**IN THE HIGH COURT OF ESWATINI**

**JUDGMENT**

**CIVIL CASE NO: 1130/17**

In the matter between:

**IMPROCHEM (PTY) LIMITED** **APPLICANT**

And

**USA DISTILLERS (PTY) LIMITED** **RESPONDENT**

**Neutral Citation:** *Improchem (Pty) Limited v USA Distillers (Pty) Limited (1130/17) [2020] SZHC (23) 21st February 2020*

**Coram:** **MLANGENI J.**

**Heard:** **3rd February 2020**

**Delivered:** **21st February 2020**

*Flynote:* *Private international law – application for the recognition and enforcement of foreign judgments in this jurisdiction.*

*Common law requirements outlined for the recognition and enforcement of foreign judgments.*

*Reciprocal Enforcement of Judgments Act No.4/1922 discussed.*

*Question: Whether the Act ousts the common law procedure or not.*

*Held:* *The Statutory procedure is for the convenience of preferred countries that are specifically mentioned in the Act or declared in terms of the Act; it does not oust the common law procedure.*

*Held, further:* *Judgments and arbitration awards obtained in South Africa may be recognized Eswatini through the Common Law procedure, and enforced in this Jurisdiction.*

*Application granted with costs.*

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**JUDGMENT**

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[1] This matter is a classic example of paradox. Arbitrations are intended to obviate the delays that are associated with court litigation. The dispute between the parties was first arbitrated upon during the period 2012 to 2013 and the arbitrator made his award on the 31st January 2014. About six years later the dispute still rages on, and the parties could well feel that they might have been better of going straight to court.

[2] An appeal was lodged against the award dated 31st January 2014. It was dismissed by the arbitration appeal tribunal on the 17th September 2014. Thereafter, the present applicant moved an application in the Gauteng Local Division of the High Court of South Africa, seeking to have the appeal award made an order of court so that it could be enforceable as such. The application was granted on the 31st August 2016. Because the judgement debtor is a peregrinus in South Africa and has no assets in that country, it has become necessary for the judgment creditor to have the judgment recognized in this country so that it can be enforceable as a judgment of court in this jurisdiction. The application before me is for that purpose. It is common cause that the Respondent is a corporate citizen of this country and has assets here.

[3] The applicant's prayers are as follows:-

**"1. That this Honourable Court recognise the judgment of the Gauteng Local Division of the High Court of South Africa, dated 31st August 2016……as revised by the order of that court dated 31st August 2016……which made the arbitration award of Judge LTC Harns, Advocate DM Fine SC and WHG Van der Linde SC dated 17th September 2014…….below referred to 'the appeal award', an order of that court.**

**2. That the aforesaid order of 31st August 2016……may be enforced as an order of the High Court of Swaziland against the Respondent in Swaziland.**

**3. In the alternative to prayers 1 and 2, that the Registrar be granted leave, in terms of Section 3 of the Reciprocal Enforcement of Judgments Act No.4 of 1922, to register in this court the appeal award.**

**4. In the alternative to prayers 1, 2 and 3, that this Honourable Court recognise the appeal award, and order that it be enforced as an order of the High Court of Swaziland against the Respondent in Swaziland.**

**5. That the Respondent pays the costs of this application on an attorney and client scale…….**

**6. Further or alternative relief**

[4] Like all the preceding process between the parties, this application is vigorously opposed. Over and above that, the Respondent has filed a **"Conditional counter–application,"** which I will deal with in due course.

[5] At the hearing of the matter I was informed that the Applicant no longer pursues prayer 3. In succinct terms the applicant, who has been successful at every level of litigation between the parties – a greater part of which occurred in South Africa – wants this court to recognise the relief that it has obtained in South Africa, so that it can be enforced against the Respondent in this country. In South Africa the appeal award was made an order of court by Her Lordship Keightley J. in the case of IMPROCHEM (PTY) LTD v USA DISTILLERS (PTY) LTD[1], and it is this order that the applicant mainly seeks to enforce in this country. To give a better perspective of the matter, below I quote in full the order of Keightley J.

