THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case no: 704/2015

In the matter between:

KRISHNA SOOBRAMONEY PADACHIE	**FIRST APPELLANT**
AMANDA MARCELLA PADACHIE	**SECOND APPELLANT**
and	
THE BODY CORPORATE OF CRYSTAL COVE	**FIRST RESPONDENT**
BRIAN EDWARD SHELTON AGAR N.O.	**SECOND RESPONDENT**

Neutral citation: *Padachie v The Body Corporate of Crystal Cove* (704/2015) [2016] ZASCA 145 (30 September 2016)

Bench: Maya DP, Petse, Willis JJA and Fourie and Makgoka AJJA

Heard: 29 August 2016

Delivered: 30 September 2016

Summary: Arbitration - Arbitration Act 42 of 1965 - statement of case to court in terms of s 20(1) refused for being imprecise - appellant making a qualified request for referral to court - such request impermissible - s 20(1) only applicable where questions of law arise during the course of arbitration - party to an arbitration not entitled to refer to court the very issues referred for arbitration - Arbitrator did not deprive appellant of his right in terms of s 20 to approach court.

ORDER

On appeal from: KwaZulu-Natal Local Division of the High Court, Durban (Nkosi J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Makgoka AJA (Maya DP, Petse, Willis JJA and Fourie and Makgoka AJJA):

[1] This is an appeal against the judgment of the KwaZulu-Natal Local Division of the High Court, Durban (Nkosi J). The high court dismissed with costs, the appellants' application to review and set aside an arbitration award made by the second respondent, Mr Brian Agar, an attorney, who was appointed as an arbitrator by the parties in this matter. The appeal is with leave of the high court.

[2] The first and second appellants, Mr and Mrs Padachie, were married to each other in community of property. They were registered owners of a unit in a residential estate situated at La Mercy, Durban. The first respondent, the Body Corporate of Crystal Cove (the Body Corporate) is a sectional title body corporate established in terms of s 36(1) of the Sectional Titles Act 95 of 1986. It was responsible for the management of the sectional title scheme in which the appellants' property was situated. The second appellant, Mrs Padachie, and the arbitrator, did not take part in the appeal. For the sake of convenience, I shall refer to Mr Padachie as 'the appellant'.

[3] The narrow issue for determination is whether the arbitrator deprived the appellant of his right, in terms of s 20 of the Arbitration Act 42 of 1965 (the Act) to have certain questions of law stated for the opinion of the court. If he did, his conduct may have been susceptible to be reviewed and set aside as a gross irregularity in terms of s 33(1) of the Act.

[4] Section 20 of the Act reads as follows :

'Statement of case for opinion of Court or counsel during arbitration proceedings

(1) An arbitration tribunal may, on the application of any party to the reference and shall, if the court, on the application of any such party, so directs, or if the parties to the reference so agree, at any stage before making 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.

(2) An opinion referred to in ss (1) shall be final and not subject to appeal and shall be binding on the arbitration tribunal and on the parties to the reference.'

[5] The facts are simple. As registered owners of a unit in a sectional title scheme managed by the Body Corporate, the appellants were liable to the Body Corporate for monthly levies and other costs.[1] During July 2009 the Body Corporate instituted action against the appellants in the Magistrate's Court, Inanda, for a sum of R9 891.83 in respect of alleged arrear levies and ancillary charges. The appellants defended the action and delivered their plea. Subsequently, the parties agreed to refer the disputes arising from that action to arbitration. In the arbitration, the Body Corporate filed five claims against the appellants. Claims 4 and 5 were abandoned during the course of the arbitration. Three of the remaining claims were:

(a) Claim 1 – the payment of R1 362.95 for alleged arrear levies, legal costs, interest and other charges for the period February 2009 to September 2012;

[1] In terms of s 37 of the Sectional Titles Act 95 of 1986.

