Enforcement of a foreign arbitral award

Dear Uncle Oswald

I am in a serious predicament! I am the sole owner of a Namibian catering and events management enterprise. After the level 5 COVID-19 lockdown regulations came into effect, one of my biggest clients, an oil refinery in Dubai, failed to make payment of my February 2020 invoice for an amount of N$2 758 000. The invoice was due and payable on 15 April 2020. The client relied on force majeure *as the reason for its payment default. Our written contract provided for dispute resolution by way of compulsory final arbitration before a single arbitrator to be appointed by the Association of Arbitrators (Southern Africa) NPC (**AoA**). I referred the dispute to arbitration. The AoA appointed an arbitrator who conducted the proceedings expeditiously and published her award in my favour on 10 May 2020. The arbitral proceedings were conducted virtually via* Zoom*, with the arbitrator sitting in Maputo, Mozambique. That is also where I happened to manage the event and provided catering services for the client. In terms of the arbitration clause in our contract, the juridical seat of the arbitration was Johannesburg. The respondent owns immovable commercial property in Johannesburg, but it has no physical address in South Africa. In terms of the arbitrator's award, which was published in Portuguese in Mozambique, the respondent is obliged to pay me an amount of N$2 785 000, interest at 10% per year from 2 April 2020 to date of final payment and the costs of the award. I was under the impression that the respondent is obliged to give immediate effect to the arbitrator's award but, four months later and despite several strongly worded emails from me to the respondent, I have not received payment. I have complained to the arbitrator, but she said that her jurisdiction came to an end when her award was published. Please help, I am in dire financial straits! What can I do to get my money out of the respondent?*

Regards

Penny Pincher

Dear Penny

The answer to your question is a mouthful, and it is legally and technically complex. I will do my best to keep it simple. What is set out below is intended merely as a general overview of your situation, and the solution available to you. Please do not act on it as legal advice. You will have to consult a legal practitioner. As they say: do not try this at home.

On my reading of your question, you are faced with the following challenges. The arbitrator cannot assist you in the enforcement of her award. Having made her award, she is, as she correctly pointed out, *functus officio.* The Sheriff of the High Court can only levy execution on

a court order, not an arbitral award. You are not entitled to take the law into your own hands by appropriating the respondent's money or property.

We know that the arbitral award in your favour is one sounding in money. We know that both parties are from states other than South Africa. We know that the award was made in a state other than South Africa. We are therefore dealing with an award arising from an international commercial arbitration. It is, in legal terms, a foreign arbitral award. International commercial arbitrations and foreign arbitral awards are governed in South Africa by the International Arbitration Act, No. 15 of 2017 (**the Act**). The award in your favour is a foreign arbitral award as defined in section 14(d) of the Act.

Your challenge is to convert your award to money. The solution lies in the Act. More specifically, it lies in Chapter 3 of the Act, read with Schedules 1 and 3 thereto. Chapter 3 of the Act deals with the recognition and enforcement of foreign arbitral awards. Schedule 1 is the UNCITRAL Model Law on International Commercial Arbitration. Schedule 3 is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Section 16 in Chapter 3 of the Act contains provisions to the following effect. Section 16(1) determines that a South African court is obliged to recognise and enforce a foreign arbitral award. Section 16(1) also contains a qualification: Recognition and enforcement in terms of section 16(1) will always remain subject to section 18. I will deal with section 18 later.

Section 16(2) determines that a foreign arbitral award is binding between the parties and may be relied upon by the parties in any legal proceedings. Such legal proceedings include an application to court for the recognition and enforcement of foreign arbitral awards. Section 16(3) determines that a foreign arbitral award must, on application, be made an order of court. The prescribed procedure is therefore motion procedure, as opposed to action procedure. Section 16(3) also determines that an award which has been made an order of court may be enforced in the same manner as any judgment or order of court. In other words, the Sheriff may then levy execution in terms of the court order.

The obvious next question is, which court is the one referred to in section 16 of the Act? On my reading, the answer lies in section 14(c) thereof, which defines the word *court* as any division of the High Court referred to in section 6(1) of the Superior Courts Act, No. 10 of 2013 or any local seat thereof with jurisdiction. Therefore, only the High Court may recognise and enforce a foreign arbitral award. In your case, Penny, this will be the Johannesburg High Court because the juridical seat of arbitration was Johannesburg, and the respondent owns immovable property in Johannesburg.

We now know that the High Court is obliged to assist you by recognising and enforcing the award, subject only to the provisions of section 18 of the Act. Before we deal with section 18,

let me express some thoughts on the correct procedure to follow. To correctly place the matter before the Johannesburg High Court you will first have to consider section 16(3) of the Act.

Section 16(3) determines that you must approach the High Court *on application*, in other words by way of notice of motion. The Act is of no further assistance. To ascertain the correct procedure, you will have to look at rule 6 of the Uniform Rules of Court (**the Rules**). It contains all the formalities required for an application of this nature. Your notice of motion will have to be in accordance with Form 2A in the First Schedule to the Rules.

Because the respondent has no physical address for service in South Africa, it might be necessary for you to first seek leave from the court to serve the application on the respondent by way of edictal citation and/or substituted service in Dubai. That is something which your legal representative will have to advise you on.

