REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 55273/2021

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

[1] 02/06/2023 ____________________

[2] DATE SIGNATURE

In the matter between:

MOMOCO INTERNATIONAL LIMITED APPLICANT

AND

GFE-MIR ALLOYS AND MINERALS SA (PTY) LTD RESPONDENT

Neutral citation: *Momoco International Limited v GFE-MIR Alloys and Minerals SA (Pty) Ltd* (Case No: 55273/2021) [2023] ZAGPJHC 620 (2 June 2023)

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 2 June 2023.

Summary: the recognition and enforcement of a foreign arbitral award section in terms of section 16 r/w section 18 (1) (a) (ii) of the International Arbitration Act 15 of 2017-
public policy

Held: the recognition and enforcement of such foreign arbitral awards not contrary to public policy of the Republic

Order: Para 40 of this judgment.

JUDGMENT

MUDAU, J:

[1] This is an application for the recognition and enforcement of a foreign arbitration award. The application arises out of an award made on 12 June 2020, in arbitration proceedings between the applicant, Momoco International Limited (Momoco) and the respondent, GFE-MIR Alloys and Minerals SA (Pty) Limited (GFE), held in Beijing, People's Republic of China. GFE resists the application. In terms of the award, GFE was ordered to:

a. pay the applicant $ 1 088 488.63 together with interest from 27 January 2014 until 26 November 2018 at a rate of 3.00%;

b. compensate the applicant for its attorney fees of $ 65 500;

c. pay the arbitration fee of RMB 236 521 in full; and

d. pay the arbitration fees for the counterclaim in the amount of $ 21 776.3.

The parties

[2] Momoco is a British incorporated company, duly registered and incorporated in terms of the laws of England and Wales, United Kingdom. Momoco was the claimant in the arbitration proceedings. GFE is a South African company, duly registered and incorporated in terms of the laws of the Republic of South Africa.

[3] The arbitration was an international arbitration as contemplated by Article 1(3) of the Model Law[1] because at the time of the conclusion of the arbitration agreement, the parties had their places of business in different countries.

[1] The UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, as amended by the said Commission on 7 July 2006 and as adopted in Schedule 1 of Act 15 of 2017.

Factual Background

[4] The background facts leading to the arbitration proceedings, which form the basis of this application are largely common cause between the parties and clearly set out in Momoco's founding affidavit. The applicant is an international trading entity that imports and exports various goods. The respondent specialises in the manufacture and marketing of alloys and associated products for the steel, foundry and light metals industries. During the period 2011 to 2014, the applicant concluded numerous sale agreements with the respondent in terms of which the respondent ordered and the applicant supplied cored wire (either 9mm or 13mm) to the respondent for an agreed price.

[5] In each instance, the agreements were concluded by the respondent sending an order to the applicant for a specified amount of cored wire. The order was on a prescribed order form and was sent by email. A written agreement was thus concluded on the terms set out in each sales confirmation in the following manner: the applicant accepted the order and communicated the acceptance to the respondent by sending a duly signed sales confirmation via email. The respondent then signed the sales confirmation form and sent it back to the applicant by email.

[6] The applicant delivered the cored wire to the respondent by sea freight in accordance with the sale agreements. However, the respondent failed to make payment of the agreed purchase considerations in terms of the sale agreements. Despite demand, the respondent has refused to pay the purchase considerations due to the applicant. There is no dispute that the respondent has breached the supply agreements by failing to settle the outstanding amount for the sales concluded in terms of the 16 sales confirmation. Consequently, a dispute arose between the applicant and the respondent.

[7] It is common cause that the relief the applicant seeks is primarily premised on the recognition and enforcement provisions of the International Arbitration Act,[2] (the Act) which provides for the incorporation of the UNCITRAL Model Law and

[2] 15 of 2017.

the New York Convention[3] and gives effect to the obligations of the Republic of South Africa under the New York Convention. The Model Law, in its amended form, is attached to the International Arbitration Act as Schedule 1 and forms part of South African domestic law.

[8] The parties concluded written arbitration agreements and agreed that the applicable law would be the laws of the People's Republic of China. Clause 9 of the various agreements is an arbitration agreement as defined in the Model Law, which is common cause between the parties.

