CASE NOTE

To arbitrate or not?

Levy recoveries in the wake of Greenacres

Tertius Maree

The recent judgment by the Supreme Court of Appeal in the matter of *Body Corporate of Greenacres v Greenacres Unit 17CC*, 2008 (3) SA 167 (SCA)* has answered some questions about the interpretation of the wording of the Standard Management Rule (SMR) 71, which has been the subject of debate since its promulgation in 1997.

But, in doing so, the court has raised a number of new issues. The decision should be seen against the background of the advantages and disadvantages of arbitration in general, the historic interpretation of SMR 71(1), and the nature of levy recoveries in particular.

Arbitration, as opposed to litigation in court, offers the advantages of speedy resolution, simplified procedures, a possible (but not inevitable) costs advantage, selected expertise in respect of the presiding officer and finality.

The other side of the coin is the privacy of awards, which are not published and have no precedent value (and therefore do not contribute towards the development of sectional title law), the absence of execution procedures, the denial of a right to appeal, the possibility of higher costs and perhaps the lack of availability of suitable arbitrators.

Of the above, and from a global perspective, the most serious shortcoming of arbitration is its private nature.

SMR 71(1) makes arbitration compulsory for all disputes in the sectional title arena, except

> 'where an interdict or any form of urgent or other relief may be required or obtained from a court having jurisdiction'.

A strict interpretation of the above leads to a conclusion that no disputes are arbitrable, because of the fact that 'or other relief' includes every conceivable dispute between parties. Clearly this would not be a sensible way to interpret the rule and an opinion was expressed by Prof David Butler in the *Stellenbosch Law Review* 1998, vol 9, at 256, that the provision should not be interpreted to exclude all 'other relief' from arbitration, but to exclude all other relief of an urgent nature. This view has been generally accepted in practice and was quoted in the unreported judgment by Cleaver J, *Baumoral Heights No 39 BK v Baumoral Heights Body Corporate*, (C) (unreported case 698/2001 4-13-2002).

Accordingly, pre-*Greenacres*, the following matters were regarded as not being arbitrable in cases:

- Where no dispute exists.
- Where an interdict is required.
- Where a matter is of urgent or interlocutory nature.
- Where the Sectional Titles Act 95 of 1986, specifically prescribes court relief, which were regarded to be the following;
  - s 1(3A) – sanctioning a unanimous resolution;
  - s 37(2) – recovery of arrear levies,
  - s 41 – appointment of a curator;
  - s 44(2) – consent to use a section for another purpose;
  - s 46 – appointment of an administrator; and
  - s 48 – destruction of buildings.

In terms of s 37(2) levies

> 'may be recovered by the body corporate by action in any court (including a magistrates' court of competent jurisdiction)...'

Apart from s 37(2) at least one other instance can also be seen as a matter involving a dispute, namely an application in terms of s 44(2) for a court order allowing an owner to use a section for a different purpose.

In the *Greenacres* case the SCA revisited the unfortunate wording of SMR 71(1) and, deviating from the Butler approach, came to a conclusion that the words

> 'or other relief may be required or obtained from a Court'

should be interpreted narrowly as excluding only such relief as an arbitrator is not competent to give, whether by virtue of the provisions of the Act or otherwise.

Excluded from arbitration would accordingly be cases where other relief *has to be* obtained from a court. The SCA proceeded to give two examples from the Act where this would be the case, namely ss 46 and 48. The court felt that s 37(2) should be distinguished from such examples, because of the existence of a dispute.

The court's interpretation of s 37(2) in effect tells us that, where the legislator speaks of 'by action in any court', it means that any action except one in which a dispute is involved. As soon as a dispute is established, the matter has to be referred to arbitration. This would for practical purposes exclude all defended matters, leaving only undefended matters for adjudication by the courts. Should this intention be ascribed to the legislature, or is it more likely that the intended reference to 'action in any court' was to an action, whether defended or not, pursued to its conclusion?

If it is considered that s 37(2) existed from 1988, before SMR 71 was promulgated in 1997, it is clear that the legislature's intention must (at least initially) have been that disputes regarding levies were to be settled by court action, as no alternative was then available. The *Greenacres* decision therefore amounts to a finding that, on promulgation of SMR 71, the legislature's intention changed and that disputed levy recoveries were no longer to be pursued in the courts, but through arbitration.

