REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: 508/2012

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

…….. ……..

In the matter between:

PIERRE FATTOUCHE Applicant

And

MZILIKAZI KHUMALO Respondent

J U D G M E N T

WEINER J:

Background

[1] On 1 May 2006, the Applicant, the Respondent and an entity named Rosario International Investments Limited ("Rosario") entered into a written sale of shares agreement.

[2] On 21 April 2008, the applicant and the Respondent entered into an agreement to refer certain disputes that had arisen between the parties from the sale of shares agreement to arbitration.

[3] The parties settled the disputes at the arbitration. On 12 March 2009, the arbitrator issued an award in Paris, France, based on the settlement agreement.

[4] In terms of the settlement agreement, the Respondent was obliged to pay the Applicant the sum of US$5 million as follows:

4.1. US$1 250 000.00 on 16 April 2009;
4.2. US$1 250 000.00 on 16 May 2009;
4.3. US$1 250 000.00 on 16 July 2009; and
4.4. US$1 250 000.00 on 16 September 2009.

[5] The Respondent did not make payment to the Applicant of any of the amounts due in terms of the award.

[6] In compliance with the Recognition and Enforcement of Foreign Arbitral Awards Act No 40 of 1977 ("Recognition and Enforcement Act"), the Applicant obtained a certified copy of the original arbitral agreement and a

certified copy of the foreign arbitral award and applied to have the award made an order of this court.

[7] The arbitral award is expressed in United States Dollars. The Applicant has established by way of affidavit evidence that the exchange rate prevailing at the date of the arbitral award was US$1.00 = ZAR10.1863.

[8] The Respondent opposed the application but failed to file an answering affidavit in spite of his undertaking to do so by 9 March 2012, which undertaking was made an order of court on 28 February 2012.

[9] The matter was set down for hearing on 22 October 2012 when it was again postponed as the Respondent launched an application for security for costs on the same day. The Respondent had still not filed an answering affidavit by that stage.

[10] The application was again set down for hearing on 11 June 2013. On that occasion the application was postponed to 23 July 2013, and the court ordered the respondent to file his answering affidavit in the application by 25 June 2013.

[11] At the hearing on 23 July 2013, the court ordered the Applicant to furnish security for costs in an amount to be fixed by the Registrar. This was subsequently furnished and is no longer an issue.

[12] The parties were also required by the presiding judge to deal with the implications of the Protection of Businesses Act 99 of 1978 ("The Protection of Businesses Act") on the relief sought. They have done so.

[13] The defence raised by the Respondent in his answering affidavit is an alleged *pactum de non petendo*. The Respondent alleges therein that he entered into an oral agreement with the applicant during 2009 that the Applicant would not proceed to litigation or to any execution in terms of the award until such time that the Applicant had obtained two mining licences in Armenia.

The Relief sought by the Applicant

[14] The Applicant seeks an order recognising and enforcing the foreign arbitral award.

[15] There are two Acts that govern the enforcement of foreign arbitral awards:

1. The Recognition and Enforcement Act and
2. The Protection of Businesses Act.

[16] The Respondent does not raise an issue in relation to the Recognition and Enforcement Act.

[17] In ***Jones v Krok*** 1995 (1) SA 677 (A) the court dealt with an application for provisional sentence based on a foreign court judgment.

Although the present matter concerns an application rather than provisional sentence, the following basic principles stated therein are applicable:

> *"The present position in South African law is that a foreign judgment is not directly enforceable, but constitutes a cause of action and will be enforced by South African courts provided (i)…(vi) that enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act, 99 of 1978, as amended. Apart from the aforegoing, South African Courts will not go into the merits of the case adjudicated upon by the foreign court and will not attempt to review or set aside its findings of fact and law".*

[18] Section 1(1) of the Protection of Businesses Act prohibits the enforcement of certain foreign arbitration awards. The provision states as follows:

> *"Notwithstanding anything to the contrary contained in any law or other legal rule, and except with the permission of the Minister of Economic Affairs - (a) No… arbitration award… in connection with any civil proceedings and arising from any act or transaction contemplated in ss (3), shall be enforced in the Republic ..."*

Section 1(3) thereof provides that:

> *"In the application of ss (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 (sic) any matter or material of whatever nature whether within, outside, into or from the Republic."*

[19] The principles referred to in ***Jones v Krok*** *(supra)* are *mutatis mutandis* applicable to the enforcement of foreign arbitral awards, subject to

the additional need for an applicant relying thereon to comply with the Recognition and Enforcement Act.

