IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D1850/2024

In the matter between:

THE SWEDISH CREDIT EXPORT AGENCY **Applicant**

and

SACKS PACKAGING (PTY) LTD **Respondent**

ORDER

The following order is granted:

1. The arbitration award made by the International Court of Arbitration of the International Chamber of Commerce (ICC) under case number 25521/HBH, comprising the partial award on jurisdiction dated 10 February 2022, and the final award dated 4 September 2023, are made an order of Court.

2. The respondent is directed, pursuant to the arbitration award, to pay to the applicant:

   2.1 the sum of € 5 972 709.51 together with simple interest of 12% per annum on each invoice from the respective due dates to date of final payment, in line with the table set out paragraph 205(a) of the arbitration award;

2.2 the sum of US$ 343 000.00, as reimbursement for the applicant's payment of the advance on costs for the arbitrator's expenses and the ICC's administration expenses, together with simple interest pursuant to section 6 of the Swedish Interest Act [1975: 635] from the date of award until payment in full;

2.3 the sum of € 18 973.45 as reimbursement for the applicant's legal and other costs, together with simple interest pursuant to section 6 of the Swedish Interest Act [1975: 635] from the date of award until payment in full;

2.4 the sum of SEK 6 492 692.25 as reimbursement for the applicant's legal and other costs, together with simple interest pursuant to section 6 of the Swedish Interest Act [1975: 635] from the date of award until payment in full.

3. The respondent shall bear the costs of this application, as taxed or agreed, at Scale C.

JUDGMENT

Tucker AJ

[1] The applicant seeks an order in terms of section 16 of the International Arbitration Act 15 of 2017 ("the Act") to make the two arbitration awards handed down by the International Court of Arbitration of the International Chamber of Commerce (hereinafter referred to as "ICC") of 10 February 2022 and 4 September 2023 orders of this Court.

[2] This relief is opposed by the respondent who, fundamentally, challenges firstly that the ICC had jurisdiction to determine the dispute before it, and secondly that, given the factual dispute that exists on the present papers as to whether an arbitration

agreement was ever concluded between the parties, the relief should in any event be refused.

[3] The history underlying the matter is extensive, but also necessary to the determination of the current dispute.

Background

[4] During the period from October 2016 to April 2019, the respondent made 30 orders of sack kraft paper manufactured in Russia from a Swedish based entity, Forpac International AB (hereinafter referred to as "Forpac"). Of these various orders, the claim arose after it was alleged that the respondent had failed to pay for 22 of these orders, totalling an amount of € 5 972 709.51.

[5] Forpac had, so it was alleged by the applicant in the underlying arbitration proceedings, ceded its rights to Swedbank, who in turn subsequently ceded its rights under the invoices to the applicant - a government agency that specializes in providing guarantees for Swedish companies exporting goods, particularly in circumstances where the underlying goods are financed by Swedish banks.

[6] Crucially, on the sales documentation exchanged between Forpac and the respondent, the following condition repeatedly appeared:

'This order is subject to the General Trade Rules for Paper and Paper Board.'

[7] This reference to General Trade Rules for Paper and Paper Board is a clear reference to the internationally recognised rules governing the international trade of paper and paper board of 1980.

[8] Article 16 of the General Trade Rules for Paper and Paper Board provides as follows:

'All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the Rules.'

[9] The applicant, claiming to be the ultimate cessionary of the rights of Forpac, declared a dispute arising from the non-payment of the 22 orders aforementioned, which dispute was ultimately heard by the ICC.

[10] The seat of the arbitration was Paris, France, and the arbitrators were Ms Van Hooft, Mr Nilsson and Mr Badenhorst SC. Badenhorst SC was appointed after the respondent's failure to nominate an arbitrator, as it was called upon to do and entitled.

[11] The underlying proceedings in the ICC were heard on two different occasions and two separate awards were handed down. This was necessitated by the defence raised by the respondent.

