IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

REPORTABLE

CASE NO: 013203/12

In the matter between:

A J DE LANGE **Applicant**

and

E BELL **First Respondent**

TOLLNER BODY CORPORATE **Second Respondent**

ETHEKWINI MUNICIPALITY **Third Respondent**

Order:

(a) The application for the arbitration award to be made an order of court is dismissed.

(b) The counter-application relating to the signing of building plans is dismissed.

(c) Andre Grundler is appointed, in terms of section 46 of the Sectional Titles Act 95 of 1986, as administrator to the Tollner Body Corporate for a period of twelve months, with the powers and duties of the body corporate, to its exclusion.

(d) The applicant and the first respondent are directed to hand over to the administrator any books, documents or other property of the body corporate which he may require.

(e) There will be no order as to costs.

JUDGMENT
DATE: 06 August 2013

PLOOS VAN AMSTEL J

[1] This is a dispute between the only two members of theTollner Body Corporate, which is a body corporate as contemplated in s 36 of the Sectional Titles Act[1]. The two units in the sectional title scheme are situated at 35A and 35B Mkhula Road in Westville. One of them is owned by the applicant and occupied by him and his wife. The other is owned by the first respondent and occupied by a tenant. The second respondent is the body corporate and the third respondent the Ethekwini Municipality. Neither of them took part in the proceedings.

[2] The relief sought by the applicant is for an arbitration award to be made an order of court in terms of s 31 of the Arbitration Act[2] and for the appointment of an administrator in terms of s 46 of the Sectional Titles Act. In a counter-application the first respondent seeks an order directing the applicant to sign certain building plans relating to alterations and additions to her unit, and she also seeks the appointment of an administrator in terms of s 46 of the Act.

[3] The parties have never administered the body corporate in accordance with the provisions of the Sectional Titles Act. There are no trustees, the body corporate does not have a bank account, the members do not pay levies, there is no fund as contemplated in s 37 (1)(a) and there are no financial statements. In the light of the strained relationship between the parties and the chaotic state of the affairs of the body corporate it seems desirable to appoint an administrator to perform its powers and duties and get its affairs in order. Nothing further needs to be said about this as both parties have asked for such an appointment.

[1]Act 95 of 1986.
[2]Act 42 of 1965.

[4] The real dispute between the parties relates to alterations and additions to the first respondent's unit. It is not disputed that these were done without building plans having been approved by the local authority. The applicant demanded that certain of the additions and alterations be removed, the first respondent refused to do so and contended that the applicant had orally agreed to them, and so the dispute ended up before an arbitrator. He handed down an award on 13 September 2012 in which he *inter alia* ordered the first respondent to remove certain of the additions and alterations. This is the award which the applicant wants me to make an order of court.

[5] The first respondent resists the application and contends that the award is a nullity as the arbitrator had no power to order her to demolish or remove any structures as such an order amounts to a mandatory interdict, which is excluded from the operation of the management rule which deals with arbitrations.

[6] It is convenient first of all to consider the legal basis of an arbitration in terms of the management rules. Section 35 (1) of the Sectional Titles Act provides that a scheme under the Act shall be controlled and managed, subject to the provisions of the Act, by means of rules. Subsection (2) states that the rules shall provide for the control, management, administration, use and enjoyment of the sections and the common property, and shall comprise management and conduct rules, prescribed by regulation, which may be substituted, added to, amended or repealed from time to time by the unanimous resolution of the body corporate.

[7] The management rules prescribed by regulation are contained in annexure 8 to GNR 664 of 8 April 1988, as amended. Rule 71(1) provides that the disputes referred to therein shall be determined in terms of the rules. Sub-rule (2) provides that if such a dispute or complaint arises the aggrieved party shall give notice thereof and if it is not resolved within fourteen days, either party may demand that the dispute or complaint be referred to arbitration. Sub-rules (3) and (4) provide for the appointment of an arbitrator, sub-rules (5), (6) and (8) provide for procedural matters and sub-rule (7) provides that the decision of the arbitrator shall be final and binding and may be made an order of the High Court upon application of any party to or affected by the arbitration.

[8] It was held in *Body Corporate Pinewood Park v Dellis (Pty) Ltd*[3] that these rules are of a contractual nature. Mpati P pointed out that the Sectional Titles Act and the regulations made under it do not prescribe a procedure for dispute resolution, nor do they require the rules to do so. The rules prescribed by regulation do provide for the determination of disputes, but in terms of s 35(2)(a) of the Act they may be substituted, added to, amended or repealed by the developer or the unanimous resolution of the body corporate. Mpati P referred with approval to *Wiljay Investments (Pty) Ltd v Body Corporate, Bryanston Crescent and Another*[4], where Spoelstra J said the following in connection with the rules governing bodies corporate under the Act's predecessor:

'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.'