The Protection of Businesses Act – factual scenario

[20] It is common cause that the foreign arbitral award that the Applicant seeks to enforce is in connection with civil proceedings arising from a transaction. A key question before this court however is whether the transaction falls within the ambit of Section 1 of the Protection of Businesses Act.

[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 20J – 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).

[26] In its interpretation of the agreement, in light of the Sections referred to above, the Respondent contends that the foreign arbitral award that the Applicant seeks to enforce is in connection with civil proceedings arising from a transaction in connection with mining of raw materials. Further he argues that it is clear that the act or transaction is connected with mining, production, importation, exportation, refinement, possession, use or sale of or ownership to *(sic)* any matter or material as contemplated in subsection 1(3) of the Protection of Businesses Act.

[27] The arbitrator, in summarising the dispute, referred to the Respondent as a businessman *"specialised in mining activities"*. He furthermore referred to the various mining transactions relating to mining businesses and specific mining sites and outlined these aspects contained in the Claimant's claim dated 8th August 2007, which he sets out in the terms of reference.

[28] The Applicant, on the other hand, relying on the restrictive interpretation, submits that the transaction dealt with the sale of *shares*, and not raw materials. Therefore, the Applicant submits that Section 1(3) is inapplicable in the present proceedings.

[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 a mining company).

[30] Therefore, as the transaction in question does not fall within the scope of section 1 (3) of the Protection of Businesses Act, the failure of the Applicant to obtain the permission of the Minister prior to the institution of the application, is of no significance.

Defence on the merits – The alleged pactum de non petendo

[31] The defence raised by the Respondent in his answering affidavit is an alleged *pactum de non petendo*. The respondent alleges therein that he entered into an oral agreement with the applicant during 2009 that the applicant would not proceed to litigation or to any execution in terms of the award until such time that the applicant had obtained two mining licences in Armenia.

[32] The Respondent submits that, in terms of such agreement, the Applicant would not insist on payment and would not litigate on the award until such time as he had finalised and obtained licenses in respect of the two mines. This, the Respondent contends, was because it would make no sense for the Respondent to pay the amount if the Applicant was unable to obtain the licenses.

[33] The Respondent refers to the fact that the Applicant did not proceed to enforce the award immediately upon default. Therefore the reasonable inference can be drawn that such a pact was concluded between the parties and the Applicant, for whatever reason, then sought to insist on payment of the amount and to *"reserve his rights".*

[34] However, contrary to the Respondent's submissions, what is evident in the correspondence between the Applicant and the Respondent, is a continuous undertaking by the Respondent to make payment to the applicant in terms of the arbitral award. There is, in fact, no mention of any agreement that the Applicant would not proceed pending the obtaining of the licenses in Armenia.

[35] In the premises, the Respondent has set out no sustainable defence to the application and the Applicant is entitled to the order which he seeks in terms of section 4 of the Enforcement Act.

The Constitutional Position

[36] I requested counsel to address the issue of whether Section 1(1) read with Section 1(3) of the Protection of Businesses Act offends against any provision of the Constitution.

[37] In ***Van Dyk v National Commissioner, South African Police Service and Another*** 2004 (4) SA 587 (T) Du Plessis J stated at 589:-

> *"A court cannot enforce laws that are inconsistent with the Constitution and therefore invalid. In view thereof, Courts have the duty to consider meru moto the constitutionality of laws that it is called upon to enforce".*

[38] It appears to me that on a broad interpretation of Sections 1(2) and 1(3), virtually every transaction would be subject to approval by the Minister.