[12] The primary point of defence, and that which formed part of the initial proceedings heard on 25 October 2021 at the ICC was to dispute the jurisdiction of the ICC to determine the dispute. This was, in summary, on the following grounds:

(a) A denial of a contract ever being concluded between the respondent and Forpac that incorporated the general trade rules, and consequently the denial of an agreement that renders the dispute subject to arbitration;
(b) The argument that, even if the ICC came to the conclusion that an agreement was concluded between itself and Forpac, the right to arbitration being a right so personal it is not capable of cession without consent and such consent was not given;
(c) Considering the denial of the existence of an arbitration agreement at all, which would be a pre-requisite for the appointment of the ICC, the ICC did not have the power to determine the dispute as to whether it had jurisdiction to determine its own jurisdiction to hear the dispute.

[13] The second hearing was before the ICC on 10 May 2023. The ambit of the second hearing was to deal with the balance of the claim, the ICC having determined that it had jurisdiction in terms of the original award.

[14] The respondent participating in both hearings, though such participation in the second hearing was subject to express reservation that its participation should not be construed as an acceptance of the ICC's jurisdiction.

[15] Ultimately:

(a) In the first award of 10 February 2022, the ICC held that it had jurisdiction over the respondent and the arbitration could proceed;
(b) The final award of 4 September 2023, the ICC granted an award in favour of the applicant against the respondent for payment of € 5 972 709.51, together with ancillary relief related to costs.

[16] The applicant now approaches this Court, in accordance with section 16 of the International Arbitration Act 15 of 2017, to make these two awards orders of Court. This is opposed by the applicant.

[17] As a brief overview of the applicant and the respondent's positions:

(a) The applicant's case rests on the International Arbitration Act 15 of 2017, with a particular emphasis on the importance of the ability to enforce these awards. The submission by the applicant, fundamentally, is that an award was clearly made, in circumstances where the respondent has participated. If the respondent took issue with any aspect of the award relating to jurisdiction it was enjoined to approach a Court in France to have the arbitration proceedings set aside. They failed to do so and this Court accordingly must, unless there is some technical deficiency in the award itself or it is *contra bonos mores* (an argument not raised by the respondent), proceed to make the award an order of Court.
(b) The respondent contends that, in order for the provisions of the International Arbitration Act to apply, this Court needs to be satisfied that an arbitration agreement exists. It was argued by Stokes SC for the respondent that this Court could not come to the conclusion that there was a valid arbitration agreement based on the evidence in the founding affidavit. Absent this finding, so it was argued, the Court cannot conclude

that the ICC had jurisdiction to determine the matter and the application should be refused. At the very least, so it was argued, the existence of an arbitration agreement was part of a dispute of fact on the papers which should be resolved in favour of the respondent,[1] equally leading to the dismissal of the application.

[18] This dispute requires an analysis of the provisions of the International Arbitration Act.

Legislative background

[19] The International Arbitration Act 15 of 2017, which forms the basis of the applicant's claim, was created in order to incorporate into our Law the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985.

[20] The relevant sections of the Act are as follows.

[21] The purpose of the Act is made clear in section 3 of the Act when it states:

'The objects of the Act are to—

(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.'

[1] *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD) being referenced.

[22] Three sections of the Act bear particular consideration for the determination of whether an international arbitration award should be made an order of Court. These are as follows.

[23] Section 16(1) of the Act provides that:

'Subject to section 18 an arbitration agreement and a foreign arbitral award must be recognised and enforced in the Republic as required by the Convention, subject to this Chapter.'

[24] Section 17 of the Act states:

'A party seeking the recognition or enforcement of a foreign arbitral award must produce:

(a) (i) the original award and the original arbitration agreement in terms of which an award was made, authenticated in a manner in which foreign documents must be authenticated to enable them to be produced in any court; or

(ii) a certified copy of that award and of that agreement; and

(b) a sworn translation of the arbitration agreement or arbitral award authenticated in a manner in which foreign documents must be authenticated for production in court, if the agreement or award is in a language other than one of the official languages of the Republic: Provided that the court may accept other documentary evidence regarding the existence of the foreign arbitral award and arbitration agreement as sufficient proof where the court considers it appropriate to do so.'

