

In the High Court of South Africa
KwaZulu-Natal Local Division, Durban

Case No : 9462/2014

In the matter between:

The Body Corporate of Valence House (SS : 183/1992)

Applicant

and

Shameem Malani NO

First Respondent

Kapilroy Neermul Singh NO

Second Respondent

Rajendra Kandhir NO

Third Respondent

Usha Singh NO

Fourth Respondent

Shamil Rabichundra Maharaj NO

Fifth Respondent

Judgment

Lopes J

[1] The applicant brings an application before this court for an arbitration award to be made an order of court in terms of s 31 of the Arbitration Act, 1965.

[2] The following matters are relevant to this application:

- (a) the five respondents were the trustees of the Valence House Trust which was at all material times, and remains the registered owner of units 1, 2, 3, 4 and 22 in the sectional title scheme, Valence House;
- (b) those units are not residential units and are used for commercial purposes.
- (c) at some stage the body corporate instituted action out of the Durban Magistrates' Court against the trustees for payment of outstanding levies, etc due by the Trust. A plea was taken that the matter should have been referred for hearing by way of arbitration proceedings, and the proceedings in the Magistrates' Court were then left in abeyance;
- (d) on the 23rd September 2013 the body corporate of Valence House served a notice on the trustees in terms of Rule 71(2) of the Management Rules contained in Annexure 8 to the regulations to the Sectional Titles Act, 1986. That notice recorded the existence of a dispute between the body corporate and the Trust relating to the failure of the Trust to pay levies due to the body corporate in respect of units 1, 2, 3, 4 and 22 of the scheme, and that if the dispute was not resolved within fourteen days, either party may refer the matter to arbitration;
- (e) on the 9th October 2013 the body corporate caused a second notice to be served on the trustees, this time referring the dispute to arbitration and setting out the names of three possible arbitrators and requesting the trustees to advise whether any of those names were acceptable to the Trust. As no

agreement was reached, the attorneys acting for the body corporate approached the Chief Registrar of Deeds who nominated Mr J R Archer as the arbitrator. This was presumably pursuant to the provisions of Rule 71(4) of the management rules;

- (f) on the 6th May 2014 the body corporate caused its statement of claim to be served upon the trustees and Bilal Malani & Associates, the attorneys who had hitherto represented the trustees;
- (g) as no reply was received to the statement of claim within the fourteen day period allocated, on the 23rd May 2014 the body corporate caused a notice of set down of the arbitration proceedings for the 5th June 2014 at 9.00am to be served on both the trustees and the trustees' erstwhile attorneys;
- (h) on the 5th June 2014 a Mr C Malani appeared at the arbitration hearing, and informed the arbitrator that he was the husband of the first respondent who had passed away, and that he was authorised to represent the other trustees. Mr C Malani then applied for the matter to be adjourned for two weeks on the basis that his attorney, Mr B Malani of Bilal Malani & Associates, was not available on the 5th June 2014 to represent the trustees;
- (i) after hearing argument on the matter the arbitrator granted the application for a two week adjournment to the 19th June 2014. In addition he ruled that the trustees were to file their statement of defence on or before the 12th June 2014. He also made an order for the wasted costs occasioned by the adjournment;

- (j) on the 19th June 2014 and at the arbitration hearing, there was no appearance on behalf of the trustees. The arbitrator then instructed the applicant's attorney to telephone Mr Malani of Bilal Malani & Associates. Mr Bilal Malani advised the attorney that he had no instructions to act for the trustees and would not be appearing. He indicated that his previous involvement had been due to a family connection, but that he was no longer acting;
- (k) a short while later, and as the body corporate's attorney was about to lead evidence, the proceedings were interrupted when the body corporate's receptionist advised the hearing that Mr C Malani had telephoned to say that he would not be available for today's hearing. The arbitrator then instructed that the arbitration should proceed, and having heard the evidence, made an award of R1 882 622,40, together with interest thereon calculated at the rate of 21 per cent per annum from the 1st April 2014 to date of final payment, to be compounded monthly, and the costs of the arbitration on an attorney and client scale. The arbitrator's award was made on the 7th June 2014.

