THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 498/2011

In the matter between: Reportable

BODY CORPORATE OF THE PINEWOOD PARK SCHEME NO. 202 **Appellant**

and

DELLIS (PTY) LIMITED **Respondent**

Neutral citation: *Body Corporate of the Pinewood Park scheme no 202 v Dellis (Pty) Ltd* (498/11) [2012] ZASCA 105 (1 June 2012)

Coram: MPATI P, BRAND, MHLANTLA and TSHIQI JJA and BORUCHOWITZ AJA

Heard: 09 May 2012

Delivered: 1 June 2012

Summary: **Sectional Title – Status and nature of rules governing control and management of body corporate – management rules – resolution of dispute as to payment of levies – whether provisions of s 6 of Arbitration Act 42 of 1965 excluded by arbitration procedure provided for in rule 71.**

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (Kruger, D Pillay JJ and Nkosi AJ, sitting as court of appeal).

1 The application for special leave to appeal is granted.
2 The appeal is upheld with costs.
3 The order of the Full Court is set aside and replaced with the following:
‘(a) The appeal is upheld with costs.
(b) The order of the court below is set aside and replaced with the following:
“The defendant’s point *in limine* is dismissed with costs.”’

JUDGMENT

MPATI P (BRAND, MHLANTLA, and TSHIQI JJA, and BORUCHOWITZ AJA CONCURRING):

[1] This is an application for special leave to appeal against the order of the Full Court of the Pietermaritzburg High Court (Kruger J, D Pillay J and Nkosi AJ concurring) dismissing an appeal to it by the applicant against an order of Seegobin AJ in terms of which the applicant’s claim against the respondent for payment of certain moneys was dismissed with costs. The two judges of this court who considered the application referred it for oral argument in terms of s 21(3)*(c)*(ii) of the Supreme Court Act 59 of 1959.

[2] The respondent is the registered owner of Sectional Title Unit 7 (the property) in the Sectional Title Development Scheme known as Pinewood Park No 202 (the scheme), situated in Pinetown, KwaZulu-Natal. As owner of the property the respondent is obliged, in terms of s 44(1)(b) of the Sectional Titles Act 95 of 1986 (the Act), to pay levies in respect of the property to the applicant, the body corporate, which manages the scheme.

For convenience I shall refer to the applicant as 'the body corporate' and to the respondent as 'the owner'.

[3] On 2 November 2006 the body corporate issued summons against the owner for payment of arrear levies in the sum of R123 101.00, which the owner had allegedly failed to pay 'despite same being due, owing and payable' to the body corporate. The body corporate also sought orders for payment of interest on the amount claimed at a rate of two percent (2%) calculated from 1 August 2006 and for costs of suit on the scale as between attorney and client.

[4] The owner admitted in its plea that it was obliged to pay levies 'imposed in accordance with the Act, as read with the rules governing the Scheme', but denied that it was obliged to pay the amount claimed. It pleaded further that any entitlement to claim the levies 'would have arisen more than three years prior to the institution of this action, and have prescribed';[1] that the body corporate had from time to time appropriated payments received from it 'towards debits which were unauthorised and to which the body corporate was not entitled' and that it is entitled to be credited on its account with the payments which were previously appropriated towards unauthorised debits.

[5] At a pretrial conference held on 23 February 2010 the owner's legal representatives contended that the jurisdiction of the high court to determine the claim was ousted by virtue of the judgment of this court in the matter of *Body Corporate of Greenacres v Greenacres Unit 17 CC & another* 2008 (3) SA 167 (SCA), which, in the owner's view, 'compels the resolution of the [body corporate's] claim by means of arbitration'. The parties subsequently agreed to have the issue argued before the trial court as a point *in limine.* The trial court answered the point in favour of the owner, holding that the latter's denial of liability 'constituted an arbitrable dispute which should in light of the *Greenacres*

[1] The body corporate annexed to its summons a schedule reflecting the manner in which the amount claimed was computed. The schedule shows debits and receipts as from September 2001.

judgment be determined by arbitration'. It dismissed the claim, but granted the body corporate leave to appeal to the Full Court, which in turn dismissed the appeal.

