IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case no: 227/2004

In the matter between

FAVISH (also known as SHRAGA) VIDAVSKY **APPELLANT**

and

BODY CORPORATE OF SUNHILL VILLAS **RESPONDENT**

Coram: **STREICHER, FARLAM, CONRADIE, HEHER *et* VAN HEERDEN JJA**

Heard: **24 MAY 2005**

Delivered: **31 MAY 2005**

Summary: Arbitration – s 15 of Arbitration Act 42 of 1965 – award made in default of appearance of party – effect – whether binding for purposes of ss 28 and 31 of the Act.

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JUDGMENT

HEHER JA:

[1] This judgment concerns the legal consequences of a wrong direction by an arbitrator that proceedings take place in the absence of a party to the arbitration under the Arbitration Act 42 of 1965 ('the Act') and the entitlement of the party in whose favour an award has been made in such circumstances to have the award made an order of court in terms of s 31(1) of the Act.

[2] The appellant is the owner of a sectional title unit in a residential development in the suburb of Bruma, Johannesburg. The respondent is the responsible body corporate. The appellant declared a dispute with the respondent relating to various aspects of the latter's administration of the property which was referred to arbitration. The provisions of the Act applied to the arbitration in question by reason of the operation of s 40 thereof since the arbitration was one 'under a law' (the Sectional Titles Act 95 of 1986) which lays down (in s 35(1) and (2)) that a scheme shall be controlled and managed, by *inter alia* 'management rules, prescribed by regulation' and the rules so prescribed provide for the solving of disputes by arbitration (in rule 71 of the Management Rules contained in Annexure 8 to the Sectional Titles Act, read together with regulation 39 of the Regulations originally published in terms of s 55 of that Act in GN 664 of 8 April 1988).

[3] The arbitrator appointed was a Mr Louro, an attorney. The chairman of the

body corporate was Mr Botha, upon whom, as the representative of the respondent and in his personal capacity, the appellant's statement of claim was duly served. No statement of defence was, however, filed on his or on the respondent's behalf (or on behalf of the other trustees who were also cited as respondents). The arbitrator set the hearing for Thursday 27 March 2003 at 10h00. I shall shortly describe how he did this. At the appointed hour the appellant was present in person, supported by Mr Nathan, a director of Sectional Title Services ('STS'), a sectional title scheme administrator, and Mr Ranoko, a messenger employed by STS. What then took place is recorded in the arbitrator's award and is not in dispute:

'Due to the non appearance of the Respondents, the Arbitrator requested the Applicant to address him on the issue of whether the arbitration could proceed without the presence of the Respondents. Mr. Nathan, on behalf of the Applicant and Mr. Mpho Ranoko led evidence of the delivery of the Applicant's Statement of Claim. The Arbitrator handed in proof of notice by registered mail to the Respondents advising of the date, time and place for the arbitration.'

In his award the arbitrator then refers to s 15(2) of the Act. It is convenient at this point to quote s 15 in full:

'(1) An arbitration tribunal shall give to every party to the reference, written notice of the time when and place where the arbitration proceedings will be held, and every such party shall be entitled to be present personally or by representative and to be heard at such proceedings.

(2) If any party to the reference at any time fails, after having received reasonable notice of the time when and place where the arbitration proceedings will be held, to attend such proceedings without having shown previously to the arbitration tribunal good and sufficient cause for such failure, the arbitration tribunal may proceed in the absence of such party.'

The arbitrator continued:

'I find that the Respondents received reasonable registered notice of the time, date and place where the arbitration proceedings would be held. I also find that no good and sufficient cause for the failure of the Respondents to attend has been shown and that the arbitration tribunal shall proceed in the absence of the Respondents.'

[4] I interpose here that the factual basis for the arbitrator's findings that the respondents *received* notice and that such notice was *reasonable* remains a matter of speculation as the arbitrator did not depose to an affidavit in the subsequent application to court. In this regard s 37 of the Act which provides that any notice required by any provision of the Act to be served on any person, may be *served* in any manner specified in that section (including sending the notice by post to that person at his usual or last known place of residence in the Republic) does not apply since s 15 does not require *service* (in contradistinction to ss 5(3), 10(2) and 12(1)).

[5] The arbitrator proceeded to hear the evidence of the appellant. In the result he made an award in favour of the appellant on 28 March 2003.

[6] After several unanswered letters in which the appellant demanded compliance with the terms of the award and threatened to apply to court to have it made an order, Messrs Klopper-Jonker, attorneys, wrote to the arbitrator on behalf of the respondents on 29 May 2003:

'We annex hereto copy of registered notice in terms of which you will note that your letter dated 19 March 2003 was only received by The Body Corporate on the afternoon of 27 March 2003, after the scheduled time and date for the arbitration.

