IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 11001/2016

DATE: 11 AUGUST 2017

In the matter between:

OVERSEAS WORK AND LEISURE SERVICES CC Applicant

and

TERENCE MATZDORFF N.O. 1st Respondent

PEPPER CLUB BODY CORPORATE 2nd Respondent

J U D G M E N T

DAVIS, J:

This is an application in terms of section 32(1) of the Arbitration Act 42 of 1965 for the review and setting aside of the awards relating to levies interest and wasted costs made by the first respondent (the arbitrator) on 10 June 2016 in the arbitration between applicant and the second respondent, on the grounds that the arbitrator committed a gross irregularity in the conduct of arbitration proceedings.

The arbitrator has elected not to oppose this application, and filed a notice to abide the outcome of the proceeds in this matter.

In summary, the applicant contends that the award made in respect of the levies that were claimed by second respondent should be set aside, as the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings by:

1 Misconceiving the nature of the inquiry and/or his duties in connection therewith, with the result that the applicant did not have a fair hearing.

2 Deliberately refused to apply his mind to a binding and applicable decision of the High Court on the interpretation of section 37(2) of the Sectional Titles Act 95 of 1986 after his attention had been drawn thereto.

3 Disregarded pertinent facts that had been drawn to his attention when he awarded the incorrect amount of R142 429,52, whereas the amount claimed by the second respondent in respect of both levies and interest was, in fact, R124 060,24.

4 Prevented a full and fair determination of the issue relating to the levies and interest.

I should add that the issue with regard to the incorrect amount has been settled, but is the subject matter of a counter-application brought by the second respondent to make the amended award an order of court.

The applicant also submits that the award made in respect of wasted costs claimed by the applicant in relation to postponement, necessitated, in applicant's view, by second respondent's late discovery, should be set aside, as gain the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings by, in effect, not taking account of pertinent facts, and deliberately refusing to apply his mind to a settled practice and principles related thereto in respect of wasted costs.

In *Limine* objections

Before dealing with these questions, I have to deal with a point *in limine* raised by Mr Van Dorsten, who appeared on behalf of the applicant.

Mr Van Dorsten noted that the dispute in respect of which the

award was made, was referred by the second respondent to arbitration in terms of an arbitration agreement contained in Rule 71(1) of the Prescribed Management Rules:

> "Any dispute between the body corporate and an owner or between owners arising out of or in connection with or related to the applicant, these rules or the conduct rules, save where an interdict or any form of urgent or other relief may be required or obtained from the Court having jurisdiction, shall be determined in terms of these rules."

In this connection he referred to the saving provision in section 71(1) which was the subject of consideration in Body Corporate of Greenacres v Greenacres Unit 17CC and Another 2008 (3) SA 167 (SCA) at 170-171, where at para 6, in particular, Cloete JA said:

> "Against this background, the saving provision at issue should, in my view, be interpreted narrowly as excluding only such relief as an arbitrator is not competent to give, whether by virtue of the provisions of the Act or otherwise. The last part of the rule should accordingly be read as follows: save where an interdict or any form of urgent relief may be required or other relief, has to be obtained from a Court having jurisdiction. The purpose

behind the inclusion of the provision was, in my view, to make it clear that although the operative part of the rule is to be interpreted widely for the purpose of ascertaining what disputes have to be subjected to arbitration, it is not to be interpreted as conferring jurisdiction on an arbitrator to grant all forms of relief which may be sought consequent upon such determination, and accordingly, if the relief sought cannot be granted by an arbitrator, arbitration on a dispute which would otherwise fall within the operative part of the rule, would nevertheless not be competent in terms of the rule.'"

Thus, the power of an arbitrator is limited by the saving provision in Rule 71(1), and accordingly an arbitrator would not have jurisdiction to arbitrate a dispute or to make an award if the award sought by the second respondent in the case was in the form of an interdict.

Mr Van Dorsten then referred in De Lange v Bell and Others [213] ZAKZDHC 36. In this case the relief sought by the applicant was, inter alia, for an arbitration award to be made an order of court in terms of section 31 of the Arbitration Act 42 of 1965. The first respondent successfully resisted the application on the ground that the award was a nullity, as the arbitrator had no power to make an award that amounted to a

mandatory interdict, because this was excluded from the operation of Management Rule 71(1).

