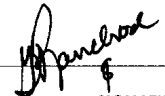




IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
31/1/2013	
DATE	SIGNATURE

CASE No: 47764/2011

DATE: 1/2/2013

In the matter between:

HARLEQUIN DUCK PROPERTIES 259 (PTY) LTD
ERIC SCHOEMAN

1ST APPLICANT
2ND APPLICANT

And

CHEG TRADING 56 (PTY) LTD
MR S Y KIM
CAPIOSCENE CC
FRANCOIS HENNING
EMFULENI GOLF ESTATE (PTY) LTD
GOLF DATA HOLDINGS

1ST RESPONDENT
2ND RESPONDENT
3rd RESPONDENT
4th RESPONDENT
5th RESPONDENT
6th RESPONDENT

JUDGMENT

RANCHOD J:

[1] This is an application in which the applicants seek an order, pending the outcome of the action instituted by them against the respondents in case number 47765/2011, interdicting the first, second, third and fourth respondents from allowing anyone to play golf on the 14th hole of the Emfuleni Golf Course in Vanderbijl Park unless the green is relocated to a position not closer than forty metres from Erf 1511, Vanderbijl Park South West 5, extension 6 Township ('the erf'), measured over the shortest distance between the border of the erf and the edge of the green. The applicants also seek an order in terms of section 3(2)(c) of the Arbitration Act, 1965 that all disputes between any parties to this application which the Court may find to be subject to the arbitration clause contained in the constitution of the Emfuleni (Estate) Home Owners Association, shall not be referred to arbitration but be adjudicated by this Court. It is also sought that the first, second, third and fourth respondents jointly and severally pay the costs of the application. For the sake of convenience the second applicant will be referred to as Mr Schoeman. He is effectively the mouthpiece of the first applicant as the sole director of the company.

[2] The second respondent (Mr Kim) is the sole director and shareholder of the first respondent. The fourth respondent is the manager of the third respondent and his wife is the only member of the fourth respondent.

[3] The applicants say that the fifth and sixth respondents are cited in these proceedings only in so far as they may have an interest in the subject matter of the application but no relief is sought against them.

[4] The first applicant is the registered owner of the erf. There is a residential property on the erf and Mr Schoeman and his wife reside there. The golf course is

situated more or less in the middle of the township and houses and common areas are situated around the golf course.

[5] Mr Schoeman says that the living area of the house where he and his wife reside fronts the golf course. There is a large patio on the outside with sliding doors giving access into the living room inside the house. When the sliding doors are open, the living room and the patio become one living area where he and his wife spend most of their time and entertain visitors. There is a swimming pool next to the patio. His grandchildren aged 12 and 15 years spend most of their afternoons as well as weekends at his residence - mainly in the living room and patio.

[6] The erf is situated close by the 14th hole of the golf course which includes the tee from where the players play their first shot, the fairway along which they progress towards the green and the green itself. The distance from the house and the closest point on the edge of the green on the 14th hole is more or less ten metres. This close distance, says Schoeman, gives rise to a highly unsatisfactory and dangerous situation in that as players progress towards the green the players play their shots towards the house. Many players play their shots too long with the result that the house and adjacent living area are regularly hit by fast travelling golf balls. Apart from causing damage to property, these balls may cause serious injuries and even death if a person is hit by them. He says he and his wife and visitors to their home, in particular their grandchildren, are in constant danger.

[7] Mr Schoeman alleges that before he took steps which "alleviated the situation somewhat," the house was hit by about 100 balls per month. Some of the balls hit the patio, some of them hit the stoep, others hit the outside of the house while some

of them went right into the house where they damaged furniture or pictures, or struck the floor and bounced up against the ceiling.

[8] Mr Schoeman alleges further that at the time when he bought the erf as a vacant stand, both the estate agent involved and a director of the fourth respondent, which was the developer of the township and was also the owner of the golf course at the time, had assured him that the 14th green would be relocated to a safe distance from the erf. Acting on the verbal assurances that he was given he purchased the erf and built the house on it. He and his wife moved into the house in 2005 and towards the end of that year he enquired from a Mr Barkit of the fourth respondent why the 14th green was not yet relocated and was assured that it would still be done by the sixth respondent. During 2006 he became aware that the fourth respondent intended to sell the golf course and ultimately the purchaser turned out to be Mr Kim who housed it in the first respondent. The new owners did not relocate the 14th hole.

[10] In order to alleviate the dangerous situation on a temporary basis, he went to see Mr Kim and suggested certain changes at the 14th green. The applicant does not state when he went to see Mr Kim. After discussions with Mr Kim, Mr Schoeman replaced the sand bunker with a grass bunker and he built a pond between the green and his house. Mr Kim consented to the second applicant's reconstruction of the bunker and the construction of the pond on condition that Mr Schoeman paid for the costs. Mr Schoeman says that after the construction of the grass bunker and the pond and use age of a white flag on the green the problem was alleviated somewhat but that 'the house was still regularly hit inside and outside by fast travelling golf balls'.

[11] Some four years later, during 2010, Mr Schoeman obtained a copy of a report in respect of the golf course prepared by the sixth respondent. That report, dated 24 May 2010 contained a suggestion that the green of the 14th hole should be moved as a matter of urgency. About three months later the first applicant's attorneys addressed a letter dated 6 September 2010 to the first and third respondents requesting an undertaking from them that they will arrange for the closure of the existing green within 14 days of the date of the letter failing which they will approach a court for the necessary relief.

