

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

Case no.: A 698/2001

In the matter between:

BAUMORAL HEIGHTS NO 39 BK

Appellant/Plaintiff

and

**THE TRUSTEES FOR THE TIME BEING OF
Respondent/Defendant
THE BAUMORAL HEIGHTS BODY CORPORATE**

JUDGMENT GIVEN THIS FRIDAY, 4 OCTOBER 2002

CLEAVER J:

[1] The issue to be determined in this matter is whether or not management rule 71 prescribed in terms of regulations published under the Sectional Titles Act 75 of 1986 ("the Act") provides for a compulsory arbitration procedure. The difficulties raised by the wording of the rule were foreseen by academic writers, but as far as I am aware, the issue has not yet come before the courts.

[2] The appellant, the owner of a sectional title unit of a sectional title scheme known as Balmoral Heights in Cape Town sued the respondent, the Trustees of the Body Corporate responsible for the administration of the sectional title scheme, in the Cape Town magistrate's court for payment of the sum of R26 000. The appellant alleged that the respondent had failed and neglected in its legal duty to prevent water penetrating into its unit and to maintain the common property in the scheme so as to prevent water penetrating its unit.

The amount claimed was said to represent loss of rental income. The particulars of claim record that the appellant had informed the respondent and its managing agent of the dispute in terms of rule 71(2) promulgated under section 55 of the Act by means of a written notice which had been hand delivered to the respondent. I will deal further with this rule in due course.

- [3] In addition to raising a defence on the merits, the respondent raised a special plea and it is that which is the subject of this appeal. The plea reads:

“Defendant pleads that, in view of the provisions of Management Rule 71, which Rule was published in Government Notice R1422 of 31 October 1997, and which is applicable to the relevant Sectional Title Scheme in question, any dispute between an owner of a unit and the body corporate is to be determined by means of arbitration.”

The special plea was argued before the magistrate in Cape Town who upheld the plea and dismissed the plaintiff's claim with costs.

- [4] The appeal before us was brought on two grounds, namely:
- 4.1 That rule 71 does not provide for compulsory arbitration; and
 - 4.2 In the alternative, if it be found that the rule does provide for compulsory arbitration, the magistrate should not have dismissed the plaintiff's claim, but merely stayed it.

The respondent does not oppose the appeal on the second ground.

- [5] Rule 71(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 or other relief may be required or obtained from a court having jurisdiction, shall be determined in terms of these rules.”*

[6] One of the points raised by the appellant was that since the claim was one for consequential damages, it was not proper to bring the claim under and in terms of the Act and rules, the argument being that since the claim was one in delict, the Act and the rules had no application. In the first place, the appellant specifically invoked the provisions of rule 71(2) by giving the respondent notice of the dispute. Secondly, the claim is, as pointed out by the magistrate, firmly founded on the provisions of the Act since the claim is based on the respondent's alleged failure to comply with duties specified in the Act. I agree with the magistrate that the fact that the claim is for damages makes no difference and that is not thereby excluded from the rule.

[7] The interpretation of two elements of rule 71 are of importance, namely
 7.1 the meaning of the word 'shall'; and
 7.2 the meaning of the proviso "*save where an interdict or any form of urgent or other relief may be required or obtained from a Court having jurisdiction*".

[8] Mrs **Le Roux**, who appeared for the appellant, submitted that when interpreting the rule, regard should be had to the provisions of section 39(2) of the constitution, which provides that

"when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

Thus, she argued that the common law principle that the intention of the legislature to oust the jurisdiction of the courts must be expressly stated before such ouster can take place, has application. Since section 34 of the

constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum, she argued that the appellant's right to enforce his claim in a court of law should not be taken away by requiring him to submit to arbitration. In developing this argument she relied on a principle of statutory interpretation (with reference to the meaning to be applied to the word "*shall*" in rule 71(1)) that where a provision in an enactment is couched in positive language and no penalty for failure to comply with the provision is provided, the provision should be interpreted as being merely directory. She also submitted that strict compliance with the provision in question would lead to an injustice in that access to the courts would be denied to the appellant, the appellant would be forced to submit to a more costly procedure and would be denied a right of appeal which he would have in the courts. Finally, the result would also be to treat sectional titleholders differently from holders of conventional or traditional title to immovable property.

