

REPUBLIC OF SOUTH AFRICA



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

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED.

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Name: FARBER AJ

Date: 13 October 2023

CASE NUMBER: 19883/2002

In the matter between:

MMATLOU HELLEN PHALENG-PODILE

APPLICANT

And

COMPEG SERVICES (PTY) LTD

FIRST RESPONDENT

PHIL MELTON N.O.

SECOND RESPONDENT

AMIT DAYA N.O.

THIRD RESPONDENT

PAUL HUNTER N.O.

FOURTH RESPONDENT

PALESA SUPING N.O.

FIFTH RESPONDENT

CHARLENE KALUMBI N.O.

SIXTH RESPONDENT

AMBIANCE BODY CORPORATE

SEVENTH RESPONDENT

EAS COST CONTROL (PTY) LTD

EIGHTH RESPONDENT

JUDGMENT

FARBER AJ:

[1] The Applicant is the sectional title owner of a unit in the Ambiance Sectional Title Scheme situate at 24 Campbell Road, Craigavon, Sandton.

[2] On 6 June 2022 the Applicant instituted motion proceedings against the managing agent of the complex (the First Respondent), and the trustees of its body corporate (the Second to Sixth Respondents). Subsequently the Applicant joined the body corporate and an entity named Eas Cost Control Pty Ltd as the Seventh and Eighth Respondents respectively.

[3] Nine substantive prayers were framed by the Applicant in the notice of motion. They may conveniently be divided into the following categories:

- the setting aside of the resolution adopted by the body corporate at a special general meeting held on 15 March 2022, which resolution

provided for the appointment of the Eighth Respondent as a service provider (prayer 1);

- the substitution of that resolution with a resolution to the effect that because the 75% majority vote required to make the appointment of the Eighth Respondent as a service provider was not achieved, such appointment was not made (prayer 3);
- the affording to the members of the body corporate the right to participate with the trustees in the selection process for the appointment of a service provider to provide and install a pre-paid water and electricity metering infrastructure at the complex, whereafter a special general meeting of the body corporate was to convened by the trustees for the purpose of affecting that appointment, at which meeting three to four service providers selected by the trustees in collaboration with members of the body corporate were to make representations of their respective pre-paid metering products, services and pricing options (prayers 4, 5 and 6);
- the grant by the trustees to members of the body corporate of permission to remain on a post-paid water and electricity arrangement, which permission was not to extend to those members who were in regular default of the payment of levies (prayer 7);
- the unreasonable withholding by the trustees of their consent in circumstances where members of the body corporate wished to install solar panels on the units occupied by them (prayer 8);

- the unreasonable withholding by the trustees of bank statements from interested members of the body corporate who wished to look into the financial standing of the scheme (prayer 9).

THE SETTING ASIDE OF THE RESOLUTION ADOPTED BY THE BODY CORPORATE AT THE SPECIAL GENERAL MEETING HELD ON 15 MARCH 2022

[4] The Applicant on this leg of the case sought to review and set aside the Resolution in question on the basis of section 6(2) of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). It has since abandoned reliance thereon and it now seeks to assail the resolution on the basis of the common law grounds of review.

[5] The Applicants case is set out in paragraphs 25 to 33 of her founding affidavit thus: -

“25. On 15 March 2022, a further SGM of Ambiance Body Corporate took place via Zoom platform that was duly recorded by the first respondent as the host. The agenda of the said SGM being to approve a special resolution for a suitable prepaid metering contractor to install prepaid metering devices to devices to measure water and electricity consumption. A copy of the said agenda and SGM minutes dated 15 March 2022 are attached as annexure “MPH4” and “MPH5” respectively.

26. During the SGM of 15 March 2022, only one service provider, EAS Cost Control (Pty) Ltd (“EAS Cost”), who was independently selected by the second to sixth respondents to the exclusion of

members participation prior to the SGM, was also invited to conduct presentation of its services for prepaid metering products, to members of the BC who were in attendance.