Annexed to your notice of motion will be your founding affidavit. We find the minimum requirements for the founding affidavit in section 17 of the Act. You are required to allege the existence of an arbitration agreement, and the existence of an award as contemplated in Chapter 3 of the Act. You are required to prove these allegations by appending the original arbitration agreement and the original award, both authenticated in terms of rule 63 of the Rules, or a certified copy of the arbitration agreement and the award. In addition, if the agreement and/or the award is in a language other than a South African official language, as with the award in your case, then a sworn translation thereof has to be appended to the founding affidavit and the sworn translation has to be authenticated in terms of rule 63 as well.

You also will have to say what it is that you want from the court, in other words, you will have to set out what relief you require in your prayers. Your first prayer will be for an order that the award be judicially recognised as a foreign arbitral award for purposes of Chapter 3 of the Act. Your second prayer will for the award to be made an order of court in terms of section 16(3) of the Act. Your third prayer will be for costs of the application. These are, as I see it, the essentials for an application for recognition and enforcement of a foreign arbitral award.

However, your notice of motion, your founding affidavit and your two appendices will tell only your side of the story. The court and/or the respondent may also have something to say about the case. That is why the application has to be served on the respondent, and that is why the court has a (limited) discretion whether to recognise and/or enforce the award. That brings us to section 18 of the Act.

Although section 16 determines that a South African court is obliged to recognise and enforce a foreign arbitral award, it also determines that recognition and enforcement remain subject to the provisions of section 18. Section 18 of the Act deals with the grounds for refusal of recognition or enforcement. The grounds for refusal of recognition or enforcement are limited. Section 18(1) determines that the court may only refuse to recognise or enforce a foreign arbitral

award under the circumstances expressly provided for in sections 18(1)(a) and 18(1)(b). A court may not, for example, simply decide that a foreign arbitral award is unfair and for this reason refuse to recognise and enforce it. As a matter of interest, this limitation on the court's discretion ties in with article 5 of Schedule 1 to the Act (the UNCITRAL Model Law) which states that in matters governed by the Model Law (recognition and enforcement are dealt with under articles 35 and 36 of the Model Law), no court shall intervene except where specifically so provided. The legislature's intention is clear: courts are to regard international commercial arbitration as a no-go area unless expressly so provided in the Act, and then only to the extent expressly provided for. In section 18 the legislature expressly provided for court intervention, but only to a limited extent.

Section 18(1)(a) deals with the situation where the court finds one or more of only two prohibitions against recognition or enforcement. You will find them in section 18(1)(a)(i), namely where the reference to arbitration of the subject matter of the dispute is not permissible under South African law, e.g. where the underlying arbitral dispute concerns divorce proceedings, and in section 18(1)(a)(ii), namely where the recognition or enforcement of the award is contrary to South African public policy, e.g. where the arbitral award is for damages arising from breach of contract between two parties involved in cross-border drug smuggling.

It appears to me that one of the reasons why section 18(1)(a) is stated separately from section 18(1)(b) is that not all applications for recognition and enforcement of foreign arbitral awards are opposed by respondents. In unopposed applications the court will be entitled, on its own initiative, to refuse recognition or enforcement if it finds present the circumstances referred to in either of the two grounds provided for in section 18(1)(a)(i) or (ii). If the application is opposed, then of course nothing prevents a respondent from raising any of these two grounds in opposition to the application.

Section 18(1)(b) applies only when a respondent alleges and proves to the satisfaction of the court that any of the six limited grounds set out in sections 18(1)(b)(i) to (vi) exist. The court has no jurisdiction to raise any of these six grounds on its own initiative. The respondent must allege and prove it. These six grounds are essentially the following: Section 18(1)(b)(i) – a party had no contractual capacity, for example where one of the parties was a company under business rescue and required the consent of its business rescue practitioner to conclude a contract; section 18(1)(b)(ii) – the arbitration agreement is invalid, for example where it was not in writing; section 18(1)(b)(iii) – the respondent did not receive notice of the appointment of the tribunal or of the arbitration proceedings, or was otherwise unable to present its case; section 18(1)(b)(iv) – the award deals with a dispute outside the terms of the reference or it contains a decision on something beyond the scope of the reference; section 18(1)(b)(v) – the constitution of the tribunal or the arbitration procedure was not in accordance with the arbitration agreement, for example where the arbitration agreement required the appointment of an advocate but the

appointed arbitrator was an engineer; and section 18(1)(b)(vi) – the award is not yet binding, for example where an award is still subject to fulfilment of a suspensive condition, or the award has been set aside or suspended by a competent authority of the state where or under the law of which the award was made.

Lastly, section 19 of the Act determines that the provisions of Chapter 3 thereof do not affect any other right to rely upon or to enforce a foreign arbitral award, including the right conferred by article 35 of Schedule 1 (the UNCITRAL Model Law) to the Act. Article 35 of the UNCITRAL Model Law deals with the recognition and enforcement of foreign arbitral awards.

I hope that this provides you with sufficient background to have an informed consultation with your legal representative.