- [9] All these arguments are dependent upon whether or not rule 71 is a statutory enactment. The question requires one to go back to the Act. Section 35 of the Act reads as follows:

"35 Rules

- (1) A scheme shall as from the date of the establishment of the body corporate be controlled and managed, subject to the provisions of this Act, by means of rules.*
- (2) 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 repealed 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 repealed from time to time by unanimous resolution of the body corporate as prescribed by regulation;

(b) conduct rules, prescribed by regulation, which rules may be substituted, added to, amended or repealed by the developer when submitting an application for the opening of a sectional title register, and which rules may be substituted, added to, amended or repealed from time to time by special resolution of the body corporate: Provided that any conduct rule substituted, added to or amended by the developer, or any substitution, addition to or amendment of the conduct rules by the body corporate, may not be irreconcilable with any prescribed management rule contemplated in paragraph (a).

(3) Any management or conduct rule made by a developer or a body corporate shall be reasonable, and shall apply equally to all owners of units put to substantially the same purpose.

(4)”

[10] Although the legislature determined that certain management rules would apply to a scheme, it is clear that such determination is unlike a statutory provision which remains binding, for provision is made

10.1 for other rules to be substituted, added to, amended or withdrawn by the developer when submitting an application for the opening of a sectional title register; and

10.2 for the rules to be added to, amended or repealed by unanimous resolution of the body corporate once there are owners, other than the developer, of at least 50% of the units in the scheme.

[11] Although rule 71 has its origin in a statutory enactment, persons affected by it are not in the position of persons who are subject to normal statutory

enactments who do not have the right to choose whether the enactments will apply to them or not. In discussing the nature of the rules, Professor C G van der Merwe in his work 'Sectional Titles, Share Blocks and Time-sharing' (Vol 1, Butterworths) comes to the conclusion that

"It is extremely difficult to come to a definite conclusion on the nature of the rules. What follows, is merely intended as a few observations of a preliminary nature which can serve as a point of departure for further discussion.

In our view, the following dogmatic foundations for the rules merit consideration:

- (i) that the rules have a contractual nature;*
- (ii) that the rules have their origin in the law of things;*
- (iii) that the rules have the character of delegated legislation; and*
- (iv) that the rules flow from the legislative power of an autonomous sectional title community."* (p 13-16)

[12] Support for the theory that the rules are by nature contractual is to be found in the judgment in *Wiljay Investments (Pty) Ltd v Body Corporate Bryanston Crescent* 1984 (2) SA 722 (T) at 727D. In that case, **Spoelstra J** also rejected the notion that the rules should be regarded as being similar to restrictive conditions contained in the title deeds of urban property.

[13] As to the third and fourth theories, Prof van der Merwe points out that there is a difference in the nature of the rules set out in annexure 9 which deals with restrictions on the use and enjoyment of sections and the common property (which show a strong resemblance to restrictive conditions in a township development) and the rules which relate to the management, administration and control of a scheme set out in annexure 8 and with which we are concerned. He concludes that

"The only tenable theory which can accommodate the rules of both

schedules is that the rules of a sectional title community are the product of the legislative power of an autonomous association.” (p 13 – 29)

[14] I do not consider it necessary to decide finally on the nature of the rules, save to say that whatever the underlying nature may be, it is not such as to require the rights of individuals to be protected against interference by the State. Rule 71 plainly and clearly provides that with the exception of matters covered by the proviso, any dispute between the body corporate and owner or between owners *“arising out of or in connection with or related to the act, the rules or conduct rules”* shall be determined in terms of the rules. Regulation 39 published under the Act in turn provides

“that provisions of the Arbitration Act 1965 ..., shall insofar as these provisions can be applied, apply mutatis mutandis *with reference to arbitration proceedings under the act.*”

[15] The dispute between the parties is a dispute between the owner of a unit and the body corporate and arises out of or in connection with or related to the Act. The ambit is very wide and as I have already remarked, there is no reason why a claim for damages based on an alleged failure by the body corporate to comply with its obligations under the rules should not fall under the ambit of rule 71. In the result, it is my view that the rule 71(1) read with regulation 39 provides for a compulsory arbitration of the dispute.

[16] Can it be said, as it was argued by Mrs **Le Roux**, that the appellant was entitled to bring its case to court under the concept of *“other relief”* referred to in the proviso? I think not, and incline to the view set forth by Prof Butler in his

article 'The Arbitration of Disputes in Sectional Title Schemes under Management Rule 71' published in Stellenbosch Law Review 1998 (3) at 264, namely

"The reference to 'other relief' should clearly not be taken literally and should be restricted to urgent relief similar to an interdict which is directed at preventing serious prejudice to one party pending the arbitrator's award or to ensuring that a party will still be in a position to comply with the award."