27. *Following the said presentation, few unitholders including myself, raised valid and material concerns regarding the selection of only one service provider by the second to sixth respondents, and further invitation to the SGM to make presentation to unitholders, to the exclusion of its competitors who offer a similar service in the market.*

28. *Upon these concerns being raised, the first respondent's representative and former Portfolio Manager for Ambiance, Mr. Guy Little ("Mr. Little") and the second and third respondents, vehemently insisted that unitholders, despite valid concerns raised on the process, proceed to cast votes on the appointment of the service provider, and thereby disregarding unitholders' valid and essential concerns.*

29. *The outcome of the percentage of votes pronounced by Mr. Little was approximately 74%, which he succinctly and crisply confirmed to be lower than the required 75%.*

30. *Mr. Little further confirmed that there was no compliance with 75% requirement in terms of Prescribed Management Rule 29(4) of the Rules Prescribed in terms of section 10(2)(a) of the Sectional Titles Schemes Management Act, 08 of 2011 ("the Management*

Act”), read together with the definition of a special resolution set out in section 1(1) of the Management act.

31. *The non-compliance with the 75% requirement, measured in number and in value for a special resolution to succeed was clearly confirmed, and the effect thereof being that EAS Cost could not be appointed as a contractor to carry out the envisioned work for the BC.*

32. *Following pronouncement of the voting results, one unitholder, after few minutes, abruptly expressed her wish to alter her initial vote, from a “no” to a “yes” to the contracting of the service provider, purporting to have lacked understanding of what she was voting for, and further purporting to be a new owner. The said concern and purported lack of understanding was never raised prior to casting of her vote, nor prior to the pronouncement of the voting results.*

33. *Mr. Little then proceeded to re-open the voting process in pursuit to allow an absurd subsequent change of vote to take place, which culminated into “the purported passing of a special resolution” for the appointment of EAS Cost as contractor for the BC. The said act of reopening the voting process following pronouncement of the results amounted to a pure administrative irregularity.”*

[6] The version of the trustees differs fundamentally. Their answering affidavit was deposed to by the Fourth Respondent who in paragraphs 62 to 67 said the following: -

“62. *The meeting was held virtually via “zoom”. As the meeting was held virtually, the only method available for the counting of votes was for the body corporate to go through each unit individually. This began with unit number one, then two, then three et cetera. As each unit’s number was called, the were requested to either vote in favor, against, or abstain concerning the approval for the installation of prepaid water and electricity meters. Unit 5, 12 and unit 15 were not allowed to vote as they were in arrears with their levies for which legal action had been pending.*

63. *Unit 13 was a new owner to the complex. When the unit number was called, she voted to abstain on the basis of being relatively new.*

64. *Once the voting was complete, they were accordingly tallied. At this stage the required percentage for a special resolution was not met. However, a dispute arose as to the method of counting and calculation, that was, whether there was one vote per unit based on a unit participation quota. The chairman recounted the vote and declared that the required threshold for a special resolution was indeed met. At this time unit 13 interjected and requested that her vote be changed from “abstention” to voting in favour for the installation of water and electricity prepaid meters. Her*

reasoning for doing this was disclosed that she was persuaded it was the best thing for the complex after hearing the various owners comments. The chairman of the meeting had not closed the vote and accordingly allowed unit 13 to amend her vote. Thereafter, the chairman proceeded to deal with the remaining units.