All the best,

Uncle Oswald

Readers' comments

On 23 September 2020, Adv JP Snijders wrote to Uncle Oswald about the advice he provided to *Fearless Frikkie* in respect of the rule in ***Hollington v F Hewthorne & Co*** [1943] 2 ALL ER 35. Since Mr Snijders's letter provides some very useful insights into the circumstances where this rule would find application, and also where not, it is published in full, *without* any alterations to it. It reads as follows:

'*Dear Uncle Oswald,*

The rule in Hollington v Hewthorn & Co, [1943] KB 587 (CA) reviewed by Uncle Oswald is controversial, as repeated in the authorities you referred to in your Q&A in July.

I am not persuaded however, that it is generally applicable to the admissibility of statements of facts in previous tribunals and investigations (arbitrations, e.g.). It finds application to exclude the opinions, findings of fact, conclusions, convictions, etc. of other tribunals. The ***statements of fact*** *remain admissible in evidence, subject to standard limitations on the admission of opinion evidence, irrelevant evidence and hearsay evidence.*

For a recent exposition of the English law, see Hourani v Thomson [2017] EWHC 432 (QB), paras [19] to [21], applying the House of Lords decision in Three Rivers DC v Bank of England (No 3), [2003] 2 AC 1, paras [28]-[33], [79], [103] and [130]-[133] per Lords Hope and Hutton. The statements of fact are admissible, subject to the standard rules applicable to the admission of hearsay evidence.

The latter approach was also followed in South Africa in the authority you referred to, applied to the facts in that matter: Graham v Park Mews Body Corporate and Another, 2012 (1) SA 355, paras [58], [60] to exclude the opinion of an expert that a building was not well-maintained as inadmissible into evidence in a matter that concerned the appointment of an administrator.

Henney J in Graham followed the Hoffmann J [sic] *-- as he then was -- (the author of Hoffmann and Zeffert, The South African Law of Evidence, 4th ed., 1990) exposition of the Hollington Rule in Land Securities PLC v Westminster City Council, [1993] 4 All ER 124 (Ch D), p. 126 c-j: 'In principle the judgment, verdict or award of another tribunal evidence to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties.' Henney J considered that the justification for the Hollington Rule may lie in the different standards of proof between different tribunals (see para [63]). Henney J also considered that evidence of credibility of a witness before one tribunal was admissible in another tribunal.*

Where the standards of proof are the same, the parties are the same, and the statement of fact is otherwise admissible; arguendo the Rule does not apply. I can foresee this issue arising between a hearing before a Dispute Adjudication Board and an arbitration under FIDIC contracts. A re-hearing of all the facts, and all expert statements (except the final opinion of the expert) would be a monumental waste of time and money, and a wrong application of the Hollington Rule. See the criticism of Hollington in Zeffert, Paizes and Skeen, The South African Law of Evidence, p. 315.

I am of the view that the court wrongly generalized the Hollington rule in Msunduzi Municipality v Natal Joint Municipal Pension/Provident Fund and Others, 2007 (1) SA 142 (N), p. 151I, per Pillay J to exclude all evidence before another tribunal as follows: 'the objection to the admissibility into evidence of the disciplinary hearing must be upheld.' What should have been inadmissible would be the conclusion/award/finding of the disciplinary hearing, not all evidence or statements of fact before it.

Because of the absence of an independent jury, who is the 'finder of fact' in the English law of civil and criminal procedure; South African practice may not as clearly distinguish between evidence and fact (findings of fact). There is a distinction in our law of evidence and civil procedure between facta probantia and factum probandum, but this distinction is not always understood by practitioners, or arbitrators for that matter. I would therefore suggest that evidence of the factum probandum would be inadmissible in a different tribunal, applying Hollington; but evidence of the facta probantia would be admissible into evidence before another tribunal (subject to the general rules of admissibility, including, e.g. hearsay). I would also suggest that if both tribunals are civil tribunals and the parties are the same, all the more reason to include the evidence and statements of fact before the other tribunal.

Accordingly, I would not accept the general proposition that all evidence heard in a previous tribunal be excluded on the basis of the Hollington Rule. The statements of fact will not be excluded. The findings of fact, or conclusions of fact, or the inferences, or the final award will be excluded. The distinction is not always easy to apply, and neither are the exceptions to the rule.

The Hollington rule is fertile ground for adjudication, requiring precision from adjudicators/arbitrators issuing awards ('statements of fact' distinguished from 'findings of fact')!

Jean Pierre Snijders'

Editor: The advice sought from Uncle Oswald by Fearless Frikkie concerned Frikkie's question about his own '… *argument … that the* <u>*arbitrator must accept the adjudicator's decision*</u> *…* *[i.e. that all elements of his claim had been proven] … *and that it is not necessary for me to prove my claim before her, again* …' (*Own underlining and insertion). This is what Uncle Oswald

opined had to be excluded. According to you '… *findings of fact, or conclusions of fact, or the inferences, or the final award will be excluded*' in terms of the so-called *Hollington*-rule. You therefore at least appear to be in agreement with Uncle Oswald on the correct application of the rule in this specific instance.