THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 521/06
Reportable

In the matter between :

BODY CORPORATE OF GREENACRES — APPELLANT

and

GREENACRES UNIT 17 CC — FIRST RESPONDENT
GREENACRES UNIT 18 CC — SECOND RESPONDENT

CORAM : HARMS ADP, CLOETE, LEWIS, PONNAN *et* COMBRINCK JJA

HEARD : 13 NOVEMBER 2007

DELIVERED : 28 NOVEMBER 2007

Summary: Sectional Titles Act 95 of 1986: Arbitration: Management rule 71(1) interpreted.

Neutral citation: This judgment may be referred to as *Body Corporate of Greenacres v Greenacres Unit 17 CC* [2007] SCA 152 (RSA).

JUDGMENT

CLOETE JA/

CLOETE JA:

[1] The appellant is the Body Corporate of Greenacres, a body corporate as contemplated in s 36 of the Sectional Titles Act[1] and to which it would be convenient to refer as 'the body corporate'. The first respondent is Greenacres Unit 77 CC which, as its name implies, is the registered owner of unit 17 in the Greenacres sectional title scheme. It would be convenient to refer to the first respondent as 'the owner'. The relief sought on appeal does not concern the second respondent (the registered owner of another unit in the Greenacres sectional title scheme) and it should not have been joined in these proceedings.

[2] The body corporate claims that it is owed levies and electricity charges in respect of the unit by the owner. The owner's defence to the claim is that it undertook, at its expense, work for the completion of parts of the common property, which the body corporate was obliged to undertake but which it had requested the owner to perform; and that the body corporate's claim was extinguished by set-off. The parties' rival contentions were set out in pleadings in an action instituted in the Randburg Magistrate's Court. Those proceedings were withdrawn by the body corporate and arbitration proceedings instituted. The owner delivered a special plea alleging that the latter proceedings were not competent in that only a court of law could determine the body corporate's claim. The arbitrator held that the dispute between the parties was indeed arbitrable. The court *a quo* (Snyders J), in a judgment which has been reported as *Greenacres Unit 17 CC v Body Corporate of Greenacres*,[2] held the contrary at the suit of the owner who was the first applicant before that court. The body corporate (which was the first respondent) has appealed to this court with the leave of the court *a quo*.

[3] The legislative framework relevant to the appeal is the following. Section 35(1) of the Act provides:

'A scheme shall as from the date of the establishment of the body corporate be controlled and

[1]95 of 1986.
[2][2006] 4 All SA 78 (W).

managed, subject to the provisions of this Act, by means of rules.'

Section 35(2) provides:

'The rules shall provide for the control, management, administration, use and enjoyment of the sections and the common property, and shall comprise –

(a) management rules, prescribed by regulation . . . .

(b) conduct rules, prescribed by regulation . . . '.

Regulation 30[3] provides in subregulation (1) that[4] the management rules as contemplated in s 35(2)(a) shall be the rules set out in Annexure 8, and in subregulation (5) that the conduct rules as contemplated in s 35(2)(b) shall be those rules set out in Annexure 9, to the regulations. Regulation 39 provides:

'The provisions of the Arbitration Act, 1965 (Act 42 of 1965), shall, insofar as those provisions can be applied, apply *mutatis mutandis* with reference to arbitration proceedings under the Act.'

Management rule 71(1) was subsequently inserted[5] into Annexure 8. It provides:

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

The rule goes on to provide for the procedure for arbitration and to prescribe time limits within which steps are to be taken.

[4] The issue in the present proceedings revolves primarily around the correct interpretation of the third saving provision in rule 71(1), namely:

'Save where . . . any form of . . . other relief may be required or obtained from a Court having jurisdiction.'

This provision cannot be interpreted literally as covering any relief which a court may grant, for then it would be as wide as the rule itself and operate to negate it. That would plainly be absurd.

[5] In my view the key to the interpretation of the provision at issue is the wide

[3]Of the regulations made in terms of s 55 of the Act and contained in GN R664 published in *Government Gazette* 11245 of 8 April 1988.
[4]Subject to subregulations (2) and (3), which are irrelevant for present purposes.
[5]By GN R1422 contained in *Government Gazette* 18387 of 31 October 1997.

wording of the operative part of the rule. The word 'any', which introduces the rule, is 'a word of wide and unqualified generality'.[6] Each of the phrases 'arising out of', 'in connection with', and 'related to' is also of wide import and the combination of all three evidences an intention on the part of the Legislature to cast the net as widely as possible. The inclusion of the Act and the conduct rules with the management rules is in itself an indication that the Legislature wished to regulate by arbitration almost every dispute which might arise between a body corporate and an owner, and between the owners themselves. The same intention appears from rule 71(8)[7] which reads as follows:

'Notwithstanding that the Arbitration Act, No. 42 of 1965, makes no provision for joinder of parties to an arbitration without their consent thereto, should a dispute arise between the body corporate and more than one owner or between a number of owners arising out of the same or substantially the same cause of action, or where substantially the same order would be sought against all the parties against whom the dispute has been declared, such party shall be automatically joined in the arbitration by notice thereof in the original notice of dispute given in terms of sub-rule (2).'