[6] It is perhaps convenient to refer, at this stage, to the relevant legislative framework relating to the management and control of sectional title schemes. Section 35(1) of the Act provides that a scheme shall be controlled and managed by means of rules as from the date of establishment of the body corporate, subject to the provisions of the Act. Section 35(2) reads:

'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, which rules may be substituted, added to, amended or repeated by the developer when submitting an application for the opening of a sectional title register, to the extent prescribed by regulation, and which rules may be substituted, added to, amended or repeated from time to time by unanimous resolution of the body corporate as prescribed by regulation;

(b) …'

Regulation 30(1) of the regulations made in terms of s 55 of the Act[2] provides as follows:

'Subject to subregulations (2) and (3), the management rules as contemplated in section 35 (2)(*a*) of the Act, shall be those rules as set out in Annexure 8 of the Regulations, for which . . . other rules may be substituted, added to, amended or withdrawn by the developer when submitting an application for the opening of a sectional title register.'

It is common cause in this matter that no substitution, amendment, addition to, or withdrawal from, the rules (management rules) as contained in Annexure 8 to the regulations was effected by the developer at any stage.

[7] Management rule 71 deals with the determination of disputes by arbitration and subrules (1) and (2) read:

'(1) 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.

[2] Contained in GN R664 published in *Government Gazette* 11245 of 8 April 1988.

(2) If such a dispute or complaint arises, the aggrieved party shall notify the other affected 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: . . ..'

In *Greenacres* this court held that in order for the rule (rule 71) to operate, there must be a dispute. The court held further that '[a]bsent 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 . . .'.[3]

[8] And in *Telecall (Pty) Ltd v Logan*[4] this court (per Plewman JA) said that before there can be a reference to arbitration a dispute, which is capable of proper formulation at the time when an arbitrator is to be appointed, must exist and there cannot be an arbitration and therefore no appointment of an arbitrator can be made in the absence of such a dispute. Thus, if the word 'dispute' is used in a context which indicates that what is intended 'is merely an expression of dissatisfaction not founded upon competing contentions no arbitration can be entered into'.[5]

[9] During the course of its judgment the court a quo mentioned – and this was the factual basis upon which it reached its conclusion – that counsel for the body corporate 'ultimately conceded that [a] dispute existed and was known to the [body corporate] prior to the institution of the action'. Counsel had argued, however, that no proper dispute, capable of being taken, or referred, to arbitration existed. But the court, drawing support from the decision of Cleaver J in *Baumoral Heights No 39 Bk v The Trustees for the Time Being of the Baumoral Heights Body Corporate* CPD (A698/2001) [2002] ZAWCHC 54 (4 October 2002)[6], expressed the opinion that 'arbitration is compulsory in all matters where a dispute exists, unless the relief claimed is not competent through arbitration'.[7] It held that '[a]s arbitration is compulsory, the [body corporate] ought to have referred the

[3] At para 9.
[4] *Telecall (Pty) Ltd v Logan* 2000 (2) SA 782 (SCA).
[5] At para 12.
[6] In the body of the judgment the property concerned is referred to as 'Balmoral Heights'.
[7] At para 8 of the judgment of the court a quo.

dispute to arbitration and ought not to have proceeded by way of action in the High Court'. It accordingly upheld the order of the court of first instance dismissing the claim with costs.

[10] In this court counsel for the body corporate repeated the argument that there had been no proper dispute between the parties which was capable of being referred to arbitration and explained that the dispute put up by the owner in correspondence exchanged between the parties prior to the institution of the action was completely different to the one ultimately pleaded. What was important, counsel contended, was the dispute raised in the plea, that is, whether that dispute was capable of being referred to arbitration. He submitted that the court of first instance should not have dismissed the claim, but should have dismissed the point *in limine*, and, in the exercise of its discretion, either dealt with the claim to finality or referred the dispute to arbitration and stayed the action pending the determination of the arbitration proceedings. Consequently, so the argument continued, the court a quo erred in dismissing the body corporate's appeal. Counsel's further argument was that the owner, in any event, never demanded arbitration, which it could have done in terms of rule 71(2), and that the proper procedure it should have adopted was to apply for a stay of the proceedings in terms of s 6 of the Arbitration Act 42 of 1965,[8] or raised a special plea (dilatory plea) praying for a stay of proceedings pending the final determination of the dispute. In this regard counsel relied on the decision of this court in *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading* 119 (Pty) Ltd 2009 (4) SA 68 (SCA) para 7.