65. *It is specifically denied that the chairman declared the voting closed and thereafter reopened the votes to allow unit 13 to change her vote. It is submitted that the version of the respondent's should be preferred. It is submitted that a material dispute of fact exists which cannot be resolved in the papers. It will then be submitted that this matter needs to be referred to oral evidence.*

66. *The content of this paragraph is denied. The same contention was delivered by the Applicant to the First Respondent on 17 March 2022. In reply to this demand, it was explicitly noted that the resolution would still have carried despite the Applicant's contention. The effect of this cannot be understated. As a result, the argument by the Applicant is, with respect, only academic. For ease of reference, I quote the relevant response delivered on 23 March 2022 by the first Respondent:*

"Good day

With regards to the contents of your letter dated 17 March 2022, which we shall not deal with at length, we reply as follows;

- 1. The special resolution was to agree in principle to install per-paid meters and not to appoint that specific contractor. This was clearly explained.*

- 2. The vote had not been finalized and the other owner decided to change their vote prior to the count and result being announced. The only objection to this was yours, all the other owners present, by their silence, accepted the same.*

- 3. Please note that the vote is recorded as follows:*
 - a. Yes Vote: 93.75% on 16 voters with 1 no and 1 abstention*

 - b. Percentage of Yes P.Q. 95%*

- 4. If the vote that you are unhappy about is removed or regarded as abstention then the result is as follows:*
 - a. Percentage Yes Vote if we disregard 13 that crossed the floor: 83%*

 - b. Percentage P.Q. if we disregard 13 that crossed 89%*

5. *In short, the vote is successful whether that single vote is added or disregarded. We trust that you/your client will now abide the decision of the majority of the members of the Body corporate. The attached set of minutes for the Special General Meeting, held on 15 March 2022, refer.*

Sincerely

Guy Little”

67. *Once the members adopted the resolutions, it became an unequivocal mandate to the trustees to ensure that the will of its members was complied with.”*

[7] The Applicant seeks relief by way of notice of motion. I must accordingly approach the matter on the basis of the trustees’ version, unless I am able to reject it on the basis that it has not been *bona fide* raised or is otherwise frivolous. There is no cognisable basis for me to do so.

[8] The following emerges from the trustees’ version:

- After the unit holders present had voted, a view was expressed that the requisite threshold for the adoption of the resolution had not been achieved.
- A dispute arose in relation to how the votes needed to be tallied, more especially whether it was to be based on each unit having a

single vote or on the participation quotas which attached to each one of them.

- After a discussion in relation thereto, the chairman of the meeting again tallied the votes which had been cast and declared that the required threshold for the adoption of the special resolution had been satisfied.
- At this point the owner of unit thirteen, who had initially abstained from voting, interjected and requested that her vote be changed as she now wished to support the adoption of the resolution.
- The chairman of the meeting permitted her to do so.
- At the time of doing so the voting had not closed and the resolution had not been formally adopted.
- The voting threshold of 75% of the unit holders present at the meeting had been satisfied, both when the owner of unit thirteen had abstained from voting and when she had sought permission to cast a vote in support of the adoption of the resolution.

[9] Based on these facts it cannot be said that the adoption of the resolution appointing the Eighth Respondent as the body corporate's service provider for the provision and installation of a pre-paid water and electricity metering infrastructure was tainted by irregularity. The change of stance adopted by the owner of unit thirteen held no prejudice for the Applicant. The requisite majority for the adoption of the resolution would have been attained irrespective of the manner in which she exercised her vote.

[10] The Applicant has wisely eschewed her original reliance on section 6(2) of PAJA such reliance was entirely misplaced. The adoption of the resolution of 15 March 2022 did not constitute administrative action within the meaning of PAJA (see *Legacy Body Corporate v BAE Estates and Escapes* [2022] 1 ALL SA 138 (SCA)).

[11] The Applicant belatedly sought to assail the propriety of the resolution on the basis that it fell to be set aside under common law. The grounds of review under common law have a more restricted ambit than those provided for under PAJA. The position was formulated in BAE's case *supra* thus: -
"I turn now to consider the grounds on which a decision of a private body can be subjected to judicial review at common law. This would be the case where a decision-maker failed to comply with the elementary principles of justice, such as, for example, where the tribunal misconceives the nature and ambit of its powers, or where it acts capriciously or mala fide, or where its findings in the circumstances are so unfair that they cannot be explained unless it is presumed that the tribunal acted capriciously or with mala fides."