[1] 2015/13244, at pages 681-708 of Vol 3 of the Book of Pleadings (BOP).

**"1. The arbitration appeal award of the Hounorable Justice LTC Harns, DM Fine SC and WHG Van der Linde SC dated 17th September 2014, is made an order of court.**

**2. The Respondent is directed to pay the costs of the application on an attorney and client scale."[2]**

[6] The legal basis of the application is captured in the founding affidavit of Kamal waghmarae. The deponent avers that the application is **"based on the Common Law right to seek recognition and enforcement of foreign judgments by this court....."[3]**. Further on in the same affidavit, the deponent states that in the alternative, the application is in terms of Section 3 of the Reciprocal Enforcement of Judgments Act No.4 of 1922.

THE COMMON LAW

[7] The Applicant's common law argument requires no gusto. It is about the status of Roman-Dutch Common Law in this country. It is the law of general application, and has been since the 22nd February 1905 when The General Administration Act was promulgated. Section 3 of this Act is headed **"what laws to be in force",** and it then provides what follows:-

> **"The Roman-Dutch Common Law, save in so far as the same has been heretofore or may from time to time hereafter be modified by statute, shall be law in Swaziland."**

I point out, needlessly, that the clause recognizes that the common law may from time to time be modified through statutory intervention.

[2] At page 28 of the Judgment.
[3] At para 5 of the Founding Affidavit, P7, Vol.1 of BOP.

[8] Applicants submission is that at common law a judgment handed down in one jurisdiction may be recognized and enforced in another jurisdiction, subject to certain requirements being met. I understood at the hearing of this matter that the parties are in agreement regarding the requirements that a foreign judgment needs to meet in order to be recognized and enforced in another jurisdiction. The requirements were recognized and endorsed by Dunn J. as he then was, in the case of ECONOMA PROPRIETARY LIMTED v HUDSON (NULL)[4]. His Lordship's salutary remarks appear below:-

> **"This court does……have common law jurisdiction to recognise and enforce foreign judgments. Under the Roman Dutch Common Law there are certain conditions which need to be fulfilled before a foreign judgment will be recognized."**

[9] The requirements are:-

9.1 it must be shown that the foreign court had international jurisdiction or competence to decide the case;

9.2 it must be shown that the judgment was final and conclusive;

9.3 the recognition and enforcement of the judgment must not be against public policy including observance of the rules of natural justice.

It is the applicant's case that once the requirements mentioned in Economa are met, the foreign judgment has to be recognized and enforced in this jurisdiction. This position is acknowledged by the Respondent in its answering affidavit where it lists the above-stated requirements[5].

[4] Civil Case No. 1594/93 [1994] SZHC 40.

[5] Answering affidavit at para 2.11, pages 813-814, Vol. 3 of BOP.

[10] According to the Respondent, in *casu* only one of the three requirements is fulfilled – i.e. that the foreign judgment was final and conclusive[6]. If the Respondent is correct, then the foreign judgment cannot be recognized in terms of the common law. At this juncture I need to interrogate the two other requirements in order to determine whether they are met by the Applicant's case or not.

10.1 FOREIGN COURT'S INTERNATIONAL JURISDICTION

i) The agreement that is the subject matter of the dispute between the parties is between an Eswatini entity and a South African entity. At page 95 of Vol.1 of the Book of pleadings it shows that at least one party signed the agreement at Kempton Park in Gauteng. Moreover, although one of the parties is a South African entity, performance of the contract was largely within the borders of this country, at Big Bend. There is no doubt in my mind that this is an international agreement.

ii) Clause 25 of the agreement is headed **"Governing Law"** and it provides as follows:-

> **"The entire provisions of this Agreement shall be governed by and construed in accordance with the laws of South Africa. Furthermore, the parties hereto hereby irrevocably and unconditionally consent to the non-exclusive jurisdiction of the Witwatersrand Local Division of the High Court of South Africa <u>in regard to all matters arising from this agreement"</u>** (My underlining).