[9] Clause 9 of each of the sales confirmation provides for dispute resolution mechanisms between the parties. Disputes include issues relating to interpretation, the parties' respective rights or obligations, breach, or any matter arising out of the agreement. In terms of the clause, all disputes shall be settled amicably through friendly negotiation failing which, the dispute shall then be submitted to the China International Economic and Trade Arbitrations Commission (CIETAC), for arbitration in accordance with its rules. It was agreed that Chinese law shall be applicable, and that an arbitral award is final and binding upon both parties. By agreeing to arbitration, parties waived their rights *pro tanto.*[4] In due course, the respondent failed to pay the applicant the agreed contract price in terms of the sale agreements and consequently, a dispute arose between the parties arising from the execution of each of the sale agreements. Attempts to resolve the dispute amicably were unsuccessful.

[10] Consequently, on 10 November 2017, the applicant submitted the dispute to arbitration to CIETAC. The applicant subsequently amended its specific claims to be that the respondent make payment of the remaining 16 sales confirmations. On 15 May 2018, the CIETAC Court of Arbitration served the arbitration notice, the arbitration rules, and register of arbitrators of CIETAC on both parties respectively by express mail and delivered the arbitration application and related evidentiary materials submitted by the applicant to the respondent. Article 25 (2) of the rules provides – "unless otherwise agreed by

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[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958 published in 330 U.N.T.S. 38 (1959), No. 4739.

[4] *Telcordia Technologies Inc. v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266 (SCA) at para 48.

the parties or provided by these Rules, the arbitral tribunal shall be composed of three arbitrators".

[11] GFE appointed Mr Lu Song to act as arbitrator. Momoco did not appoint anyone to act as arbitrator and accordingly, in terms of article 27 (1) of the CIETAC rules, the chairman of CIETAC appointed Mr Tsang Tao to act as arbitrator. The parties did not jointly appoint the third and presiding arbitrator and accordingly, in terms of article 27 (4) the chairman of CIETAC appointed Mr Song Dihuang to act in that capacity. There is no dispute that the arbitral panel was duly and lawfully appointed. In sum, the arbitrators had to – (i) interpret the agreement; (ii) by applying Chinese law; (iii) in the light of its terms; and (iv) all the admissible evidence.

[12] On 15 January 2019, the arbitration was heard. Both parties were represented in the proceedings. Subsequently, on 12 June 2020, the arbitral award was granted and served on both parties. The arbitral award is final as contemplated in clause 9 of the agreements. However, despite knowing the outcome of the arbitration and the award, the respondent has not complied with the award. The respondent resists to pay in accordance with the arbitral award for reasons dealt with below.

[13] In this case, GFE neither challenges the lawfulness of the establishment of the arbitral tribunal, nor the fairness of the proceedings before it, nor the lawfulness or validity of the grant of the award. Further, the respondent does not dispute that the arbitral award constitutes a "foreign arbitral award" as defined in section 14 (d) of the Act because it was given in the People's Republic of China.

The defence

[14] GFE alleges that Momoco is a dormant entity, which does not trade, nor owns any significant assets. In its answering affidavit, GFE points out that at the instruction of Momoco, the purchase price for the cored wire was required to be paid to a bank account outside the United Kingdom. GFE alleges that the deponent to Momoco's founding affidavit, Ma, "the owner, and controller of the applicant had disappeared and only reappeared during October 2015" when he

demanded payment of the outstanding invoices from the respondent and the group of companies.

[15] Essentially, the defence is that the applicant is guilty of tax evasion in that it has failed to declare the income generated from its sales of copper wire to the respondent to the United Kingdom tax authorities. GFE contends that there is a real risk that if were to be ordered to make payment in the future to Momoco outside the United Kingdom, and into Momoco's bank account in Hong Kong, then such payment would be viewed as an offence under the regulations to the UK Criminal Finance Act, 2017 referred to as the Corporate Criminal Offence (CCO) Regulations. This would result in it being seen as aiding and abetting the applicant to evade tax in the United Kingdom. The respondent also argues that the enforcement of the award would involve it in a breach under the Prevention of Organised Crime Act[5] (POCA).

[16] GFE also alleges that there are individuals it claims are involved in the applicant's operation who "were fined for customs fraud" and that it has reported the applicant for "suspected of tax evasion" to the customs authorities in the United Kingdom. However, the Supreme Court of Appeal cautioned in *Knoop NNO v Gupta (Tayob Intervening)*[6] that "[t]he drawing of inferences from the facts must be based on proven facts and not matters of speculation".[7]

[17] GFE's position to date remains the same. Until such time as the applicant can demonstrate to it that it is not evading tax, and that there is no substantial risk of GFE being prosecuted based on complicity, it will not pay. Section 1 of POCA relied upon defines "unlawful activity" as "any conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of th[e] Act and whether such conduct occurred in the Republic or elsewhere".