At para 12 the Court said:

> "It follows that a dispute where an interdict may be required is excluded from the ambit of Rule 71. The arbitration agreement contained in the rules does not apply to such a dispute. It was not disputed in argument before me that in the circumstances of this case an order directing the first respondent to demolish a particular structure will amount to a mandatory interdict."

The Court then went on to say at para 18:

> "The result is that the arbitration agreement contained in the Management Rules did not cover the dispute which was put before the arbitrator, and there was no other valid arbitration agreement between the parties. It follows that the arbitrator did not have the required power to arbitrate the dispute between the parties and to make the award which he did."

In the present case, the arbitrator was confronted with a statement of case which comprised the claim of payment of

levies, electricity and interest. Mr Van Dorsten classified this relief as a form of a mandatory interdict.

A mandatory interdict is defined as an order requiring a person to do some positive act to remedy a wrongful state of affairs for which he or she is responsible or to do something which he or she ought to do if the complainant is to have his or her rights (e.g. to demolish a building encroaching on the complainant's land). It has been said that a mandatory interdict can serve:

> "To compel the performance of a specific statutory duty and to remedy the effect of unlawful action already taken."

See Erasmus, Superior Court Practice Volume 2 D6-3.

Viewed in this context, it is understandable why the Court in De Lange supra held as it did, namely the relief sought was in respect of unauthorised alterations and additions to a building. But in the present dispute the argument (which, I should add, is at war with applicant's own notice of motion in that para 2 thereof seeks an order directing that the dispute between the applicant and the second respondent to be referred to a hearing afresh before a new arbitration panel constituted in the

manner directed by the Court) cannot succeed, in that the dispute was for a claim for payment of levies, exactly, I must emphasise, the same as the relief sought in Greenacres supra. Were Mr Van Dorsten to be correct, little would be left for arbitration in these cases and, contrary to the finding in Greenacres, the exclusion would have been given extremely wide scope, rather than narrow scope, which was clearly in the minds of the Court in Greenacres supra.

Section 37(2)

In short, the point *in limine* stands to be rejected, and for this reason I must now consider the substantive point in relation to section 37(2) of the Sectional Titles Act. It provides:

> "Liability for contributions levied under any provision of subsection (1), save for special contributions contemplated by subsection (2A), accrues from the passing of a resolution to that effect by the trustees of the body corporate, and may be recovered by the body corporate by action in any court (including any Magistrate's Court) of competent jurisdiction from the persons who were owners of units, holders of exclusive use areas and holders of real rights of extension at the time when such resolution was passed: provided that upon the change of ownership of the unit, exclusive use

areas and real rights of extension, the successor in title becomes liable for the pro rata payments of such contributions from the date of change of such ownership."

Critical to this component of the case was the fact that section 37(2) has received an interpretation from the High Court in The Body Corporate of the Peaks Sectional Title Scheme v Prinsloo NO and Another [2012] ZAWCHC 201, where Meer J stated at para 27:

"The statutory provision, section 37(2) of the Sectional Title Act, cannot be nullified by the equities surrounding the estoppel or the conduct of the parties in the instant case. The statutory provision is designed to ensure that any action for the claiming of levies by the body corporate is sanctioned by the trustees. The section clearly states that liability for the levies accrues from the passing of such a resolution, and thereby protects sectional title holders in the claim for levies which have not been approved by the trustees."

Mr Van Dorsten contended that this judgment is a binding and authoritative decision on the interpretation of section 37(2), and it was accordingly incumbent upon the arbitrator to apply this interpretation after his attention had been drawn thereto.

In short, what was being argued, was that the judgment governed this interpretation of this section, in particular the prerequisite that an owner in a sectional title scheme would only be liable for a contribution after the passing of a resolution to that effect by the trustees of the body corporate. As this was the point in dispute, the arbitrator was obliged to follow the judgment of Meer J, and what he did, according to Mr Van Dorsten, was to deliberately refuse to apply his mind to the Peaks judgment when he wrote:

> "In view of the conclusion to which I have come, it is not necessary for me to explore the case law which was referred to in the heads of argument which were exchanged between the parties' representatives."

