IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 7558/2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED.

25/05/18
DATE

SIGNATURE

In the matter between:

HONEYRIDGE CENTRE (PTY) LTD Applicant

and

BEYERS OFFICE PARK BODY CORPORATE First Respondent

DU CHENNE INVESTMENTS (PTY) LTD Second Respondent

JUDGE ANTONIE GILDENHUYS Third Respondent

JUDGMENT

NICHOLLS J:

[1] The applicant seeks to make an Arbitration award, regarding the validity of a servitude, an order of court in terms of section 31(1) of the Arbitration Act 42 of 1965 (the Act). The respondents initially opposed the application and instituted a counter application to set aside the award. In the alternative they claim declaratory relief.

[2] The dispute regarding the servitude dates back to 20 April 2010 when the respondents instituted proceedings out of this court seeking an order that the servitude be declared invalid. The application was dismissed and leave to appeal was refused. On petition, the Supreme Court of Appeal granted leave to appeal to the full court of this division. On 9 November 2016 the full court set aside the original order and referred the matter back to the motion court. At this point, presumably frustrated by the lack of finality, the parties decided to refer the matter to arbitration. Retired Judge Gildenhuys was appointed as the arbitrator.

[3] The arbitration agreement concluded between the parties on 6 December 2016 provides as follows:

"AWARD TO BE BINDING

5.1. The award of the tribunal shall, subject to the provisions of the Act, be final and not subject to appeal and each Party to the reference shall abide by and comply with the award in accordance with its terms.

5.2. All the parties agree that the Award of the tribunal will be final and binding on all the parties and may not be disputed, and they hereby relinquish their right to take the matter on appeal.

5.3. The parties agree that the order made by the Tribunal shall be made an order of Court."

[4] The dispute identified for arbitration was "to resolve and make a decision on the dispute". The dispute was defined as "the dispute which has arisen between the parties as detailed on the record of appeal". The arbitration took

place before Judge Gildenhuys on 21 January 2017. At his instigation, the parties agreed to properly formulate the issues between them.

[5] It was further agreed that no witnesses would be called and no additional papers filed. A few days later on 24 January 2017 a replacement arbitration agreement was signed which was identical in all respects other than that the dispute was defined as:

> **"Dispute"** means the dispute between the parties is as follows: Firstly, whether by virtue of the principle of *nemini res sua sevit/null res sua sevit* Notarial Deed of Servitude K 2138/2008 is invalid.
> Secondly, the proper interpretation of the Deed of Servitude, more particularly that the right of way over Erf 4210 Randparkrif Extension 62 Township in favour of Erf 4209 Randparkrif Extension 62 Township is restricted to a right of way and does not include the right to park any motor or other vehicles on the servitude are.

[6] In an award dated 13 February 2017 the arbitrator found in favour of the applicants. Pursuant thereto the applicant launched the present application to make the award an order of court.

[7] During the course of argument, counsel for the respondents took an instruction and waived the counter application to set aside the award. This is a concession well made. No case is made out on the papers that the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings or that he has exceeded his powers. Instead the complaint is that he relied upon an incorrect authority in the House of Lords.

[8] The opposition to the application was also abandoned during the course of the argument. The respondents therefore concede that the applicants are entitled to make the award an order of court. Accordingly, the only relief they seek is that this court grant declaratory orders in respect of the award. These are not set out in a notice of motion but are couched in the form of a conditional counter application which reads as follows:

"32 The Respondents seek an order in the following terms:

32.1...

32.3 if the Arbitration Award is not set aside:

32.3.1. that the Applicant is bound by the conduct rules of the first Respondent Body corporate insofar as they relate to the use of the servitude area; and

32.3.2. that the Applicant is obliged to make a financial contribution to the First Respondent Body corporate's cost associated with the servitude are based on the size of the servitude area in relation to the common area of the body Corporate;"

[9] The respondents' argument is that the applicant does not consider itself bound by the rules and regulations of the body corporate of the first respondent which bears the financial burden of the costs occasioned by the applicant's use of the servitude area. Counsel for the respondent referred to several cases[1] which support her argument that the dominant tenement may only exercise its servitude rights *civiliter modo*, namely in a civil or reasonable manner. That may be so.