[25] Section 18 of the Act provides a limited series of defences available to a respondent in proceedings launched under the Act, section 18(1)(a) detailing absolute defences upon which an applicant bears the onus to disprove, and section 18(1)(b), detailing permissible defences to making the award an order of Court but where a respondent has a reverse onus to establish the defence.

[26] There is no ambiguity in these sections of the Act. In summary:

a. Section 16 gives the entitlement to a successful party in an arbitration award to have that award made an order of Court within the Republic of South Africa so that it may be enforced;
b. Section 17 details the requirements an applicant in such proceedings must demonstrate;

c. Section 18 provides the possible defences available to a respondent in such proceedings.

[27] Crucially, this Court does not sit as a Court of review or appeal of an arbitration award. This Court is restricted to determining whether the applicant has complied with section 17 and whether the respondent has raised (and evidenced if the defence is envisaged in section 18(1)(b) of the Act) a permissible defence to the award being made an order of Court.

Applying the Law to the Facts

[28] Section 17 requires the original award and the original arbitration agreement to be provided in a properly authenticated manner. The Court file has such authenticated award.

[29] The proceedings were conducted in English and the award is in English, consequently the requirements of section 17(1)(b) have been met.

[30] The dispute between the parties can be distilled down to the existence of the arbitration agreement.

[31] The applicant has provided the purchase orders and responses thereto in demonstrating the arbitration agreement. This was evidenced in the arbitration proceedings in greater detail, but confirmed (and the purchase orders provided evidencing the clause relied upon) in the current application.

[32] The respondent's argument is that no agreement was concluded as the clause incorporating the General Trade Rules for Paper and Paper Board was not agreed to, and a dispute was raised to the cessions to the applicant and whether the right to arbitration was a right so personal that it could not be conceded without consent.

[33] In response to this argument, the applicant relied on the principle of quasi-mutual assent.

[34] In summation of quasi-mutual assent and its ambit, the full Court of the Western Cape High Court stated in *Trust Hungary RZT v Vincorp (Pty) Ltd*[2] as follows:

'It has long been accepted in our law that a person cannot escape from an apparent agreement merely because his subjective intention differed from the apparent agreement. This is known as the doctrine of quasi-mutual assent. In *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis 1992 (3) SA 324 (A) at 239F-240B* the court said that in various earlier decisions our courts had adapted, for purposes of the facts of their respective cases, the well-known dictum of Blackburn J in *Smith v Hughes (1871) LR 6 QB 597 at 607*:

> 'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon the belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.'

[35] However, it must be reiterated that this Court does not sit as a Court of appeal in review of the underlying arbitration. Accordingly, it is not for this Court to revisit the findings that have been made by the ICC. The ICC has already dealt with this dispute in full, and to regale and revisit these findings would be an academic exercise beyond the scope of the Act.

[36] In compliance with its obligations under section 17 of the Act, the applicant in its particulars of claim has put up the 22 purchase orders and invoices which contained the clause as aforementioned incorporating the general trade rules for sales of paper and paper board. It is these same documents that were the basis upon which the ICC found that jurisdiction existed, being the purchase orders and invoices constituting the binding agreement between the applicant and the respondent, and that the ICC accordingly found that it had jurisdiction to determine the dispute.

[37] Accordingly, and there is no contention from the respondent otherwise, the applicant has complied with the requirements upon it under section 17 of the Act.

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[2] *Trust Hungary RZT v Vincorp (Pty) Ltd* [2016] ZAWCHC 112, ad para 36, as discussed further on appeal to the Supreme Court of Appeal in *Vincorp (Pty) Ltd v Trust Hungary* ZRT [2018] ZASCA 35

Consequently, this Court must make the arbitration award an order of Court unless a defence under section 18 exists.

[38] The argument raised by the respondent is that, prior to the applicant being able to rely on any of the provisions of the Act, the Court must be satisfied that an arbitration agreement exists between the parties, and failing this the Act and its provisions are of no moment to the dispute. This argument, however, cannot be sustained. This is for several reasons.