Statutory framework

[5] 121 of 1998.
[6] 2021 (3) SA 88 (SCA).
[7] Id at para 19.

[18] Section 6 (Chapter 2) of the Act provides that "[t]he Model Law applies in the Republic subject to the provisions of this Act". On international arbitration agreements, the transitional provisions (section 20(1)) of the Act provides that -

> "Chapter 2 of this Act applies to international commercial arbitration agreements whether they entered into force before or after the commencement of Chapter 2 of this Act and to every arbitration under such an agreement, but this section does not apply to arbitral proceedings which commenced before Chapter 2 of this Act came into force."

[19] On the recognition and enforcement of foreign arbitral awards section 16 of the Act provides as follows -

> "(1) 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.
>
> (2) A foreign arbitral award is binding between the parties to that foreign arbitral award, and may be relied upon by those parties by way of defence, set-off or otherwise in any legal proceedings.
>
> (3) A foreign arbitral award must, on application, be made an order of court and may then be enforced in the same manner as any judgment or order of court, subject to the provisions of this section and sections 17 and 18.
>
> (4) Article 8 of the Model Law applies, with the necessary changes, to arbitration agreements referred to in subsection (1)."

[20] Section 17 of the Act makes provision that a party seeking enforcement of a foreign arbitral award must produce the original foreign arbitral award and the original arbitration agreement in terms of which the award was made, both authenticated for use in the high court, or certified copies of the award and the agreement and sworn translations of those documents. In this matter certified copies of the original sale confirmations, incorporating the arbitration agreements are attached to the applicant's founding affidavit as annexures FA3 to FA32. A copy of the original and authenticated award is also attached to the applicant's founding affidavit as FA1 as well as a sworn translation thereof, which is attached as FA2. The authenticity of the arbitral award or the arbitration agreements is not in issue.

[21] Section 14 of the Act defines a court as "any Division of the High Court referred to in section 6(1) of the Superior Courts Act, 2013 (Act No. 10 of 2013), or any local seat thereof…". Article 35 of the Model Law provides that: "An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36."

[22] Section 18 of the Act set out the grounds upon which a party opposing an application for enforcing a foreign arbitral award may rely in the following terms -

> "(1) A court may only refuse to recognise or enforce a foreign arbitral award if-
>
> (a) the court finds that-
>
> "…
>
> (ii) the recognition or enforcement of the award is contrary to the public policy of the Republic".

[23] GFE assails the application and opposes it on a limited ground, that is, section 18(1)(a)(ii). GFE contend that this court is precluded from making the award an order of court if the recognition or enforcement is contrary to the public policy of the Republic. Counsel for GFE submitted that the court should refuse to make the award an order of court so that the order does not contravene the law relating to schemes evading income tax on the basis that it is public policy that companies must fully declare their trading affairs to the authorities.

[24] According to GFE, after Momoco launched this application, GFE obtained an expert accountants' report from Smith and Williamson dated 11 March 2022, in which they opined that there is no sufficient evidence to support the conclusion that Momoco was engaging in a reportable tax scheme as might be understood by United Kingdom law, although Momoco had failed to file appropriate accounts which have implications for its tax compliance status. With this advice, on GFE's own version, there is no finding of any tax evasion by Momoco. The "tax evasion" defence was raised and considered by the arbitral panel but found to be irrelevant to the dispute.

[25] In its Preamble, POCA makes plain that the rapid growth of organised crime, money laundering and criminal gang activities nationally and internationally is an international security threat. It recognises further that "organised crime, money laundering and criminal gang activities infringe on the rights of the people as enshrined in the Bill of Rights". POCA was enacted inter alia "to introduce measures to combat organised crime, money laundering and criminal gang activities; to prohibit certain activities relating to racketeering activities; to provide for the prohibition of money laundering and [to create] an obligation to report certain information; to criminalise certain activities associated with gangs; to provide for the recovery of the proceeds of unlawful activity; for the civil forfeiture of criminal property that has been used to commit an offence…". Sections 4-8 of POCA deal with offences relating to proceeds of unlawful activities.

