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## CONSTRUCTION LAW BULLETIN

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### REFERRAL TO COURT OR COUNSEL FOR AN OPINION IN ARBITRATION PROCEEDINGS

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#### INTRODUCTION

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The Arbitration Act, 42 of 1965 (“the Act”), contains a provision relating to the referral of questions of law to either the court or an advocate for an opinion, which opinion is final and binding.

The relevant section<sup>1</sup> reads as follows:

***“Statement of case for opinion of Court or counsel during arbitration proceedings***

- (1) *An arbitration tribunal may, on the application of any party to the reference, and shall, if the court, on the application of any such party, so directs, or if the parties to the reference so agree, at any stage before making a final award, state any question of law arising in the course of the reference in the form of a special case for the opinion of the court or for the opinion of counsel.*
- (2) *An opinion referred to in subsection (1) shall be final and not subject to appeal and shall be binding on the arbitration tribunal and on the parties to the reference.”*

The Supreme Court of Appeal (“SCA”) recently delivered a judgment which provides some insight into the ambit of this provision.<sup>2</sup>

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<sup>1</sup> Section 20.

<sup>2</sup> Padachie v Body Corporate of Crystal Cove (704/2015) [2016] ZASCA 145 (30 September 2016).

## **BACKGROUND**

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Mr and Mrs Padachie owned a unit in a residential sectional title scheme known as Crystal Cove in La Mercy on the KwaZulu-Natal North Coast.

The Padachies failed to pay certain levies and ancillary amounts and the Body Corporate instituted legal action against them in the Inanda magistrate's court for payment of the princely sum of R9 891,83.

The Padachies defended the action and *inter alia* raised a defence of prescription.

Subsequently the parties agreed to refer the dispute for determination by arbitration.

The arbitration hearing was completed over the period 13 November 2012 to 19 November 2012.

As agreed between the parties and the arbitrator, at the conclusion of the hearing the Body Corporate was to file its written argument on 26 November 2012 and the Padachies were to deliver their replying argument by 7 December 2012, with the Body Corporate to file replying argument thereafter.

Shortly before the Padachies' opposing argument was due to be filed, their attorneys wrote to the arbitrator to say that various legal issues had arisen during the course of the arbitration and enquiring whether they should apply to court for a referral of these issues to court or deal with the matters in their clients' written argument.

The arbitrator advised that he was not aware of any issues necessitating such a referral and that he would leave it to the Padachies' attorneys to adopt whatever course they considered most appropriate. The arbitrator reminded the Padachies' attorneys that he required their argument to be filed timeously.

In the event the Padachies' attorneys filed their written argument dealing with the substantive issues in the arbitration and closed their argument with the statement that the interpretation of the Body Corporate's management rules, the nature of the claims and the issue of prescription were all issues of law which ought to be referred to court.

The Padachies' attorneys, after filing their argument, wrote a further letter to the arbitrator enquiring whether he intended to refer the issues concerned to court, failing which they would apply to court for such a referral.

Without responding to the letter, the arbitrator delivered his award in which he dealt comprehensively with the issues in dispute including the alleged questions of law raised by the Padachies.

The arbitrator found that the Padachies were liable to the Body Corporate in an amount a little less than had been claimed.

## **APPLICATION TO COURT**

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The Padachies applied to court for an order setting aside the arbitrator's award in terms of section 33(1) of the Act.

The thrust of their argument was that the arbitrator had prevented them from approaching the court for an opinion by delivering his award despite knowing that they wished to refer the matters concerned to court.

The High Court dismissed the application and made the arbitrator's award an order of court.

## **SCA APPEAL**

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The Padachies appealed the High Court decision to the SCA.

On appeal the Padachies presented the same argument, namely that, despite being aware from their written argument that they considered the matters to be questions of law which should be referred to court, the arbitrator had nonetheless gone ahead and simply delivered his award.

They characterised this reference in their argument as being the application contemplated in section 20(1) of the Act.

The SCA disagreed. It pointed out that the arbitrator had made it clear from the outset that he did not consider there were any issues which needed referral to court. It was accordingly incumbent on the Padachies, if they persisted with that view, to have applied to court to interdict the arbitrator from delivering his award pending their making an application to court for an order directing that such matters be referred to the court for an opinion.

The SCA held that on this ground alone the Padachies' appeal had to fail.

## **THE AMBIT OF SECTION 20**

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However, importantly, the SCA went on to identify two other grounds on which the appeal had to fail. The first was that a party is not entitled to refer to court the very issues which have been referred to arbitration. The second concerned the manner in which the Padachies formulated their request for a referral.

On the first issue the court made it clear that a referral to court for an opinion can only be countenanced if the legal question arises in the course of the arbitration. It is not intended to apply to issues and questions of law which form part of the initial referral to arbitration.

In this case the questions of law relied on by the Padachies were all issues that formed part of the dispute between the parties which had been referred to the arbitrator.

As such the Padachies had never had any right to seek a referral to court.

On the second issue the court pointed out that what the Padachies had in truth sought to do, after filing detailed written argument on the so-called legal issues, was to say to the arbitrator, if you adopt our argument on the issues, good and well, but if you do not, we want to refer the questions to a court.

The SCA said that this was an untenable approach and that such a qualified request for a referral was impermissible having regard to the content of section 20 of the Act.

The court also pointed out that such an approach demonstrated the fallacy of the Padachies' argument that the questions were ones which the arbitrator was not qualified to determine and which only a court could.

In closing, the SCA commented on the absurdity of a case involving an amount of approximately R9 000,00 having been allowed to take up the time of two arbitrators<sup>3</sup>, a High Court judge and five SCA judges. The legal costs involved exceeded the amount in dispute by many multiples.

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<sup>3</sup> Although the judgment does not make it clear, for some reason the first arbitrator could not complete the arbitration, resulting in the appointment of a second arbitrator.