

*IN THE HIGH COURT OF
GAUTENG DIVISION,*



*SOUTH AFRICA
JOHANNESBURG*

APPEAL CASE NO: A20653-2018

1. Reportable: No
2. Of interest to other judges: No
3. Revised

Wright J
2 November 2023

In the matter between:

DAVID KOTZEN N.O.

FIRST APPELLANT

ROBERTO CARELOS DE FREITOS DE

SECOND APPELLANT

VASCONCELOS N.O.

And

THORN VALLEY ESTATE HOMEOWNERS

FIRST

RESPONDENT

ASSOCIATION NPC

JOSEPHSON, JONATHAN N.O.

SECOND

RESPONDENT

FULL COURT APPEAL - JUDGMENT

THE COURT

1. The first appellant, Mr Kotzen is an attorney and a trustee of a trust which owns a residential property. The second appellant, Mr De Vasconcelos is the other trustee.
2. The first respondent is the Thorn Valley Estate Homeowners' Association. The second respondent is Adv J Josephson, the arbitrator in the dispute between the Trust and Thorn Valley.
3. During 2014, the Trust caused the garage door of the residential property it owns to be painted black instead of white. Thorn Valley objected and sought to enforce its Rules against the Trust.
4. The dispute went to arbitration. It did so via a clause in the Rules applicable to Thorn Valley. The arbitration proceeded under the auspices of the Arbitration Foundation of South Africa (AFSA) and its Rules.
5. On 10 May 2017, Mr Kotzen wrote to Thorn Valley's Attorneys, stating that the parties would be unable to agree on the name of an arbitrator and requesting that the matter be referred to AFSA to nominate an arbitrator. The letter recorded that "*Our agreement to appoint an arbitrator must not be construed*

as an acceptance of your right to refer the matter to arbitration as we maintain that there is no dispute.”

6. Adv J Josephson was appointed as arbitrator by AFSA.
7. The trust participated in the arbitration proceedings. The Trust attended at least one pre-trial arbitration meeting and participated in the hearings that were conducted. It pleaded over after raising the three special pleas referred to below.
8. The first special plea was that Thorn Valley had no legal standing to bring a claim against the trust as the relevant property was registered in the Deed's Registry as falling under the Stone Valley Estate rather than under the Thorn Valley Estate. Thorn Valley replicated, referring to certain conveyancing documents which evidenced that there had been a bona fide conveyancing mistake and alleging that the relevant property correctly fell under Thorn Valley. This special plea seems to have fallen by the wayside, at least for present purposes and it is not necessary to deal further with it.
9. The second special plea was that the arbitrator lacked jurisdiction. The Trust pleaded that even if Thorn Valley was the Home Owners Association of which the Trust was a member (which the Trust denied), then Thorn Valley was an association as defined in section 1 of the Community Schemes Ombud Service Act 9 of 2011 (CSOS) of which the property would be a part. This plea went on to allege that the claims made in the arbitration by Thorn Valley were disputes as envisaged in terms of section 38, 39(1)(e) and 39(2)(d) of the Act. It was pleaded further that under section 37(3) the rights under the Act may not be waived nor may a person act contrary to the provisions of the Act.

10. The third special plea was pleaded in the alternative to the second special plea. It was alleged that, in the event of the second special plea not being upheld by the arbitrator or a court of law on review, the Trust intended to counterclaim for relief to the effect that the Rules of Thorn Valley be found to be unreasonable and that their enforcement against the Trust would be unfair, arbitrary, inconsistent and unreasonable. A stay of arbitration proceedings was sought.
11. The arbitrator dismissed the second and third special pleas. He also dismissed an application by the Trust under section 20(1) of the Arbitration Act 42 of 1965 that he state certain questions of law in the form of a special case for the opinion of the Court.
12. The Trust launched an application in the High Court. Under Part A, it sought an order that the arbitrator be directed to state certain questions of law in the form of a special case for the opinion of the Court. Under Part B, an order was sought setting aside the arbitrator's award in respect of the second and third special pleas and replacing those awards with awards by the Court in favour of the Trust. Under Part C, and in the alternative to Part B, an order was sought remitting the pleas to the arbitrator for reconsideration. In Part D, the extension of certain time periods under the Arbitration Act was sought.
13. Thorn Valley says that the property falls within the Thorn Valley Estate. In the founding affidavit, Mr De Vasconcelos says that the property does not fall within the Thorn Valley Estate. He says that the court is not called upon to decide the question and that the court may assume, without finding, that the property falls within the Thorn Valley Estate "*and/or that the trust is subject to*

the First Respondent's rules of association." We shall make this assumption without deciding the point.