Witwatersrand Local Division is now known as the Gauteng Local Division of the High Court of South Africa.

[6] Para 2.13, page 814, Vol. 3 of BOP.

iii) The main agreement (at clause 24.2) and the arbitration agreement (at clause 3.2) are to the express effect that the arbitration was to be conducted in terms of the South African Arbitration Act. And, for the avoidance of doubt, clause 8 of the arbitration agreement provides that the **"agreement shall be governed by the law of South Africa,"** and Clause 5.11 of the same agreement provides that the arbitration **"shall be held, for the most part, in Johannesburg at a place and time to be determined by the arbitrator. It is envisioned that it may become necessary for the arbitration to be heard, in part, in Swaziland".**

iv) Clause 5.12 of the arbitration agreement envisages that either party may **"institute proceedings in any court"**. In the context of the dispute and the parties, this can only mean a court in this country or in South Africa.

v) In terms of Section 31 of the South African Arbitration Act either party is entitled to apply to court to have an award made an order of court so that it can be enforced as such.

vi) Upon application by the present Applicant, on the 31st August 2016 the appeal award was made an order of the High Court sitting in Johannesburg.

In my view the sum total of the foregoing paragraphs is that the High Court of Johannesburg does have, in the context of this matter, international jurisdiction and the conclusion that the Respondent submitted to its jurisdiction is inescapable.

10.2 RECOGNITION AND ENFORCEMENT OF THE JUDGMENT MUST NOT BE AGAINST PUBLIC POLICY INCLUDING OBSERVANCE OF THE RULES OF NATURAL JUSTICE

i) The respondent's position is that the performance by the Applicant was deficient and fell short of the requirements stipulated in the contract. This argument has the support of the initial arbitrator, Redding SC, who found that in respect of phase 1 of the contract (September 2002 to April 2003) the Applicant was entitled to the contract price **"but reduced by 35%"[7].** This suggests that he found the extent of malperformance to be 35 per cent. On appeal, the appeal tribunal set aside the Redding award in its entirety and ordered in effect, that the Respondent was to pay the entire contract price, with costs at attorney-client scale, including costs of counsel and other ancillary matters.

ii) Flowing from the premise that the Applicant's performance fell below the required standard, and thereby-it was alleged-occasioned damage to the Respondent's equipment, the Respondent argues that it is against public policy of this country to let a party be paid for work that it has not done, and to the extent that this is what the appeal award effectively requires, and by extention the order of the High Court of Johannesburg, per Keightley J, then on that basis the appeal award and/or the court order is not enforceable in this country. Coupled with the foregoing argument, the Respondent submits that in its pleadings the Applicant did

[7] Para 134.1 of the award, at P164 of BOP, Vol. 1.

not seek payment of the full contract price which was eventually awarded by the appeal tribunal.

iii) At this stage I mention that the appeal award was based on the interpretation of the contract of service between the parties, specifically clause 6.3, which provides as follows:-

> **"The client shall not be entitled to withhold payment of any amount due under this agreement for any reason whatsoever and the client shall not be entitled to set off against any amounts payable under this agreement any present or future claim which the client may have against Nalco."**

There is no doubt that this clause has tenacity but, as was pointed out by Applicants counsel during legal arguments, the parties were negotiating at arms' length, duly represented, and in any event the application of the contra proferentem rule was expressly excluded[8] by the parties.

iv) The truth of the matter is that the respondent has misunderstood the legal basis of the appeal award. The basis is that the Respondent is precluded, in plain language, from withholding payment for any reason whatsoever, and may not claim set-off against any amounts which are payable to the Applicant in respect of the agreement. The unavoidable result of this is that the respondent cannot rely on the *exceptio non adimpleti contractus*. This would seem to be the reason why clause 6.3 was put in place, to ensure that payment would not be withheld for any reason whatever, including malperformance. The reason for this, it

[8] Per Clause 1.11 of the agreement,p72 of BOP, Vol. 1.

was suggested, is that it was critical for the purification plant to function without interruption for the duration of the contract period.

v) In any event, the effect of Clause 6.3 is not to render the Respondent without redress in the event of defective performance or (as was argued) damage to the Respondents equipment. The Respondent has a right to raise a dispute and take it to arbitration in terms of the agreement between the parties. Instead, it opted to take a route that leads to nowhere, or shall I say that leads to enormous legal costs.