[39] Firstly, section 17 of the Act provides that "*the original arbitration agreement in terms of which an award was made*" be provided. It does not provide an evidential burden on an applicant to once again prove the existence of this contract. The rationale behind this is clear – it would be superfluous to submit to an international arbitration in a foreign country if, at the time of seeking enforcement of an award within the Republic, a dispute of fact could so easily be created about the existence of the agreement or otherwise necessitating the referral of the matter to trial (and thereby resulting in the arbitration being effectively pointless).

[40] This furthermore is contrary to the context of the Act, particularly in light of the limited discretions given to a Court as clearly confirmed by section 16 which specifically states that a foreign arbitral award "***must*** *… be made an order of Court*" (own emphasis).

[41] Secondly, this proposition does not fit with the provisions of Article 16 to Schedule 1 to the Act.

[42] In particular, the following articles from Schedule 1 bear reference:

Article 16(1):

'The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.'

Article 16(3):

‘The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules on such plea as a preliminary question, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.’

[43] Article 16(1) is a formal inclusion of the so-called competence-competence principle from international law.

[44] Article 16(3) provides protection against individuals and entities within the Republic who dispute a decision that the arbitral body had jurisdiction over them (which would include a wide jurisdictional challenge that the arbitration agreement was not concluded between the parties). It does so by giving the right to a person or entity who has received an award on jurisdiction under the competence-competence principle to approach Court within 30 days of receiving the ruling and seek suitable relief. The Court in this instance would be a High Court of Paris, considering the seat of the arbitration.

[45] There is no evidence to suggest that the respondent availed itself of its right to challenge the finding of the initial arbitration award that the ICC had jurisdiction to determine whether there was an agreement of arbitration between the applicant and the respondent (including the incorporation of the general trade rules and the challenge to competence-competence ruling).

[46] Thirdly, in challenging the application to make an international arbitration award an order of Court, a respondent in such application appears to be limited to the grounds set forth in section 18 of the Act. Section 18(1)(b) of the Act, which involves various challenges to the existence, ambit or applicability of an agreement, all require that it is “the party against whom the award is invoked” must prove to the satisfaction of the Court such invalidity.

[47] The defence raised by the respondent does not fall within the ambit of section 18(1)(a) of the Act. It arguably does not fall within the ambit of section 18(1)(b) of the Act either, but even the defence did fall within such ambit this is a clear situation of a reverse onus where is it incumbent on the respondent to demonstrate, through evidence, that there are deficiencies with the agreement that render the award unenforceable.

[48] The respondent has done little in the answering affidavit to discharge this onus. The deponent to the answering affidavit, Mr Kisten, and in summary, alleges that there was no agreement because the overarching agreement in terms of which the relationship between the respondent and Forpac came into existence did not incorporate the order being subject to the general trades for paper and paper board. The respondent refers the disputes raised about the timing of invoices, certain orders not containing signatures by respondent's representatives, etc.

[49] All of these challenges, however, constitute argument rather than fact. Apart from a bare denial, there is nothing to suggest or argue why this was not agreed to by the furnishing of further orders, by the acceptance of goods under such order, or why quasi-mutual assent would not be applicable. Nor is there any explanation as to why the several years of purchase orders and invoices containing the same proviso could be ignored.

[50] In those circumstances and even were the matter to fall within the ambit of a permissible dispute under section 18(1)(b) of the Act, it is an onus that has not been discharged by the respondent.

[51] That said, the challenge made does not appear to actually fall within the limited scope of section 18(1)(b), but instead is in effect an appeal of the decision by the ICC when it found that "*as a matter of fact, respondent must have seen the references to the general trade rules on the sales orders when signing them*".[3] The respondent has also avoided the findings relating to the process where the references to orders being

[3] Paragraph 173 of the partial award on jurisdiction – ICC Case Number 25521/HBH.

subject to the general trade rules for the sales of paper and paper board form part of the purchase orders, which would thereafter be stamped and accepted by the respondent (sometimes on top of the reference to the general trade rules), an order thereafter shipped, and an invoice generated by Forpac.