[39] In ***Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others*** 1996 (3) SA 617, a constitutional challenge was levelled against section 2(1) of the Indecent or Obscene Photographic Matter Act. Mokgoro J stated at 49:-

> *"To determine whether a law is overbroad, a court must consider the means used, (that is, the law itself, properly interpreted), in relation to its constitutionally legitimate underlying objectives. If the impact of the law is not proportionate with such objectives, that law may be deemed overbroad.*

[40] The Applicant submits that the statutory provision in the Protection of Businesses Act, that the Minister must approve such enforcement, is unnecessary as our courts are able to deal with the enforcement of foreign judgments on the basis of public policy. Further, the Applicant argues that such Ministerial approval can be perceived by foreign applicants as being

contrary to the intention of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") and as state interference in foreign trade agreements. As early as July 1998, the South African Law Reform Commission (Project 94) recommended that the Act should be repealed and replaced by legislation dealing with international arbitrations.

[41] Criticisms have been levelled at the Protection of Businesses Act from the academic sphere. In his textbook ***"Private International Law" (5th ed),*** at 466, Forsyth describes the Protection of Businesses Act as a clear example of "legislative overkill". Since most foreign judgments concern *"ownership* [or possession of]*…any matter or material"*, a literal interpretation of the Act requires ministerial permission for the enforcement of just about any judgment.

[42] Importantly, as highlighted by the SALRC in its paper ***Concerning its Investigation into Consolidated Legislation pertaining to international co-operation in civil matters*** *(supra)* at 4.2.2:-

> *"[The Protection of Businesses Act] was passed during the apartheid years, when South Africa had restricted dealings with the international business community."*

And further at 5.2.9:-

> *"[Section 1 of the Act] was intended to block undesirable foreign policies."*

[43] The SALRC ***Concerning its Investigation into Consolidated Legislation pertaining to international co-operation in civil matters*** (*supra*) commented that:-

"The principal aim of the Protection of Businesses Act 99 of 1978 is to protect South Africans from the draconian effects of certain foreign laws, in particular those allowing awards of penal or multiple damages."

As Forsyth *(supra)* at 402 explains, the Act was originally enacted *"to protect South African businesses from the far-reaching tentacles of American anti-trust legislation".*

[44] It was furthermore considered that the Protection of Businesses Act had been and remained a major obstacle to the principle of international judicial co-operation and that, in the majority of cases, the provisions of the Act frustrated uncontentious requests. It was stated that the Act could be interpreted as signalling a hostile and defensive attitude to the international community.

[45] There are, in my view, three bases upon which the overbreadth of the Sections might be considered unconstitutional:

45.1. In terms of Section 165 of the Constitution, which provides:-

"(1)The judicial authority of the Republic is vested in the courts.
(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
(3) No person or organ of state may interfere with the functioning of the courts.
(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
(5)…
(6)..."

45.2. In terms of Section 34 of the Constitution, which provides:-

"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 or, where appropriate, another independent and impartial tribunal or forum."

45.3. In terms of Section 231(5) and Section 233 of the Constitution, which provide:-

"231(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."
…
233. When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

[46] Section 36 of the Constitution deals with limitations on other rights enshrined in the Constitution. Such limitation must however be reasonable and justifiable. It could be argued that Sections 1(1) and Section 1(3) of the Protection of Businesses Act amount to an executive intervention in the sphere of the Judiciary (contrary to Sections 34 and 165 of the Constitution).

[47] In relation to Sections 231(5) and 233 of the Constitution, the Applicant referred to the New York Convention *(supra).* Recognising the growing importance of international arbitration as a means of settling international commercial disputes, the New York Convention sought to provide common legislative standards for the recognition of foreign arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards.

[48] The New York Convention's principal aim was that foreign and non-domestic arbitral awards would not be discriminated against, and parties were obliged to ensure that such awards were recognised and generally capable of enforcement in their jurisdiction in the same way as domestic awards.

[49] South Africa acceded to the New York Convention on 3 May 1976. The South African Legislature gave effect, from 13 April 1977, to its accession by enacting the Recognition and Enforcement Act.