(b) Claim 2 – the re-payment of R4 000 made to the appellant by the trustees of the Body Corporate on 28 July 2008 for carrying out his duties as the chairperson of the board of trustees of the Body Corporate, which payment the Body Corporate alleged was unlawful, and in breach of rule 10(1) of the Body Corporate's Management rules;[2]

(c) Claim 3 – the repayment of R3 500 arrear levies which were alleged to have been unlawfully credited to the appellants' levy account during April 2009.

[6] The appellant filed his statement of defence in which he denied any indebtedness to the Body Corporate, and pleaded, among others, that the claims had been extinguished by prescription. The arbitration hearing ultimately commenced before the arbitrator on 13 November 2012 and concluded on 19 November 2012. As agreed between the parties at the conclusion of the arbitration, the Body Corporate, as the claimant, filed its written argument on 26 November 2012. The appellant's written argument was due on 3 December 2012, and the Body Corporate's replying argument was to be filed on 5 December 2012. However, the appellant was afforded an extension of time to file his written argument by no later than 7 December 2012.

[7] On 3 December 2012 the appellant's attorneys delivered a letter to the arbitrator in which they stated that a number of legal points had been raised during the evidence and arguments, which, in their view, could not be resolved by way of arbitration. They further enquired from the arbitrator whether they should apply for referral to court in terms of s 20, or deal with the issues in their written argument. In response, on 5 December 2012, the arbitrator stated that he was not aware of any issues which warranted such referral. He accordingly left it to the appellant to decide how best to deal with the matter. But he also reminded the appellant's attorneys that he was expecting their written argument on or before 7 December 2012, as agreed.

[8] On 7 December 2012 the appellant's attorneys delivered their written argument on the substantive issues before the arbitrator. In the penultimate paragraph of the

[2] Annexure 8 of the Sectional Titles Schemes Management Act 8 of 2011, promulgated in terms of ss 35(3) and 55 of that Act.

written argument, under the heading 'Referral to Court under Arbitration Act' it was recorded that the interpretation of Management rule 10 of the Body Corporate's rules,[3] the nature of the claims and whether the claims had prescribed, were all questions of law, which ought to be referred to court.

[9] On 12 December 2012 the appellant's attorneys wrote a letter to both the Body Corporate's attorneys and the arbitrator, reiterating that the issues they had raised in their written argument, should be referred to court for an opinion. Those issues were summarised in that letter as follows:

'(a) The interpretation of Management rule 10;

(b) Whether the nature of the claim is *ultra vires*; (sic)

(c) Whether the claimant [the Body Corporate] has pleaded a proper claim;

(d) What, if any parts of the claim has prescribed;

(e) If establishing a breach in terms of management rule 10, the claimant [the Body Corporate] bears the onus of proving unlawful payments to the first respondent [the appellant]'

The appellant's attorneys enquired from the arbitrator whether he intended to refer those issues to court, and stated that if the arbitrator was not amenable to a referral, they intended to bring the necessary application to the high court. The arbitrator was requested to advise the appellants of his intention by close of business on 13 December 2012, to allow them adequate time to bring the application.

[10] On 13 December 2012 the arbitrator, without responding to the letter mentioned above, published his award, in which he dealt comprehensively with the issues in dispute between the parties, including the alleged questions of law raised by the appellant. I shall revert to the latter aspect. In the end, the arbitrator found the

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[3] Management rule 10(1) provides:
'Unless otherwise determined by a special resolution of the owners, trustees who are owners shall not be entitled to any remuneration in respect of their services as such: provided that the body corporate shall reimburse to the trustees all disbursements and expenses actually and reasonably incurred by them in carrying out their duties and exercising their powers.'

appellants liable to the Body Corporate in the amounts claimed. He accordingly ordered the appellants to pay the Body Corporate a total sum of R8 862.95.

