SOUTH GAUTENG HIGH COURT

Case No: 06945/2013

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

10 February 2014 **EJ FRANCIS**

In the matter between:

BODY CORPORATE OF SIMMER COURT (SS22/2006) Applicant

and

MALESELA JOE MASILELA 1st Respondent

THANDISWA MAGDELINE MASILELA 2nd Respondent

JUDGMENT

FRANCIS J

1. This is an application to make an arbitration award issued on 29 September 2012 an order of court in terms of section 31(1) of the Arbitration Act 42 of 1965 (the Arbitration Act).

2. The application to make the arbitration award was opposed by the respondents on the grounds that they were not given reasonable notice of the date of hearing arbitration hearing. They also stated that they did not agree that the matter be referred to arbitration and that the matter was *lis pendens* in the Germiston Magistrate's Court.

3. It is common cause that the applicant instituted two actions against the respondents in the Germiston Magistrate's Court in July 2007 and 2010 respectively under case numbers 5611/2007 and 5023/2010 for payment of levies in terms of section 37 of the Sectional Titles Act (the Act). Default judgments were obtained against the respondents who successfully had the judgments rescinded, on 15 September 2010. After the judgments were rescinded the applicant elected to refer the dispute between the applicant and respondents to arbitration in terms of Regulation 71(2) of Annexure 8 of the Act. The requisite statutory notices were duly served pursuant to which application was subsequently made to the Registrar of Deeds at Pretoria for the appointment of an arbitrator in terms of the Prescribed Management Rule 71(4) of the Act.

4. The Registrar of Deeds appointed Jonathan Ely (the arbitrator) as the arbitrator in the arbitration. The arbitrator requested the applicant to submit a statement of claim and the respondents to submit a statement of defence. The applicant complied and the respondents failed to do so. The arbitrator proceeded to enrol the matter for arbitration after notice was given to the parties. The matter was enrolled for arbitration on 31 August 2012. The applicant was duly represented at the hearing by its legal representatives. There was no appearance from the representatives or its legal representatives and the matter proceeded in their absence. Evidence was duly led on behalf of the applicant. On 29 September 2012 the arbitrator issued an award which the applicant wishes to make an order of court. It is not necessary to deal with the contents

of the arbitration award.

5. The issue that arises in this matter is whether the respondents were given reasonable notice of the date of hearing of the arbitration hearing. The applicant contended that the respondents were given adequate notice of the arbitration hearing. The respondents did not seek to review the arbitration award but contended that where an arbitrator has failed to give them reasonable notice of the arbitration hearing, the arbitration award is a nullity and there is no need to bring such an application to declare it a nullity. They rely on the judgment of *Vidavsky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 SCA.

6. Section 15 of the Arbitration Act deals with the notice to be given to the parties. Section 15(1) requires an arbitration tribunal to give every party written notice of the time and place where the arbitration proceedings will be held, and every such party is entitled to be present personally or by representative and to be heard at such proceedings. Section 15(2) provides that if any party to the reference at any time fails, after having received reasonable notice of the time when and place where the arbitration proceedings will be held, to attend such proceedings without having shown previously to the arbitration tribunal good and sufficient cause for such failure, the arbitration tribunal may proceed in the absence of such party.

7. It is common cause that the arbitration was set down for a hearing on 31

August 2012. The arbitrator wrote a letter to the respondents' attorneys dated 27 August 2012 stating inter alia that unless he was provided with a copy of the court order, he would convene the arbitration hearing and hear the matter starting at 10h00 on Friday 31 August. The respondents responded to the letter with theirs dated 30 August 2012 stating that they had received the letter on 28 August 2012. They stated further that they had received short notice of the hearing and requested that the meeting be postponed since they were no longer represented by their previous attorneys. The arbitrator did not respond to the letter before the hearing.

8. The arbitrator in a letter dated 27 June 2012 which was left in the respondents post box on 6 September 2012 at 10:50 referred to the respondents facsimile dated 30 August 2012 which he said he had received via email on the same day but only had an opportunity to read it on 1 September 2012 after the arbitration hearing. He said that because the respondents did not respond to most of the correspondence and had failed to file a statement of defence despite being given ample time to do so, he elected to proceed in their absence on 31 August 2012. The arbitrator stated that he required the respondents to produce the court order and any further evidence by close of business on Friday 14 September 2012 and would reconsider the issue and make his award.

9. The question that arises for determination is whether the notice give to the respondents on 28 August 2012 that the matter was set down for arbitration on

31 August 2012 is reasonable notice in terms of section 15(2) of the Arbitration Act. There is simply no explanation given by the arbitrator nor did he file an affidavit explaining why when he had received the respondent's facsimile on 30 August 2012 he did not read it and did not postpone the matter too afford the respondents an opportunity to appear at the hearing at a later stage. The arbitrator does not state in his letter that he gave the respondents reasonable notice of the date of hearing. There cannot be any doubt that the notice given to the respondents was not reasonable notice of the date of hearing. This is too obvious. The applicants in their founding papers did not state that the respondents were given reasonable notice but state that they were given proper notice of the date of arbitration. It is telling to note that the applicant has not dealt with the issue of reasonable notice at all in its replying affidavit.

10. The notice to be given should be reasonable notice. The two days that the respondents were given cannot be construed as reasonable notice. Since the arbitration award is a nullity it follows that the application stands to be dismissed.

11. There is no reason why costs should not follow the result.

12. In the circumstances I make the following order:

12.1 The application is dismissed with costs.

FRANCIS J

JUDGE OF THE HIGH COURT

FOR THE APPLICANT	:	M DE OLIVEIRA INSTRUCTED BY BICCARI BOLLO MARIANO INC
FOR RESPONDENTS	:	GY KHETHELO INSTRUCTED BY MALANGENI ATTORNEYS
DATE OF HEARING	:	3 & 5 FEBRUARY 2014
DATE OF JUDGMENT	:	10 FEBRUARY 2014