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203. SOUTH AFRICA: SUPREME COURT, DURBAN AND COAST LOCAL DIVISION – 13 March 1984 – *Laconian Maritime Enterprises Ltd. v. Agromar Lineas Ltd.* *

Jurisdiction to recognize and enforce a foreign arbitration award under the New York Convention

(See Part I. A.3 and C.1)

BOOYSEN J: The applicant is a company which carries on business as shipowners and operators at Piraeus, Greece. The respondent is a company which carries on business as charterers of ships at Barranquila, Colombia.

On 17 June 1977, and at New York, the parties concluded a voyage charterparty in respect of the motor vessel "Kavo Dellini". This charterparty incorporated the "Centrocon" arbitration clause stipulating that any dispute between the parties should be referred to and settled by arbitration in London.

A dispute arose between the parties regarding payments of amounts in respect of demurrage arising under the charterparty. The dispute was referred to arbitration. On 23 January 1979 the arbitrator handed down an award in favour of the applicant in terms of which he ordered that the respondent should pay to the applicant US $16 585,34 together with interest at the rate of 7½% per annum from 1 October 1977 until date of the award and the applicant's costs of arbitration, including the costs of the award.

On 18 May 1983 the applicant's attorney learnt that the respondent had chartered a vessel, the "Globe Trader", on a time charter basis to perform a trip between South Africa and Colombia and concluded that the respondent would from date of delivery on time charter, ie 21 May 1983, be the owner of the bunkers on board of vessel. The vessel was then in Durban harbour.

On 25 May 1983 the applicant sought an order, firstly, that it be granted leave to sue the respondent by edictal citation in the proceedings; secondly, for a rule *nisi* calling upon respondent to show cause

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* The text is reproduced from The South African Law Reports (1984) 3, p. 234 ff.

why the arbitrator's award should not be made an order of this Court in terms of the provisions of the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977; and, thirdly, that the respondent be interdicted from removing the bunkers from this Court's area of jurisdiction or disposing thereof.

On 26 May 1983, and after a supplementary affidavit had been filed, my Brother KUMLEBEN granted the following order:

"That the deputy sheriff, Durban, be and he is hereby authorised and directed to attach the bunkers on board the vessel mv 'Globe Trader' and the respondent's right, title and interest in and to all freight monies in the possession of or to be paid to its agents, Nedlloyd Agencies (Pty) Ltd, arising out of the carriage of goods on board the mv 'Globe Trader' *ad fundandam et confirmandam jurisdictionem* in an action to be instituted by the applicant against the respondent claiming that the arbitration award made by Mr Ralph E Kingsley at London on 23 January 1979, a copy of which is annexure 'B' to the application papers, be made an order of Court and claiming judgment for the Rand equivalent of US $16 585,04, interest and other relief and to hold the said bunkers and right, title and interest under attachment pending the final determination of the said action.

That the said deputy sheriff be and he is hereby authorised to release the said bunkers and right, title and interest from attachment upon the respondent lodging with the Registrar security for the payment of the Rand equivalent of US $16 585,04, interest and the costs of the said action, such to be to the satisfaction of the Registrar.

That the applicant is hereby granted leave to sue the respondent by edictal citation for an order that the arbitration award made by Mr Ralph E Kingsley at London on 23 January 1979, a copy of which is annexure 'B' to the application papers, be made an order of Court and for payment of the Rand equivalent of US $16 585,04, interest, costs and other relief.

That the said citation is to be served on the respondent at their registered office or principal place of business at Apartado Aereo 3259 and 5313, Barranquila, Colombia.

That the respondents if they desire to defend the said action shall within one month of the service upon them of the said citation file notice of their intention to defend the said action with the Registrar of this Court and serve a copy thereof on the applicant's attorneys; such notice to appoint an address (not being a post office box or poste restante) within eight kilometres of the office of the Registrar in Durban for service thereat on the respondent of all documents in the said action.

That the costs of this application be costs in the cause in the said action.