In support of the submission that, given the facts before the arbitrator, the governing effect of section 37(2) and the authoritative decision by the High Court in respect of the meaning of the section, that the entire award stood to be set aside, Mr Van Dorsten referred to the decision in Le Roux v CCNO and Others (2000) 6 BLLR 680 (LC), where Wallis AJ (as he then was) held that:

> "A gross irregularity in the conduct of arbitration proceedings is committed when an arbitrator fails to

apply his mind to a binding interpretation of an applicable statutory provision."

At para 18 the Learned Judge said:

"The next possibility I must consider, is that, whilst not referring expressly to section 194(2), the commissioner did apply his mind to the section but misconstrued it. That raises the question of whether the award can be set aside in terms of section 145, bearing in mind that, in general, where a matter is referred to arbitration the parties are bound by the decision of the arbitrator ... even though the award flows from a bona fide error of fact or law ... That approach is not, however, in my view available in order to uphold the present award, as the passage I have quoted from the judgment of the Labour Appeal Court, LAC, and particularly the emphasised portion, demonstrates that decision was a binding and authoritative decision by the highest court in labour matters on the interpretation of section 194 of the LRA. It is therefore incumbent not only on the Labour Court, but also on commissioners sitting in arbitration proceedings to apply that interpretation of the Act. In the circumstances, an arbitrator who departs from the terms of that judgment in the case where section 194 is

applicable, commits a gross irregularity in the conduct of the arbitration proceedings, and they fall to be reviewed and set aside. It is not as if the judgment is in any way complicated or obscure so as to give rise potentially to a genuine error as to its meaning. If the arbitrator departed from it, therefore, it follows that he either it that it is impossible to conclude that he could properly have applied his mind to the matter."

This judgment must, be placed in the context of the LRA, for, as Wallis, AJ makes clear at paragraph 21:

"The whole structure of the LRA places the Labour Appeal Court at the pinnacle of the pyramid of adjudicative bodies established under that Act. In terms of section 167 of the LRA, it is established as a court of law and equity, sitting as a final court of appeal in matters under its jurisdiction, and having authority, inherent powers and standing equivalent to that of the Supreme Court of Appeal. Below the Labour Appeal Court sits the Labour Court, which within its sphere of jurisdiction corresponds to the court of a provincial division of the High Court of South Africa. The CCMA and commissioners sitting as arbitrators in terms of the LRA are tribunals performing their functions in terms of

the LRA and subject to review by the Labour Court. It is erroneous to suggest that the jurisdiction of the commissioner sitting as an arbitrator differs on questions of law from the authoritative pronouncements of this Court and the Labour Appeal Court. Commissioners are as much bound to follow and apply the judgments of this Court as the Magistrate's Courts are obliged to follow and apply the judgments of the High Court."

As Mr Eloff, who appeared on behalf of the second respondent, noted, the key judgment which governs this area of law is not to be found in the specific context of labour relations, but rather in the magisterial judgment of Harms JA in Telcordia Technologies INC v Telkom SA Ltd 2007 (3) SA 266 (SCA). In his judgment Harms JA said that:

"A gross error of law committed by an arbitrator can lead to a gross irregularity in the conduct of proceedings, e.g. when the arbitrator, because of a misunderstanding of the *audi alteram partem* principle, refuses to hear the one party."

In this the Harms, JA referred to the statement in Ellis v Morgan 1909 TS 576 to 581 where Mason J said:

"But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as for example some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined."

Harms JA, then pointed out that in Goldfields Investment Ltd v City Council of Johannesburg 1938 TPD 551 the Court had raised two qualifications in respect of this *dictum*, the first being where the decision-making body misconceives its mandate, whether statutory or consensual, in that by misconceiving the nature of the inquiry, a hearing cannot be considered to be fair because the body fails to perform its mandate.

