



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

REPORTABLE / NOT REPORTABLE

CASE NO: D7924/24

In the matter between:

AMAVEL MOTA MOREIRA

APPLICANT

and

ZIMBALI ESTATE MANAGEMENT ASSOCIATION (RF)

NPC

FIRST RESPONDENT

FRANCOIS SCHOEMAN

SECOND RESPONDENT

MARTIN MOHALE N.O

THIRD RESPONDENT

GLEN GODDARD N.O

FOURTH RESPONDENT

LUTCHMEE NAIDOO N.O

FIFTH RESPONDENT

ORDER

Accordingly, I make the following order:

The application is dismissed with costs, such costs to include the costs occasioned by the employment of one senior counsel on scale C and one junior counsel on scale B.

JUDGMENT

NQALA AJ

Introduction

[1] The applicant seeks an order in the following terms:

- (a) That Articles 28, 30 and 31 of the Memorandum of Incorporation ("MOI") of Zimbali Estate Management Association (RF) NPC [registration number: 1995/000581/08] are declared void for vagueness.
- (b) That legal fees debited to the applicant's levy account in the sums of R213 206.19; R6 380.58 and R424 550.70 and all related interest charges and service fees be removed pending the arbitration and other hearing pertaining to the dispute between the applicant and first respondent.
- (c) That the first respondent be directed to engage with the applicant in having the adjudication dispute referred to and determined by an arbitration process.
- (d) That the respondents shall pay costs of the application on an attorney and client scale on scale C, jointly and severally and the one paying the other to be absolved.

[2] The respondents concede that the amounts which form the basis of the relief sought in paragraph 2 of the notice of motion and which are referred to in paragraph [1] (b) above were incorrectly debited because the litigation in respect of which those amounts were debited is still pending before this court.

[3] The respondents, however, oppose the relief sought in paragraphs 1 and 3 of the notice of motion, which relief is set out in paragraphs [1] (a) and [1] (c) above. The order sought in paragraph 1 of the notice of motion is opposed on the basis, *inter alia*, that it is nothing more than an attempt by the applicant to circumnavigate the binding provisions of the MOI which resulted in the adjudication award and the consequences

that flow therefrom, as well as the time bar provisions contained in Articles 28.9.4, 28.9.5 and 31, as they relate to the referral of a dispute to arbitration.

[4] The relief sought in paragraph 3 of the notice of motion is opposed on the basis, *inter alia*, that the applicant had 10 days within which to challenge the adjudication ruling and he failed to do so within that period, as well as on the basis that this court has no jurisdiction to decide as to whether or not the challenge to the adjudication award was out of time. According to the respondents, that dispute on its own should be referred to arbitration as it concerns the interpretation of the MOI and can therefore not be dealt with by this court.

Background

[5] The applicant is a resident member of the Zimbali Estate. On 8 April 2024, Rupert Candy Attorneys Incorporated, acting on behalf of the Board of the Zimbali Estate Management Association ("ZEMA"), addressed a letter to the applicant, wherein they notified the applicant that he had breached certain provisions of Article 27 of the MOI. The notice was given to the applicant in terms of Article 28.5 of the MOI which provides that for enforcement of the MOI or any of the Conduct Rules of the Association, the Board may give notice to a member to remedy any breach within a time period deemed reasonable by the Board. In the same letter, the applicant was given 48 hours to remedy the breaches by providing an unconditional public apology for such breaches, as well as an unconditional undertaking in writing to refrain from further breaches, including refraining from publishing, endorsing and allowing the publication of statements on WhatsApp groups which insult, disparage or otherwise interfere with officers and employees of ZEMA.

[6] It appears from the Adjudication Ruling that the applicant denied any wrongdoing and recorded that he would oppose any action embarked upon by the first respondent. The applicant did not give any apology, nor did he give any undertaking that he would not continue with his conduct.

[7] An Adjudication Committee was subsequently convened to adjudicate on whether the applicant had breached Article 27 of the MOI. The Adjudication Committee made its ruling on 15 May 2024 and found that the applicant had breached Article 27.12 of the MOI of the ZEMA. The applicant did not attend the adjudication hearing.