At this point it must be said that the SCA was somewhat ambivalent regarding the question whether arbitration is obligatory in the case of disputed levy recoveries, or merely an option. The following is stated in a footnote:

> 'It is not necessary to consider the position where no demand for arbitration is made by the owner. It may be that the court action would continue, as in the case of a consensual arbitration; or it may be that a body corporate is obliged to proceed to arbitration under rule 71 because legislation requires such a dispute to be resolved by arbitration. If the latter is the position, a court could raise the point *mero motu*.'

In view of the fact that, in terms of the conclusions reached in the *Greenacres* judgment, a demand for arbitration during litigation should always succeed to the exclusion of the jurisdiction of the court and even in the absence of agreement between the parties, one has to conclude that arbitration is compulsory and that a court should therefore, whenever a dispute becomes apparent, require that the dispute be further dealt with by arbitration.

This interpretation of the SCA's finding is strengthened by the fact that SMR 71 conceives of only two categories, namely matters which are not arbitrable, and matters for which arbitration is obligatory.

Whatever criticism may be levelled at the

*See also 2008 (March) *DR* 38 – *Editor.*

Greenacres decision, it is now law and can be changed only by legislation (or by individual rule amendments). It must therefore be considered how the decision will be applied in practice. In this regard a number of questions arise:

• Does the *Greenacres* decision mean that an application to use a section for a different purpose (which usually involves a dispute) in terms of s 44(2) should now also be referred to arbitration despite the specific words of the statutory provision?

• Which procedures apply in an action for recovery of arrear levies, and how is a matter where a dispute has become evident to be dealt with? Are the parties then compelled to pursue a resolution by arbitration, or may the court action be proceeded with?

As stated above, it is likely that arbitration is compulsory under such circumstances.

• In the event of arbitration coming into play, how is the court action to be dealt with?

In *Greenacres* the court suggested that proceedings in, for example, a magistrate's court, be stayed pending arbitration. This implies that the matter may, subsequent to arbitration, be resumed, presumably for an order to be made. As explained below, this may not be possible.

• How may execution of an arbitral award be obtained?

If the action is stayed, it may presumably later be concluded with a judgment, followed by normal execution procedures in the relevant court. But the vast majority of levy recovery actions are initiated in a magistrate's court and in terms of SMR 71(7) an arbitral award may be made an order only of the High Court. This excludes the jurisdiction of a magistrate's court and would mean that a typical pattern for a disputed levy recovery action could be

– summons in the magistrate's court;

– exchange of pleadings up to a special plea, (or even trial, if no special plea is raised and a magistrate is then compelled to refer the dispute to arbitration);

– hearing of arguments on the special plea;

– stay of action;

– initiation of arbitration proceedings and the exchange of such pleadings as may be required by the arbitrator;

– on an arbitral award being made, an application to the High Court in order to have the award made an order of court; and

– if appropriate, reverting to the magistrate's court for execution procedures.

The above scenario may not be exactly what is now happening in practice, but the effects of the *Greenacres* decision have not yet been properly digested and it may well become clear that legislative amendments are necessary, either to accommodate the decision, or to countermand it.

When the long-awaited ombud legislation is passed, probably in 2009, the above scenario may change completely. This legislation, applicable to sectional title and other high-density housing schemes, will replace compulsory arbitration as the prescribed dispute resolution mechanism. Hopefully such legislation will avoid the unsettled issues arising from the *Greenacres* decision.

Tertius Maree *BA LLB (University of Stellenbosch)* is an attorney at Tertius Maree & Associates Inc in Stellenbosch.

❑

De Rebus/LexisNexis
BURSARY

For Postgraduate Study

De Rebus and LexisNexis are offering two bursaries each to the value of R40 000 for postgraduate legal study by attorneys. Funded by LexisNexis as part of its contribution towards the development and transformation of the legal profession, the two bursaries will be awarded to practising attorneys from a previously disadvantaged background, for postgraduate studies at South African universities of their choice.

Apply online at **www.lexisnexis.co.za/lawbursary** or call Natanya on 031 268 3243

Closing date for Applications: 17 October 2008

KNOWLEDGE-BASED SOLUTIONS
Research Solutions Compliance & Training Risk Management Practice Management

LexisNexis