[3] The body corporate now seeks to have that award made an order of court together with an order that sections 1, 2, 3, 4 and 22 are declared to be executable. That application was issued on the 11th August 2014. The matter was opposed with the trustees filing answering affidavits and the matter came before me to be heard on the 18th June 2015. On that day Mr *Motala*, who appeared for the trustees, indicated that he required an adjournment because he had been briefed at the last minute and had not had time to familiarise himself with the papers. I accordingly adjourned the matter to the 19th June 2015 to enable him to do so. I should mention that I would, in

any event, not have been able to hear the matter on the 18th June 2015 because there was insufficient time at the end of the court day to hear the matter which was set down as the second opposed application on the Motion Court roll.

[4] On the 19th June 2015 Mr *Motala* moved a substantive application for an order condoning the late filing of the trustees' heads of argument, and postponing the matter to a date to be arranged with the Registrar to enable him fully to appraise himself of the matter. I condoned the late filing of the heads of argument and refused the application for an adjournment on the basis that Mr *Motala* had had sufficient time to prepare the matter. My view in that regard was vindicated by the fact that Mr *Motala* argued the matter at length and had prepared supplementary heads of argument to assist him in doing so.

[5] Mr *Motala* then raised the problem that the first respondent, Shameem Malani was deceased. He indicated that the matter should be adjourned to enable an executor to be appointed and to ensure that the Trust and its beneficiaries and trustees were not in any way prejudiced in the conduct of the proceedings. Mr *Motala* was unable to cite any authority for the proposition that an executor would step into the shoes of a deceased trustee and take over the functions of that trustee.

[6] In the absence of a trust deed indicating that the remaining trustees were unable to continue to represent the Trust in the present litigation, and in the absence of any indication of prejudice to the other trustees or beneficiaries of the Trust, I

directed that the hearing continue. As I understand the position, the office of trustee is a personal position and is not automatically transmitted to an executor on the death of the trustee. Whilst it may be the case that trust property passes to the executor of a deceased trustee's estate in an ownership-trust, it was not suggested that that could prevent a creditor from continuing to pursue an application with regard to the trust property. Had the position been otherwise, I would have expected the Trust to have dealt with this matter in its papers. The death of the first respondent, although apparently having taken place prior to June of 2014, was not established by the production of a death certificate by the respondents. No evidence or legal argument was put before me to suggest that her death was a barrier to the continuation of the body corporate's application, and no copy of the Trust deed was made available to me.

[7] Mr *Motala* raised the following defences to the arbitration award being made an order of this court.

(a) The authority of Mr C Malani

Mr Motala submitted that there was no indication that Mr C Malani had authority to represent the trustees in the arbitration. Mr *Motala* was, however, unable to indicate to me any statement in the papers which challenged the authority of Mr C Malani to appear on behalf of the trustees. It is clear from the arbitrator's award that Mr C Malani indicated to those present at the arbitration proceedings on the 5th June 2014 that he had authority to represent the trustees.

In the answering affidavit which was deposed to by the second respondent, he stated that the arbitrator had failed to call for a trustee's resolution confirming the purported mandate of Mr C Malani to represent the Trust at the hearing on the 5th June 2014. The second respondent states further that Mr Malani did not inform the trustees of the arbitration notices and of the pending arbitration. This is confirmed in an affidavit by Mr C Malani.

In my view these submissions do not assist the trustees because:

- (i) in his affidavit Mr Singh, the second respondent, does not deal in any way with how it came about that Mr C Malani appeared at the arbitration, save to state that Mr C Malani would investigate the matter and advise the trustees if the matter was not resolved. In his confirmatory affidavit Mr C Malani does no more than confirm the contents of Mr Singh's affidavit. He in no way purports to deal with the circumstances under which he came to appear at the arbitration, and why he failed to appear at the resumed hearing. In my view this is the least one would have expected of Mr C Malani. The reluctance of both Mr Singh and Mr C Malani to take the court into their confidence with regard to the facts of the matter lead to the inevitable conclusion that what is stated is not the truth, or not the entire truth;
- (ii) none of the other trustees have deposed to affidavits confirming the allegation by Mr Singh that the trustees were not aware of the arbitration in circumstances where one would have expected them to have done so;

- (iii) Mr C Malani gives no explanation whatsoever as to why he did not attend the arbitration hearing on the 19th June 2014. Nothing in the answering affidavits of the trustees indicates why Bilal Malani & Associates were not instructed to appear.