[6] 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.

[7] So far as the Act is concerned, two examples may be given where an

[6]Per Innes CJ in *R v Hugo* 1926 AD 268 at 271.
[7]Inserted by GN R438 contained in *Government Gazette* 27561 published on 13 May 2005.

arbitrator will not have jurisdiction: s 46 and s 48. Section 46 deals with the appointment of an administrator who, to the exclusion of the body corporate, has some or all of the powers of the body corporate. The discretion whether or not to appoint an administrator, to determine which powers of the body corporate shall be vested in the administrator, and to remove the administrator is vested in the court, ie, in terms of the definition in s 1, the provincial or local division of the High Court having jurisdiction. Section 48 deals with the destruction of, or damage to, building(s) comprising the scheme. It confers wide powers on a court. A court may make an order that the building(s) shall be deemed to have been destroyed[8] and

'impose such conditions and give such directions as it deems fit for the purpose of adjusting the effect of the order between the body corporate and the owners and mutually among the owners, the holders of registered sectional mortgage bonds and persons with registered real rights'[9].

A court may also[10] authorise a scheme for the rebuilding and reinstatement in whole or in part of the building(s), and for the transfer of the interests of owners of sections which have been wholly or partially destroyed, to the other owners; and in this regard the court:

'may make such order as it may deem necessary or expedient to give effect to the scheme.'

A dispute in relation to any of the matters in respect of which a discretion is vested in the court by the Act could not be determined by an arbitrator acting under rule 71 of the management rules, for such an interpretation of the rule would have the impermissible consequence that the rule would conflict with the Act.

[8] More general examples of relief, which an arbitrator is not competent to give and which the saving provision must also be interpreted as covering, would be an order for the inspection or the preservation of property, pending the resolution of a dispute relating to such property. The power to make such orders is conferred on a court[11] in terms of s 21(1)(e) of the Arbitration Act read with regulation 39 made under the Act quoted in para 3 above. An arbitrator acting under s 71(1) would not have this power.

[8]Section 48(1)(c).
[9]Section 48(2).
[10]Section 48(3).
[11]Defined in s 1 of the Arbitration Act to mean any court of a provincial or local division having jurisdiction.

[9] It was submitted on behalf of the body corporate that because of the express wording of the saving provision at issue ('may be obtained') the meaning to be given to the saving provision should extend also to relief that may (not only must) be sought from a court. That was the approach of the court *a quo*, which reasoned:[12]

'[T]he saving provision has to be read to exclude interdictory relief, urgent relief and any other relief which may be required or obtained from a court having jurisdiction. Other relief obtains practical content if read with section 37(2) which empowers a body corporate to recover levies from an owner by way of action in a court of competent jurisdiction. The recovery of levies is therefore relief which may be required or obtained from a court having jurisdiction and would fall within the ambit of the saving provision of rule 71(1).'

Section 37(2) provides:

'Any contributions levied under any provision of subsection (1)[13], shall be due and payable on 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 at the time when such resolution was passed.'

The submission on behalf of the body corporate was that rule 71 (which makes arbitration compulsory) cannot contradict s 37(2) (which permits an action in a court) because a regulation which is inconsistent with the statute under which it was made, is invalid under the Constitution according to the doctrine of legality.[14] But properly understood, the rule and the section deal with two different situations. In order for the

[12]Above, n 2, at 80h-j.
[13]Which obliges a body corporate to establish for administrative purposes a fund, and to require the owners, whenever necessary, to make contributions to the fund for the purposes of satisfying any claims against the body corporate.
[14]*Pharmaceutical Manufacturers Association of SA : In re ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 50.

rule to operate, there must be a dispute.[15] Absent a dispute ─ for example, where an owner ignores a demand for payment of levies or simply refuses, without more, to pay them ─ there can be no arbitration, as there is nothing for an arbitrator to determine;[16] and the body corporate is entitled to institute a court action in terms of s 37(2) for recovery of the levies. It was submitted on behalf of the body corporate that this would give rise to an anomaly as an owner might raise a dispute in the court proceedings and then require arbitration.[17] But such a situation frequently arises in the case of consensual arbitrations. What happens is that the court proceedings are stayed, the dispute goes to arbitration and, if determined in favour of the claimant, the consequent arbitral award can be made an order of court to enable the claimant to execute against the respondent. The whole purpose of rule 71 is to provide an expeditious and inexpensive method of determining disputes and the operative part of the rule is formulated in wide terms, as I have already pointed out. I see no reason why a dispute as to the liability of an owner to pay levies should be excluded from its operation and there is in my view no basis to do so.

