IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 85247/2014

13/7/2015

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

7/7/15

DATE SIGNATURE

In the matter between:

LEOTO JAN KGOPA	**First Applicant**
FREEDAH LEGAKILWE NOMTHANDAZO KGOPA	**Second Applicant**

and

THE BODY CORPORATE OF WALENI	**First Respondent**
JASPER VAN DER WESTHUIZEN	**Second Respondent**

Heard:

Delivered

JUDGMENT

A.A.LOUW J

Introduction

[1] The applicants are co-owners of a sectional title unit in a sectional title development called Waleni.

[2] A dispute regarding outstanding levies arose between the applicants and the first respondent, The Body Corporate of Waleni. This dispute was referred to an arbitrator, the second respondent, who is a senior attorney in Pretoria.

[3] The arbitrator made a ruling dated 23 June 2014. This ruling is annexed as "C" to the founding affidavit. At the hearing the applicants (who were then the defendants) met with the first applicant in the arbitrator's boardroom and agreed to payment of R6887,21 as well as 50% of the arbitrator's costs. This is common cause on the papers before me as appears from the answering affidavit. The applicants did not deliver a replying affidavit.

The arbitrator's award

[4] The applicants only attack the award in regard to costs. The arbitrator's ruling in that regard is that a successful party is entitled to its costs and the order in regard thereto appears from para 8 of its ruling which reads as follows:

> *"I am therefore of the opinion that because the legal proceedings were correctly started, that the plaintiff is entitled to his taxed attorney and client cost on the Magistrate's Court scale A."*

[5] The applicants interpret this order in the following terms in their founding affidavit:

> *"6.5. Wherefore it is submitted that the second respondent was never vested with the ability to order costs for anything other than the reference to arbitration and actual arbitration of a dispute.*
>
> *6.6. We are further advised and it is submitted that costs incurred in the reference of a matter to arbitration are costs that would be incurred in the drafting and service of Statements of Claim and the like and that, in the present case, the costs the first respondent incurred in connection with the proceedings in the Magistrate's Court are not costs connected with the reference of the matter to arbitration. It would have been proper in terms of Rule 71, [of the management Rules of the first respondent] to refer the matter immediately to arbitration, thus rendering the proceedings in the Magistrate's Court not only redundant, but improper."*

[6] They then proceed to state that in terms of section 33(1)(b) of the Arbitration Act, 42 of 1965, an arbitrator's award may be set aside if the arbitrator has exceeded his powers. They ask the following relief in the notice of motion:

> "2. *That the arbitration award granted by the second respondent on 23 June 2014 (hereinafter referred to as "the award") be reviewed and set aside in so far as it pertains to the granting of attorney client costs on Magistrate's Court Scale A in favour of the first respondent, as appears in paragraph 8 of the award on the grounds that the second respondent exceeded his power in granting the award and/or that such award was improperly obtained, pursuant to the provisions of section 33(1)(b) of the Act.*"

[7] The applicants take issue only with para 8 of the award which I have already quoted in para 4 above.

[8] There is no reason on the facts to believe that the second respondent at all intended to grant costs in respect of a Magistrate's Court action in which the parties are still involved. This action has nothing to do with the proceedings at arbitration. The arbitrator simply used the relevant scale in the Magistrates' Court Rules so as to provide the structure in terms of which taxation should take place. This is made clear by the second respondent in his affidavit supporting the first respondent's opposition, more specifically, in para 4 thereof.

[9] In a counter-application the first respondent asks that the award published by the second respondent on 23 June 2014 be made an order of court.

[10] There is no opposition hereto as the applicants did not file any answering affidavit.

[11] I believe that sound grounds exist for this relief asked by the first respondent.

Application for postponement

[12] At the hearing the applicants asked for a postponement. No substantive application or affidavit supported such an application.

[13] On this basis alone, in terms of well-established practice, it is fatal to the application for postponement.

[14] In any event section 33(2) of the Arbitration Act reads as follows:

> *"An application pursuant to this section* ***shall be made within six weeks after the publication of the award to the parties****: Provided that when the setting aside of the award is requested on the grounds of the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the abovementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, such application shall*

> *be made within six weeks after the discovery of the offence and in any case not later than three years after the date on which the award was so published."* (own emphasis)

[15] This period ended on 4 August 2014. This application was issued as late as 1 December 2014.

[16] The applicants have not given a satisfactory explanation for the delay. Neither have they shown "good cause". I believe that their application is totally without merit. The application for postponement therefore has to be refused.

The counter application

[17] As stated above there is no reason why this relief should not be granted.

Costs

[18] The applicants have brought an application totally devoid of merit. They did not file a replying affidavit. Furthermore they did not answer to the counter application. The main application was not brought timeously as required by the Arbitration Act. All-in-all, I am of the view that the application was simply intended to delay payment of the amount and costs awarded by the arbitrator.

[19] The rules of the first respondent in any event provide for attorney and client costs. In the premises I believe that a punitive costs order on a scale as between attorney and own client is justified.

Order

[20] I therefore make the following order:

1. The applicants' application for the postponement of the matter is refused.
2. The main application seeking the review and setting aside of the arbitration award is dismissed.
3. In respect of the first respondent's counter application – it is ordered that the award published by the second respondent on 23 June 2014, and attached as annexure "C" to the founding affidavit is made an order of Court.
4. The applicants are ordered to pay, jointly and severally, the one paying the other to be absolved, the costs of the application for postponement, the main application and the first respondent's counter application on the opposed attorney and own client scale.

A.A. LOUW

Judge of the High Court