IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 042768/2023

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

…… ……
Date **ML TWALA**

In the matter between:

KAPCI COATINGS S.A.E
APPLICANT

And

KAPCI COATINGS SA CC **FIRST RESPONDENT**

MOGAMAT NIZAM ALLY **SECOND RESPONDENT**

JUDGMENT

TWALA J

Introduction

[1] In this application, the applicant seeks an order recognising and making an international arbitration award enforceable in the following terms:

1.1 The final arbitration award made by the Cairo Regional Centre for International Commercial Arbitration under case number 1528/2021, dated 23 January 2023 be made an order of Court.

1.2 Ordering any Respondent that opposes the application to pay the costs.

[2] The application is opposed by the second respondent who is the sole member of the first respondent. I shall refer to the parties as the applicant and respondent and where necessary shall refer to each respondent by its number.

Factual Background

[3] The genesis of this case arises in that on 7 December 2021 the applicant, Kapci Coatings S.A.E *("Kapci")*, referred a dispute to the Cairo Regional Centre for International Commercial Arbitration *("the CRCICA")* for determination in accordance with article 16.4 of the General Conditions of the Distribution Contract between the applicant and the first respondent, dated 1 January 2019 *(the Agreement").* In the notice of arbitration, the applicant appointed first of the three arbitrators which would form the arbitral Tribunal. Subsequently, CRCICA confirmed that the respondents have received the notice of arbitration but have

not filed any reply or nomination for the second arbitrator. Accordingly, on 10 March 2022 CRCICA appointed a co-arbitrator on behalf of the respondents.

[4] It is undisputed that on 4 April 2022 the panel of the tribunal appointed a presiding arbitrator amongst themselves and on 21 April 2022 the Tribunal communicated a draft of the first procedural order including the draft procedural timetable to the parties for their consideration and comments. On 28 April 2022 the applicant communicated its comments regarding the draft of the first procedural order and the procedural timetable. It further noted that it had attempted to contact the respondents via e-mail to discuss the proposed timetable but did not receive any response. Thereafter the Tribunal afforded the respondents an opportunity to communicate their comments by not later than 5 May 2022 and still the respondents did not respond.

[5] Concerned with not receiving any responses from the respondents, the Tribunal invited the applicant to make enquiries about the status of the respondents in South Africa. The applicant submitted correspondence to the Tribunal confirming the addresses of the respondents on 8 June 2022. As directed by the Tribunal, the applicant delivered the papers in the arbitration proceedings to the respondents' addresses in South Africa and thereafter the applicant filed its statement of claim on 26 June 2022. On 1 July 2022 the applicant notified the liquidator of the first respondent of the arbitration and provided them with copies of the agreement, the notice of arbitration and the letter of appointment of the members of the Tribunal.

[6] It is further not in dispute that on 23 August 2022 the applicant wrote to the Tribunal confirming that it was satisfied with the Tribunal determining the matter on the papers without an oral hearing and advising further that the first respondent has voluntarily surrendered itself to liquidation. The Tribunal confirmed on 8 September 2022 that it had not received the statements of defence from the respondents. The Tribunal then directed the applicant on 28 September 2022 to furnish the liquidator with various email correspondence

exchanged between the parties pursuant to the arbitration. Since no statements of defence were received from the respondents, the Tribunal directed that the hearing of the matter should be held on the 18th of October 2022. CRCICA communicated the link to attend the virtual hearing to the parties on 29 September2022.

[7] The hearing proceeded virtually on 18 October 2022 and the respondents were not in attendance. After the hearing, the Tribunal directed the parties to file post-hearing briefs and submissions on costs which the applicant filed on 2 and 3 November 2022 respectively. Again, on 20 December 2022 the Tribunal invited the parties to indicate if they have any further proof to offer or to make further submissions. The Tribunal declared the hearing closed on 9 January 2023 as the respondents failed to take this opportunity. On 23 January 2023 the CRCICA handed down the arbitration award.