[10] For the sake of completeness I shall deal also with the argument advanced on behalf of the body corporate. It was that the saving provision should be read as being limited to an interdict, and other relief in connection with the interdict, granted as a matter of urgency. This submission was influenced by what Prof Butler has

[15]Rule 71(2) also provides for a 'complaint' to be referred to arbitration. The first reference to 'complaint' in the rule was inserted by GN R438 contained in *Government Gazette* 27561 published on 13 May 2005. That rule now provides:
'If such a dispute or complaint arises, the aggrieved party shall notify the other interested party or parties in writing and copies of such notification shall be served on the trustees and the managing agents, if any and should the dispute or complaint not be resolved within 14 days of such notice, either of the parties may demand that the dispute or complaint be referred to arbitration . . .'. (Underlining supplied.)
It may be that an arbitrator is called upon to investigate a complaint and act as a mediator; or it may be that the complaint has to have given rise to a dispute before the services of an arbitrator must be engaged (which is the view of Butler, *The Arbitration of Disputes in Sectional Schemes under Management Rule 71* (1998) vol 9 Stellenbosch Law Review 256 at 260). It is not necessary for the purposes of the appeal to express any opinion in this regard.
[16]*Withinshaw Properties (Pty) Ltd v Dura Construction Co (SA) (Pty) Ltd* 1989 (4) SA 1073 (A) at 1079B-G; *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1980 (1) SA 301 (D) at 304E-G.
[17]It is not necessary to consider the position where no demand for arbitration is made by the owner. It may be that the court action would continue, as in the case of a consensual arbitration; or it may be that a body corporate is obliged to proceed to arbitration under rule 71 because legislation requires such a dispute to be resolved by arbitration. If the latter is the position, a court could raise the point *mero motu*.

suggested in an article,[18] namely:

'The reference to "other relief" should clearly not be taken literally and should be restricted to urgent relief similar to an interdict which is directed at preventing serious prejudice to one party pending the arbitrator's award or to ensuring that a party will still be in a position to comply with the award.'

Cleaver J (D Potgieter AJ concurring) in his unreported judgment in *Balmoral Heights No 39 BK v The Trustees for the Time Being of the Balmoral Heights Body Coporate*[19] was inclined to Prof Butler's view, but did not come to a definite conclusion. With respect, I see no reason to confine the saving provisions in rule 71 to urgent relief, or to relief granted in connection with or similar to an interdict. The phrase 'or other relief' is used in contradistinction both to an interdict and to urgent relief; 'other' does not mean 'similar'; and the relief excluded may be neither urgent nor dependent on an interdict being granted.[20]

[11] I therefore conclude that the arbitration provisions prescribed by rule 71 are applicable to disputes described in sub-rule (1) between the parties there referred to, save where an interdict or any form of urgent relief is required, and save where an arbitrator is not competent to grant the relief sought. It follows that the arbitrator was correct in determining that the dispute between the Body Corporate and the owner was arbitrable and the court *a quo* was incorrect in finding the contrary.

[12] The following order is made:

(1) The appeal is allowed, with costs.

(2) The order of the court *a quo* relating to the first respondent on appeal (the first

[18]Above, n 15, at 264.

[19]CPD case A698/2001; 4 October 2002; para 14. In that matter an owner claimed loss of rental income as damages from the body corporate which, the owner alleged, had failed to maintain the common property with the result that water penetrated the unit owned by it. The court correctly upheld a special plea that the dispute had to be arbitrated under rule 71 because it arose out of the body corporate's alleged failure to comply with its duties under the Act. (The court no doubt had in mind the duty imposed by s 37(1)(j) viz 'properly to maintain the common property (including elevators) and to keep it in a state of good and serviceable repair').

[20]For example, an order for the inspection of property – see para 8 above.

applicant in the court *a quo*) is set aside and the following order is substituted:

'The first applicant's application is dismissed, with costs.'

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T D CLOETE
JUDGE OF APPEAL

Concur: Harms ADP
Lewis JA
Ponnan JA
Combrinck JA