Our client emphatically denies that notice of the meeting was hand delivered as alleged and submits

that the first and only notice they received, was your registered letter which, as said above, was only collected on the afternoon of 27 March 2003.

Under the circumstances, we trust that you will agree that the arbitration was not properly convened, as insufficient notice of the arbitration meeting was given to our client and we shall therefore be pleased if you would kindly confirm that your award which was made, will be withdrawn and a new date for the arbitration will be scheduled.'

A copy was sent to STS. After further futile correspondence between the parties the application which gave rise to this appeal was launched. The appellant sought an order which would have made those parts of the award with which the respondent had not complied in the interim an order of court.

[7] The respondent opposed the relief on the ground that it had not received timeous notice of the arbitration proceedings. Bregman AJ agreed. He found that 'the award was so tainted by the irregularity, ie the hearing of the dispute in the absence of the respondent, that it is null and void.' He dismissed the application with costs but granted leave to appeal to this Court.

[8] In the application there was no disagreement of moment between the parties that the dispute was to be decided on the following facts:

1. Letters dated 17 March 2003 were written by the arbitrator to the trustees and to the appellant notifying them that the arbitration would take place on Thursday, 27 March 2003 at 10h00 at a given address in Glenanda, Johannesburg. (The letters added, 'Please indicate whether such a day and time is convenient to you', an invitation which implied not merely receipt but also

sufficient opportunity to debate the proposal before the stipulated date.)

2. The letter to the chairman was, according to the date stamp on the registered slip, received by Bruma post office on 22 March 2003 – a Saturday – at an unspecified time.

3. The arbitration proceeded on the morning of Thursday, 27 March 2003.

4. The registered letter to the chairman was collected from the post office on 27 March 2003. That is reflected in a second date stamp on the same slip and is borne out by the affidavit of Mrs Botha, the chairman's wife, who added that she collected the letter during the afternoon and handed it unopened to her husband on his return from work.

[9] In the appeal the appellant did not dispute that the arbitrator had committed a gross irregularity by proceeding in the absence of the respondent. That was a correct concession because the peremptory terms of s 15(2) require, as a precursor to proceeding in the absence of a party, that such party has *received* reasonable notice of the time and place of the proceedings. The evidence proved that no such notice was received by the chairman.

[10] The argument on appeal ran thus:

1. Section 28 of the Act provides that, unless the arbitration agreement provides otherwise

> 'an award shall, subject to the provisions of this 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'.

According to counsel, the phrase 'subject to the provisions of this Act' refers to s 33(1) which empowers a court, on limited grounds, to set aside an award.

2. The irregularity, although gross, did not nullify the award, but merely had the effect of rendering it voidable at the instance of either party. If either party sought that result it was bound to bring an application under s 33(1)(*b*). As no such application had been brought within the prescribed time limit (six weeks after the publication of the award to the parties (s 33(2)) or within such extended period as the court may, on good cause shown, allow (s 38)), the award remained binding on the parties at the time of the application. The court was therefore obliged to make it an order of court in terms of s 33(1).

3. Even if the irregularity resulted in a nullity it remained a 'gross irregularity' for the purposes of s 33(1)(*b*) and the award stands until set aside by an order under that section.

[11] The line of reasoning espoused by the appellant's counsel is not new. Similar submissions have recently been rejected in *Van Zijl v Van Haebler* 1993 (3) SA 654 (SEC) at 658J-659J and *Wilton v Gatonby and Another* 1994 (4) SA 160 (W) at 168B.

[12] It will be convenient first to consider the nature of the irregularity in the present case. The arbitrator was vested with general jurisdiction to try the dispute between the parties by reason of his appointment. But his powers to conduct the proceedings in the absence of a party were expressly limited by s 15(2), which lays down as a jurisdictional fact that the arbitrator may only proceed if that party has received reasonable notice of the time and place of the hearing. The requirement is

peremptory. There was no notice and the arbitrator's jurisdiction to proceed was lacking. An alternative, but, I think equally valid, approach to the section is to recognise that proceeding with a hearing without proper notice to a party of the date and place of that hearing fundamentally taints both the proceedings and any decision which depends upon them.

[13] What are the legal consequences of absence of jurisdiction and the failure to give notice of the hearing? Specifically, do they result in nullity or are the proceedings and award merely voidable as counsel for the appellant would have it?