[11] On the other hand, counsel for the owner disavowed any support for the finding of the court of first instance that its jurisdiction was ousted by the *Greenacres* judgment, which finding appears to have been accepted by the court a quo. Counsel submitted,

[8] Section 6 reads: '(1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.
(2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such

instead, that management rule 71 provides for compulsory arbitration where a dispute exists between the parties to a sectional title scheme. This is clear, he said, from the use of the word 'shall' in sub-rule (1). Because of the stance taken by him that rule 71 provides for compulsory arbitration, counsel had to contend that even though regulation 39 stipulates that the provisions of the Arbitration Act 'shall, in so far as those provisions can be applied, apply *mutatis mutandis* with reference to arbitration proceedings under the Act', s 6 of the Arbitration Act does not apply in this case, since provision is made in the rules for compulsory arbitration. In those circumstances, so it was contended, the court has no discretion.

[12] For these submissions counsel sought support from the decision of Van Dijkhorst J in *Independent Municipal and Allied Trade Unions v Northern Pretoria Metropolitan Substructure & others* 1999 (2) SA 234 (T) (*IMATU* judgment). In that case an order was sought by the applicant (IMATU) declaring the first respondent (the employer) to be bound to comply with the terms and conditions of a collective agreement between it (employer) and three unions of which IMATU was one. Among several points *in limine* raised by the employer, one was that the court had no jurisdiction to decide the matter because the Labour Relations Act 66 of 1995 contained clear provisions about dispute resolution regarding collective agreements. Section 24(1) of that Act provides that '[e]very collective agreement . . . must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement'. The provision stipulated that the procedure 'must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration'. Van Dijkhorst J held that wherever the Act with which he was concerned provided for dispute resolution by arbitration, 'that concept in the context of the Act excludes resort to the ordinary courts of law for dispute resolution'. I can find no fault with this statement of the law, at least in so far as it does not purport to suggest that resort to the ordinary courts is excluded even when the statute concerned does not prescribe that the decision of the arbitrator shall be final, where one of the parties wishes to challenge the decision of the arbitrator.

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proceedings subject to such terms and conditions as it may consider just.'

[13] But the learned judge gave, inter alia, the following reasons for his statement:

'It was the clear intention of the Legislature that a specialised set of fora should deal with labour-related matters. To this end it established an interlinked structure of inter alia trade unions, employers' organisations, a variety of councils, the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Labour and Labour Appeal courts. The Act also creates procedures designed to accomplish the object of simple inexpensive and accessible resolution of labour disputes. In this the role of the CCMA and the exclusive jurisdiction of the Labour Courts are important features. Generally the scheme of the Act is that the Labour Court does not itself hear disputes as a court of first instance but neither does the Act confer exclusive jurisdiction on the CCMA vis a vis the Labour Court in all matters pertaining to labour disputes.'[9]

He accordingly held that the court had no jurisdiction to adjudicate upon a dispute about the interpretation or application of a collective agreement as referred to in the Labour Relations Act.

[14] As to the present matter the Act and the regulations made under it do not prescribe a procedure for dispute resolution. Section 35(1) of the Act simply provides that the sectional title scheme shall be controlled and managed by means of rules (which may or may not provide for the resolution of disputes). Section 35(2) directs that the rules shall provide for the control, management and enjoyment of common property and that they may be substituted, added to, amended or repealed by the developer. Although s 35(2)*(a)* directs that the rules shall comprise management rules prescribed by regulation, regulation 30(1) only tells us where to find the rules and which parts thereof may not be substituted, added to, amended or withdrawn by the developer when submitting an application for the opening of a sectional title registrar.[10] The fact that the rules may be jettisoned in part by a developer and in toto, and others substituted for them, by unanimous resolution of a body corporate indicates clearly, in my view, that the Legislature intended the rules to be of a contractual nature.