[8] On 30 May 2024, the applicant's legal representatives sent a letter to the Adjudication Committee wherein they pointed out certain alleged irregularities in the adjudication process. In the same letter they required that the Adjudication Committee retract its entire decision within three days to allow for a comprehensive and proper presentation of their client's case, failing which they would seek legal recourse in the appropriate court to have the adjudication decision set aside and to pursue costs against the Adjudication Committee and the ZEMA.

[9] On 21 June 2024, the first respondent's legal representatives addressed a letter to the applicant's legal representatives wherein they advised them, *inter alia*, as follows:

- (a) That the Adjudication Committee delivered its decision on 15 May 2024;
- (b) That according to Article 28.9.4 of the MOI the decision of the Adjudication Committee shall be final unless objected to in writing within 10 days of being notified of the decision;
- (c) That in terms of Article 28.9.5 of the MOI it was incumbent upon the applicant to refer the matter to arbitration, which the applicant failed to do; and
- (d) That the applicant's objection (to the Adjudication Award) was, in terms of Article 1.7 of the MOI, due on 27 May 2024.

[10] On 27 June 2024, the applicant's legal representatives addressed a letter to the first respondent's legal representatives wherein they advised them, *inter alia*, as follows:

- (a) That the MOI does not explicitly define 'days';
- (b) That generally for legal matter 'days' refers to business days, excluding weekends and public holidays;

- (c) That the 10-day period expired at the end of business on 30 May 2024 and that their letter dated 30 May 2024 was delivered in time;
- (d) That Article 28.9.5 of the MOI states that should the member refuse to accept the decision of the committee on any matter, such dispute shall then be referred to arbitration in terms of Article 31;
- (e) That the letter of 30 May 2024 constitutes a clear refusal and disputes the decision of adjudication and that, with reference to Article 28.9.5, the applicant's legal representatives could not see how it would be incumbent upon the applicant to refer the matter to arbitration;
- (e) That the MOI is silent as to who is to refer a disputed ruling to arbitration; and
- (f) That since the respondents have declined to refer the matter to arbitration and have refused to reverse the wrongful debt debited to the applicant's levy account, the applicant would be proceeding to set aside the adjudication ruling.

[11] On 2 July 2024, the applicant's legal representatives addressed another letter to the first respondent's legal representatives in which they recorded, *inter alia*, the following:

- (a) That their client (the applicant) has refused to accept the adjudication ruling and is disputing it and that their refusal to accept the adjudication ruling had the effect of invoking the arbitration provision of Article 28.9.5;
- (b) That the MOI is unclear as to who is meant to initiate and convene the arbitration proceedings;
- (c) That the process of the appointment of the arbitrators and the proceedings of the arbitration is also unclear;
- (d) That they (the applicant's legal representatives) are of the view that the first respondent, as the administrative body giving effect to the rules as contained in the MOI are tasked with the responsibility of initiating and convening the arbitration proceedings; and
- (e) That they (the applicant's legal representatives) were calling upon the first respondent to officially institute the arbitration proceedings and for the legal

representatives of both parties to engage in the process of the selection of the arbitrators;

- (f) That the failure by the first respondent to institute the arbitration proceedings deprives the applicant of his rights in terms of Article 28.9.5 of the MOI and that the applicant reserves his right to institute an application to protect his rights; and
- (g) That the applicant's refusal to accept the adjudication order was clearly made within the 10-day period envisioned in Article 28.9.5 of the MOI.

[12] On 2 July 2024, the first respondent's legal representatives sent an email message to the applicant's legal representatives in which they stated, *inter alia*, the following:

- (a) That they (first respondent's legal representatives) regarded the matter (of the adjudication ruling) as closed and that the internal Adjudication Committee was *functus officio*;
- (b) That the first respondent does not need to refer the dispute to arbitration;
- (c) That nothing stops the applicant from referring the adjudication dispute to arbitration and incurring the costs of doing so and should do so if he elects to do so; and
- (d) That the first respondent would oppose the relief that the applicant would seek at arbitration.

[13] Although the applicant seeks an order declaring the entire Article 28 of the MOI void for vagueness, it is clear from the papers that the sub clauses of Article 28 that are in issue are only those relating to the finality of the adjudication dispute and those relating to the referral of an adjudication dispute to arbitration. These are Articles 28.9.4 and 28.9.5 of the MOI.

Are the impugned articles of the MOI void for vagueness?