And that a copy of this order and the application papers shall be served:

(a) upon Nedlloyd Agencies (Pty) Ltd;

(b) by sending them by prepaid registered airmail to the respondent at Apartado Aereo 3259 and 5313, Barranquila, Colombia;

(c) upon the Port Captain, Durban; and

(d) upon the master of the mv 'Globe Trader'."

After the order was granted the respondent furnished the applicant with a bank guarantee. The applicant then agreed to the release of the attachment and the vessel sailed from Durban.

On 1 December 1983, the respondent delivered a counter-application in which it sought an order that the order of attachment be set aside, and the respondent released from the guarantee and that the applicant be ordered to pay the costs of the application. In the supporting affidavit the respondent's attorney alleged that the parties were *peregrini* of this Court and stated:

"Neither the agreement of charter, nor any aspect of the arbitration award which is referred to in the order and which forms the subject-matter of the applicant's application, were concluded, or arose, or related to the Republic of South Africa."

He submitted that there was no ground upon which the Court could

exercise jurisdiction.

On 19 January 1984, the applicant delivered a notice in terms of Rule 6 (5) (*d*) (iii) to the effect that it intended to oppose the counter-application on the basis that as a matter of law:

". . . the provisions of the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 confer upon this honourable Court jurisdiction to make a foreign arbitral award an order of this honourable Court irrespective of the fact that:

(*a*) both of the parties thereto are *peregrini* of this honourable Court; and that

(*b*) the charterparty under which the disputes giving rise to the foreign arbitration arose was not concluded in the Republic of South Africa nor did it fall to be performed within the Republic of South Africa; and that

(*c*) the arbitration proceedings were conducted entirely outside the Republic of South Africa."

On 23 November 1983 the applicant delivered application papers in which it sought the following order:

"That the order granted by the Court on 25 May 1983 under case No 3577/83 is amended by the deletion of para 4 thereof and the substitution therefor of the following:

'That the said citation is to be served on the respondent at the offices of the attorneys, Messrs Goodrickes, 24th Floor, 320 West Street, Durban.'

That the respondent pay the costs of this application.

Further, other or alternative relief."

The applicant's attorney stated in the supporting affidavit that the respondent's attorney, one Poseman of Goodrickes, advised him on 25 May 1983 that he had been instructed on behalf of the respondent as a result of which the papers were served on Goodrickes. Later on 25 May, respondent's attorney advised applicant's attorney that respondent had decided not to oppose the granting of the order prayed.

Subsequently respondent's attorney caused the required guarantee to be furnished.

Thereafter counsel advised applicant's attorney that applicant should proceed by way of application and not action but that it was counsel's view that the term edictal citation covered both actions and applications. In the result it was not sought to amend the order in order to refer to an application as opposed to edictal citation. He stated further that he then asked Goodrickes to obtain instructions from their client as to whether they would accept service of the proceedings. On 8 August 1983 he was advised by Goodrickes that they received instructions to accept service. Later, however, ie on 30 September 1983, they stated that their client did not consent to service of an application. Applicant's attorney had made enquiries and had been told by the Department of Foreign Affairs that, as a result of various diplomatic problems, they had experienced delays of up to 18 months before process could be served in South American countries where our country has no consular representatives; Colombia being such a country.

Respondent's attorney in an opposing affidavit stated *inter alia* that he would have difficulty in obtaining affidavits timeously and that his client was not prepared to consent to an application being served on his firm.

The applications were heard together. I shall deal firstly with the

counter-application. Mr *Hurt*, who appeared for the respondent, submitted that s 2 of Act 40 of 1977 should be restrictively interpreted in accordance with the canon of construction that a statute is to be construed in conformity with existing law and that it is presumed not to have altered the existing law unless it is clear that it is intended to do so.

Mr *Wallis* submitted that the Act was clearly intended to alter the existing law to enable any foreign arbitral award to be recognised and that the object of the Act would be frustrated were it to be interpreted restrictively so as to enable such recognition only in circumstances in which the Court would prior to its enactment have had jurisdiction.