[12] It is of course true that meetings of juristic persons such as body corporates may be set aside by the Court in circumstances where it has been tainted by a material irregularity. The grounds which would permit thereof are varied and may, by way of examples, arise where notice of the meeting has not been furnished, those in attendance have not been permitted to speak, or the votes have not been properly tallied. There are other examples. I am however not satisfied that sufficient facts which would warrant the setting aside of the resolution in issue have been advanced by the Applicant.

[13] In short, the essence of the Applicant's case is that the chairman of the meeting after the close of voting improperly reopened it so as to enable the threshold necessary for the adoption of the resolution to be attained. The case thus stated is in sharp issue and as previously indicated I must determine the matter on the trustees' version. It is perhaps well that I mention that the Applicant did not seek the referral of the matter to either evidence or trial.

THE SUBSTITUTE RESOLUTION

[14] In essence the Applicant asks the Court to substitute the resolution adopted by the body corporate on 15 March 2022 with a resolution to the effect that that the threshold necessary to carry the appointment of the Eighth Respondent as a service provider to the body corporate was not satisfied.

[15] Given my finding that there is no warrant for interfering with the adopted resolution, this relief cannot be sustained.

PARTICIPATION OF MEMBERS OF THE BODY CORPORATE WITH THE TRUSTEES IN THE SELECTION OF SERVICE PROVIDERS

[16] Body corporates and trustees under the relevant statutory regime have well defined functions. The trustees are essentially responsible for the management of the body corporate, which management is subject to oversight and control by members of the body corporate. The members cannot usurp for themselves managerial functions or the right to participate

therein. The managerial functions are to be performed by the trustees and should members of the body corporate be dissatisfied with the exercise thereof they have available to them appropriate remedies to redress the situation.

[17] There is no basis for the relief sought.

THE TRUSTEES ARE TO PERMIT MEMBERS OF THE BODY CORPORATE TO REMAIN ON A POST-PAID WATER AND ELECTRICITY ARRANGEMENT

[18] The relief under this head was abandoned by the Applicant during the course of the hearing, wisely so, for in my view this a decision for the trustees and not the Court.

THE TRUSTEES ARE NOT TO UNREASONABLY WITHOLD COSENT FOR THE INSTALLATION OF SOLAR PANELS

[19] This is a decision for the trustees and not the Court.

THE WITHOLDING OF BANK STATEMENTS

[20] The Applicant has advanced no facts which suggest that the trustees, if asked by a member to produce bank statements, would decline to do so. The question is entirely academic and absent any substratum of fact which proclaims the need for the grant of the relief sought, I cannot accede thereto.

THE SUPPLEMENTARY AFFIDAVIT

[21] The Applicant seeks leave to file a supplementary affidavit so as to establish that as at 15 March 2022 the Eighth Respondent had adopted a resolution to place itself in voluntary winding up. This fact is said to be material for if the Respondent was then being wound up the adoption of the resolution of 15 March 2022 would be tainted by irregularity and would thus fall to be set aside. It was in this regard suggested that by virtue of the adoption of the resolution for its voluntary winding up, the directors of the Eighth Respondent could no longer act on its behalf. This is as a matter of law incorrect for it is notionally possible for a liquidator to authorise the directors of a company to continue with its business. The factual matter raised in the supplementary affidavit is scant and it takes the matter no further. In the exercise of my discretion I thus decline to admit such matter into evidence.

CONCLUSION

[22] The application falls to be dismissed with costs and it is so ordered.

G Farber

ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 11 October 2023

Date of Judgment: 13 October 2023

APPEARANCES

For the Applicant:

Adv. CM Shongwe

Instructed by:

Phaleng Podile Attorneys

For the 1st to 6th Respondents:

Adv. WC Carstens

Instructed by:

Barnard Attorneys

7th Respondent

Ambiance Body Corporate

8th Respondent

Eas Cost Control (Pty) Ltd