IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 20653/2018

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

Date: 08 September 2020

(*Electronically submitted)*

In the matter between:

DAVID KOTZEN N.O.	First Applicant
ROBERTO CARLOS DE FREITAS DE VASCONCELOS	Second Applicant

and

THORN VALLEY ESTATE HOMEOWNERS ASSOCIATION	First Respondent
JOSEPHSON, JONATHAN H N.O.	Second Respondent

JUDGMENT

FOULKES-JONES, AJ

1. The application is one in terms of sections 20(1), 32(2) and 33(1)(b) of the Arbitration Act No. 42 of 1965 (*"the Arbitration Act"*).

2. Part A of the application relates to the relief claimed in terms of section 20(1); Part B relates to the relief claimed in terms of section 33(1)(b) and Part C relates to the relief claimed with reference to section 32(2) of the Arbitration Act; Part D relates to relief claimed with reference to section 38 of the Arbitration Act.

3. The matter arises from arbitration proceedings between the applicants and the first respondent before the second respondent, the Arbitrator, who abides the decision of this Court.

4. The applicants are the trustees of a trust which owns an immovable property in respect of which there is a dispute as to whether same falls within the Thorn Valley Estate and thus whether the Trust is subject to first respondent's rules of association. The first respondent is an association as defined in section 1 of the Community Schemes Ombud Services Act No. 9 of 2011 (*"the CSOS Act"*) which is responsible for administering and managing the Thorn Valley Estate (*"the first respondent"*).

5. In the arbitration the first respondent was the claimant and the applicants were the defendants. The applicants raised three special pleas of which

two are relevant to the current application, namely:

5.1 It was common cause that the first respondent constituted an association as defined in section 1 of the CSOS Act and that the dispute constituted a dispute in terms of section 38 read with sections 39(1)(e) and 2(d) of the CSOS Act, and as such the second respondent did not have the necessary jurisdiction to entertain such dispute;

5.2 In terms of section 37(3) of the CSOS Act the rights contained in the CSOS Act might not be waived or limited;

5.3 In the alternative to the second special plea the applicants counterclaim for relief as envisaged in terms of section 39(1)(c), 3(c) or (d) and 7(b) of the CSOS Act on the premise that the rules that the first respondent intended to rely upon (if found applicable) were unreasonable, alternatively the first respondent's enforcement thereof against the defendants are unfair, arbitrary, inconsistent and unreasonable.

5.4 That the arbitration be stayed pending the outcome of such an envisaged referral in terms of section 38 of the CSOS Act.

6. The second respondent dismissed the second and third special pleas.

7. The applicants (while reserving their rights to set aside such dismissals, sought that the second respondent refer questions arising from the dismissal of the special pleas to this Court for an opinion in terms of section 20(1) of the Arbitration act, which the Arbitrator similarly dismissed.

8. The first respondent raises the following points *in limine*:

8.1 The applicants seek in Part A of the application an order that the second respondent be directed to state certain questions of law that arose in the course of the arbitration proceedings between the applicants and the Association before the second respondent, in the form of a special case for the opinion of the Court;

8.2 The applicants set out questions of law to be determined by this Court pursuant to paragraphs 1.1 to 1.5 of the Notice of Motion;

8.3 Part A of the Notice of Motion is identical to the applicants' application in terms of section 20(1) of the Arbitration Act No. 42 of 1065 attached to the applicants' application in this matter;

8.4 The section 20(1) application was heard before the second respondent who handed down his award on 23 April 2018. The latter found no legal merit in the application and dismissed same, with reasons.

8.5 The section 20(1) application was brought after the second respondent had made two final awards in respect of the two special pleas which raised similar legal questions. The result is that the section 20(1) application was not brought in time, which was found to be fatally defective for a section 20(1) application and the second respondent considered the points raised in the section 20(1) application;

8.6 The second respondent found that there was no material difference between the points of law raised in the section 20(1) application and the points of law that were argued in dealing with the two special pleas. The first respondent further claims that the legal questions raised in the section 20(1) application before the second respondent differed from those raised in the special pleas which were found to have no merit;

8.7 The first respondent raises that the present application had already been finally determined between the same parties on

exactly the same points and that the arbitration order is final and not subject to appeal and cannot be raised again in this forum;

8.8 The first respondent raises that the application should be dismissed with costs on a punitive scale as between attorney and client in that applicants had been aware of the final award on the same points yet persist to renege on an arbitration order and to frustrate the very foundations of the arbitration award.

9. The first respondent argues that Part A of the Notice of Motion is simply an abuse of this Court's process in that the questions of law sought to be determined by this Court have been determined not only once but twice. It also argues that Parts B and C have no legal basis set out in the papers and stand to be dismissed.