[50] The New York Convention was binding on South Africa when the Constitution took effect on 4 February 1997, and it remains so. Section 231(5) of the Constitution provides that:-

> *"The Republic is bound by international agreements which were binding on the Republic when the Constitution took effect".*

[51] It is submitted by the Applicant that in 1978, the legislature reneged on its international undertakings by enacting the Protection of Businesses Act. It is contended that several provisions of the Act, including section 1 thereof, insofar as they relate to arbitrations:

1. discriminate against foreign arbitration awards relating to the acts or transactions referred to therein;
2. do so in circumstances in which:
    2.1. the subject matter of the dispute was or would be capable of settlement by arbitration in terms of South African law; and
    2.2. nothing about the recognition and enforcement of the award would offend against public policy in South Africa.

[52] In terms of Section 1A of the Protection of Businesses Act, the enforcement of multiple or punitive damages is prohibited. The Recognition and Enforcement Act also provides for the courts discretion if the award is contrary to public policy.

[53] According to the Applicant, the limitations already in place in the Recognition and Enforcement Act and Section 1A of the Protection of Businesses Act are sufficient to curtail the likelihood of the abuse of our courts in relation to foreign arbitration awards.

[54] The Respondent, on the other hand, contends that the Protection of Businesses Act does not outright prohibit the enforcement of a foreign arbitral award. The Act only introduces a procedural aspect (the Minister's approval) relating to the enforcement of foreign arbitral awards.

[55] He submits that in terms of Section 4 of the Recognition and Enforcement Act, a Court may refuse to grant an application for an order of Court in terms of Section 3 if the Court finds that:

55.1. A reference to arbitration is not permissible in the Republic in respect of the subject matter of the dispute concerned;

55.2. Enforcement of the award concerned would be contrary to public policy in the Republic.

[56] The Respondent submits that the Protection of Businesses Act simply introduces additional procedural requirements for the enforcement of certain foreign arbitration awards. The additional procedural requirement is the permission of the Minister of Finance (previously Minister of Economic Affairs).

[57] It is this "procedural requirement" which needs to be analysed to ascertain whether or not it is in conflict with any provision of the Constitution.

[58] In order for this issue on the constitutionality of the Protection of Businesses Act to be adjudicated upon, it would be necessary, *inter alia,* for the Minister of Finance, the Minister of International Affairs and Cooperation and the Minister of Justice and Constitutional Development to be joined to these proceedings. See ***Van der Merwe v Road Accident*** 2006 (4) SA 230 (CC) at [8]. None of the parties sought to do this. In addition, there are other interested parties that may wish to make submissions.

[59] As I am able to decide this matter on the facts before me, it is not necessary, at this stage, to postpone the matter for those parties to be joined and for the constitutional matter to be decided upon. See ***Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others*** 2009 (4) SA 222 (CC) at [38]:-

> *"The High Court also referred to the general principle that constitutional issues should not be decided prior to a decision on factual issues or matters of law with which have no constitutional implication, unless the decision on the constitutional issue is necessary for a proper assessment of the non-constitutional issues at stake."*

And further at [43]:-

> *"A court may therefore, of its own accord, raise and decide a constitutional issue where…a decision on the constitutional question is necessary for a proper determination of the case before it."*

[60] If this matter proceeds further, the Applicant will have the choice whether to pursue the route of unconstitutionality and join the necessary parties.

Conclusion

Accordingly, the following order is made:

1. The order granted on 6 May 2014 is recalled.
2. The arbitration award annexed hereto is made an order of court.
3. The Respondent is directed to pay the Applicant:-
    3.1. The sum of R53 074 092,50;
    3.2. Interest on the amount of R53 074 092,50 at the rate of 9% per annum from the 24th of April 2009 until the date of final payment.
4. The Respondent is directed to pay the costs of suit, including the costs consequent upon the employment of two counsel.

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WEINER J

Counsel for the Applicant: Adv. Miltz SC with Adv. Bitter
Applicant's Attorneys: Edward Nathan Sonnenbergs
Counsel for the Respondent: Adv. Bava SC
Respondent's Attorneys: Shepstone & Wylie Attorneys
Date of Hearing: 3 February 2014
Date of Judgment: 6 May 2014