Whether Prof Butler's view is adopted or not, it is in my view quite clear that "other relief" must be given a restricted meaning, for otherwise the provisions would be meaningless and any dispute could then be brought before the courts. This could never have been the intention of the legislature. The proviso clearly covers the situation where interim relief is sought, since the Arbitration Act does not permit an arbitrator to grant interim relief relating to a matter under dispute.

[17] Rule 71(2) also needs to be considered. It provides:

"If such dispute arises, the aggrieved party shall notify the other interested party or parties in writing and copies of such notification shall be served on the trustees and the managing agents, if any. Should the dispute or complaint not be resolved within fourteen days of such notice, either of the parties may demand that the dispute or complaint be referred to arbitration."

The use of the word 'may' should not in my view be interpreted so as to give a party the right to have the dispute resolved by a method other than arbitration.

The subsection is concerned with the mechanism of resolving the dispute.

The fourteen-day period is allowed so that the parties may endeavour to resolve the dispute. If no such resolution is achieved, either party can (may) demand that the dispute proceed to arbitration. The party is not obliged to do

so and may decide not to take the matter further, hence the use of the word 'may'.

[18] To return to the main point advanced by the appellant, namely that the appellant will be denied its right in terms of section 34 of the constitution, it should be remembered that the section speaks of a public hearing before a court, or where appropriate, *another independent and impartial tribunal or forum*. Arbitration is clearly an impartial and independent forum. The discretionary power of a 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.

[19] There may of course be cases which although ostensibly arise out of or are in connection with or related to the Act and the rules are not arbitrable, (see the examples given by Prof Butler *op cit* at 265) but the case before us is not one of those.

[20] Finally, there is the question of whether the respondent was entitled to raise

the defence of arbitration at the fairly late stage of the proceedings in the manner in which it did. As to the propriety of raising the defence in a plea, instead of doing so by way of a substantive application, the following passage from *Delfante v Delta Electrical Industries Ltd and Another* 1992 (2) SA 221 (C) is instructive

“An arbitration agreement is no ‘automatic bar to legal proceedings in respect of disputes covered by the agreement’ (Conress (Pty) Ltd and Another v Gallic Construction (Pty) Ltd 1981 (3) 73 (W) at 75H, per Nicholas J). *It is incumbent upon a defendant seeking to invoke such a clause to file a special plea* (Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd 1977 (4) SA 682 (C) at 692H) *or to raise it as a defence on affidavit* (Conress (Pty) Ltd and Another v Gallic Construction (supra at 75H)). *Thus, while the language used in s 6(1) of the Arbitration Act 42 of 1965 is suggestive of a substantive application, in compliance with Rule 6(5)(a), or at least Rule 6(11), it would seem to me that Joubert (ed) Law of South Africa vol 1 para 467 correctly contends that*

‘(t)he procedure provided in the (A)ct is not obligatory but permissive and does not derogate from the practice of pleading the submission clause either by way of a preliminary special plea or by way of defence.’

That practice is evidenced by such cases such as The Rhodesian Railways Ltd v Mackintosh 1932 AD 359 at 371 and King v Harris 1909 TS 292. (See also Piercy v Young (1879) 14 ChD 200 at 209 and Russel on Arbitration 20th ed (1982) at 206.)”
(226E-H)

It seems clear therefore that it is not improper to raise the defence in a plea.

- [21] The defendant having raised the matter by way of a special plea, the magistrate was in my view not correct in dismissing the application. The proper course would have been to grant a stay of proceedings pending the outcome of the arbitration. The plaintiff will on this basis enjoy only very limited success on appeal, but such success will not be sufficient to disentitle the respondent to the costs of the appeal.

[22] I accordingly make the following order:

22.1 The appeal against the magistrate's judgment upholding the special plea is dismissed with costs.

22.2 The appeal against the magistrate's judgment dismissing the plaintiff's claim with costs is set aside and following order made in place thereof:

(a) The plaintiff's claim against the defendant is stayed, pending the resolution of the plaintiff's claim by arbitration as provided for in the rules applicable to the sectional title scheme known as Balmoral Heights and situated at Balmoral Road, West Beach, Tableview.

b) The costs will stand over for determination at a later stage.

R B CLEAVER

POTGIETER AJ

I agree.

D POTGIETER