Mpati P added that it is a matter of pure logic that, when a purchaser purchases a unit in a sectional title scheme after a sectional title register has 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. He concluded that, therefore, the arbitration procedure provided for in management rule 71 is consensual.

[9] I should also make reference to s 40 of the Arbitration Act, which provides that the Act shall apply to every arbitration under any law passed before or after the commencement of the 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, the Arbitration Act shall not apply to any such arbitration in so far as it is excluded by or is inconsistent with that other law or is inconsistent with the regulations or procedure authorised or recognised by that other law. In *Vidavsky v Body Corporate of Sunhill Villas*[5]Heher JA considered that an

[3]2013 (1) SA 296 (SCA).
[4]1984 (2) SA 722 (T).
[5]2005 (5) SA 200 (SCA) para [2].

arbitration under management rule 71 was one 'under a law' and that s 40 applied to it. I should add that regulation 39 of the regulations[6] which prescribed the management rules provides that the provisions of the Arbitration Act 42 of 1965 shall, in so far as those provisions can be applied, apply *mutatis mutandis* with reference to arbitration proceedings under the Sectional Titles Act.

[10] There is no need in this matter to consider whether there is a material difference between the approaches in*Body Corporate Pinewood Park* and *Vidavsky.* The arbitration pursuant to rule 71(1) must be approached as one under an arbitration agreement, either because the arbitration agreement is contained in the management rules[7] or because, in terms of s 40, 'that other law'[8] is regarded as an arbitration agreement.[9]

[11] The question then arises as to the correct interpretation of the arbitration agreement as contained in rule 71. Sub-rule (1) reads as follows:

> '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 relief may be required or obtained from a Court having jurisdiction, shall be determined in terms of these Rules'.

The rule was considered in *Body Corporate of Greenacres v Greenacres Unit 17 CC and another.*[10]Cloete JA held that the saving provision in sub-rule (1) 'save where … any form of … other relief may be required or obtained from a Court having jurisdiction…' 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, which would be absurd. He held that it should 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. He said the following:[11]

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[6] GNR 664 of 8 April 1988, as amended.
[7]The approach in *Body Corporate Pinewood Park.*
[8] The Sectional Titles Act, read with the applicable regulations and the management rules.
[9]The approach in *Vidavsky.*
[10]2008 (3) SA 167 (SCA).
[11]In para [6].

'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.' His conclusion was formulated as follows: '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.'[12]

[12] It follows that a dispute where an interdict may be required is excluded from the ambit of rule 71. The arbitration agreement contained in the rules does not apply to such a dispute. It was not disputed in argument before me that in the circumstances of this case an order directing the first respondent to demolish a particular structure will amount to a mandatory interdict. See in this regard11 *Lawsa*2ed par 390where the learned authorsays an interdict is an order of court which enjoins a party to refrain from doing something, or orders such party to do something. Also see *Jafta v Minister of Law and Order and Others*[13], where Corbett CJ said orders enjoining the doing of an act are known as 'mandatory interdicts'.

[13] Counsel for the applicant sought to overcome this difficulty by arguing that the effect of rule 71(1) is to compel the parties to have their disputes determined in terms of the rules, save where an interdict or any form of urgent or other relief may be required or obtained from a court, in which case the determination of the dispute in terms of the rules is optional. He developed this argument by submitting that the parties had in fact referred their dispute to the arbitrator by agreement.

[12]Par [11].As examples of relief which an arbitrator is not competent to grant, the learned judge mentioned, *inter alia*, the appointment of an administrator (s 46 of the Act vests the power to do so in the Court), and an order that a building shall be deemed to have been destroyed (s 48 confers the power to make such an order on the Court).
[13]1991 (2) SA 286 (AD) at 295C.

[14] The onus was on the applicant to establish the existence of such an agreement.[14] It has to be an arbitration agreement other than the one contained in the management rules as the power of the arbitrator in such an arbitration is limited by the saving provision in rule 71 (1). He has no power or jurisdiction to arbitrate in a dispute where an interdict is sought.[15] The issue is not whether the arbitration is compulsory or optional, depending on what relief is sought. If the arbitration is one under rule 71 then the arbitrator's jurisdiction is limited by the saving provision. For an arbitrator to have jurisdiction to hear such a dispute there must be an arbitration agreement in terms of which the dispute in question is referred to arbitration. Section 1 of the Arbitration Act defines an arbitration agreement as a written agreement which provides for the reference to arbitration of any existing dispute or any future dispute *relating to a matter specified in the agreement*[16], whether an arbitrator is named or designated therein or not.