[8] The order of the award is the following:

(i) Declares that the first respondent has breached its main obligation under the Distribution Agreement by failing to pay the already acknowledged debt owed to the claimant and that the claimant is entitled to specific performance;

(ii) Orders the first respondent to pay the claimant the sum amounting to USD 4, 482,385.43 (four million, four hundred and eighty-two thousand, and three hundred and eighty-five United State Dollars, and forty-three cents) for the total debt owed to the claimant;

(iii) Orders the first respondent to pay the claimant a delay penalty at 2% of the delayed amounts for every week of delay from 4 November 2021 until the date of this final award;

(iv) Orders the first respondent to pay the claimant a legal interest on the amount awarded in (ii) above at 5% annually from the date of this final award until payment in full;

(v) Orders the first respondent to pay the claimant the sum amounting to USD 93,142 (ninety-three thousand, and one hundred and forty-two United States Dollars) covering the CRCICA registration and administrative fees as well as the fees of the Tribunal with interest thereupon at 5% annually from the date of this final award until payment in full;

(vi) Orders the second respondent to pay the claimant the sum amounting to USD 4,352,776 (four million, three hundred and fifty-two thousand, and seven hundred seventy-six United States Dollars);

(vii) Orders the second respondent to pay, jointly with the first respondent, all the above outlined in (iii), (iv) and (v);

(viii) Orders that the claimant shall bear its own legal and other costs in these proceedings; and

(ix) Dismisses any other claim or request for the relief made by the claimant.

The Parties Submissions

[9] The applicant says that it is impermissible for the second respondent who has not participated in the arbitration proceedings to now seek to rehash the merits of a matter that has already been determined and a final and binding arbitration award having been issued. The second respondent was served with all the processes and papers in the arbitration proceedings and invited on numerous occasions to take part but failed to do so. This Court, so the argument went, is not a court of review or a court of appeal and therefore is not obliged to entertain the defences now being raised by the second respondent which have been dealt with and determined in the arbitration.

[10] It is submitted further by the applicant that it has complied with the provision of the act as it has filed certified copies of both the award and the agreement upon which the award was made. The issues being raised by the second respondent in these proceedings that the CRCICA did not have jurisdiction to make an award

against him in his personal capacity because he is not a party to the agreement which referred the dispute to arbitration and that he did not consent to the arbitration and the laws of Egypt were all determined in the arbitration. The court's discretion is limited to refuse to make the award an order of court once the provisions of the act have been complied with by the applicant. The court can only refuse to grant the order, so it was contended, if the respondent raised the defences as provided for in the act which is not the case in this matter.

[11] The applicant says that there is no merit in the contention that the award is against public policy. The issue was determined in the arbitral proceedings which was brought about by the agreement of the parties that any dispute arising between them shall be arbitrated by CRCICA. The applicant contended further that the second respondent has failed to demonstrate how the agreement was contrary to public policy. Since the dispute between the parties was a commercial one, and the agreement provided for an acknowledgement of debt which the second respondent signed in his personal capacity, certainly the dispute fell within the realm of clause 16.4 of the agreement - hence the CRCICA found the second respondent to be jointly liable with the first respondent for the claim of the applicant.

[12] The case for the respondent is that the arbitration tribunal could not exercise jurisdiction over him in his personal capacity for he was never a party to the distribution agreement containing the arbitration clause which the applicant relies upon, and it is against public policy to hold him to account on an agreement he is not party to. Further, the respondent says that the tribunal dealt with a dispute which was beyond the scope of the terms of reference to arbitration and the award contained decisions beyond the scope of the reference to arbitration. It was contended further that the constitution of the arbitration tribunal and or the arbitration procedure was not in accordance with the relevant arbitration agreement.

[13] It is contended further by the respondent that, although he signed the agreement, he signed it in his representative capacity as a sole member of the first respondent and never intended to bind himself personally in that agreement. The agreement which the applicant attached to these proceedings is not an agreement between the respondent and the applicant but between the first respondent and the applicant. The respondent contended that it did not consent to submit to foreign arbitration, that the seat of arbitration be in Egypt nor the procedural and substantive law that shall apply.