[10] However, I have a more fundamental problem which was not properly addressed in argument. I am not persuaded that this court has any jurisdiction to make declaratory orders in the face of the parties' election to settle their dispute by means of private arbitration. By so doing they have ousted the jurisdiction of the court except in very limited circumstances as set out in section 33 of the Act.[2] These are directed at procedure rather than issues of

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[1] *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 (5) SA 440 CC para [150] and the cases cited therein.

[2] *Arbitration Act 42 of 1965,* Section 33(1) provides:

(1) Where-

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

substantive law. In what has now become a trite proposition: "Arbitrators have the right to be wrong"[3] In short, it is now established law that an arbitration cannot be set aside on the grounds that an arbitrator erred in applying the law.

[11] Our courts have held that the interpretation of arbitration clauses must be construed so as to give effect to their purpose, namely to resolve legal disputes in privately agreed arbitration tribunals instead of the courts. Whatever the true dispute is between the parties, they are bound by the dispute identified in the arbitration agreement. Courts do not have concurrent jurisdiction - when parties choose to arbitrate their disputes privately instead of litigating through the courts, they intend all their disputes to be determined by the same tribunal. This is presumed to be so, unless it is expressly stated in clear language that certain issues are excluded from the arbitrator's jurisdiction. There is thus a presumption in favour of 'one stop arbitration'.[4]

[12] In *Zhongji Development Construction Engineering Company Limited v Kamoto Copper Company Sarl*[5] the Supreme Court of Appeal dealt with whether the High Court was obliged to grant declaratory relief where the dispute had been subject to arbitration. It was held that if the high court pronounced on these issues, it would be venturing into a terrain not within its province but rather in the province of the arbitrator.[6]

[13] The arbitrator in this matter interpreted the servitude, whether rightly or wrongly. It is not competent for this court to interfere with, or second guess what he meant in his award. The parties are not only obliged by law to live with the consequences of the award, but have elected to do so. This is implicitly by choosing private arbitration as their preferred means of settling their dispute, and also in explicit terms when they agreed in clause 5.2 of the

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(c) an award has been improperly obtained, the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

[3] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para [85]
[4] *Riversdale Mining Limited v Du Plessis and Another* (536/2016) [2017] ZASCA 007 para [28]
[5] 2015 (1) SA 345 (SCA)
[6] *Zhongji* (supra) para [54]

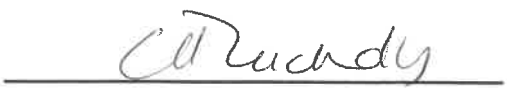
arbitration agreement that the award will be final and binding and may not be disputed. Furthermore, they have waived their right to take the matter on appeal. It is not open to the respondents to approach this court when the results of the arbitration do not find favour with them.

[14] The respondents have denied any suggestion that they are impermissibly attempting to have their dispute re-considered or re-litigated in another forum. Despite the concessions made during the course of argument it is difficult to conceive the declaratory orders, as anything else. It appears that the counter application is nothing more than a thinly disguised attempt to appeal the decision of the arbitrator via the backdoor. Even if it can be said that the declaratory orders sought do not encroach directly on the aspect of the invalidity of the servitude, they certainly deal with matters incidental thereto. This offends the presumption of a 'one stop arbitration'.

[15] For the above reasons I am of the view that this court is not competent to entertain the relief sought. I do not intend to traverse the merits of the declaratory relief sought which are irrelevant for present purposes. The counter application falls to be dismissed.

In the result I make the following order:

1. The Arbitrator's Award by Judge Antonie Gildenhuys dated 13 February 2017 be made an order of court;
2. The respondents' conditional counter claim is dismissed.
3. The respondents are to pay the costs of this application jointly and severally, the one paying the other to be absolved.



C. H. NICHOLLS
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the Applicant	: Adv. LM du Plessis
Instructing Attorneys	: Victor and Partners
Counsel for the Respondent	: Adv. D Landman-Louw
	: Neels Engelbrecht Attorneys
Date of hearing	: 23 May 2018
Date of judgment	: 25 May 2018