

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<p>.....</p> <p>SIGNATURE DATE</p>	

Appeal Case No: A5010/2022

GJ Case No: 15862/2020

In the matter between:

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

Appellant

And

INDUSTRIUS D.O.O.

Respondent

Neutral Citation: *IDS Industry Service and Plant Construction South Africa (Pty) Ltd v Industrious D.O.O.* (2020-15862) [2023] ZAGPHJHC 637 (5 June 2023)

Summary: Enforcement of an International Arbitration Award as contemplated by article 1(3) of the UNCITRAL Model Law on International Commercial Arbitration read with the International Arbitration Act, 15 of 2017- Application to stay pending the outcome of an action- Action has no prospects of success and barred by the arbitration agreement- No real and substantial injustice established- Appeal dismissed.

ORDER

- 1 Appeal is dismissed with costs.
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JUDGMENT

WINDELL, J:

Introduction

[1] On 9 June 2020, an arbitral award was made against the appellant, Industry Service and Plant Construction South Africa (Pty) Ltd ('IDS'). The award was made in an international arbitration as contemplated by article 1(3) of the UNCITRAL Model Law on International Commercial Arbitration (Model Law) read with the International Arbitration Act, 15 of 2017 ('the Act'), as the claimant in the arbitration, Industrious D.O.O. ('Industrious') has its place of business in the Republic of Croatia and IDS has its place of business in South Africa.¹ In terms of the award, IDS had to pay Industrious, an amount of € 2 775 853.08 together with interest and costs. IDS's counterclaim, in the amount of € 20 834 137.87, was dismissed with costs. The award was made in the absence of IDS.

¹ IDS is a private company registered in terms of the laws of the Republic of South Africa with its place of business and registered address in Boksburg. Industrious is a foreign company registered in terms of the laws of the Republic of Croatia as a limited liability company with its place of business in Bajagić, a village in Croatia.

[2] IDS failed to pay the amount due and Industrius instituted motion proceedings against IDS in terms of article 35 of the Model Law for the enforcement of the award ('the enforcement application'). IDS opposed the application and counter applied, inter alia, for an order staying any order making the award an order of court, alternatively that Industrius be interdicted pendente lite from executing the said order pending the final adjudication of an action instituted by IDS against Industrius on 20 August 2020 under case number: 19156/2020 ('the action').² On 20 August 2021 the court a quo (per Senyatsi J) granted the enforcement application with costs and made the award an order of court. The counter application to stay the proceedings was dismissed with costs. After leave to appeal was refused by the court a quo, IDS petitioned the Supreme Court of Appeal. The appeal is with leave of that Court.

[3] IDS does not challenge the award. It, in fact, concedes that there was no legal impediment for the award to be made an order of court. What is appealed against is the dismissal of the counter application, i.e., the decision of the court a quo to decline to grant a stay of the enforcement of the court order.

Background Facts

[4] IDS is a wholly owned subsidiary of a German company, namely IDS Industrieservice und Anlagenbau GmbH (IDS Germany). IDS Germany was approached by Mitsubishi Hitachi in Germany to assist its companies in South Africa in relation to the Medupi and Kusile Eskom Power Station Projects. The controlling person in IDS Germany (and IDS), Mr Drazan Vrca ("Vrca") a Croatian national, approached Ms Milenka Barac (Barac"), to assist in providing certain skilled Croatian workers who would work on the projects in South Africa, under the full supervision and

² IDS abandoned the first two prayers in the Notice of Motion and pursued only the third prayer.

control of IDS Germany and/or IDS. For this purpose, Barac formed Industrius. Over the four years, between 2013 and 2017, Industrius recruited artisans in Croatia who were sent to work under the supervision, direction, and control of Industrius at the power stations. Industrius was remunerated by IDS for the provision of this service in Euros in Croatia.

[5] However, during 2017 and 2018 disputes arose between the parties. To resolve their respective disputes, the parties concluded an arbitration agreement on 11 July 2018, referring their disputes to an arbitration tribunal in South Africa. The parties agreed that the arbitration would be conducted in accordance with the Rules for the Conduct of Arbitrations (2013 edition) of the Association of Arbitrators (Southern Africa).