[11] Aggrieved by the arbitrator's decision, the appellant, on 4 April 2013, launched an application in the high court, seeking to set aside the arbitrator's award in terms of s 33(1) of the Act. The appellant raised a number of points, among others, that the arbitrator had in essence prevented him from approaching court for an opinion on points of law. The Body Corporate opposed the application and filed a counter-application for the enforcement of the award in terms of s 31 of the Act. The high court rejected the appellant's arguments and dismissed his application, primarily on two grounds. First, that the arbitrator had not committed any irregularity in the course of the arbitration, and second, that the arbitrator had not prevented the appellant from approaching the court for an opinion on questions of law. The high court further granted the Body Corporate's counter-application in terms of which the arbitrator's award was made an order of court.

[12] Before us, it was argued on behalf of the appellant that the request for referral to court, made in the appellant's written argument on 7 December 2012, constituted an application in terms of s 20(1) of the Act. Accordingly, it was argued that by issuing his award in the circumstances referred to above, the arbitrator effectively prevented the appellant from approaching the court for an opinion.

[13] I disagree. As early as 5 December 2012, the arbitrator had made his position clear to the appellant's attorneys: he discerned no points of law requiring referral to court. He further made it plain that he intended finalising his award, and to that extent, reminded the appellant's attorneys to submit written argument as agreed. It could not have been clearer to the appellant's attorneys, at that time already, that the arbitrator did not intend to refer any issue to court. Nothing, for instance, prevented the appellant from approaching the court to interdict the arbitrator from publishing his award, pending the determination of an application for referral.

[14] Counsel for the appellant submitted that as of 5 December 2012, the questions of law had not been precisely stated, and accordingly, that that request could not be regarded as a proper application before the arbitrator. There is no merit in this submission. If the questions were not properly formulated, it was only because the appellant and his attorneys had not sufficiently applied themselves in formulating them. The appellant was therefore the author of his own misfortune. But, in any event, the arbitrator's response should have prompted the appellant's attorneys immediately to delineate the alleged points of law. Instead of doing that, they submitted lengthy written argument, running into some 30 pages, dealing with all the issues in dispute between the parties. As already mentioned, after written arguments had been submitted on behalf of the parties, the arbitrator published his award, in which he dealt thoroughly with all the disputes between the parties, including the alleged points of law, in respect of which he said:

'What respondent's [i.e. appellant in the present appeal] counsel is asking for is much more than mere questions of law, delving further into the nature of the claimant's [i.e. respondent] claim; and claimant's pleadings.

The questions of law, on the interpretation of Management rule 10 and "the issues of prescription" are also imprecise.

To raise this request at such late stage of the procedure is, to say the least, inopportune. The claimant does not wish to state such a case and the arbitrator does not wish to state such a case and the arbitrator declines to do so. The request for interpretation of management rule 10 is also inconsistent with the contention of the Body Corporate's counsel in paragraph 18 where he states:

"The language of Management rule 10(1) is, with submission, clear and unambiguous and therefore effect must be given to its ordinary everyday meaning."'

[15] There is nothing wrong with the arbitrator's reasoning. I therefore conclude that the arbitrator did not prevent the appellant from approaching the court to compel a referral. It is the appellant's own inaction, and to some extent, acquiescence, which led to the arbitrator publishing his award without a referral. I have alluded to the steps which

were open to the appellant, but which he failed to take. This should be the end of the matter, and the appeal should fail on this point alone.

[16] However, there are two further bases on which the appeal should fail. The first is that the appellant is not entitled to refer to court the very issues referred for arbitration. The second concerns the manner in which the appellant formulated his request for a referral. These issues were fully debated in this court with counsel. I briefly consider them, in turn.

[17] The purpose of s 20 of the Act was stated by this court in *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266 (SCA) para 154 thus:

'[It] can be used only if the legal question arises "in the course" of the arbitration. It is not intended to apply where the parties agree to put a particular question of law to the arbitrator. Any other interpretation of the section would defeat its purpose and "it would be futile ever to submit a question of law to an arbitrator". Its purpose, at the very least, is not to enable parties, who have agreed to refer a legal issue to an arbitrator to renege on their deal.' (Footnote omitted.)