The second qualification concerned orders made where a jurisdictional fact was missing, or, put differently:

"A condition for the exercise of a jurisdiction had not been satisfied."

In evaluating this jurisprudence, Harms JA at para 75 said:

"In all these cases the complainant was directed at the

method or conduct, and not the result of the proceedings. Where the legal issue is left for the decision of the functionary, any complaint about how he reached his decision must be directed at the method, and not the result (my emphasis)."

Harms JA at para 85 placed this entire issue beyond any dispute:

"The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly or had regard to inadmissible evidence, does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator 'has the right to be wrong on the merits of the case and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry – they may be misconceptions about meaning, law, or the admissibility of evidence, but that is a far cry from saying that they constitute a misconception of the nature of the inquiry. To adapt the quoted words of Hoexter JA:

'It cannot be said that the whole interpretation of

the integrated agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the integrated agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the integrated agreement could not afford any ground for review by a Court.'"

Turning to the arbitrator's award in the case, it is important to read the relevant passage fully:

"I view the requirement of resolution in section 37(2), i.e. the resolution by the trustees, as being a secondary measure, and as a step which can be implied also by the conduct of the trustees. In view of the conclusion to which I have come, it is not necessary for me to explore the case law which is referred to in the heads of argument which were exchanged between the parties' representatives. It seems to me that the purpose of section 37(2) is to ensure that the trustees sanction the decisions taken by the body corporate as regards the claiming of levies. The purpose of the section is furthermore to protect owners of units in a sectional title

scheme against claims for the levies which have not been approved by the trustees. In this matter it is clear that the claim for levies has been so approved expressly and/or impliedly and/or by their conduct. The purpose and focus of the section is the recovery of levies. In light of the views which I have formed in this regard, it was not necessary for me to furnish to the claimant an opportunity to respond to the further submissions made by the respondent's counsel on 1 June 2016 at 10h56. It is my conclusion, therefore, that the levies were lawfully imposed and the respondent was liable to pay them."

It is difficult to see how, on any basis, this finding represents:

1 A denial of a fair trial.

2 A misconception by the arbitrator of the necessary inquiry or of his duties or functions.

The applicant accuses the arbitrator of having deliberately failed to apply his mind to the decision in Peaks supra. The problem with this submission is that, at best for applicant, it hones in on one sentence in the arbitrator's award and avoids dealing with it in its full context. The context of the sentence which is chosen by the applicant must be read within the

meaning of the passages which I have cited. In short, the context is to be found in the arbitrator's findings with regard to the decisions that have been reached by the body corporate, that is the second respondent, at the general meeting.

There is a further point: To the extent that there may be any dispute, at best for the applicant, the arbitrator may well have got the law wrong. On the only evidence available to this Court, that is of Mr Shev who deposed to an affidavit on behalf of second respondent (which evidence was not contested), the following appears.

> 'The arbitrator's intention was indeed drawn to the authorities quoted by the applicant in its founding affidavit, and he listened patiently to the applicant's counsel's address in regard thereto. He also received the applicant's supplementary submissions which impermissibly also covered the issue of the wasted costs of 7 April 2016 (the opportunity had at the request of the applicant's counsel been given to him to present further argument in writing only in relation to another topic). There was correctly no suggestion that the arbitrator had failed to afford the applicant the fullest opportunity to address all relevant matters to his attention in regard to the question of the wasted costs of 7 April 2016. The

arbitrator did indeed consider the applicant's submissions in regard to the wasted costs of 7 April 2016.'

Viewed thus, even if the arbitrator's findings as to the applicability and interpretation of section 37(2) of the Sectional Titles Act or as to the applicability of certain case law was wrong, on the Telcordia approach he was entitled to err in respect of his conclusions of law, and any error in this regard cannot be considered to be reviewable.

In short, the clear jurisprudence which is available shows that, there is no merit in the approach adopted by the applicant that somehow there was no fair trial nor had the arbitrator conceived properly of the inquiry before him. Apart from Telcordia supra, see also Riversdale Mining Limited v Du Plessis and Another (case number 536/2016 SCA).