[12] In April 2011 a safety net six metres in height and spanning the side of the house that faced the 14th green was erected by the fourth respondent as a result of certain discussions between him and Mr Schoeman. In an email dated 13 May 2011 addressed to Mr Schoeman the fourth respondent denied having made any agreement with Mr Schoeman that the green will be moved. He said the only person who could make that decision was Mr Kim. He also pointed out that the sixth respondent could merely make a suggestion but it did not have the final say.

[13] The applicants' attorneys filed an answering affidavit which, according to the filing sheet attached to it, is that of both the applicants. However, nowhere in the answering affidavit does the name of the deponent to the affidavit appear. However, the applicants have not taken issue with this in the replying affidavit nor was it raised during argument. It therefore appears to be not in dispute that the deponent to the answering affidavit is Mr Kim who filed the affidavit on behalf of both himself and the first applicant. The affidavit had been filed late and consequently an application for condonation was made. The applicants did not oppose the granting of condonation and it was accordingly granted at the commencement of the hearing.

[14] Mr Kim purchased all the shares in the first respondent from the previous shareholder Mr Barkit. The sale of shares agreement disclosed certain contracts and records an oral agreement between the fourth respondent and a certain M J Van Staden which was incorporated into the sale of shares agreement. Significantly, the alleged verbal assurance given to Mr Schoeman by Mr Barkit about the relocation of the 14th hole is not mentioned in the sale of shares agreement.

[15] The first applicant and Mr Kim have raised two points. The first is that the dispute between the applicants and themselves should have been referred to arbitration in terms of the Emfuleni Estate Home Owners Association constitution. It is averred by Mr Kim that the first respondent trades as the Emfuleni Golf and Country Club. However, clause 1.1.5 of the constitution states:

‘ “club” means the Emfuleni Golf and Country Club which is a separate legal entity.’

[16] Clause 8.2 of the constitution states that the club is a member of the Association and subject to its constitution. Clause 36 of the constitution provides that if there is any dispute, question or difference which arises between members or between a member and the trustees, it shall be referred to arbitration except for any issue that relates to any claim for non-payment of levies or any other amount due by a member to the Association in terms of the constitution. Hence, say the respondents, the dispute should have been referred to arbitration.

[17] In their replying affidavit the applicants deny that the first respondent trades under the name and style of the Emfuleni Golf and Country Club. They aver that the club is an entity which has been in existence for many years, since the time that the golf course belonged to Iscor. They say the club is a common law corporate body

with legal personality and perpetual succession and as such is a legal entity separate and distinct from the first respondent. Mr Schoeman says further that the first respondent's assumption of the club's name is preposterous and without legal or factual basis. The applicants attached a copy of a constitution of an entity called 'Emfuleni Country Club'. Mr Kim says that the first respondent trades under the name Emfuleni Golf and Country Club. As I said, the Emfuleni Estate Home Owners Association constitution refers in the definitions section to the 'club' as the 'Emfuleni Golf and Country Club which is a separate legal entity'. The applicants state that the reference to the Emfuleni Country Club as the Emfuleni Golf and Country Club in the Homeowners Association constitution is merely a misnomer. However, in the sale of shares agreement at paragraph 12.2 it is stated that 'the developer of the golf course, has entered into a development agreement with the Emfuleni Golf and Country Club'. The applicants' assertion that it is merely a misnomer can therefore not be accepted without further factual evidence in this regard.

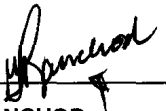
[18] In my view, this aspect therefore needs to be referred for oral evidence as the full facts in this regard will also have an important bearing on the point *in limine* regarding the referral of any dispute to arbitration as well as whether the homeowners association should have been joined as a party. It is apparent, and in fact admitted by Mr Schoeman that the first applicant is a member of the homeowners association.

[19] I summarise then, the aspects that have to be referred to oral evidence. The respondents have raised two points *in limine* and rely on the constitution of the Emfuleni Estate Home Owners Association. The applicants rely on the Emfuleni Country Club constitution and deny that the constitution of the Emfuleni Estate Home Owners Association is of any force or application. The applicants' denial of material

allegations made by the respondents in regard to the constitution of the Emfuleni Estate Home Owners Association, is a material dispute of fact. This court cannot determine the correctness of either party's averments in respect of the two points *in limine*. Therefore, the issue concerning the application of the constitution of the Emfuleni Estate Home Owners Association or the Emfuleni Country Club constitution to this matter should be referred to oral evidence.

I make the following order:

1. The issue concerning the application of the constitution of the Emfuleni Estate Home Owners Association or the Emfuleni Country Club constitution in this matter is referred to oral evidence.
2. Costs shall be costs in the cause.



N RANCHOD
JUDGE OF THE HIGH COURT

Parties:

Counsel for the Applicants: Mr J J Botha

Attorney for the Applicants: De Klerk Vermaak & Partners Inc, Vanderbijlpark.

Counsel for the Respondents: Mr Y F Saloojee

Attorney for the Respondents: Jassat Attorneys, Pretoria.