[18] In the present case, only two issues could possibly constitute questions of law, namely, the interpretation of Management rule 10, and prescription. The alleged contravention of Management rule 10 was first raised in the Body Corporate's amended particulars of claim in the magistrate's court. As stated earlier, that action was withdrawn, and the parties agreed on arbitration. Thus, it was part of the disputes which the parties agreed to refer to arbitration. When the Body Corporate delivered its statement of claim in the arbitration during October 2012, that claim was one of the five it initially pursued against the appellant. Properly construed, therefore, the contravention of Management rule 10, and by parity of reasoning, also its interpretation, had been placed squarely before the arbitrator for determination. On that premise, the issue did not 'arise in the course of' the arbitration as envisaged in s 20. It is therefore not open to the appellant to seek an opinion from the court on it.

[19] The issue whether any of the Body Corporate's claims had become extinguished by prescription, similarly arose during the pleading stage in the arbitration. The appellant raised it in his statement of defence in October 2012. By electing to plead this issue without any suggestion that it ought to be referred to court, the appellant placed it among the issues which the arbitrator had to determine. It therefore, similarly did not arise 'in the course' of the arbitration. Thus the appellant was not entitled to invoke the provisions of s 20.

[20] I turn now to the manner in which the appellant formulated his request for referral of the interpretation of Management rule 10 to court. The appellant vacillated on this issue. While, on the one hand, he pressed that the interpretation should be referred to court, on the other, he argued, extensively with reference to case law, for a particular interpretation of the rule. He accordingly invited the arbitrator to adopt his preferred interpretation of the rule. No less than fifteen paragraphs, running over six pages, of the appellant's written argument, were devoted to the appellant's interpretation of Management rule 10.

[21] The significance of this should not be lost. The appellant's stance amounted to a qualified request for referral to court: only if the arbitrator did not accept the appellant's preferred interpretation of the rule, would the appellant seek referral to court. Put differently, had the arbitrator adopted the appellant's preferred interpretation of the rule, the appellant would not have pressed for a referral. It is an untenable proposition, and serves only to demonstrate the fallacy in the appellant's argument that the question was one which the arbitrator was not qualified to determine, and which only the court could.

[22] In *Government of the Republic of South Africa v Midkon (Pty) Ltd & another* 1984 (3) SA 552 (T),[4] it was submitted, with reference to English authorities, that a qualified request for a referral was entirely permissible (at 561I-562D). Preiss J, after a careful analysis and comparison of the English counterpart of our s 20 of the Act, concluded (at

[4] Cited with approval in *Telecordia Technologies Inc v Telkom* (above) and *Road Accident Fund v Cloete N.O. & others* [2009] ZASCA 126; 2010 (6) 120 (SCA).

563H) that a qualified request 'has no place in our law by reason of the relatively limited provisions of s 20 of the South African statute.'

[23] The facts in *Midkon* closely resemble those in the present case. There, the application for questions of law to be referred to the court was made after the hearing of the evidence was concluded, and at the commencement of argument. It was submitted to the arbitrator that if he was not prepared to accede to the application he should not make the award, but should first give the applicant an opportunity to approach the court for an order compelling him to state a special case in terms of s 20 of the Act. The arbitrator did not accede to the request. He published an award which dealt with all the disputes between the parties, including the alleged questions of law. Dealing with that situation, the court made the following pointed observations (at 561E-F):

'I am of the view that the request made to [the arbitrator] in its qualified form must have fortified the arbitrator's scepticism. It seems to me that the department was saying to the arbitrator, "I am content for you to decide any question of law arising in the dispute provided you resolve it in my favour, but if you are going to be against me, I submit that this will be the type of question for which you are disqualified and for which a court of law is fitted." In doing so, I am of the view that the department deprived itself of the contention that these latter issues were such as necessarily possessed the three requirements postulated in the *Halfdan Grieg* case *supra*.[5] Moreover, I find it quite inexplicable that on some as yet undefined legal issues an arbitrator was to be regarded as an adequate Judge while at the same time on other as yet undefined issues he was to be regarded as inadequate.'