[15] One normally finds such an agreement in contractual documents which provide for arbitration in the event of a dispute arising out of the contract or its performance, and a method of determining who will be the arbitrator. One also finds that parties to a dispute which has arisen agree to go to arbitration, and an arbitration agreement is concluded for that particular dispute. In the present matter there was no separate written arbitration agreement. Counsel for the applicant argued that in the statement of claim before the arbitrator the applicant sought orders directing the first respondent to demolish certain structures, to remove others and to repair structural damage to the common property and the applicant's unit. He contended that the first respondent participated in the arbitration proceedings without objecting to the arbitrator's power to conduct such an arbitration and that therefore she had agreed to him deciding the issues raised in the statement of claim. There is no substance in this argument. The documents presented to the arbitrator did not constitute or contain a written arbitration agreement as contemplated in the Arbitration Act. There is no averment in them that the parties had agreed to refer a dispute relating to an interdict for arbitration. An arbitrator who lacks the power to hear a particular dispute cannot acquire such power by the failure of the parties to take the point. The source of his power is a valid arbitration agreement.

[14] *Vidavsky v Body Corporate of SunhillVillas* 2005 (5) SA 200 (SCA) para [17].
[15] *Body Corporate of Greenacres v Greenacres Unit 17 CC* 2008 (3) SA 167 (SCA).
[16] My emphasis.

[16] I should add that it was not the applicant's case that the arbitration was one under the common law, for which no written agreement is required.[17] An oral agreement suffices, but it has to comply with the requirements for a valid arbitration agreement. No such case was made in the application papers, nor was it contended for in argument before me.

[17] It seems plain to me that the applicant sought an interdict from the arbitrator, without objection from the first respondent, not because they had agreed that the arbitrator should have the power to make an award which amounted to an interdict, but because neither of them realised that a dispute where an interdict is sought is excluded from the management rule which provides for arbitration between owners.

[18] The result is that the arbitration agreement contained in the management rules did not cover the dispute which was put before the arbitrator, and there was no other valid arbitration agreement between the parties. It follows that the arbitrator did not have the required power to arbitrate the dispute between the parties or to make the award which he did.

[19] In *Vidavsky*[18]Heher JA said that an arbitration is a quasi-judicial proceeding, and want of jurisdiction in such proceedings has the effect of nullity without the necessity of a formal order setting the proceedings aside. He said lack of jurisdiction in arbitration proceedings renders an award invalid.

[20] There is therefore no valid arbitration award which can be made an order of court in terms of s 31 of the Arbitration Act. I realise that the applicant may be frustrated by this outcome as the 'award' in his favour turns out to be worthless, but that is the unfortunate consequence of an invalid procedure. One hopes that the appointment of an administrator will help the parties to get the affairs of the body corporate in order and to live in peace as neighbours.

[21] The first respondent's counter-application cannot succeed. She seeks an order directing the applicant to sign the building plans in respect of the improvements

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[17]Butler and Finsen, *Arbitration in South Africa*, p 4 – 6; 1 *Lawsa* 2edpara 544.
[18]2005 (5) SA 200 (SCA) para [14].

and alterations to her unit and, failing that, an order directing the Sheriff to do so. There is no basis for such an order. On the evidence before me some of the additions were effected to the common property, although the counter-application is apparently aimed only at the improvements and alterations to the first respondent's unit. Rule 33 of the management rules requires a unanimous resolution by the owners in the case of luxurious improvements on the common property and a special resolution in the case of non-luxurious improvements. As far as improvements and alterations to her own unit are concerned the first respondent must follow the procedure in the National Building Regulations and Building Standards Act[19] relating to the approval of building plans. The applicant cannot be compelled to give his approval to any of the alterations on either the common property or the first respondent's unit.

[22] With regard to the question of costs I have to take into account that on the evidence before me the applicant and the first respondent were both advised, apparently by their respective attorneys, to embark on the arbitration. The applicant initiated the proceedings by delivering his statement of claim, although I assume both parties participated in the appointment of the arbitrator. The first respondent offered no challenge to the jurisdiction of the arbitrator and participated in the proceedings. When someone later wrote on her behalf and challenged the validity of the award it was on an obscure basis and not on the basis that in terms of rule 71(1) the arbitrator had no jurisdiction. I must also say that the affidavits before me are replete with irrelevant and argumentative matter and do not appear to be the product of careful thought and preparation. In the final analysis the applicant and the first respondent were both unsuccessful with their applications, save for the appointment of an administrator, which they both asked for. In all those circumstances I consider it fair to make no order as to costs.

[23] The order which I make is as follows:

(a) The application for the arbitration award to be made an order of court is dismissed.

[19] Act 103 of 1977.

(b) The counter-application relating to the signing of building plans is dismissed.

(c) Andre Grundler is appointed, in terms of section 46 of the Sectional Titles Act 95 of 1986, as administrator to the Tollner Body Corporate for a period of twelve months, with the powers and duties of the body corporate, to its exclusion.

(d) The applicant and the first respondent are directed to hand over to the administrator any books, documents or other property of the body corporate which he may require.

(e) There will be no order as to costs.

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Ploos van Amstel J