Discussion

[14] The nub of the case for the respondent is that the CRCICA had no jurisdiction over him since he did not sign the agreement in his personal capacity nor did he consent to foreign arbitration, the place where the tribunal is to sit, who the arbitrator is to be and procedural and substantive laws to be applied. Put differently, the case of the respondent is that it is against public policy to enforce an arbitration award against him when he was not a party to the agreement upon which the award was made. However, it should be recalled that, although he was served with the notice of arbitration, the respondent did not participate in the arbitral proceedings in Egypt.

[15] It is trite that an arbitration is a contract between the parties who agree that should there be a dispute between them arising from their agreement, it shall be referred for determination by arbitration. It is further trite that an arbitral tribunal must have jurisdiction over the person and subject-matter of the dispute before it may embark on adjudicating the dispute in question. It is further trite that arbitration is founded on the consent to arbitrate by all the parties to a dispute and is final. Once the agreement is concluded between the parties, it is binding – hence public policy requires contracting parties to honour obligations that have been freely and voluntarily undertaken.

[16] Recently the Constitutional Court in *Beadica 231 and Others v Trustees for the Time Being of Oregon Trust and Others*[1] also had an opportunity to emphasized the principle of pacta sunt servanda and stated the following:

> "[83] The first is the principle that '[p]ublic policy demands that the contracts freely and consciously entered into must be honoured'. This Court has emphasised that the principle of pacta sunt servanda gives effect to the 'central constitutional values of freedom and dignity'. It has further recognised that in general public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken. Pacta sunt servanda is thus not a relic of our pre-constitutional common law. It continues to play a crucial role in the judicial control of contracts through the instrument of public policy, as it gives expression to central constitutional values.
>
> [84] Moreover, contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.
>
> [85] The fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperilled if courts denude the principle of pacta sunt servanda."

[17] It is noteworthy that, issues being raised by the respondent in these proceedings were dealt with extensively by the arbitration tribunal and it found the respondent to be jointly liable with the first respondent. The findings of the tribunal were based on the statement made by the respondent when he signed an acknowledgment and debt account which is annexed to the distribution agreement and stated the following:

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[1] CCT 109/19 [2020] ZACC 13.

"I Mogamat Nizam Ally declare that the above account statement is correct and Kapci South Africa Owe Kapci Coating Egypt with a sum of 4,352,776.33 million US Dollar (only four million, three hundred and fifty-two thousand seven hundred and seventy-six US Dollars) and I am committed to pay the mentioned amount upon request."

[18] I do not understand the respondent to be disputing the clause of the distribution agreement which refers the dispute between the parties to arbitration. However, for the purposes of the discussion that will follow, it is now apposite to restate the relevant clause from which the arbitration receives its powers which provides the following:

"Clause 16

(1) The agreement is subject to and governed by the provisions of the Egyptian Law.

(2) All conflicts and disputes between the parties shall be communicated in writing from the claiming party to the other party to be resolved within (30) days of receipt of the notice.

(3) …

(4) Any dispute, controversy or claim arising out of or relating to this contract, its interpretation, execution, the termination or invalidity thereof, shall be settled by arbitration in accordance with the Rules of Arbitration of the Cairo Regional Centre for International Commercial Arbitration. The Arbitration Panel shall be composed of three (3) arbitrators, and seat of arbitration shall be Cairo, Egypt. The language to be used in the arbitral proceedings shall be the English language. The arbitral award shall be final and binding on the parties".

[19] It is apposite at this stage to restate the relevant provisions of the International Arbitration Act, 15 of 2017 *("the Act")* which deals with the recognition and enforcement of arbitration agreements and foreign arbitral awards which are the following:

"Section 16

Recognition and Enforcement of Arbitration Agreement and Foreign Arbitral Awards:

1. Subject to section 18 and 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 manner as any judgment or order of court, subject to the provision of this section and section 17 and 18.
4. Article 8 of the Model Lae applies, with the necessary changes to arbitration agreements referred to in subsection (1).

Section 17

Evidence to be produced by party seeking recognition or enforcement:

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

(a) (i) the original award and the original 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 the 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.