[14] Article 28.9.4 of the MOI provides that "*the decision of the Committee shall be final unless objected to in writing by the Member within a period of 10 (ten) Days of*

the date of the Member being notified of its decision". The committee referred to in Article 28.9.4 is the Adjudication Committee appointed in terms of Article 28.9.1 of the MOI.

[15] Article 28.9.5 of the MOI provides that *"should the Member refuse to accept the decision of the Committee on any matter, such dispute shall then be referred to arbitration in terms of Article 31".*

[16] Article 31 of the MOI regulates the referral of the disputes to arbitration, the appointment of the arbitrators and the process of arbitration. It provides as follows in Articles 31.1 to 31.5.2:

"31. Determination of disputes

31.1 *In the event of any dispute or difference arising between the Members inter se or between a member and the association as to the construction, meaning, interpretation or effect of any of the provisions or as to the rights, obligations or liabilities of the association or any member in terms of this Memorandum, the parties shall forthwith meet to attempt to settle such dispute or difference and failing such settlement within a period of 30 (thirty) Days, then such dispute or difference shall be submitted to arbitration in accordance with the Rules of Association of Arbitrators (Southern Africa) NPC or its successor, subject to the provisions set out below.*

31.2 *The arbitrator shall be a suitably experienced and qualified attorney or advocate of not less than 10 (ten) years standing.*

31.3 *The parties shall use their best endeavours to reach agreement as to the appointment of the arbitrator.*

31.4 *In the event that agreement cannot be reached within 10 (ten) Business Days after the arbitration has been demanded as to the appointment of the arbitrator, then the arbitrator shall be appointed in accordance with the procedure set out hereunder:*

31.4.1 *The claimant shall nominate 5 (five) potential arbitrators in writing. The Defendant shall be entitled to accept the nomination of 1 of the 5 (five) arbitrators. That arbitrator shall be the duly appointed arbitrator. Should that arbitrator refuse or fail to accept the appointment, then the process shall be repeated with the remaining 4 (four) arbitrators until an arbitrator acceptable to the Defendant accepts the appointment.*

31.4.2 Should the Claimant fail to nominate 5 (five) arbitrators or the Defendant fails to accept 1 (one) nomination as envisaged in Article 31.4.1 then either party shall have the right to request the Association of Arbitrators (Southern Africa) NPC or its successor to appoint an arbitrator which appointment shall be final and binding on the parties.

31.5 The arbitration proceedings:

31.5.1 shall be subject to the application of the law of evidence.

31.5.2 shall take place in Durban, KwaZulu-Natal."

[17] Article 30 of the MOI provides that *"Should any Member or any lessee of a Member or guest or invitee of a Member or any Hotel guest fail to perform any obligation incumbent upon him, if applicable, within the period of any notice given for compliance, the Association shall be entitled, but not obliged to do such things and incur such expenditure as is, in the opinion of the Association, necessary and/or requisite to procure compliance. The costs thereby incurred by the Association shall be a Debt due by the Member concerned, which shall be payable on demand"*.

[18] The applicant states in his founding affidavit that the rules of the association of arbitrators contemplate that an arbitration agreement is meant to be a consensual agreement which must have sufficient particularity that clearly sets out the following:

- (a) A clear definition as to which disputes are to be arbitrated;
- (b) The arbitrator's jurisdiction and powers;
- (c) The rules and procedures that need to be followed during arbitration;
- (d) Who will be the arbitrator and how the arbitrator will be appointed;
- (e) The location where the arbitration will be held; and
- (f) Who will pay the costs of the arbitration.

[19] The applicant contends that none of the aforesaid prerequisites to an arbitration agreement have been included in the MOI, with the result that there is no arbitration agreement in the MOI.

[20] I do not agree with the applicant's contention that there is no arbitration agreement in the MOI. In my view, the provisions in the MOI relating to which disputes must be referred to arbitration, the referral of disputes to arbitration, the appointment of the arbitrator, the arbitration proceedings, the place of the arbitration and the costs of the arbitration are sufficiently clear.

[21] Article 31.1 of the MOI provides that any dispute or difference arising between members *inter se* or between a member and the association as to the construction, meaning, interpretation or effect of any of the provisions or as to the rights, obligations or liabilities of the association or any member in terms of the MOI shall be referred to arbitration. In this way the MOI clearly provides which disputes should be subjected to arbitration.