I therefore do not see how the appeal award, and by extention the order of Keightley J. offends against public policy in this country. It does not say what the Respondent assumes it does, it merely decrees that the Respondent has contracted out of a right that it would otherwise have but for Clause 6.3. This position is put succinctly in the appeal award as follows:-

> **"If this disentitlement of the appellant is to have any meaning, it must refer to what would otherwise have been a positive entitlement. Certainly the second disentitlement, that not to set off, refers to what would otherwise have been a clear entitlement to invoke set off, which follows as a matter of law. This suggests that the first entitlement also likely refers to what would otherwise have been a positive entitlement"[9].**

[9] Paragraph 37 of the appeal award at page 55, Vol. 1 of BOP.

vi) The Respondent has not argued that the rules of natural justice were not complied with at any stage of the arbitration, appeal arbitration or during litigation in the Superior Courts in South Africa.

I am therefore unable to agree with the Respondent's arguments that the appeal award and/or the order of court cannot be recognized because they offend against public policy in this jurisdiction. I agree with the applicant's contention that the argument on public policy would ordinarily refer to orders or judgments that have been obtained through fraudulent means or where the order that was obtained in the foreign jurisdiction is illegal in the jurisdiction where it is sought to be recognized and enforced. This was the position in the case of JONES v KROK[10] where the South African court declined to recognise and enforce punitive damages that were awarded in the United States of America, the reason being that it was not in keeping with the *lex aquilia* of Roman Dutch Law.

[11] I have therefore come to the conclusion that the order of Keightley J. which made the appeal award an order of court does meet the requirements that are enunciated in the Economa judgment. In the light of the interpretation of **"judgment"** in the Reciprocal Enforcement of Judgments Act 1922, the same applies to an arbitration award or arbitration appeal award which is enforceable in the foreign jurisdiction. On the basis of the foregoing, they would be enforceable in this jurisdiction after due process.

[10] 1996 (1) SA 504 (T).

[12] But the discourse cannot be over until I deal with the judgment in the case of MAMBA v MAMBA,[11] which was decided about seventeen years after Economa. This judgment decrees the opposite of what the Economa case stands for. In MAMBA v MAMBA Her Lordship Ota J. came to the conclusion that the statutory regime is the only route for the enforcement of foreign judgments in this country; that any country that is not specifically declared in terms of the Act cannot have its judgments recognized and enforced in this country. In other words:-

12.1 the statutory intervention has the effect of ousting the common law procedure for enforcing foreign judgments in this country.

12.2 the statutory procedure is available only to the countries that are specifically mentioned in the Act or in-terms of the Act.

[13] The relevant clause in the Reciprocal Enforcement of Judgments Act 1922 is Section 3(1) which is in the following terms:-

**"3(1) If a judgment has been obtained in the High Court in England or Ireland or in the Court of Session in Scotland the judgment creditor may apply to the court at any time within twelve months after the date of the judgment, or such longer period as may be allowed by such court to have the judgment registered in such court……"**

So, at the inception of the statute only three countries were eligible for this procedure, all of them being part of the United Kingdom of Britain. This is obviously no coincidence. This country was under the hegemony of the United Kingdom, so it made good sense that judgments obtained in

[11] (1451/09) [2011] SZHC 43.

the principal's jurisdiction should be enforceable in this country with relative ease. In the context of relative ease, I make reference to the rules that were promulgated in June 1923, in terms of which an application under Section 3(1) of the Act could be made *ex parte* or by summons.