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[9] At 239.

[10] Sub-regulation (4) provides that the management rules may be added to, amended or repeated by unanimous resolution of the body corporate, but that may occur only when there are owners, other than the developer, of at least 32 percent of the units in the scheme. Thus the entire set of rules may be substituted by unanimous resolution of the body corporate.

[15] In *Wiljay Investments (Pty) Ltd v Body Corporate, Bryanston Crescent & another* 1984 (2) SA 722 (T), Spoelstra J had occasion to consider the status and nature of rules governing body corporates under the Act's predecessor.[11] Section 27(2)*(a)*(ii) of that Act stipulated that the rules 'shall provide for the control, management, administration, use and enjoyment of sections and the common property, and shall include. . . the rules contained in Schedule 2 which may be added to, amended or repealed by special resolution of the members of the body corporate'. Spoelstra J said the following:

'These rules are clearly not intended to define or limit the ownership of individual owners of sections, units or common property. The rules, read with the provisions of the Act, contain a constitution or the domestic statutes of the body corporate. In this sense it could properly be construed as containing the terms of an agreement between owners *inter se* and between owners on the one hand and the body corporate on the other hand.'[12]

I agree with these dicta, which are equally valid in respect of the management rules made in terms of the regulations, read with the provisions of s 35 of the Act. It is a matter of pure logic that when a purchaser purchases a unit in a sectional title scheme after a sectional title register had been opened he or she would be deemed to have consented, or agreed, to be bound by the existing rules relating to that scheme and to future changes to them introduced by unanimous resolution of that scheme's body corporate. It seems to me, therefore, that the arbitration procedure provided for in management rule 71 is consensual.[13] Unlike the Labour Relations Act which provides in s 24 that every collective agreement must provide for a specific procedure to resolve disputes, which meant that such procedure was compulsory (see *IMATU* judgment), the provisions of the Act and the regulations do not prescribe an arbitration procedure for inclusion in the rules.

[16] In *Baumoral* the issue on appeal was whether or not management rule 71 provides for a compulsory arbitration procedure. The appellant, the owner of a sectional title unit in the Balmoral Heights sectional title scheme, had sued the trustees of the body corporate

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[11] Sectional Titles Act 66 of 1971.
[12] At 727D-E.
[13] Although the court of first instance stated that the *Baumoral* decision 'correctly . . . held that [management rule] 71(1) read with regulation 39 makes provision for a compulsory arbitration', it earlier, in the same paragraph (para 14) expressed the view that s 35 'does provide for *consensual* arbitration. . .' Section 35(4) provides, inter alia, that the rules 'shall bind the body corporate and the owners of the sections and any person occupying a section'.

(respondent) in the Cape Town magistrate's court for payment of R26 000 alleged to represent loss of rental income. The appellant had alleged that the respondent had failed in, and neglected, its legal duty to prevent water from penetrating into its unit. The respondent pleaded on the merits and, in addition raised a special plea to the effect that in view of the provisions of management rule 71, which were applicable to the scheme, any dispute between the parties was to be determined by means of arbitration. The appellant's main ground of appeal was that rule 71 does not provide for compulsory arbitration. An alternative ground of appeal, which was not opposed by the respondent, was that in the event of it being found that the rule does provide for compulsory arbitration, the magistrate should not have dismissed the appellant's claim, but merely stayed it pending the finalisation of arbitration proceedings.

[17] The court (Cleaver J, Potgieter AJ concurring) held that rule 71(1), read with regulation 39, provides for a compulsory arbitration of the dispute.[14] But the court went further and said:

'The discretionary power of the court to exclude arbitration is not usually available in the case of a statutory arbitration, but as I have already indicated, the reference to arbitration in respect of the rules is not a statutory one in the normal sense of the word. Also, should the rules have a contractual or consensual basis, the availability of such a discretionary power of the court would be likely. Perhaps more importantly, the wording of regulation 39 may well support a wide application for the provisions of the Arbitration Act to rule 71, including the court's discretionary powers under sections 3 and 6 of the Arbitration Act, not to enforce the agreement.'[15]

The court found, however, that since the respondent had raised the issue by way of a special plea, the magistrate was not correct in dismissing the application, but should have granted a stay of proceedings pending the outcome of the arbitration. It set aside the magistrate's order dismissing the appellant's claim and ordered a stay of the proceedings 'pending resolution of the plaintiff's claim by arbitration' as provided for in the rules applicable to the scheme.