14. Thorn Valley opposed the application while the arbitrator abided the decision of the Court.
15. The Trust did not seek to appeal or review the decisions of the arbitrator. The arbitrator was not an adjudicator under the Act. He fulfilled the role of private adjudicator working in a judicial rather than an administrative capacity. See *Turley Manor Body Corporate v Pillay and others*, 10662/18, Gauteng Local Division, 6 March 2020 at paragraph 26.
16. The Trust's application was dismissed with punitive costs by Foulkes-Jones AJ who found that the application was no more than an attempt to delay the matter. Sadly, the learned acting judge passed away and Lamont J heard the Trust's application for leave to appeal and granted leave to this Full Court.
17. The learned arbitrator found against the Trust on the second and third special pleas and he dismissed the Trust's request to state certain questions for the Court. He did so in careful and closely reasoned awards after giving both sides full opportunity to present their cases.
18. In the founding affidavit in the application in the court below the arbitrator was criticised by the Trust for "*simply regurgitating the authorities and some of the submissions made on behalf of the applicants*" and it was complained that he "*completely ignored or omitted to deal with the trite legal principles...*" and that he "*applied only textual approach to the interpretation*" of certain legislation.

19. These and similar complaints are the high water mark of the case against the arbitrator.
20. In my view, the criticism is unwarranted. Arbitrators and judicial officers are not required to dissect all the minutiae of every piece of evidence or argument presented to them. They are obliged to give the reasons for their awards or judgments. The arbitrator did so. Thorn Valley and the Trust know precisely why they won or lost.
21. Litigants and their lawyers who appear before arbitrators or judicial officers are entitled to a process but not to an outcome.
22. It is significant that the Trust's prayers in the court below included prayers that the arbitrator be ordered to submit questions of law to the court and that the matter be remitted to the arbitrator for reconsideration. These prayers and the other steps taken by the Trust in the arbitration proceedings are inconsistent with any argument that the arbitrator lacks jurisdiction. In the light of the Trust's active participation in the arbitration and its prayers in the application in the court below, the reservation in Mr Kotzen's letter of 10 May 2017 rings hollow.

PART A – The arbitrator to state questions for the court

23. The arbitrator refused a request by the Trust to state certain questions for the court. He did so for two main reasons, namely lateness of the application and because the questions sought to be stated were essentially the same as those he had just decided in the second and third special pleas.

24. He held that his awards relating to the second and third special pleas were final awards. He held that under section 20 of the Arbitration Act an application for the stating of questions for the court must be made before the making of a final award.
25. Section 20 of the Arbitration Act reads “ *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.*”
26. The arbitrator held that because the application that he state questions of law for the court was made after these awards, the request had to be denied.
27. In our view, the arbitrator was correct. The questions of law sought to be stated for the court cover essentially what was decided by the arbitrator in the second and third special pleas. In this respect, the awards were final on the subject matter in question and the application was accordingly late.

PART B – the second and third special pleas

28. The dispute between the parties is clearly a dispute as defined in section 1 of CSOS which reads - “*dispute*” means a dispute in regard to the administration of a community scheme between persons who have a material interest in that

scheme, of which one of the parties is the association, occupier or owner, acting individually or jointly.”

29. Section 2(c) reads *“Purpose of Act. —The purpose of this Act is to provide for*

—

(a) the establishment of the Service;

(b) the functions, operations and governance of the Service; and

(c) a dispute resolution mechanism in community schemes. “

30. The use of the word “a” in section 2(c), as opposed to words like “*the only*” is an indication that the Legislature intended there to be at least one, rather than

only one form of dispute resolution.