[14] By Notice No.97 of 1922, several other countries who were part of the British Empire were included in the list of those that could utilize the procedure in terms of the Act. South Africa is not mentioned.

[15] One of the issues that arose in MAMBA v MAMBA was whether or not a judgment of a superior court in Montgomery County, United States of America, could be recognized and enforced in this Kingdom. Her Lordship Ota J. came to the conclusion that it cannot be so, because the United States of America is not one of the countries that are expressly designated in the Act or in terms of it. Her Lordship's poignant words bear repeating herein, and I do so presently.

> **"The *ipsissima verba* of the foregoing legislation has put it beyond disputation that it is the judgments of the High Court in England or Ireland or in the Court of Session in Scotland. Furthermore, Section 5 Notice No.97 of 1922 of the [Act] names 15 other Commonwealth territories other than the United Kingdom that enjoy reciprocal enforcement of judgment arrangement with the Kingdom of Swaziland. There do not include the United States of America. It is thus obvious to me from the enabling statute, that there is no arrangement for the reciprocal enforcement of judgments given in Superior Court between the Kingdom of Swaziland and the United States of America. The common law position relied upon by the Applicant in contending the issue cannot hold sway ……in the face of the express words of Statute. To**

**hold differently would contravene Section 252 (1) of the Constitution……."[12].**

[16] It is a fact that the Economa judgment was not considered in the Mamba judgment, the parties and the court being certainly oblivious of its existence. It is possible that had the Economa case been canvassed before Ota J. she may have come to a different conclusion.

[17] Section 252 (1) of the constitution is in the following terms.

> **"Subject to the provisions of this constitution or any other written law, the principles and rules that formed, immediately before the 6th September 1968 (Independence Day), the principles and rules of the Roman Dutch Common Law as applicable to Swaziland Since 22nd February 1907 are confirmed and shall be applied and enforced as the common law of Swaziland except where and to the extent that those principles or rules are inconsistent with this constitution or statute."**

[18] Regrettably, Her Lordship does not specify the inconsistency that she perceives. I respectfully disagree with the reasoning and conclusion in the Mamba case. The court appears to have unwittingly invoked the '*expressio unius*' rule of interpretation in circumstances where there was no need to do so. This is apart from the fact that in the order of importance this rule of interpretation lies pretty low.

[19] I do not see any inconsistency between the common law procedure and the statutory procedure for the recognition and enforcement of foreign

[12] At page 5 of the Judgment.

judgments in this country. These appear to me to be two different routes to the same destination. In his engaging argument Applicant's counsel, Mr. Antonie S.C. submitted that the Act was intended to avail an expedient procedure for certain preferred countries, the reason for the preferential treatment being pretty obvious. The countries belong to what was then known as the British Empire. That is why the countries that are specified can proceed *ex parte,* being spared the tedious process at common law. I see no reason in logic or elsewhere why the rest of the world should be barred from enforcing their judgments in this country, simply because they are not in the list of about eighteen countries. And the legislature cannot have intended this retrogressive position.

[20] In this era of frenetic globalization, where goods are purchased online from anywhere in the world, to hold otherwise would significantly hamper international commerce and trade. In the context of the present matter, the outcome in MAMBA v MAMBA creates an incongruous scenario in view of the very close and substantial economic activity between South Africa and Eswatini. This, in my view, may well reinforce the view that I have taken of the matter.

[21] The result of the position that I have adopted in the matter is that there is no need to interrogate some of the issues that have been raised in the pleadings. These include the defence of prescription that has been raised by the Applicant, the process of **'reductie'** that the Respondent has argued for and the many other issues that would require me to revisit the merits of the award or the appeal award. There is no doubt in my mind that there is no basis in law upon which I can enquire into the merits of the appeal award. I do, however, need to deal with the conditional counter-application because it is, after all, contingent upon the conclusion that I have come to, namely that the judgment of Keightley J. is enforceable in this country.