[6] During July 2018 two claims were referred to arbitration for determination by an arbitration tribunal in South Africa which consisted of a sole arbitrator, Mr K. Trisk SC viz: (a) a claim by Industrius against IDS for payment of a number of unpaid invoices dated from 2016 and 2017 totalling € 2 775 853.08 in terms of the oral agreement between Vrca and Barac; and (b) a counter-claim by IDS for payment of an amount due to it in terms of the so-called “Medupi subcontract” and the “Kusile subcontract” in the amount of € 20 834 137.87. Industrius disputed that these “subcontracts” governed the contractual relationship between it and IDS.

[7] During the arbitration process, IDS sought to amend its counterclaim by introducing unjust enrichment claims as an alternative to its contractual claims. Industrius opposed the amendment. The arbitrator refused leave to amend on the basis that the proposed unjust enrichment claims fell outside his terms of reference, and the arbitration agreement. As a result, IDS launched two applications out of the

High Court Gauteng Local Division, firstly to interdict the arbitration proceedings from proceeding and secondly, to inter alia, review the arbitrator's decision to dismiss the proposed amendment.

[8] Prior to the hearing of the interdict proceedings, the matter was settled between the parties, and it was agreed that the unjustified enrichment claims could be dealt with in the arbitration proceedings. IDS, accordingly, amended its counter-claim in the arbitration on 27 September 2019 to include the enrichment claims. However, before the amendment was formally effected by way of a written amendment to the arbitration agreement, IDS's attorneys of record withdrew from the proceedings due to a fee dispute. The arbitration was scheduled for 25 May 2019. For procedural reasons, the Arbitrator ruled prior to the hearing of 25 May 2020 that what was before him insofar as IDS' counterclaims were concerned, was the counterclaim in its original form —i.e. prior to the amendment to include the alternative enrichment claims. The arbitration hearing therefore proceeded on IDS' original unamended counterclaim. On 9 June 2020 the arbitrator gave his final award in the arbitration.

Court proceedings pursuant to the arbitration proceedings

[9] The claim instituted by IDS against Industrious, contains the same cause of action, in the same amount, which formed the basis of IDS's counterclaim in the arbitration. The claim also includes, in the alternative, the enrichment claims IDS wanted to introduce during the arbitration. Industrious is defending the action and has filed a plea therein. IDS submitted that as its claim far exceeds all amounts claimed by or awarded to Industrious, the debt owed by IDS to Industrious would by virtue of set-off be entirely extinguished. It is further contended that the prospects of success at trial are good and if the stay is refused, IDS' set off would be defeated, as it would be

required to pursue its claims whilst having no way of preventing Industrious from executing its judgment.

[10] The court a quo, found, inter alia, that the appellant's action was *res judicata* and had little, if no prospects. It stated further: '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 Industrious'.

The court's inherent discretion to stay the order

[11] Article 35 of the Model Law provides for the enforcement of an arbitral award in an international arbitration, irrespective of the country in which it was made. The article provides that the award 'shall be recognised as binding and, upon application to the competent court, shall be enforced, subject to the provisions of this article and of article 36'.³ IDS did not allege that any of the grounds for refusal of an application for

³ Article 36. Grounds for refusing recognition or enforcement (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (v) the conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law a State retained even less onerous conditions. 22 UNCITRAL Model Law on International Commercial Arbitration (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or (b) if the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

enforcement in article 36 applied, but instead relied on the inherent discretion of the court to grant a stay.

[12] The court a quo found that the only remedies that an aggrieved party in an international arbitration had at its disposal to refuse the enforcement were those to be found in terms of article 36 and the Act. The appellant contends that the court a quo erred as it never challenged the award and conceded that there was no legal impediment for the award to be made an order of court. The challenge was therefore not directed at the award itself, but at the court's discretion to stay its order.

[13] I accept that the court retains a discretion to stay the execution of a court order outside the Model Law. I do so without determining the policy question of the effect of the Model Law on such discretion, as it is not decisive of this appeal. In my view, the only question that is decisive of this appeal and that needs to be determined is whether the court a quo exercised its discretion correctly in refusing to stay the order.