Section 18

Refusal of recognition or enforcement

(1) A court may only refuse to recognise or enforce a foreign arbitral award if: -

(a) The court finds that: -

(i) A reference to the arbitration of the subject matter of the dispute is not permissible under the law of the Republic; or

(ii) The recognition or enforcement of the award is contrary to the public policy of the Republic; or

(b) The party against whom the award is invoked, proves to the satisfaction of the court that: -

(i) A party to the arbitration agreement had no capacity to contract under the law applicable to that party;

(ii) The arbitration agreement is invalid under the law to which the parties have subjected it, or where the parties have not subjected it to any law, the

arbitration agreement is invalid under the law of the country in which the award was made;

(iii) That he or she did not receive the required notice regarding the appointment of the arbitrator or of the arbitration proceedings or was otherwise not able to present his or her case;

(iv) The award deals with a dispute not contemplated by, or not falling within the terms of the reference to arbitration, or contains decision on matters beyond the scope of the reference to arbitration, subject to the provisions of subsection (2);

(v) The constitution of the arbitration tribunal or the arbitration procedure was not in accordance with the relevant arbitration agreement or, if the agreement does not provide for such matters, with the law of the country in which the arbitration took place; or

(vi) The award is not yet 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) An award which contains decisions on matters not submitted to arbitration may recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(3) If an application for the setting aside or suspension of an award has been made to a competent authority referred to in subsection (1)(b)(vi), the court where recognition or enforcement is sought may, if it considers it appropriate: -

(a) Adjourn its decision on the enforcement of the award; and

(b) On the application of the party claiming enforcement of the award, order the other party to provide suitable security".

[20] I accept that the respondent at first signed the distribution agreement in his capacity as the representative and sole member of the first respondent. However, the reasonable, businesslike and purposive interpretation to ascribe to the words used by the respondent and the context they were used in when he signed the acknowledgment and debt account is that he signed in his personal capacity. The respondent acknowledged the indebtedness of the first respondent and committed and or bound himself that he will pay the mentioned amount upon request. By so saying and signing the document, which is part of the distribution agreement, the respondent personally accepted the terms of the agreement as a surety who

undertook to be jointly liable with the first respondent for the fulfilment of the obligation to pay the applicant for the amount owing to it by the first respondent upon request.

[21] In *University of Johannesburg v Auckland Park Theological Seminary and Another*[2] the Constitutional Court had the opportunity to deal with the principles of interpretation of documents and court order and stated the following:

> "[65] This approach to interpretation requires that 'from the outset one considers the context and the language together, with neither predominating over the other'. In Chisuse, although speaking in the context of statutory interpretation, this Court held that this 'now settled' approach to interpretation, is a 'unitary' exercise. This means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose.
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> [66] The approach in Endumeni 'updated' the position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text. The Supreme Court of Appeal has explicitly pointed out in cases subsequent to Endumeni that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. A court interpreting a contract has to, from the onset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and knowledge at the time of those who negotiated and produced the contract".

[22] It would be an absurdity to suggest that when the respondent signed the distribution agreement at the foot thereof and made the undertaking and or commitment, he intended to sign as a representative of the first respondent. The respondent specifically stated that he commits himself to paying the debt of the first respondent and thus made himself a co-debtor with the first respondent. It would not make any business sense if the respondent were to sign a separate agreement which does not subject him to arbitration like his company, the first respondent. He signed the acknowledgement and debt account which forms part of the whole agreement and thereby identified with the terms as they pertain to

[2] (CCT 70/20) [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (11 June 2021).

the first respondent. I therefore find that the respondent signed the acknowledgement and debt account and bound himself in his personal capacity for the indebtedness owed to the applicant by the first respondent.