It seems quite clear that the Court had and still has jurisdiction in respect of proceedings for enforcement of claims sounding in money, where such proceedings are between a plaintiff *peregrinus* and an *incola* defendant or between an *incola* plaintiff and a *peregrinus* defendant where the cause of action arises within the Court's area of jurisdiction or there has been an attachment to found jurisdiction. An attachment to found jurisdiction cannot however at common law be made at the instance of a *peregrinus* plaintiff against a *peregrinus* defendant where the cause of action did not arise within such area of jurisdiction (*Maritime & Industrial Services Ltd* v *Macierta Compania Naviera SA*; *NV Scheepsvictualienhandel Atlas & Economic Shipstores Ltd* v *Macierta Compania Naviera SA* 1969 (3) SA 28 (D) at 34G-H.)

The effect of Mr *Wallis'* submission is that in proceedings between *peregrini* for the recognition of a foreign arbitral award the requirement that the cause of action has to arise within the Court's jurisdiction falls away because the Act specifically empowers recognition of any arbitral award.

Sections 2 to 4 of the Act read as follows:

"2. Foreign arbitral award may be made order of Court and enforced as such:

(1) Any foreign arbitral award may, subject to the provisions of ss 3 and 4, be made an order of Court by any Court.

(2) Where any amount payable in terms of such award is expressed in a currency other than the currency of the Republic, the award shall be made an order of Court as if it were an award for such amount in the currency of the Republic as, on the basis of the rate of exchange prevailing at the date of the award, is equivalent to the amount so payable. Any such award which has under ss (1) been made an order of Court, may be enforced in the same manner as any judgment or order to the same effect."

3. Application for award to be made order of Court:

Application for an order of Court mentioned in s 2 (1) shall be made to any Court and shall:

(*a*) be accompanied by:

(i) the original foreign arbitral award concerned and the original arbitration agreement in terms of which that award was made, authenticated in the manner in which foreign documents may 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*) if that award or agreement is in any language other than one of the official languages of the Republic, be accompanied by a sworn translation thereof into one of such official languages, authenticated in the manner in which foreign documents may be authenticated to enable them to be produced in any Court.

"4. When order of Court may be refused:

(1) A Court may refuse to grant an application for an order of Court in

terms of s 3 if

(a) the Court finds that —

(i) a reference to arbitration is not permissible in the Republic in respect of the subject-matter of the dispute concerned; or

(ii) enforcement of the award concerned would be contrary to public policy in the Republic; or

(b) the party against whom the enforcement of the award concerned is sought, proves to the satisfaction of the Court that —

(i) the parties to the arbitration agreement concerned had, under the law applicable to them, no capacity to contract, or that the said agreement is invalid under the law to which the parties have subjected it or of the country in which the award was made; or

(ii) he did not receive the required notice of the appointment of the arbitrator or of the arbitration proceedings concerned or was otherwise not able to present his case; or

(iii) the award deals with a dispute not contemplated by or falling within the provisions of the relevant reference to arbitration, or that it contains decisions on matters beyond the scope of the reference to arbitration: Provided that if the decisions on matters referred to arbitration can be separated from those on matters not so referred, that part of the award which contains decisions on matters referred to arbitration may be made an order of Court under s 3 (1); or

(iv) the constitution of the arbitration tribunal concerned was or the arbitration proceedings concerned were not in accordance with the relevant arbitration agreement or with the law of the country in which the arbitration took place; or

(v) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

(2) If, on an application in terms of s 3, the Court is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made, the Court may in its discretion postpone the hearing of the said application in terms of s 3, to such date as it may determine, and may thereupon, on the application of the party seeking to enforce the award, order the party against whom the enforcement is sought, to give suitable and specified security."

Mr *Hurt* submitted that s 2 of the Act should be interpreted in the same manner as s 5 (1) of the Matrimonial Affairs Act 37 of 1953 has been interpreted. This latter subsection, which gave extended jurisdiction to "any Provincial or Local Division of the Supreme Court", has despite its wide terms been restrictively interpreted to refer to only such Division of the Court as would have jurisdiction in respect of parties, either in consequence of domicile or residence, or on the grounds of territorial jurisdiction, as it would have had at common law, or under statutory provisions. (*Mashamane* v *Mashamane* 1962 (1) SA 628 (O); *Bruckman* v *Bruckman* 1976 (4) SA 204 (C) at 207.)