[14] At para 15.
[15] At para 18.

[18] As I have mentioned above, in the present matter the issue of the compulsory nature of management rule 71 was not raised in a special plea, but as a point *in limine* during a pre-trial conference. I have also mentioned that the only basis for the contention, on behalf of the owner, that s 6 of the Arbitration Act is of no application in this matter is that management rule 71 provides for compulsory arbitration. Counsel conceded, however, that if it were to be found that arbitration is not compulsory under the rules then the appeal must succeed.

[19] The question whether arbitration is compulsory under management rule 71 was left open in *Greenacres.* The issue in that case was whether a dispute as to the liability of an owner to pay levies is excluded from the operation of the rule. This court held that it is not excluded and that it is arbitrable.

[20] Section 40 of the Arbitration Act reads:

'This Act shall apply to every arbitration under any law passed before or after the commencement of this Act, as if the arbitration were pursuant to an arbitration agreement and as if that other law were an arbitration agreement: Provided that if that other law is an Act of Parliament this Act shall not apply to any such arbitration in so far as this Act is excluded by or is inconsistent with that other law or is inconsistent with the regulations or procedure authorised or recognized by that other law.'

The provisions of the Arbitration Act are made applicable, *mutatis mutandis* 'with reference to arbitration proceedings under the Act' (regulation 39). The management rules are not an Act of Parliament and none of the provisions of the Arbitration Act has been excluded by the Act, nor has it been suggested that anyone of its provisions is inconsistent with the Act or the regulations. I have already held that the management rules are consensual or contractual in nature and that the arbitration procedure provided for in rule 71 is not prescribed by the Act or the regulations as is the case with the Labour Relations Act. It follows that I disagree with the view expressed in *Baumoral* that management rule 71 provides for compulsory arbitration, if by that is meant that the provisions of the Arbitration Act thus do not apply. I agree though, with the view that the magistrate in that case should not have dismissed the plaintiff's claim but should have stayed the proceedings pending the finalisation of arbitration proceedings to be initiated. This would be in accordance with

the provisions of s 6 of the Arbitration Act, which are, in my view, applicable to an arbitration process under management rule 71.

[21] Similarly, in the present matter the court of first instance should not have dismissed the body corporate's claim. Whether it should have stayed the proceedings pending the finalisation of arbitration proceedings in terms of s 6 of the Arbitration Act or exercised its discretion and continued with the action would depend on the question of the existence or otherwise of a dispute between the parties and any other relevant factor that may present itself.

[22] This being an application for special leave to appeal, I proceed to consider the requisites for the grant of special leave. In *Westinghouse Brake v Equipment (Pty) Ltd v Bilger Engineering* 1986 (2) SA 555 (A) Corbett JA considered it undesirable for this court to endeavour to indicate with precision what these requirements are. The learned judge, however, laid down the general principle that an applicant for special leave to appeal must show, in addition to the ordinary requirement of reasonable prospects of success, that there are special circumstances which merit a further appeal to this court (at 564G-J). One of the special circumstances he cited (at 564I-565E) is that where, in the opinion of this court, the appeal raises a substantial point of law special leave should be granted. In my view, not only has it been shown in this matter that there are reasonable prospects of success on appeal, but the appeal indeed raises a substantial point of law, which is of great importance not only to the parties, but also to the sectional title industry as a whole. I consider that special leave should be granted.

[23] In the result the following order is made:

1 The application for special leave to appeal is granted.
2 The appeal is upheld with costs.
3 The order of the Full Court is set aside and replaced with the following:
'(a) The appeal is upheld with costs.

(b) The order of the court below is set aside and replaced with the following:

"The defendant's point *in limine* is dismissed with costs."'

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President

APPEARANCES

For the Appellant:	M E Stewart
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For the Respondents:	I Pillay
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