[23] In *Novartis v Maphil*[3] the Supreme Court of Appeal had an opportunity to deal with the principles of interpretation of contract and referred to other foreign judgments and stated the following:

> "[30] Lord Clarke in *Rainy Sky* in turn referred to a passage in *Society of Lloyd's v Robinson* [1999] 1 All ER (Comm) at 545, 551 which I consider useful.
> 'Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which the reasonable person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.'
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> [31] This was also the approach of this court in *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* [2009] ZASCA 154; 2010 (2) SA 498 (SCA) para 13. A further principle to be applied in a case such as this is that a commercial document executed by the parties with the intention that it should have commercial operation should not lightly be held unenforceable because the parties have not expressed themselves as clearly as they might have done. In this regard see *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* [1991] ZASCA 130; 1991 (1) SA 508 (A) at 514B-F, where Hoexter JA repeated the dictum of Lord Wright in *Hillas & Co Ltd v Arcos* Ltd 147 LTR 503 at 514:
> 'Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects."

[3] (20229/2014) [2015] ZASCA 111; 2016 (1) SA 518 (SCA); [2015] 4 ALL SA 417 (SCA) (3 September2015).

[24] The case for the respondent is that, if the court finds that he signed the agreement in his personal capacity, then he did not consent to foreign arbitration, the place where the tribunal is to sit, who the arbitrator is to be and procedural and substantive laws to be applied in the arbitration. I do not agree with this contention. It is not the case of the respondent that if he were to sign the acknowledgement and debt account in his personal capacity, he would have wanted or demanded a separate agreement from that he signed on behalf of his company, the first respondent. I hold the view that he signed the agreement knowing that he is bound by its terms as they apply to the first respondent, whose indebtedness to the applicant he acknowledged, and has committed himself to pay.

[25] Furthermore, clause 16.4 of the distribution agreement provides that any dispute, controversy or claim arising out of or relating to this contract, shall be settled by arbitration in accordance with the rules of arbitration of the Cairo Regional Centre for International Commercial Arbitration. It is my considered view that the dispute between the applicant and the respondent arises and is related to the distribution agreement. This is so because the respondent committed himself to pay the indebtedness of the first respondent, who is a party to the agreement, which indebtedness arose from the agreement. Thereby, the respondent has brought himself within the realm of the agreement which provides for all disputes relating thereto to be subjected to international arbitration in Cairo, Egypt. The ineluctable conclusion therefore is that the CRCICA in Egypt had jurisdiction over the respondent and to determine this matter between the respondent and the applicant.

[26] The respondent placed reliance on *MV Cos Prosperity: Phoenix Shipping Corporation v DHL Global Forwarding SA (Pty) Ltd and Another*[4]. However, this case is distinguishable from the present case. Bateman, as the second respondent, made clear the terms and conditions under which it would agree to

[4] 2012 (3) SA 381 (WCC).

the contract of carriage and these were: that the vessel to be booked should not have anything to do with the Cosco vessel; that no part of the machinery should be stored on deck; that the entire machinery be stored in the hold; and that a written contract, containing the suggested terms and conditions, be supplied to Bateman for signature. Instead, after quiet sometime has passed, a booking note which purported to be a draft agreement containing terms and condition as proposed by Bateman was received by Bateman from DHL Global. Bateman did not accept the terms and conditions set out in the draft and did not sign it. It was correctly found that Bateman was not party to the agreement for he did not sign the underlying agreement.

[27] In the present case, the respondent did not propose any new terms and conditions before he signed the underlying agreement. The respondent signed the agreement as it was – thus accepting the terms and conditions as they were applicable to his company, the first respondent. I am therefore of the view that the principles laid down in the *Phoenix Shipping* case do not find application in this case. The respondent, by signing the acknowledgement and debt account in his personal capacity, brought himself within the premise of the agreement.

[28] It is disingenuous of the respondent to attempt to invoke the provisions of section 18 of the Act challenging the constitution of the arbitration tribunal in Egypt. It is equally disingenuous of the respondent to attempt to mount a challenge that the award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, and that it contains a decision on matters beyond the scope of the reference to arbitration. I say so because the respondent does not dispute that it was served with notices of the arbitration and was afforded an opportunity to participate in the selection process of the arbitrators including the presiding officer. As already mentioned above, the dispute between the respondent and the applicant flows from the distribution agreement. It can therefore not be correct that the decision of the arbitration tribunal, by finding against the respondent, is beyond the scope of the terms of reference to arbitration.