[22] The conditional counter-application is an epitome of creativity. It shows, perhaps, the extent to which the Respondent is prepared to go in this incessant fight against the judgment creditor. Applicant's counsel lightheartedly made reference to **"the stalingrad defence".** In the conditional counter-application the Respondent seeks to persuade me:-

21.1 to set aside the appeal award and refer the appeal to a **"fresh appeal arbitration panel"** for reconsideration;

Alternatively

21.2 that the appeal award be amended by deleting claim D and reducing the capital amount of claim A by R401,150.82.

21.3 to declare that the capital and interest portion of the appeal award was reduced by the amount of E401, 150.82 by set-off on 31st October 2014;

Alternatively

21.4 to declare that immediately the respondent makes payment to the claimant of the capital and interest amounts in the appeal award, the applicant will be indebted to the Respondent in the sum of E401, 150.82, which sum will at that time become immediately due and payable by the applicant to the Respondent.

[22] In brief and simple language the Respondent is asking this court to set aside the appeal award and refer the matter to a new appeal tribunal, or find that the Applicant owes the Respondent E401, 150.82. I do not have the legal authority to interfere with the appeal award, in as much as I was not shown concrete authority that the *mandament van reductie* is part of the law of this country. If it is part of the law of South Africa, I think that this jurisdiction should be diffident towards it. But there is

also a practical hurdle. Where would I come across the material that would inform my decision once I re-open the merits of the case between the parties?

TO RECOGNISE THE APPEAL AWARD OR THE JUDGMENT OF KEIGHTLEY J.?

[23] Respondent's counsel has observed that once an arbitration award is made it:-

> **"has a life of its own. It can be enforced in any country in which the respondent has assets."[13]**

[24] It appears to me that for purposes of enforcing the award in this country there was no need to first make it in order of court in South Africa. The application could, in my view, have been made in this jurisdiction where the Respondent is believed to have assets. On the other hand nothing has been lost by making it an order of court in South Africa – except, of course, the escalating litigation costs. The route to recognise and enforce the award in this country would have been shorter and cheaper.

COSTS OF THIS APPLICATION

[25] In terms of the main agreement between the parties, referred to as "TWM", legal costs are payable at the scale of attorney and client. This is common cause between the parties. At the hearing of this matter applicant's counsel conceded that the application was too prolix, making averments in respect of the whole history of the matter from inception. The exercise could have been significantly shorter if the applicant had focused on enforcing the appeal award or the judgment of Keightley J. With this in mind I award costs to the applicant up to 60 per cent only,

[13] Respondent heads of arguments at para 22, page 8.

such costs to be at attorney-client scale and to include costs of counsel as certified in terms of Rule 68(2).

THE ORDERS

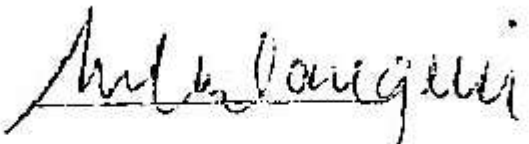
[26] I make the following orders:-

26.1 This court hereby recognizes the judgment of the Gauteng Local Division of the High Court of South Africa, dated 31st August 2016 (Annexure A hereto), as revised by the order of that court dated 31st August 2016 (Annexure B hereto), whereby the arbitration appeal award of Judge LTC Harns, Advocate DM Fine SC and WHG Van der Linde SC dated 17th September 2014 was made an order of that court (Annexure C. hereto).

26.2 The aforesaid order of 31st August 2016 (Annexure B hereto) may be enforced against the respondent in Eswatini.

26.3 The conditional counter- application is dismissed.

26.4 The Respondent shall pay costs at attorney-client scale but only up to 60 per cent, such costs to include costs of counsel as certified in terms of Rule 68(2).



**T.M. MLANGENI**

**JUDGE OF THE HIGH COURT**

**For the Applicant:** **Advocate M.M. Antonie SC instructed by Henwood & Co. Attorneys.**

**For the Respondent:** **Advocate Vivian Instructed by R.J.S. Perry.**