[26] Section 5 of POCA that GFE relies upon provides that -

> "Any person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into any agreement with anyone or engages in any arrangement or transaction whereby-
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> > "(a) the retention or the control by or on behalf of the said other person of the proceeds of unlawful activities is facilitated; or
> >
> > (b) the said proceeds of unlawful activities are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way,
> >
> > shall be guilty of an offence."

[27] At the risk of repetition, in the present case, there is no illegality in relation to the underlying agreement or the award. None was suggested. Nor is there any suggestion that the main transaction agreement with an arbitration clause was concluded with the intention of committing an illegal act requiring public policy considerations. On the application of international law, section 233 of the Constitution of the Republic of South Africa Act, 1996 makes plain that "[w]hen 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". On the contrary, compliance with an order of this court enforcing the arbitral award cannot constitute an unlawful activity as defined in section 1 of POCA. Accordingly, I find that reliance on POCA by GFE is misplaced and has no bearing, regard being had to the facts as the underlying agreement is commercial in nature, which is recognised in international law.

[28] The only source of an arbitrator's power is the arbitration agreement between the parties.[8] As Momoco's counsel also submitted, with which I agree, the tax issue has no bearing on the legality of the agreement, the underlying causa for the award or the arbitral award itself. If there have been contraventions abroad, that is a matter for those authorities but not for this court. In *Seton Co v Silveroak Industries Ltd,*[9] it was held that a court is not entitled to refuse recognition of foreign arbitral awards on grounds of fraud in circumstances where the party resisting the recognition of the award has not exhausted the remedies available to it in a foreign jurisdiction or proper forum.

[29] As Vieyra J concluded in *Commissioner of Taxes Federation Rhodesia v McFarland*[10], the courts of the Republic have no jurisdiction to entertain legal proceedings involving the enforcement of the revenue laws of another state, and that "[t]he imposition of a tax creates a duty that is not to be likened to any other debt. The fiscal power is an attribute of sovereignty".[11] As counsel for Momoco submitted, as I also find, whether the applicant complied with the relevant provisions of the legislation in the United Kingdom like the Companies Act, 2006 , the Finance Act, 2004 or is guilty of a breach of the Criminal Finance Act, 2017 are matters for the United Kingdom authorities to investigate and address. GFE concedes as much.

[30] GFE is a party to an international arbitration agreement in which the parties choose the substantive law which is to apply, the place where a tribunal is to sit, who the arbitrator is to be, as well as the applicable procedural law.[12] The

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[8] *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others* [2007] ZASCA 163; 2008 (2) SA 608 (SCA) at para 30.
[9] 2000 (2) SA 215 (T).
[10] 1965 (1) SA 470 (W).
[11] Id at 473H.
[12] *Seton Co* n 11 above at 229.

right of parties to arbitrate their disputes before a tribunal of their own choosing has long been part of our common law.[13] It is a firmly established principle of the law of arbitration that awards are final.[14] It is only in exceptional, recognised instances that courts will not give effect to arbitral awards. Failure to pay for goods purchased and delivered several years ago is nothing but breach of contract.

[31] Generally, public policy requires contracting parties to honour obligations that have been freely and voluntarily undertaken. As the Constitutional Court reminds us in *Beadica 231 CC and Others v Trustees, Oregon Trust And Others*[15] that "public policy demands that contracts freely and consciously entered into must be honoured".[16] Furthermore, the principle of *pacta sunt servanda* gives effect to the "central constitutional values of freedom and dignity".[17] In sum, courts recognise that generally, public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken. In *Telcordia Technologies,*[18] the Supreme Court of Appeal (per Harms JA) stressed the need, when considering the confirmation of arbitral awards, for adherence to the principle of party autonomy, requiring a high degree of deference to arbitral decisions, which is a worldwide tradition.

[32] The defence put up is dilatory. The award made is not in conflict with or deviating from the terms of the various sale confirmations. It is crucial to economic development; the necessity to do simple justice between individuals[19] and commercial transactions generally that individuals be able to trust that all contracting parties will be bound by obligations willingly assumed. Accordingly, GFE failed to establish any basis either as a matter of fact or law to substantiate the contention that enforcing the arbitral award will be against public policy.