[14] An arbitration is, of course, a quasi-judicial proceeding: *Estate Milne v Donohoe Investments (Pty) Ltd and Others* 1967 (2) SA 359 (A) at 373H. The precepts which govern the procedure in judicial proceedings apply to an arbitration: *Shippel v Morkel and Another* 1977 (1) SA 429 (C) at 434A-E. The authorities are clear that want of jurisdiction in judicial or quasi-judicial proceedings has the effect of nullity without the necessity of a formal order setting the proceedings aside. They are collected in *Minister of Agriculture and Economic Marketing v Virginia Cheese and Food Co (1941) (Pty) Ltd* 1961 (4) SA 415 (T). See also *S v Absalom* 1989 (3) SA 154 (A) at 164E-G. Lack of jurisdiction in arbitration proceedings renders an award invalid: *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 175; *Fassler, Kamstra & Holmes v Stallion Group of Companies (Pty) Ltd* 1992 (3) SA 825 (W) at 829B-C. The same consequence applies to proceedings in which a summons has not been served (with which, it seems to me, the absence of notice of proceedings can be equated): see the *Virginia Cheese* case at 423E-F and *Dada v*

Dada 1977 (2) SA 287 (T) at 288C-F and the authorities there cited. Absence of proper notice in arbitration proceedings has always been treated as a fatal flaw. See eg *Newman v Booty NO* (1901) 18 SC 116, 11 CTR 176; *Holtzhousen v Rademan's Executors and Others* 1918 GWLD 19 at 23; *Burns & Co v Burne* (1922) 43 NLR 461; *Sapiero and Another v Lipschitz and Others* 1920 CPD 483 at 486; *Field v Grahamstown Municipality* 1928 EDL 135.

[15] Once it is established that the proceedings and award were null and void and not merely voidable, the binding effect of an arbitration award so obtained is more apparent than real. Section 28 is in such event of no assistance to the appellant. It is in terms subject to the provisions of the Act which includes proper compliance with s 15(2), a standard which the award cannot meet, as I have shown.

[16] Mr Cohen for the appellant nevertheless submitted that the award obtained by his client is saved by s 33(1) or, rather, by the respondent's non-compliance with that section. He argued that a void award is nothing other than an award obtained irregularly and a failure to apply to set aside such an award within the time limits prescribed by s 33(2) bars reliance on the irregularity when an application is made under s 31 to have the award made an order of court.

[17] His submission cannot be correct. In the first place, as I have pointed out, the award carries no legal force at all and does not even require to be set aside. The case is to be distinguished from a valid award which is enforceable until set aside: see eg *Kolber and Another v Sourcecom Solutions (Pty) Ltd and Others*; *Sourcecom Technology Solutions (Pty) Ltd v Kolber and Another* 2001 (2) SA 1097 (C) at para

[71]; Butler and Finsen *Arbitration in South Africa* 273. In the circumstances it is hardly surprising to find that courts have resisted attempts to confer the imprimatur of an enforceable judgment on such a wraith: see eg *Steinberg v Cosmopolitan National Bank of Chicago* 1973 (3) SA 885 (RAD) at 892B-893D. A second consideration is that whether or not the respondent opposes the application under s 31(1) the applicant accepts an onus to prove that he is in possession of an award that can properly form the subject of an order of court, cf Butler and Finsen *op cit* 273. In this regard it is entirely irrelevant that the respondent has not first applied to set the award aside. It is true that in England 'insufficiency or want of hearing must be urged as a ground for setting aside the award on motion and cannot be set up as a bar to an action on it': *Thorburn v Barnes* (1867) LR 2CP 384 at 402; *Oppenheim v Mahomed Haneef* [1922] 1 AC 482; *Russell on Arbitration* 22ed para 8-008. This rule does not however apply to a defence of want of jurisdiction in the arbitrator which results in total or partial voidness of the award and the complaining party may in such cases wait for the application to enforce the award and then raise the objection: Mustill & Boyd *Commercial Arbitration*, 2ed 554. In this regard at least English practice accords with our own. Whatever the reason for the rule (which seems from the first-cited authority to be derived from the ancient jurisdictional distinctions between the courts of equity and the common law courts), there has never been such a limitation in South African practice; cf Butler and Finsen *loc cit*. Thus mere objection to an application to have an award made an order of court was successful without an application to set the award aside where notice of the arbitration hearing had not been given to a party in

Newman v Booty NO supra and *Sapiero and Another v Lipschitz and Others supra*; cf *Body Corporate Houghton Villas v Got Construction (Pty) Ltd* 2002 (1) SA 760 (W).

[18] The Court *a quo* was thus correct in refusing the application to have the award made an order of court.

[19] Counsel for the respondent has conceded that his attorney erred in not accepting a proposal by the appellant's attorney which would have had the effect of reducing the appeal record to some twenty pages instead of the three volumes of which it eventually consisted. This lack of reasonableness warrants an appropriate costs order.

[20] The following order is made:

> The appeal is dismissed with costs save that the respondent is ordered to pay the costs of preparing the record on appeal and is not entitled to recover from the appellant any costs in connection with such record.

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J A HEHER
JUDGE OF APPEAL

Concur:
STREICHER JA
FARLAM JA
CONRADIE JA
VAN HEERDEN JA