10. Section 20(1) of the Arbitration Act No. 42 of 1964 (*"the Act"*) provides that:

> *"(1) An arbitration tribunal may, on the application of any party to a reference and shall, if the court, on application of such party, so directs, or if the parties to the reference agree, at any stage before the making of a final award state any question of law arising in the course of the reference in the form of a*

special case for the opinion of the court or for the opinion of counsel."

11. Section 32(2) of the Act states:

> *"(2) The court may, on the application of any party to the reference after due notice to the other party or parties made within six weeks after the publication of the award to the parties, on good cause shown, remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for making of a further award or a fresh award or for such other purpose as the court may direct.*

and section 33(1)(b) of the Act provides that:

> *"(1) Where –*
>
> *…*
>
> *(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or*
>
> *…*
>
> *the court may, on application of any party or parties,*

make an order setting the award aside."

PART A

12. The applicants contend that they have demonstrated that the matters raised in the special pleas differ from those raised in the section 20(1) arbitration application whilst there may some overlapping.

13. The applicant also creates a misguided impression that somehow the process in approaching the Ombud in terms of the Community Schemes Ombud Service Act 9 of 2011 (the "CSOS") is peremptory and confuses the issue of what the term "unsuccessful" means in terms of section 40 (c) of the CSOS. I will touch on this later.

14. The applicant furthermore challenged the arbitrators award on this score on the basis that there was no reasoning and that he did not exercise a value judgement.

15. It is common cause that the issues relating to the second and third special pleas were determined by the second respondent who made final awards in those respects.

16. The reasoning of the dicta of Harms JA must stand in that the timing of an application is fundamental to its success or failure. I agree that the launching of the section 20 application in the arbitration and in this application is simply an attempt to review the section 20 award handed down by the second respondent.

17. I am of the view that the second respondent applied his mind, considered

the issues and relevant case law and arrived at the correct outcome.

18. I accordingly dismiss Part A with costs on the attorney and client scale.

PART B

19. The applicant submits that the arbitrator had exceeded his powers and committed a gross irregularity in two respects namely jurisdiction due the CSOS and the arbitrator failed to deal with the submissions of the applicant.

20. The applicant places reliance on section 37(3) of the CSOS which precludes a waiver of rights.

21. The applicant's averments are misplaced for two reasons:

21.1 The CSOS, with reference to section 38(1) clearly states:

"*38. Applications*

(1) Any person <u>may</u> make application if such……."

22. The word may in the CSOS is clearly not peremptory and does not impose an obligation on parties to approach the CSOS for relief.

23. The parties clearly consented to the process of arbitration.

24. Section 40 (c) of the CSOS reads as follows:

24.1 "*40 Further information…..*

After receiving an application, an ombud may require:

(a)……

(b)…..

(c) the applicant to provide evidence that an internal dispute resolution mechanism has been unsuccessful"

25. The above clearly envisages that parties may have endeavoured to resolve the matter in another forum before approaching the ombud.

26. The nonsensical argument that the word unsuccessful (section 40 {c} of the CSOS) requires a referral back to a Court for interpretation holds no grounding.

27. It would be an absurdity if parties who follow a process such as an arbitration or even litigation in the Courts would need to refer the entire matter afresh for determination to the ombud for being "unsuccessful".

28. This section of the CSOS, I believe would be in the event that some sort of mediation or attempts at settlement have failed through an alternate

dispute resolution process. In that event the ombud would then proceed with the process in terms of the CSOS, and not when a matter and issues have already been ventilated and adjudicated upon.

29. On the basis above Part B is dismissed with costs on the attorney and client scale.

PART C

30. The second respondent applied himself when making the awards and the I accordingly dismiss Part C with costs on the attorney and client scale.

PART D

31. In light of the remainder of my Judgement, PART D is moot.

32. I view the applicant's application was no more than an attempt to delay the matter.

33. In the circumstances I make the following Order:

33.1 The entire application is dismissed with costs on the attorney and client scale.

K I FOULKES-JONES
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT, JOHANNESBURG
Electronically submitted

Date of hearing: 05 June 2019
Date of judgment: 08 September 2020

Delivered: This judgement is handed down electronically by circulation to the Parties/their legal representatives by email. The date for hand-down is deemed to be 08 September 2020.

Appearances:

For the Applicants: David Kotzen Attorneys

Counsel for the Applicants: Adv. H P van Nieuwenhuizen

For the 1st Respondent: Heather van Niekerk Attorneys

Counsel for the 1st Respondent: Adv. C Marynowski

For the 2nd Respondent: No appearance