The Wasted Costs

Mr Van Dorsten submitted that the relevant principle applicable to wasted costs occasioned by a postponement is set out by Griesel AJA in Sublime Technologies (Pty) Ltd v Jonker and Another 2010 (2) SA 522 (SCA) at 524-525:

"With regard to costs occasioned by a postponement, the

general rule is that the party which is responsible for a case not proceeding on the day set down for hearing must ordinarily pay the wasted costs."

On this basis Mr Van Dorsten submitted that the second respondent was responsible for the arbitration not proceeding on the day set down for hearing; hence, in accordance with the general rule and settled practice, second respondent should have been ordered to pay the wasted costs occasioned by the postponement. Mr Van Dorsten submitted that in making the costs award the arbitrator did not act in accordance with settled practice nor with legal principle. The arbitrator had not referred to any case law or to any special circumstances that justified departing from this practice or these principles.

Mr Van Dorsten submitted further, that in the absence of special circumstances, the applicant should not have been deprived of his wasted costs, but the arbitrator should have ordered the defaulting party to pay all of the wasted costs occasioned by its own late discovery. He submitted that the arbitrator had committed a gross irregularity in the conduct of the arbitration proceedings, and failed to exercise a discretion judicially in that he had failed to consider all the relevant facts or failed to act in accordance with the settled practice and

principles upon which wasted costs are generally awarded.

If the arbitrator had failed to apply his mind to settled practice in relation to the exercise of a judicial function as to an aspect of wasted costs, it was not the method of the hearing that caused any problem, nor was the applicant prevented from having a fair hearing. This conclusion is based on the law as I have set it out in dealing with the issue of the Peaks judgment. It was the outcome of a process on the merits that gave rise to the applicant's complaint. Again, it is a complaint about a legal conclusion that is of concern to the applicant. This is a finding that falls squarely within the principles enunciated earlier in this judgment.

I should also add that the wasted costs related to the postponement of the hearing that commenced on 7 April 2016 is somewhat contested terrain. The applicant sought to postpone the hearing on that date because the second respondent had produced documents on the 6th of April 2016 of which discovery had not been made earlier. However, all the documents had been in the applicant's possession, but for a series of photographs that became irrelevant because the applicant decided to pay that part of the second respondent's claim to which the photographs related. Applicant had failed to discover any of the documents in question, which it ought to have done.

After the postponement of the hearing on the 7th of April 2016, applicant effected a substantial amendment to its statement of defence in the arbitration by delivering a supplementary statement, a defence in which it raised a whole range of defences that had not previously featured in the case. It was therefore clear that the applicant required to amend its statement of defence. The result was that the postponement was not necessitated only by the documents that had been produced by the second respondent on 6 April 2016.

All of these facts were drawn to the arbitrator's attention during closing argument at the end of the hearing on the merits when submissions with regard to wasted costs were made.

According to Mr Shev, the arbitrator was presented by the applicant with the authorities regarding the question of the wasted costs on the 7th of April 2016 on which the applicant relies. He listened patiently to the arguments of the applicant's counsel in regard to these costs.

In my view, in similar fashion to the merits review, the arbitrator's ruling in regard to wasted costs is not reviewable in terms of section 33(1)(b) of the Arbitration Act.

The counterapplication

Once the applicant's review application fails, the second respondent's application, which was to ensure that the corrected award be made an order of this Court in terms of section 31 of the Arbitration Act, must be considered. I did not take Mr Van Dorsten to adopt a view contrary to this, that if the application failed, the counterapplication ought to succeed – that is, absent success in a review application the counter-application had to be granted, and, accordingly, the following order must be made.

1 The application fails, together with costs, which must be paid by the applicant.

2 The second respondent's counterapplication is upheld on the following terms. The award of the first respondent is arbitrated, dated the 10th of June 2016, annexed to the applicant's notice of motion and to this award and marked X, as corrected by the second respondent on the 14th of July 2016 in terms of section 30 of the Arbitration Act 1965, is made an order of this Court in terms of section 31 of the Arbitration Act of 1965 (sic). The applicant is to pay the costs of this counter application.

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DAVIS, J