[52] To argue that this Court must confirm the existence of the arbitration agreement, rather than attacking on the limited grounds of section 18(1), would be impermissibly to elevate this Court to a Court of appeal against the findings already made, and in circumstances where the respondent has neglected to avail itself of its rights under Article 16(3) of the Act by approaching the High Court in Paris to challenge the determination made as to whether the ICC had jurisdiction.

[53] This argument of the respondent is contrary to the express wording of the Act, and ignores the limitations on defences and the safeguards built in for those continuing to dispute jurisdiction – the same safeguards the respondent appears to have elected not to avail itself of.

[54] During the course of argument specific reference was made to the decision of *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh N.O.*.[4] It was suggested that the applicant is in effect asking the Court to do is to make the same mistake that the Supreme Court of Appeal found had been made by the Court a *quo* in the aforementioned decision.

[55] The difficulty with this submission is that *Canton Trading* was a domestic arbitration that was decided. The Court in that matter did confirm the common law principle that arbitrators cannot decide their own jurisdiction. However, this case did not relate to an arbitration to which the Act applied, and accordingly Article 16 of Schedule 1 to the International Arbitration Act which confirms the incorporation of the competence-competence principle into our law in those limited circumstances did not apply.

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[4] *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh N.O.* 2022 (4) SA 420 (SCA).

[56] *Canton Trading v Hattingh* therefore has no relevance to the respondent's current position as a party to an international arbitration.

[57] The underlying position in common law was that international arbitration awards would be enforced by our Courts unless exceptional circumstances existed otherwise.[5] There is nothing in the Act that suggests that the common law has been amended from this (or the Act's predecessor, The Recognition and Enforcement of Foreign Arbitral Awards Act, 40 of 1977) so as to remove this requirement, save to codify some of the exceptional circumstances under section 18 of the Act.

[58] As a consequence of the above, the respondent has failed to demonstrate the exceptional circumstances required in order for this Court to be able to ignore the duty on it to enforce arbitration awards provided the requirements of section 17 are met, nor is any permissible defence under section 18 is raised and evidenced by the respondent.

[59] The opposition to making the awards of the ICC an order of Court must accordingly fail. The applicant met the requirements on it under section 17 of the Act and there being no permissible defence under section 18 raised, must succeed in its application.

[60] Turning to considerations of costs, there is no reason why the ordinary rule that costs should follow the result should not apply. Considering the subject matter and quantum involved, scale C would be appropriate.

[61] Consequently, the applicant is entitled to relief sought and an order is granted in the following terms:

1. The arbitration award made by the International Court of Arbitration of the International Chamber of Commerce (ICC) under case number 25521/HBH, comprising the partial award on jurisdiction dated 10 February

[5] *Kapci Coatings S.A.E v Kapci Coatings SA CC and Another* [2024] ZAGPJHC 450, ad para 30

2022, and the final award dated 4 September 2023, are made an order of Court.

2. The respondent is directed, pursuant to the arbitration award, to pay to the applicant:

2.1 the sum of € 5 972 709.51 together with simple interest of 12% per annum on each invoice from the respective due dates to date of final payment, in line with the table set out paragraph 205(a) of the arbitration award;

2.2 the sum of US$ 343 000.00, as reimbursement for the applicant's payment of the advance on costs for the arbitrator's expenses and the ICC's administration expenses, together with simple interest pursuant to section 6 of the Swedish Interest Act [1975: 635] from the date of award until payment in full;

2.3 the sum of € 18 973.45 as reimbursement for the applicant's legal and other costs, together with simple interest pursuant to section 6 of the Swedish Interest Act [1975: 635] from the date of award until payment in full;

2.4 the sum of SEK 6 492 692.25 as reimbursement for the applicant's legal and other costs, together with simple interest pursuant to section 6 of the Swedish Interest Act [1975: 635] from the date of award until payment in full.

3. The respondent shall bear the costs of this application, as taxed or agreed, at Scale C.

TUCKER AJ

Appearances

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Date of Hearing:	19 November 2024
Date Judgment Delivered:	5 December 2024