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[5] The requirements referred to here are those formulated in a *dictum* by Denning MR in *Halfdan Grieg & Co A/S v Sterling Coal and Navigation Corporation and another* [1973] 2 All ER 1073 (CA) with reference to comparable provisions of the English Arbitration Act of 1959. They are that:
(a) the point of law should be real and substantial and such as to be open to serious argument and appropriate for decision by a court of law as distinct from a point which is dependent on the special expertise of the arbitrator or umpire.
(b) The point of law should be clear cut and capable of being accurately stated as a point of law – as distinct from the dressing up of a fact as if it were a point of law.
(c) The point of law should be of such importance that the resolution of it is necessary for the proper determination of the case – as distinct from a side issue of little importance.
This court, in *Telecordia Technologies Inc v Telkom* (above) paras 151 -153, did not endorse Denning MR's *dictum*, and held that there is no obligation on an arbitrator to state a case if the requirements set out by Denning MR are present. Those requirements remain important factors to consider, but they are not definitive.

[24] In my view, the appellant's approach suffers the same fate. What is more, the arbitrator noted in his award that the appellant's counsel had, in para 18 of his written argument before him, argued that Management rule 10 was clear and unambiguous, and that effect must be given to its ordinary meaning. That contention by counsel, to my mind, was correct. But it undermines the substratum of the appellant's argument, for if the rule is clear and unambiguous, there would be no point in referring it to court for interpretation. It is on that very basis that the arbitrator deemed it prudent to approach the issue in the manner he did. I am unable to find fault in that approach.

[25] Lastly, it should be borne in mind that, although the question whether the arbitrator has some form of legal training is generally irrelevant in determining whether a referral to court should occur, an arbitrator, in the course of of his or her duties, may frequently be called upon to decide questions of law. See *Strutt v Chalmers & another* 1959 (2) SA 536 (N) at 539E-F. In my view, the present case falls within that category. The parties decided to place issues which involved questions of law before the arbitrator, an attorney. As it is often said, an arbitrator is entitled to be wrong on the merits. A wrong interpretation of a document like the Body Corporate's Management rules, in this instance, would ordinarily not amount to an irregularity susceptible to a review in terms of s 33 of the Act. As explained in *Telecordia* para 154:

'They have in such a case chosen their decision-maker for the particular issue and they are bound by their choice….To allow a party in these circumstances to utilise s 20 would frustrate the arbitration agreement. It is not against public policy to agree to the finality of an extra-curial decision on a legal issue especially where the review rights contained in s 33 remain available, enabling the courts to retain control over the fairness of the proceedings.' (Footnote omitted.)

[26] To my mind, the arbitrator did not commit any irregularity, let alone the one envisaged in s 33(1) of the Act. He correctly declined the appellant's request to state issues for the opinion of the court, for the reasons already stated. There was nothing wrong with that approach, as the high court correctly found. The appeal therefore stands to fail.

[27] Before I conclude, there is a related issue that requires comment. The capital amount in dispute is just under R 9000. As it stands, the absurdity is that the costs of litigation and arbitration by far exceed the capital. The matter should never have been allowed to reach this point. It is extra-ordinary that it has taken two arbitrators, a high court judge and five judges of appeal to determine a dispute involving such a paltry sum.

[28] The following order is accordingly made:
The appeal is dismissed with costs.

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T M Makgoka
Acting Judge of Appeal

APPEARANCES:

For First Appellant:	C B Edy
	Instructed by: Ashlyn Kandhai Attorneys, Tongaat Van Pletzen Lambrechts Attorneys, Bloemfontein
For Second Appellant:	No appearance
For First Respondent:	K J Kemp SC (Heads of argument prepared by A Stokes SC)
	Instructed by: De Wet Leitch Hands Incorporated, Ballito Honey Attorneys, Bloemfontein
For Second Respondent:	No appearance