the treble damages provision in RICO, and in particular whether that provision is compensatory or punitive in nature.

[30] According to Prof Blakey the treble damages provision in RICO: (a) has repeatedly been acknowledged by the American courts to constitute remedial relief; (b) does not permit the award of *'punitive'* damages because its purpose is to *'make whole'* the harm suffered; and (c) does not exclude the recovery of punitive damages under State Law for the same course of conduct.

[31] Prof Blakey explained as follows:

> *'At the same time, and similarly, RICO's treble damage provisions do not authorize "punitive" damages. They are two different and distinct legal entities, both in operation and purpose. RICO's treble damages are* automatically *assessed* by the court *(the jury is not informed of them), they are* limited *to 3x actual damages; and they thus assure that the plaintiff…is amply incentivized to bring such litigation by providing for the recovery of "accumulative" ("full", "complete" "make-whole") his or her harm…*
>
> *On the other hand, punitive damages, often referred to a "exemplary" damages, "vindictive" damages or "smart" (as in make the perpetrator "sting") money, are* discretionarily *assessed* by the jury *based, not on some limiting, multiple-damage-relation principle to plaintiff's injury, but, generally, and independently, the* malice *and* wealth *of the defendant…*
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> *In fact, while RICO itself does not authorize an additional punitive damage claim, RICO's treble damages recovery can and should independently stand with a punitive damages recovery under state law…Indeed, of the early (1970-1981) 15 state RICO statutes authorizing civil recovery, eight* specifically *authorized, where appropriate,* both a *treble (one authorized only 2x) damage claims* and *a punitive damage claim, because they each could focus on different aspects of unlawful conduct…If treble damages were rightly understood as a subset of "punitive damages", it would be legislative redundancy of* (sic) *authorize* both *treble damages* and *punitive damages, a construction that a court ought to avoid.'*

[32] The facts before Kirk-Cohen J were that the foreign court awarded an amount for compensatory damages, but also a separate amount for *'punitive or exemplary'*

damages as determined – subjectively – by the jury, although the judge ultimately reduced that amount. As found by Kirk-Cohen J: *'The award was granted because of the reprehensible behaviour of the defendant'.* The latter award thus fell squarely into the category of *'exemplary'*, *'vindictive'* or *'smart'* damages for the purpose of making *'the perpetrator sting'* in the words used by Prof Blakey.

[33] In argument before me counsel for the respondents referred to Gregory P Joseph: Civil RICO: a Definitive Guide (3 ed). The author writes that:

> *'Not infrequently, plaintiffs seek both trebled and punitive damages for alleged RICO violations. The law is in a state of flux as to whether punitive damages may be awarded in addition to treble damages under RICO. The better view is that punitive and treble damages are mutually exclusive remedies. Moreover, to the extent that punitive damages may be recovered on any additional tort claim predicated on the same facts as the RICO violation, punitive and treble damages overlap, and the latter (or lesser) should be deducted from the former (or greater).'* [at 195]

[34] As to whether RICO's treble damage remedy is punitive in nature, Joseph states that:

> *'The Supreme Court has consistently emphasized the remedial nature of the treble-damage remedy. It has held in the arbitration context that "the treble-damages provision contained in RICO itself is remedial in nature", and, therefore, it was for the arbitrators to decide whether a contractual prohibition against an award of punitive damages precluded an award of treble damages and rendered the contractual arbitration clause unenforceable.* PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 406-07 (2003). The clear implication of* PacifiCare *is that, because treble damages under RICO are "remedial", they should not be construed as "punitive" within the meaning of contractual or state law prohibitions inhibiting arbitrators from awarding punitive damages.* See also Shearson/American Express, Inc. v. McMahon, *482 U.S. 220, 240 (1987)…'* [at 195]

[35] The aforementioned extract from Joseph's work supports the expert opinion of Prof Blakey and, to my mind, places the trebling provision in RICO, at most, into the category of aggravated compensatory damages, which are therefore not strictly punitive in nature.

[36] Moreover, one should not lose sight of what the judge in the American court in the present matter reasoned and what he specifically excluded in making the award. First, he stated that treble damages are designed to fully compensate a plaintiff for intangible injuries where actual damages are often speculative and difficult to prove. He thus declined to assess damages for what he called *'the exclusive patent rights'* promised to the applicant. Second, he refused to award pre-judgment interest because the remedial nature of the treble damages provision *'already serves the corrective purpose'.* Third, he declined to award the applicant any amount based on violations of State Law because this would result in the duplication of the award.

[37] It seems to me that the treble damage provision is designed to compensate a plaintiff for his entire loss suffered (including those components which of their nature are difficult to quantify). It is not strictly punitive in the sense that its purpose is to, in addition, punish the defendant because of his reprehensible behaviour. As was held by Kirk-Cohen J in *Jones v Krok* supra, the mere fact that awards are made by a foreign court on a basis not recognised in South Africa does not mean that they are necessarily contrary to public policy. Put differently, that a particular formula to fully compensate a plaintiff for actual loss suffered is not familiar to South African legal practice is not for that reason alone justification for the conclusion that the damages are impermissibly punitive in nature.

[38] I thus find that the recognition and enforcement of the judgment of the American court is not precluded by public policy.

Conclusion

[39] I accordingly make the following order:

1. **The judgment handed down in favour of the applicant against the respondents by the United States District Court, Western District of North Carolina, Charlotte Division, dated 2 May 2014 is hereby recognised and enforced.**
2. **The respondents are directed to pay the applicant, jointly and severally, the one paying, the other to be absolved:**
   - **2.1 The sum of USD 2 578 786.51 (two million five hundred and seventy eight thousand seven hundred and eighty six United States dollars and fifty one cents);**
   - **2.2 The sum of USD 492.14 (four hundred and ninety two United States dollars and fourteen cents); and**
   - **2.3 Interest on each of the amounts aforesaid at the rate of 15.5% per annum from 2 May 2014 until 1 August 2014; from 2 August 2014 until 29 February 2016 at the rate of 9% per annum, and thereafter at the rate of 10.25% per annum until date of payment in full in terms of section 1 of the Prescribed Rate of Interest Act 55 of 1975.**
3. **The respondents are directed to pay the costs of this application, jointly and severally, the one paying, the other to be absolved.**

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J I CLOETE