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A. Legislation and rules

A.1 Legislation

The International Arbitration Act, 15 of 2017 (“IA Act”) came into force and effect on 20 December 2017.

The purpose of the IA Act is to provide for the incorporation of the UNCITRAL Model Law into South African law and to provide for the recognition and enforcement of foreign arbitral awards by South African courts unless (i) such a dispute is not capable of determination⁴ by arbitration under any law of South Africa;⁵ or (ii) the arbitration agreement is contrary to the public policy of South Africa.⁶

The IA Act provides that matters which are subject to international commercial arbitrations are international commercial disputes which the parties have agreed to submit to arbitration under an arbitration agreement.

In addition to the above, an arbitration agreement is defined by the IA Act as “an agreement by the parties to submit to arbitration all or

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⁴ These matters would include matters of status such as marital status and solvency.

⁵ Section 7(1)(a).

⁶ Section 7(1)(b).

certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”⁷

Chapter II, article 7 of the UNCITRAL Model Law sets out further requirements of an arbitration agreement which must be complied with (for example, an arbitration agreement must be in writing).

It is important therefore to ensure that an arbitration agreement complies with both the requirements as set out in the IA Act, as well as the UNCITRAL Model Law, to avoid challenges to its validity.

Arbitrations between private parties, conducted under the auspices of the IA Act, are by their nature confidential and the award and any documentation which are not in the public domain are likewise confidential.⁸ As a result, parties to an international arbitration agreement under the auspices of the IA Act may rest assured that their disputes are confidential.

Arbitration proceedings to which a public body is a party, however, are to be held in public and are therefore not confidential unless, for compelling reasons, the arbitral tribunal directs otherwise. A public body is defined by the IA Act as:

- (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (b) any other functionary or institution when—
 - (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation.⁹

⁷ Section 1.

⁸ Section 11.

⁹ Section 1.



In terms of chapter IV, article 16 of the IA Act, an arbitral tribunal possesses the ability to rule on the question of its own jurisdiction.

In addition to the above, an arbitral tribunal operating under the auspices of the IA Act is empowered to, among other things, (i) make interim awards;¹⁰ and (ii) order security for costs.¹¹

The IA Act is an important development in South African law as it is an attempt to bring South Africa's treatment of international arbitrations and their enforcement within South Africa in line with the rest of the world, thus boosting confidence in the South African legal system with foreign states and entities alike. It is hoped that, with the introduction of the IA Act, South Africa will be promoted as an international arbitration venue of choice. In this regard, South Africa is ideally positioned to take center stage as an international arbitration hub - it is perfectly positioned and offers an enormous cost saving when compared to the likes of the ICC and the LCIA.

A.2 Institutions, rules and infrastructure

The most popular domestic arbitration organizations used to resolve commercial disputes in South Africa are the Arbitration Foundation of Southern Africa ("AFSA") and the Association of Arbitrators, Southern Africa ("AASA"). Arbitrations in respect of labor-related disputes are generally heard before the Commission for Conciliation, Mediation and Arbitration ("CCMA").

The Arbitration Act 42 of 1965 ("Arbitration Act") governs domestic arbitrations in South Africa and, prior to implementation of the IA Act, governed international arbitrations as well. The Arbitration Act regulates aspects such as, *inter alia*, the types of matters excluded from arbitrations, powers of the court in respect of arbitration proceedings, recusals of arbitrators and the effect of an arbitration award.

¹⁰ Chapter IVA article 17.

¹¹ Chapter IVA, article 17(2)(e).

Parties to domestic arbitrations can agree to the procedural rules to be followed, and the arbitrator will be required to follow those rules. Generally, in respect of domestic arbitrations, the parties will adopt either AFSA or AASA's Rules, depending on the organization they choose. However, parties frequently elect to have the Uniform Rules of Court¹² apply to their arbitration.

International arbitrations are now regulated by the IA Act. Article 19 of the IA Act states that the parties may agree to the rules and procedure to be followed in respect of the arbitration, failing which the arbitrator or arbitral tribunal may do so. It is common for parties to international arbitration in South Africa to use the LCIA and the ICC international arbitration forums and traditional seats such as London, along with the associated Rules. However, as mentioned, it is hoped that the IA Act will shift this and that parties to an international arbitration will use South Africa as the seat of arbitration instead.

Initial steps to give effect to this hope, and prior to the implementation of the IA Act, came in the form of the establishment of the China-Africa Joint Arbitration Centre ("CAJAC") in late 2015, tasked with addressing trade and investment disputes between Chinese and African parties.

CAJAC was created as a result of an agreement between AFSA, Africa ADR (an external arm of AFSA), AASA and the Shanghai International Trade Arbitration Centre, with seats in both Shanghai and Johannesburg, South Africa. The CAJAC is supported by AFSA and the China Law Society, which enjoys substantial government support in China. The establishment of this body will serve to foster the desirability of utilizing South Africa as an international arbitration center.

CAJAC has an arbitral committee consisting of arbitrators nominated from China and South Africa from which parties can appoint an

¹² Uniform Rules of Court: Rules regulating the conduct of proceedings of the several provincial and local divisions of the High Court of South Africa.



arbitrator. The rules applicable to the conduct of arbitrations under CAJAC are the Rules for the Conduct of Arbitrators of Africa ADR. Standard CAJAC arbitration rules are in the process of being developed in conjunction with CAJAC Shanghai.

Expanding on the scope of CAJAC, AFSA has also established AFSA International, a division within AFSA, to facilitate all international arbitrations. International arbitrations facilitated through AFSA International will be administered under the UNCITRAL Rules, and will thus accord with the IA Act.