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[13] *Benjamin v Sobac South African Building and Construction (Pty) Ltd* 1989 (4) SA 940 (C) at 967.
[14] See *Seton Co* n 11 above; see also *Kollberg v Cape Town Municipality* 1967 (3) SA 472 (A) at 481F.
[15] [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC).
[16] Id at para 83.
[17] Id.
[18] *Telcordia Technologies* n 4 above at para 4.
[19] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC).

[33] In sum, on a proper reading of the Act, the refusal to pay for the goods purchased purportedly in terms of section 18(1)(a)(ii) following the award is not just unreasonable, but contrary to public policy in itself. It follows then that the applicant must succeed.

[34] I turn now to consider the question of costs. As for costs associated with the main application, there is no reason why I should not follow the normal rule of awarding the costs in accordance with the result. Counsel in each of the applications asked for an order in their favour with costs and that the costs of two counsel be allowed.

Reserved costs

[35] On 1 March 2023, Motha AJ removed this application and reserved the question of costs. The matter was not ripe for hearing. The relevant chronology is as follows. On 26 September 2022, the Taxing Master set security for costs in the amount of R350 000.00 in favour of GFE and provided his *allocatur* in that regard. On 7 November 2022, security for costs was provided by Momoco. Subsequently, on 5 December 2022, GFE demanded an increase in the security in the sum of R3 023 000.00 on, inter alia, the ground that the amount of R350 000.00 was no longer adequate.

[36] In response, on 20 December 2022, Momoco delivered a notice in terms of Rule 30A disputing GFE's entitlement to additional security and contended that the latter's notice was irregular and did not comply with the rules of court. On 13 February 2023, the Taxing Master informed the parties that a taxation date had been allocated for 27 February 2023. In response to the set down, Momoco served a new notice in terms of Rule 30A on GFE. Due to Momoco's second notice and the Rule 30/30A application, the taxation did not proceed and was postponed *sine die*, on the basis that Momoco's complaint was required to be resolved first.

[37] It is common cause that prior to the launching of the Rule 30/30A application, on 14th and 16th of February 2023 respectively, GFE's attorney of record wrote to Momoco's attorney of record and inter alia, requested that the main application be removed from the roll, as the issue concerning the additional

security for costs required resolution first. It is common cause that on 17 February 2023, and as a direct response to the aforementioned, Momoco's attorney of record wrote to the Taxing Master, advising the latter that the assessment of security for costs was premature and irregular, and furthermore requested that the matter be removed from the taxation roll on 27 February 2023.

[38] On 1 March 2023 and at the hearing of the main application, counsel for Momoco abandoned the Rule 30/30A application. Motha AJ deprecated Momoco’s conduct and found it as “very opportunistic and completely unacceptable” as the issue of taxation could have been heard on the date as previously set for that purpose, and the main application could have been proceeded with on 1 March 2023.

[39] It is common cause that on 24 April 2023, Momoco offered additional security for costs in the amount of R700 000.00, which DFE accepted. It is also common cause that the respondent was entitled to security for costs and the registrar could increase same in terms of rule 47(6). Momoco’s Rule 30 and/or Rule 30A application, being interlocutory in nature, of necessity was required to be disposed of first, before the main application could proceed. It is of no surprise therefore that on 1 March 2023, Momoco indicated to the court that it was abandoning the application. By then, Momoco had already scuppered the hearing before the Taxing Master for additional security on 27 February 2023. The damage and inconvenience to DFE was already done. DFE is entitled to reserved costs.

[40] Order

a. It is declared that the arbitral award by the China International Economic and Trade Arbitration Commission (handed down in Beijing, Peoples Republic of China) in the matter between Momoco International Limited and GFE-MIR Alloys and Minerals SA (Pty) Limited dated 12 June 2020, is made an order of court.

b. The respondent is directed to pay the applicant's costs, including the costs of two counsel.

c. The respondent, GFE-MIR Alloys and Minerals SA (Pty) Limited is entitled to the reserved costs of the removal of the main application, which costs shall include the costs associated with the withdrawal of the Rule 30/30A application on 1 March 2023.

T P Mudau

JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of Hearing:	2 May 2023
Date of Judgment:	2 June 2023
APPEARANCES	
For the Applicants:	Adv. D Fine SC. and Adv. M Salukazana
Instructed by:	Edward Nathan Sonnenbergs Inc.
For the Respondents:	Adv. H Van Eeden SC and Adv. H.J Fischer
Instructed by:	Spellas Lengert Kubler Braun Inc.