In all the circumstances the suggestion that Mr C Malani had no authority to appear on behalf of the trustees, and that the trustees were unaware that the arbitration was proceeding, are rejected.

(b) The authority of Mr J Kruger

In the trustees' answering affidavit, Mr Singh denies that Mr Kruger was 'duly mandated and/or authorised to proceed with and represent the Applicant at the Arbitration proceedings and for that matter launch this application.'

There are two points to be made in this regard:

- (i) that in testifying at the arbitration hearing, Mr Kruger acted as a witness for the body corporate; and
- (ii) the trustees have followed the wrong procedure in challenging the authority upon which the body corporate brought this application.

In his supplementary heads of argument Mr *Motala* submitted that no resolution was relied upon by the body corporate to authorise the

institution of this application. He submitted that the failure to put up such a resolution is fatal to the application.

See: *ANC Umvoti Council Caucus and Others v Umvoti Municipality* 2010 (3) SA 31 (KZD) at page 38 B – 43 G.

In the present application there was no challenge in terms of Rule 7(1) of the Uniform Rules. The attorneys of the Trust have therefore followed the incorrect procedure. The challenge to the authority of the body corporate is therefore dismissed.

(c) *Lis alibi pendens*

Mr *Motala* has submitted that as the cases in the Magistrates' Court have not yet been finalised, this application is incompetent and falls to be dismissed.

I have grave difficulty with the suggestion that a party in Magistrates' Court proceedings raises the dilatory defence that the action should have been referred to arbitration, and then when it is referred to arbitration, raises the dilatory defence to the holding of the arbitration proceedings that the actions in the Magistrates' Court have not been finalised. It is clear that the body corporate has no intention of continuing with those actions. The only matter which remains outstanding in the actions is the question of costs, and there is no reason why the trustees cannot have the matter set down for the hearing of costs on the basis that their plea has been successful. That,

however, is a different matter to raising the presence of the actions as a dilatory plea in the arbitration and in these proceedings.

Where actions have been withdrawn, but the costs still not paid, that does not provide a basis for the *lis pendens* defence. In *RSA Faktors Bpk v Bloemfontein Township Developers (Edms) Bpk en andere* 1981 (2) SA 141 (OPD) the court reiterated that a defence of *lis pendens* rests upon the existence of a pending earlier action and depends on the actual existence of the other action. The payment of costs is not regarded as part of the action in law and the costs procedure does not form part of the original action between the parties.

Inasmuch as it may be suggested in this application that the body corporate has not specifically set out in its papers that the Magistrates' Court actions have been withdrawn, it could hardly be suggested that the body corporate is able to continue with those actions on the basis of the original causes of action. Its conduct in bringing the arbitration proceedings and persisting with this application evinces an unequivocal intention to abandon the actions relied on in the Magistrates' Court. Indeed, Mr *Stewart*, who appeared for the body corporate, indicated in argument that the body corporate would not persist with those actions. In support of this suggestion he referred me to *Body Corporate Pinewood Park v Dellis (Pty) Ltd* 2013 (1) SA 296 (SCA) where it was held that a court retained the discretion to stay proceedings or to order the continuation of the actions. The body corporate in this matter having voluntarily decided to proceed with arbitration proceedings, can

hardly suggest that it is in any way entitled to proceed with the actions in the Magistrates' Court.

The Magistrates' Court did not, as I understand it, make a decision in the actions, but rather the body corporate acceded to the suggestion in the plea that the matter should be referred for arbitration. Insofar as considerations of reasonableness and fairness are applicable, on the basis that the trustees complained of a lack of arbitration proceedings, and in circumstances where the body corporate complied with that complaint by instituting arbitration proceedings, a defence of *lis pendens* should not be available to the trustees. It is accordingly rejected.