[22] Insofar as the jurisdiction and powers of the arbitrator are concerned, Article 31.7.1 of the MOI stipulates clearly that the parties agree that the arbitrator's decision shall be final and binding upon them and shall be forthwith carried into effect. Article 31.7.1 further provides that if prior to the lapse of 30 days from the date of the arbitrator's decision any of the parties lodges a dispute as provided for in the Community Schemes Ombud Service Act No. 9 of 2011 (CSOSA), then in that event the dispute resolution provisions of the CSOSA will apply.

[23] Insofar as the rules and procedures that need to be followed during the arbitration are concerned, the MOI makes the following provisions clearly:

- (a) That the dispute shall be submitted to arbitration in accordance with the Rules of Association of Arbitrators (Southern Africa) NPC or its successor (Article 31.1);
- (b) That the arbitration proceedings shall be subject to the application of the law of evidence (Article 31.5.1);
- (c) That the arbitrator shall decide the matter submitted to him according to what he considers just and equitable in the circumstances and shall have regard to the desire of the parties to dispose of such dispute expeditiously, economically and confidentially (Article 31.8.2);

- (d) That the strict rules of law need not be observed or taken into account by the arbitrator in arriving at his or her decision (Article 31.8.2); and
- (e) That the proceedings in the arbitration shall as far as possible take place in private and be kept confidential (Article 31.9).

[24] Insofar as the identity of the arbitrator and how he or she is to be appointed, Articles 31.2, 31.3 and 31.4 of the MOI are very clear. Article 31.2 provides that the arbitrator shall be a suitably experienced and qualified attorney or advocate of not less than 10 years standing. Article 31.3 provides that the parties shall use their best endeavours to reach agreement as to the appointment of the arbitrator.

[25] Article 31.4 deals with a situation where the parties are unable to reach agreement and provides as follows:

"31.4 In the event that agreement cannot be reached within 10 (ten) Business Days after the arbitration has been demanded as to the appointment of the arbitrator, then the arbitrator shall be appointed in accordance with the procedure set out hereunder:

31.4.1 The Claimant shall nominate 5 (five) potential arbitrators in writing. The Defendant shall be entitled to accept the nomination of 1 of the 5 (five) arbitrators. That arbitrator shall be the duly appointed arbitrator. Should that arbitrator refuse or fail to accept the appointment, then the process shall be repeated with the remaining 4 (four) arbitrators until an arbitrator acceptable to the Defendant accepts the appointment.

31.4.2 Should the Claimant fail to nominate 5 (five) arbitrators or the Defendant fail to accept 1 (one) nomination as envisaged in Article 31.4.1 then either party shall have the right to request the Association of Arbitrators (Southern Africa) NPC or its successor to appoint an arbitrator which appointment shall be final and binding on the parties."

[26] Insofar as the location where the arbitration is to be held is concerned, Article 31.5.2 of the MOI provides clearly that the arbitration proceedings shall take place in Durban, KwaZulu-Natal and insofar as the costs of the proceedings are concerned, Article 31.8.1 of the MOI provides that the arbitrator shall be entitled to make any award as to costs of the proceedings.

[27] The Rules of the Association of Arbitrators (Southern Africa) NPC to which reference is made in Article 31.1 of the MOI provide that the party or parties initiating recourse to arbitration shall communicate to the other party or parties a notice of arbitration and that the arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the receiving party.

[28] It is now well established that it is only where a contract is not capable of any effective meaning in the circumstances that it would be too vague to be enforced.¹

[29] In this case the provisions of the MOI relating to the arbitration of disputes are clear and, as such, the relief sought by the applicant in paragraph 1 of the notice of motion should fail.

Does this court have jurisdiction to make a decision on the relief sought in paragraph 2 of the notice of motion?

[30] Article 28.5.3 of the MOI provides that for the enforcement of the MOI or any of the Conduct Rules of the Association, the board may give notice to a member to remedy any breach within a time period deemed reasonable by the board. If the breach is not remedied within the time period afforded to the member concerned, the board may, in its sole discretion, take such actions as it considers necessary to address the breach, and may debit the costs incurred in doing so to the member. Such costs shall be deemed to constitute a debt owed by the member to the Association.