31. Section 4 reads *“Functions of Service. — (1) The Service must—*

(a) develop and provide a dispute resolution service in terms of this Act;”

32. Likewise, the use of the word “a”, as opposed to “*the only*” in section 4(1) indicates an intention by the Legislature that the envisaged service is a minimum requirement rather than the only method of resolving a dispute.

33. Under section 38(1) *“Any person may make an application if such person is a party to or affected materially by a dispute.”* The use of the word “*may*” by the Legislature is an indication that an application for relief relating to a dispute is optional. The intention of the Legislature is to allow a person to raise a complaint. No person is obliged to do so.

34. Section 40 reads "*Further information or material for applications. —After receiving an application, an ombud may require—*

(a) the applicant to submit further information or documentation in regard to the

application;

(b) information to be verified; and

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

35. The power given to the ombud in section 40(c) is a clear indication that the Legislature has empowered the ombud to insist that the dispute not proceed to be heard under the COSAS dispute resolution provisions until a private internal dispute resolution mechanism has been unsuccessful. In our view, success here relates to the completion of a procedure rather than with the happiness or unhappiness of a person with the outcome.

36. Section 42 reads "*Rejection of applications. —An ombud must reject an application by written notice to the applicant if—*

(a) the relief sought is not within the jurisdiction of the Service;

(b) the applicant fails to comply with a requirement of the ombud in terms of section 40;

(c) within 14 days after delivery of a notice contemplated in section 44, the ombud does not receive written confirmation from the applicant that the applicant wishes to proceed with the application;

*(d) the ombud is satisfied that the dispute should be dealt with in a court of law
or other tribunal of competent jurisdiction; or*

*(e) the application does not, in the opinion of the ombud, qualify for the
discount
or waiver of adjudication fees applied for.”*

37. The contents of section 42(b) and particularly the words “*or other tribunal of competent jurisdiction*” in section 42(d) are clear indications that the Legislature intended to grant to the ombud the power to require another tribunal to decide the dispute. Common sense dictates that an agreed arbitration is one form of resolution by a “*tribunal of competent jurisdiction.*”

38. The Act does not expressly proscribe arbitration by agreement. To oust arbitration would, in our view be to fall short of giving the Act sensible meaning in context as referred to in *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 SCA* at paragraph 18 – “*The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.*” It would not be sensible to refuse the parties the right to agree to arbitrate and then have the ombud require resolution by some “*other tribunal of competent jurisdiction*” in the form of arbitration.

39. Under section 37(3) “*A person may not waive or limit the exercise of rights in terms of this Act or act contrary to any provision of this Act.*” Reading this provision in context, sensibly and against the purpose of the Act we are of

the view that what is protected is only a waiver of the right to have a dispute dealt with. There is no bar on how the dispute should be decided.

PART C - Remittal of the special pleas to the arbitrator

40. This prayer fails with the finding above on Prayer B

PART D – Condonation under the Arbitration Act

41. Mr De Vasconcelos, with reference to the time bar provisions of the Arbitration Act, conceded that the application was brought four weeks late. He stated that his mother passed away which set him back time wise. This gave rise to the prayer in Part D of the application in the court below. In our view, condonation is appropriate. There is no prejudice to Thorn Valley.

Condonation in the appeal

42. In this appeal, the Trust also sought condonation for the extension of time for filing certain appeal documents and it sought the reinstatement of the appeal if necessary. The problems included the covid lockdown and a candid admission by the first appellant that he had misread certain Court Directives. The extent of the delay was short and there is no prejudice to Thorn Valley. Thorn Valley did not oppose and in my view, condonation should be granted and the appeal re-instated in the interests of justice. The parties should carry their own costs in the condonation and re-instatement application.

ORDER

1. The appeal is reinstated with the parties to carry their own costs in the condonation and re-instatement application.
2. The appeal is dismissed.
3. The appellants are jointly and severally to pay the costs of the respondent in the appeal in their capacities as trustees.

GC Wright

Judge of the High Court

Gauteng Division, Johannesburg

I agree

Siwendu J

Judge of the High Court

Gauteng Division, Johannesburg

I agree

Senyatsi

Judge of the High Court

Gauteng Division, Johannesburg

HEARD : 11 October 2023

DELIVERED : 2 November 2023

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