(d) The arbitrator

The suggestion is made in the answering affidavits that the arbitrator was not independent, not experienced or suitably qualified and should not have been appointed. As the appointment was in accordance with the procedure laid down in Management Rules, I do not believe that there was any onus on the applicant to have dealt with these matters in bringing the application. No acts are alleged in the answering affidavits which would suggest that the arbitrator was unqualified.

Similarly, with regard to bias on the part of the arbitrator, none of the suggested shortcomings of the arbitrator have any basis in fact. In this regard a warning to Mr C Malani by the arbitrator that no further adjournments would

be granted is not an indication of bias, but rather an indication by the arbitrator that he intended to get on with the arbitration and complete it. Obviously if a subsequent application for an adjournment had been made and the arbitrator has unreasonably refused that adjournment, that would be a matter for complaint, but that is not what happened. In my view, this defence has no merit.

(e) No cause of action

Mr *Motala* submitted that the application should fail because no copy of the Management Rules had been put up by the applicant. In the arbitration notices served upon the trustees the body corporate refers to the Management Rules of the Sectional Titles Act, 1986. A perusal of the Act indicates that the Management Rules are contained in Annexure 8 to the regulations promulgated in terms of the Act. In my view these rules are readily accessible and there was no need for them to have been put up in this application. In my view this point has no merit.

(f) Material disputes of fact

Mr *Motala* submitted that there were numerous disputes of facts on the papers such as to preclude me from making any finding. This related in the main, as I understood his submissions, to the fact that the trustees objected to paying for municipal rates, water, electricity and maintenance for the units owned by it on the basis that the properties concerned were commercial in nature and not residential, and accordingly, in a mixed use sectional title scheme the charges which have been levied by the body corporate have been unfair.

If these matters were such as to raise a dispute, then the trustees should have had them dealt with them at or prior to at the arbitration proceedings. They cannot be raised now in order to challenge the arbitrator's award. There is no evidence whatsoever that the trustees have done anything, during the period in which the Trust has been the registered owner of the units, to challenge the rulings and decisions of the body corporate. If there had been such challenges, they were not put up as part of the papers.

I am accordingly of the view that there is no dispute which should be referred for the hearing of oral evidence.

(g) Set-off

Mr *Motala* submitted that the trustees were entitled to set-off against the amounts owed by the Trust to the body corporate, amounts which had been overpaid, etc by the Trust. As there were no particulars whatsoever to suggest any particular amount which had been overpaid, nor yet any facts to suggest that those amounts were simultaneously due, owing and payable with the arbitration award, this defence has no merit and I dismiss it.

(h) Reasonableness of the notices

Mr *Motala* submitted that the application should be dismissed because the time periods which were set down in the arbitration proceedings were unreasonable. The trustees knew since 2013 that the body corporate intended to conduct arbitration proceedings against them. When the statement of claim was served on the trustees in May 2014, they did not deliver a reply, and at the hearing asked for time because the Trust's attorney

Mr Bilal Malani was not available to represent the trustees. The arbitrator granted the trustees the indulgence of the adjournment which they sought, which was for two weeks. During that period the trustees did not, as they were enjoined to do, deliver a reply to the body corporate's statement of claim. In addition the trustees did not appear at the hearing despite their attorney having been advised as well as Mr C Malani. In those circumstances I do not believe that the trustees can raise the defence that they were given an unreasonable period of time within which to comply with the requirements of the arbitration process.

[8] In all the circumstances I grant an order in terms of prayers 1, 2, 3 and 5 of the Notice of Motion, save that there will be no order for costs in relation to the hearing on the 18th June 2015.

Date of hearing : 19th June 2015.

Date of judgment : 25th June 2015.

For the Applicant : M E Stewart (instructed by Biccari Bollo Mariano Incorporated).

For the Respondent : Attorney A Motala representing A S Kader Attorneys.