[31] The respondents state that the amounts referred to in paragraph 2 of the notice of motion are the costs incurred by the first respondent in taking legal advice relating to the applicant's conduct well before the adjudication, as well as for bringing an urgent application to interdict the applicant from committing further breaches of the MOI. Thus the question of the incurrence of the costs concerned itself is subject to compulsory arbitration in terms of Article 31 of the MOI and ought not to have been brought to this court for resolution.

¹ *Namibian Minerals Corporation Ltd. v Benguela Concessions Ltd.* 1997 (2) SA 548 (A) at 557 E-F; *Smith and Others v One Vision Investments 344 (Pty) Ltd* [2020] ZAGPPHC 316 para 12.

[32] In any event, the question of the legal costs referred to in the foregoing paragraph is no longer a live issue between the parties, as the first and second respondents have conceded that the amounts concerned were incorrectly debited. The general principle is that a matter is moot when a court's judgment will have no practical effect on the parties. This occurs where there is no longer an existing or live controversy between the parties.² It follows that the order sought in paragraph 2 of the notice of motion cannot be granted.

Does this court have jurisdiction to decide whether or not the challenge to the adjudication award was out of time?

[33] Article 28.9.4 of the MOI provides that the decision of the Adjudication Committee shall be final unless objected to in writing by the member within a period of 10 days of the date of the member being notified of its decision. The applicant was notified of the award on 15 May 2024. The applicant delivered his written objection to the award on 30 May 2024.

[34] The applicant contends that the 10-day period contemplated in Article 28.9.4 refers to 10 business days, while the respondents contend that it refers to calendar days. This is clearly a dispute about the construction or meaning or interpretation of a provision of the MOI which Article 31.1 of the MOI requires that it be referred to arbitration.

[35] In *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh N.O.*,³ the court held that where parties have agreed that matters concerning the validity, enforceability and existence of an agreement shall be referred to arbitration, then the courts will respect their agreement and will not decide those matters. It follows that this court cannot decide the dispute as to whether or not the challenge to the

² *A B and Another v Pridwin Preparatory School and Others* [2020] ZACC 12; 2020 (9) BCLR 1029 (CC); 2020 (5) SA 327 (CC) para 50.

³ *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh N.O* 2022 (4) SA 420 (SCA) para 38.

adjudication award was out of time. Such dispute must be referred to arbitration in terms of Article 31.1 of the MOI.

[36] In support of the relief he seeks in paragraph 3 of the notice of motion, the applicant contends that it is not clear who should refer the dispute to arbitration. The applicant contends that the first respondent is the administrative body and, as such, it can reasonably be inferred that the first respondent is supposed to commence an engagement with him (the applicant) to have the matter referred to arbitration.

[37] I do not agree with the aforesaid contention of the applicant. Article 31.1 of the MOI provides that the dispute shall be submitted to arbitration in accordance with the Rules of the Association of Arbitrators (Southern Africa) NPC, or its successor. However, the Rules of the Association of Arbitrators do not require the party who is not aggrieved by the ruling to refer the dispute to arbitration. The Rules of the Association of Arbitrators provide that the party initiating recourse shall communicate to the other party a notice of arbitration. Therefore, the party who must initiate the arbitration is the party who is aggrieved by the decision sought to be referred to arbitration.

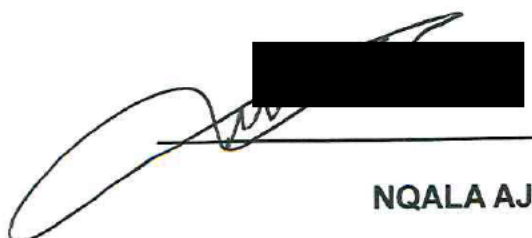
[38] It makes no business sense to expect a party in whose favour the ruling has been made to refer the same ruling that favours him to arbitration. In any event, there was nothing preventing the applicant from referring the adjudication ruling to arbitration if he so wished.

[39] It follows that the relief sought by the applicant in paragraph 3 of the notice of motion should also fail.

Order

[40] I accordingly make the following order:

The application is dismissed with costs, such costs to include the costs occasioned by the employment of one senior counsel on scale C and one junior counsel on scale B.



NQALA AJ

Date of hearing : 22 January 2025

Date of judgment : 13 March 2025

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