[14] In *BP Southern Africa (Pty) Ltd v Mega Burst Oils and Fuels (Pty) Ltd* 2022 (1) SA 162 (GJ), a stay was sought pending an appeal. Although the current matter deals with a stay pending the determination of an action, the principles to be applied in the exercise of such discretion are instructive:

'In exercising its discretion to stay execution pending completion of a petition for leave to appeal, this court must ask if real and substantial justice requires such a stay (if an injustice will otherwise be done). There is merit in exercising the discretion under these circumstances of a pending petition by having regard to the factors listed above and to the following factors (freely borrowed from *South Cape Corporation v Engineering Management Services ...*) and not intended to limit the court's discretion to see that justice be done: ... The potentiality of irreparable harm being sustained by the applicant on appeal if execution were not stayed. ... The potential of irreparable harm being sustained by the respondent if execution were not stayed.'

[15] IDS's main claim in the action is identical to its counterclaim in the arbitration. One of the special defences raised by Industrious in the action is based on *res judicata*. The defence is based on the fact that the arbitrator dismissed the counterclaim based on the Kusile and Medupi "subcontracts" on its merits. The arbitrator held as follows:

'40. The evidence of Barac made it apparent, as was pleaded by the Claimant, that both of the written contracts were nothing more nor less than a fiction. The express terms contemplated by the written instruments upon which IDS relied, on Barac's evidence, were self-evidently of no application whatever to the nature or purpose of the relationship which subsisted between the Claimant and IDS. The purpose for Vrca wishing to have these documents signed by Barac is not apparent. What is clear, however, is that neither of the documents which are attached to the Defendant's (IDS') Amended Counterclaims, were of any moment insofar as the proceedings before me were concerned.

41. I am satisfied that the version advanced by Barac, in this regard, is to be preferred to that advanced by IDS and it is her version which I accept.

47. It will be apparent from the foregoing 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.'

[16] In the court *a quo* IDS, amongst other things, submitted that the counterclaim was not *res judicata* as it was dismissed by default, and that the 'purported dealing with the merits of the counterclaim in its absence is of no force and effect', and that IDS was therefore free 'to pursue its counterclaim in the Courts of South Africa' (referring to the action that was instituted by IDS against Industrious).

[17] These arguments were abandoned on appeal and IDS seems to accept that its main claim in the action (the contractual claim founded on the 'fictional "subcontracts"')

is *res judicata*. The argument pursued by IDS in this appeal, is that the action is not *res judicata* because the alternative claims based on unjust enrichment were not before the arbitrator and were thus not dismissed by him. It is submitted that the action therefore has prospects of success and enforcing the award in the meantime will deprive IDS of its set-off. In addition, it is submitted that if the order is not stayed, IDS will have difficulty enforcing an eventual judgment in its favour in the action because Industrius is a foreign peregrinus which has no assets in the Republic of South Africa other than the arbitration award that has been made an order of court. A refusal to stay, so it is argued, will therefore cause real and substantial injustice to IDS.

[18] In its action, the appellant, in the alternative, alleges that the payments in the aggregate amount of Euro 20 834 137.87 were made to the respondent *sine causa*. It pleads as follows:

'In the alternative, and if it is found that the defendant is not obliged to reimburse the plaintiff in terms of clause 6.1. 1 of the Kusile subcontract, the defendant is obliged to do so on the basis that the amounts paid by the plaintiff were neither due nor owing by the plaintiff and were paid on the defendant's behalf and the defendant was enriched unjustly in such amounts at the expense of the plaintiff.'

[19] During argument it was contended that IDS's alternative claim is in fact brought under the *condictio indebiti* in that IDS laboured under the false misapprehension that the payments were due and payable, when in fact they were not. The respondent, on the other hand, and in support of the *res judicata* point, contends that the appellant's enrichment claims are in respect of alleged 'overpayments' or 'overcharges' or the application of incorrect exchange rates, resulting in IDS paying more than what it says was properly due to Industrius under the 'subcontracts'. As the obligation to pay can only be found in the 'subcontracts' which are fictitious, it cannot give rise to any

obligation. It further argues, that if the alternative claims are under the *condictio indebiti*, and that IDS thus mistakenly believed that the 'subcontracts' obliged Industrious to reimburse IDS for airfare, hours worked and the exchange rate fluctuations, there is no such mistake nor is it excusable, since IDS knew that the 'subcontracts' were fictions.