[29] In *Seton Co v Silveroak Industries Ltd*[5], the Court stated the following when it was dealing with an arbitral award:

> "…In the case of arbitral awards, the position is different as the parties voluntarily contracted to submit their dispute to arbitration. In case of international arbitration, the parties have a choice of the substantive law which is to apply, the place where a tribunal is to sit, who the arbitrator is to be and what procedural law is to apply. It is a firmly established principle of the law that arbitral awards are final. It is only in exceptional, recognised instances where the Courts will not give effect to arbitral award. The Recognition and Enforcement of Foreign Arbitral Awards Act, 40 of 1977 was promulgated because South Africa was a party to the New York Convention the interpretation of the Convention by the Court of the countries which incorporated the Convention into their national legislation (inter alia the United Kingdom) has persuasive authority in our Courts. Furthermore, s 233 of the Constitution of the Republic of South Africa Act, 108 of 1996 provides 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'".

[30] It should be recalled that section 18 of the Act provides for instances when a court may only refuse to recognise or enforce a foreign arbitral award. Although the Act uses the word "only", I am minded that the list is not exhaustive. I hold the view that the Legislature did not intend to change the common law position which existed under the old act which provided that the court may refuse to recognise and enforce a foreign arbitrary awards if the party who is opposed to it demonstrate that exceptional circumstances exist.

[31] It is a trite principle of our law that a statute must either explicitly state that it is the intention of the legislature to alter the common law, or the inference from the statute must be such that we can come to no other conclusion than that the legislature did have such intention. Further, it is long established that a statute should be interpreted in conformity with the common law rather than against it,

[5] 2000 (2) SA 215 (T).

except where and so far as it is plainly intended to alter the course of the common law.

[32] In *Wild v Legal Practice Council and Others*[6] the Court when faced with the similar point, quoted a paragraph from the case of *Bills of Costs (Pty) Ltd v The Registrar*[7] where it was explained that:

> "what one has to seek in that Act and other relevant legislation is whether they have explicitly or by necessary implication altered the common law…. In my view, none of the legislation referred to effects such an alteration. On the contrary, if anything, it assumes the continuance or retention of that common law rule".

[33] In this case, the respondent has failed to demonstrate that there exist any exceptional circumstances which enjoins the court to refuse to recognise and enforce this foreign arbitrary award.

Conclusion

[34] Section 16 of the Act enjoins the court to recognise and enforce the foreign arbitral award and must, on application make the award an order of the court if it complies with the provisions of the Act. It is my considered view therefore that although the respondent is not named as a party in the distribution agreement, he has brought himself within the realm of the agreement by signing the acknowledgment and debt account – hence the provisions of the clause 16.4 of the agreement finds application. The contentions of the respondent that the whole issue of holding him liable in terms of the agreement is against public policy is unmeritorious, having regard to the conclusions and reasons stated above.

[35] It is my considered view therefore that the applicant has met all the requirements of the Act in that it produced and attached to these papers certified copies of both the distribution agreement and the arbitrary award. The applicant has therefore

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[6] (31130/2019) [2023] ZAGPPHC 1762; 2023 (5) SA 612 (GP) (24 April 2023).
[7] 1979 (3) SA 925 (A) at 942 D-E.

made out an unassailable case and is entitled to the order it seeks in terms of the notice of motion.

[36] For the reasons stated above, I make the following order:

1. The final arbitration award made by the Cairo Regional Centre for International Commercial Arbitration under case number 1528/2021 and dated 23 January 2023, is made and order of Court.
2. The second respondent is to pay the costs.

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TWALA M L
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

For the Applicant:	**Advocate S. Meyer**
Instructed by:	**Bowman Gillfillan Inc** **Tel: 011 669 9581** **Jonathan.barnes@bowmanslaw.com**

For the Respondent:	**Advocate M Karolia**
Instructed by:	**Ayoob Kaka Attorneys** **Tel: 011 726 1710** **ebrahim@kakalaw.co.za**

Date of Hearing: **15th April 2024**

Date of Judgment: **2nd May 2024**

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 2nd May 2024.