In addition to the above, the ICC South Africa has also been established and is available for the administration of international arbitrations.

B. Cases

Given that the IA Act is relatively new, there is currently no case law on its implementation or interpretation. We have, however, set out below a number of domestic arbitration cases of interest from the past year.

B.1 An arbitration award is not a new debt in terms of the Prescription Act

In the case of *Brompton Court Body Corporate v Khumalo*,¹³ disputes arose between the parties which, by agreement, were referred to arbitration. An arbitration award was published on 12 December 2012 and, on 26 March 2014, the applicant applied to have the arbitration award made an order of the court in terms of section 31 of the Arbitration Act. The respondent claimed that the arbitration award had prescribed. The High Court upheld the respondent's defense of prescription. The issue on appeal to the Supreme Court of Appeal ("SCA") was whether the defense of prescription had been correctly upheld.

¹³ 2018 (3) SA 347 (SCA).

The respondent claimed that the arbitration award created a new debt and that the matter between the parties had prescribed in terms of section 13(1) of the Prescription Act 68 of 1969 (“Prescription Act”) in terms of which, so the respondent claimed, completion of prescription will be delayed until one year after arbitration proceedings have come to an end. The applicant was therefore required to make the arbitration award an order of court within one year of the award.

The SCA rejected this contention on the basis that section 13 provides that, if the relevant period of prescription of a debt would, but for the provisions of section 13, have been completed within one year of the date of publication of the award, the completion of the period of prescription would be delayed for one year after the publication of the award. In this regard, the SCA noted that the respondent had failed to show that the applicant’s counter-claim would have prescribed before or on or within a year of the arbitration award.

Consequently, the SCA held that the defense of prescription had to fail, and the arbitration award was enforceable against the respondent.

Importantly, this case establishes that an arbitration award does not create a new debt, and it merely affirms the existing debt that is in dispute. Accordingly, the right to make an award an order of the court is not a debt under the Prescription Act.

The significance of this award is that clients should ensure that arbitration awards are made orders of court as soon as practically possible after receiving the award, in order to ensure that the underlying debt does not potentially prescribe.

B.2 An arbitration award can be set aside in part due to an irregularity

In the case of *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd*,¹⁴ the SCA was tasked with determining

¹⁴ [2018] 2 All SA 660 (SCA).



whether a finding of gross irregularity in respect of arbitration proceedings resulted in the whole award being set aside, or whether it was possible to preserve and enforce a portion of the award.

In terms of section 33(1)(b) of the Arbitration Act, a court may, on application, set aside an arbitration award where an arbitration tribunal has committed any “gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers.” A gross irregularity will be established where an arbitrator misconceives the nature of the inquiry in the proceedings with the result that a party is denied a fair hearing or a fair trial. If an arbitrator errs on the facts or the law but engages in the correct inquiry, then this will not constitute a gross irregularity and there is thus no basis for setting aside the award. In this regard, the court noted that, where parties agree to refer a matter to arbitration, the courts will endeavor to uphold this decision and will not interfere unless absolutely necessary.

In considering whether the arbitration award in question should be set aside on the basis that the appellant did not have a fair trial of the issue it sought, the court considered that section 33(1)(b) says nothing about a situation in which an irregularity or excess of powers affects only a discrete part of an award. In this regard, the court determined that there was no reason why an arbitration that has been properly conducted on certain issues and in respect of which a proper determination has been made, should be set aside entirely purely because of an irregularity in relation to a wholly separate issue (in this instance the fairness in relation to the counterclaim). Given that the irregularity related only to the counterclaim, it was only this part of the award that was required to be set aside.

The court did, however, note that, if the irregularity had the effect of distorting the conduct of the whole proceedings, then the court would be required to set the award aside in its entirety.

B.3 An arbitration award issued under the Labour Relations Act does not prescribe in terms of the Prescription Act

As we have set out above, an arbitration award constitutes a debt for the purposes of the Prescription Act (in other words, it is capable of prescribing within 3 years). Prescription will begin to run as soon as an arbitration award is published.

However, this is no longer the position in respect of arbitration awards issued in terms of the Labour Relations Act 66 of 1995 (“LRA”).

In the recent cases of *Mogaila v. Coca Cola Fortune (Pty) Ltd*¹⁵ (“Mogaila”) the Constitutional Court (“CC”) held that the Prescription Act does not apply to the LRA and, consequently, arbitration awards issued in terms of the LRA cannot prescribe.

In making its determination, the CC relied on the case of *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus and Others*¹⁶ (“Myathaza”) where the CC held that the arbitration award in question had not prescribed. In reaching its conclusion, three CC judges relied on different reasons. The result of this was that there was no majority decision and, consequently, no binding decision was reached.

In the first judgment, it was held that the Prescription Act did not apply to the LRA because the acts were incompatible and that an order for reinstatement of an employee (as was the current situation) was not a debt and therefore could not prescribe. In the second judgment, it was held that the LRA and Prescription Act were compatible if they were correctly interpreted. In this regard, it was found that CCMA proceedings were capable of interrupting prescription and that an order for reinstatement was a debt because it placed an obligation on the employer to perform an act. In the third judgment, it was found that CCMA proceedings could not interrupt prescription because it was not a court process in terms of the Prescription Act.

¹⁵ 2018 (1) SA 82 (CC).

¹⁶ 2018 (1) SA 38 (CC).



In *Mogaila*, the CC applied each of the three judgments in *Myathaza* to the issue before it. On this basis, the court determined that the Prescription Act does not apply to the LRA and that, in any event, a reinstatement order is not a “debt.” The court further determined that CCMA proceedings can interrupt prescription. As a result, the CC finally held that the reinstatement order had not prescribed and was still enforceable.