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CONSTRUCTION LAW BULLETIN

SECTIONAL TITLE ARBITRATIONS

Introduction

In June this year the Supreme Court of Appeal¹ ("SCA") delivered a judgment which clarified the legal basis for sectional title disputes to be decided by arbitration.

The fundamental question in the case was whether the arbitration regime provided for in the standard Management Rules promulgated under the Sectional Titles Act, 95 of 1986 ("the Act"), amounted to a compulsory statutory arbitration regime which ousted the inherent jurisdiction of the court.

If a statute provides for a dispute resolution process such as arbitration in relation to disputes described in the statute, then the effect is entirely to exclude resort to the ordinary courts of law for dispute resolution. In other words the inherent jurisdiction of the courts to deal with such disputes is ousted.²

Ordinarily our courts have inherent jurisdiction, notwithstanding an arbitration agreement between the disputing parties, to assume responsibility for determining the dispute. This power derives from the provisions of the Arbitration Act³ which provides that **on good cause shown** a court may set aside an agreement or direct that a particular dispute not be decided by arbitration. Generally our courts uphold arbitration agreements and there must be very good reasons before they are persuaded to override arbitration agreements.

To summarise:

¹ Body Corporate of the Pinewood Park Scheme No 202 v Dellis (Pty) Ltd, Case No 498/11 [2012] ZASCA 105, date of judgment 1 June 2012.

² See section 40 of the Arbitration Act which states that the Act will not apply if it is excluded by or is inconsistent with another statute or its Regulations. See also Independent and Allied Trade Unions v Northern Pretoria Metropolitan Substructure and Others 1999(2) SA 234 T, Van Dijkhorst J.

³ Section 3 of Act No 42 of 1965.

- our courts have inherent jurisdiction to deal with disputes notwithstanding that the parties may have agreed that disputes between them must be resolved by arbitration;
- however, where arbitration is provided for in terms of a statute, the jurisdiction of our courts is completely ousted and the court has no jurisdiction to deal with the dispute.

The Facts

The Pinewood Park Body Corporate instituted action against one of the unit owners, Dellis (Pty) Ltd, for the payment of an amount of R123 101,00 in respect of alleged arrear levies payable by the owner.

The owner took the point that the legal action against it was incompetent because the Act and Rules provided for compulsory arbitration which meant the court's jurisdiction was completely ousted.

The Durban High Court agreed with the owner and dismissed the body corporate's claim but granted leave to appeal to the Provincial Appeal Court sitting in Pietermaritzburg.

The Pietermaritzburg Appeal Court also agreed with the owner's argument and dismissed the body corporate's appeal.

Despite these setbacks, the body corporate was not willing to simply pursue its claim in arbitration proceedings. It applied to the SCA in Bloemfontein for special leave to appeal to the SCA which leave was granted.

Sectional Title Arbitration Regime

The requirement for disputes in relation to sectional title matters to be decided by arbitration derives from the Regulations promulgated in terms of section 55 of the Act. These Regulations incorporate what are known as Management Rules which deal with matters relating to the control and management of sectional title schemes.

The Act provides that certain of these Management Rules can be added to or amended by a developer when a scheme is initially established and they can all be changed thereafter by unanimous resolution of the members of the body corporate.

The standard rule dealing with arbitration is Management Rule 71 which reads as follows:

- "(1) 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.*
- (2) If such a dispute or complaint arises, the aggrieved party shall notify the other affected party or parties in writing and copies of such notification shall be served on the trustees and the managing agents, if any, and should the dispute or complaint*

not be resolved within 14 days of such notice, either of the parties may demand that the dispute or complaint be referred to arbitration."

In a previous decision⁴ the SCA confirmed that the effect of Management Rule 71 is to require disputes relating to sectional title matters to be decided by arbitration. It did not however deal with the question of whether the court's inherent jurisdiction in such matters is ousted.

SCA's Decision

In the Pinewood case the SCA found that the provisions of Management Rule 71 which provide for arbitration are contractual in nature and do not constitute statutory provisions providing for compulsory arbitration. The court quoted with approval a decision of the Transvaal High Court which described the Management Rules as in effect constituting the terms of an agreement between owners inter se and between owners on the one hand and the body corporate on the other hand.⁵

The court found that the sectional title Management Rules do not constitute an Act of Parliament and therefore none of the provisions of the Arbitration Act are excluded by the Rules.

In the result the court held that the decisions of the Durban High Court and the Pietermaritzburg Appeal Court were wrong and that the body corporate's claim should not have been dismissed. It concluded that the Durban High Court ought either to have stayed the court proceedings pending determination of the dispute by arbitration or, if the circumstances warranted it, exercised its jurisdiction to continue with the action.

The net result of this excursion through three different courts was to send the matter back to the Durban court to decide whether to force the parties to go to arbitration or, if any exceptional circumstances so warranted, to deal with the dispute itself.

Bear in mind that there must be a very good reason before our courts exercise their discretion to bypass an arbitration agreement and deal with a dispute that would otherwise be subjected to arbitration.

Conclusion

The arbitration regime provided for in the Management Rules, although promulgated as Regulations under the Act, does not amount to a compulsory statutory obligation to arbitrate. As such our courts retain their inherent jurisdiction to deal with sectional title disputes.

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⁴ Body Corporate of Greenacres v Greenacres Unit 17 CC 2008(3) SA 167 SCA.

⁵ Wiljay Investments (Pty) Ltd v Body Corporate Bryanston Crescent and Another 1984(2) SA 722 T, Spoelstra J.