[20] In my view, the alternative claim, does not assist IDS. It is a requirement of the *condictio indebiti* that the payment was mistaken, and the mistake excusable.⁴ IDS pleaded that the alleged 'false misapprehension' stems from a mistaken belief that the 'subcontracts' obliged Industrious to reimburse IDS for making payments that it was not obliged (by the 'subcontracts') to pay. The arbitrator found that the 'subcontracts' were fictional and were never intended to govern the relationship between the parties. In light of such finding it will be very difficult for IDS to show that it paid, mistakenly thinking that an actual subcontract applied. IDS is estopped from relying on such subcontracts and consequently raising such claims, since they are *res judicata*. The prospects of success on the alternative claims are, in my view, very slim.

[21] In any event, even if there were some merit in the alternative claims, the action is barred from proceeding by the arbitration agreement. This is because the parties agreed that the unjustified enrichment issues could be dealt with in the arbitration proceedings. The agreement was committed to writing in the form of emails. This suffices for an international arbitration agreement. Article 7 of the Model Law requires an arbitration agreement to be in writing but qualifies this in sub- articles (3) and (4) as follows:

⁴ *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* 2009 (1) SA 196 (SCA) para 24.

‘(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

[22] IDS contends that this agreement was not ‘formally effected by way of written amendment to the arbitration agreement’ as required by the rules for the 2013 Conduct of Arbitrations [of the Association of Arbitrators]. It unfortunately does not quote the particular rule that ostensibly requires this. The 2013 Rules define an agreement as ‘the written agreement entered into between the parties’⁵ and Section 1: Article 1 provides:

‘1. Where parties have agreed in writing that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the Association’s Rules for the Conduct of Arbitration, then such disputes shall be settled in accordance with these Standard Procedure Rules subject to such modification as the parties may agree in writing.’

2. For purposes of paragraph 1 an agreement in writing includes an electronic communication if the information contained in it is accessible so as to be useable for subsequent reference.

3. For purposes of paragraph (2), “electronic communication” means a communication by means of data messages and “data message” means data generated, sent, received or stored by electronic means and includes a stored record.

⁵ Article 1 paragraph 6

[23] In any event, the question whether the Association of Arbitrators has jurisdiction over the particular dispute can have no bearing on whether there is a valid arbitration agreement as it is governed by the Act and the Model Law.

[24] There is accordingly a binding agreement to arbitrate the enrichment claims. Thus, even if those claims were not *res judicata* they cannot be pursued by way of action in the High Court.

Conclusion

[25] The dismissal of the counter application is unassailable. The pending action has no real prospects of success and is barred by the arbitration agreement. In the exercise of the court's discretion to stay, the court *a quo* held that South African courts should exhibit a 'pro-enforcement bias' with regard to the enforcement of foreign arbitral awards. I agree. The 'pro-enforcement bias' is a strong factor in the exercise of a court's discretion and should weigh in favour of enforcement of arbitral awards and against delaying it. However, accepting this, the counter application does not meet the threshold for a stay, namely the avoidance of real and substantial injustice.

[26] The disadvantage to IDS of having to enforce its claim against Industrious if, one day, it actually pursues and finally succeeds in that claim does not constitute 'real and substantial injustice'. If that were so, a stay of enforcement could always be obtained by the simple device of instituting a claim against the enforcer.

[27] IDS failed to show why this court should interfere with the court *a quo*'s discretion in the dismissal of its counter application. Any further delay in the enforcement of the arbitral award would cause an injustice to Industrious. In the result the following order is made:

1. The appeal is dismissed with costs.

L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I agree

D.C. FISHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I agree

A.A. CRUTCHFIELD
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judges whose name are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 5 June 2023.

APPEARANCES

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Date of hearing:

1 March 2023

Date of judgment:

5 June 2023