I do not find it particularly helpful to have regard to the interpretation of the section in the Matrimonial Affairs Act when charged with the duty of interpreting s 2 of this Act. The context in which the words "any Court" appears and the wording of the relevant sections in each Act differ to such an extent that it seems to me to be futile to attempt to draw comfort from the interpretation of the one Act in interpreting the other. The most important difference between the two Acts is to my mind the fact that Act 40 of 1977 provides for the recognition of any foreign arbitral award by any Supreme Court of this country and then goes on in s 4 to mention specifically a list of instances in which

the Court may refuse recognition, whereas no provisions similar to those of s 4 is contained in the Matrimonial Affairs Act.

It seems to me that the inclusion of s 4 is indeed a strong pointer to the Legislature having intended the Court to be empowered to recognise any foreign arbitral award even where no common law grounds of jurisdiction exist.

It seems to me, with respect, that there is much force in the statement of Viljoen J, as he then was, in *Benidai Trading Co Ltd v Gouws & Gouws (Pty) Ltd* 1977 (3) SA 1020 (T) at 1040A-B that

> "It might have been found necessary to pass the Act after the accession of the Republic to the New York Convention, to confer jurisdiction on the Courts which they did not otherwise possess, by making provision for the direct recognition and enforcement of arbitral awards and to enjoy reciprocity".

It appears from *Government Notice* 1028 published in the *Government Gazette* 5160 dated 18 June 1976 that the Republic's Instrument of Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards was deposited with the Secretary-General of the United Nations on 3 May 1976. In terms of the Convention, South Africa's accession entered into force on the ninetieth day (and not the "nineteenth day" as stated in the English version of the notice) after such deposit.

It is clear from the articles of the Convention that each "contracting State" bound itself to recognise (foreign) arbitral awards in accordance with the conditions laid down in the articles and not to impose substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which the Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Section 4 of Act 40 of 1977 has its counterpart in art V of the Convention and was clearly enacted in order to give effect to art V. This latter article provides that:

> "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, *only* if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that

(my italics) and then sets out a list of instances which are virtually identical to those listed in s 4 (1) of the Act.

Against this background I conclude that s 2 was indeed meant by the Legislature to invest any Provincial or Local Division of the Supreme Court of South Africa with jurisdiction to recognise any foreign arbitral award, even one between *peregrini*, subject only there being that degree of effectiveness which is provided by an attachment of property or person.

The counter-application therefore falls to be dismissed.

It became apparent during argument on the application for the amendment of the order granted on 25 May 1983, that the only objection of substance was that application proceedings would subject the respondent to unacceptable time limits for the delivery of opposing affidavits. It seems to me that the problem would be met by amending the order further in order to extend the period for the delivery of the respondent's answering affidavits. Counsel were agreed, in my view quite correctly, that the costs of these two applications should be reserved for the decision of the Court hearing the application for recognition of the arbitral award.

1. The counter-application is dismissed.

2. The order granted by this Court on 25 May 1983, under case No 3577/83, is amended by the substitution of the following paragraphs for paras 4 and 5 thereof:

"4. That the said citation is to be served on the respondent at the offices of the attorneys, Messrs Goodrickes, 4th Floor, 320 West Street, Durban.

5. That the respondent, if it desires to defend the proceedings should within three months of the service of the citation upon its attorneys, deliver its notice of intention to oppose and within four months of such service deliver its answering affidavits or notice in terms of Rule 6 (5) (*d*) (iii)."

3. The costs of the counter-application and the costs of the application under case No 8131/83 are reserved for decision by the Court which is to determine the proceedings for recognition of the arbitral award.

Applicant's Attorneys: *Shepstone & Wylie*. Respondent's Attorneys: *Goodrickes*.