IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER 68052/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

26/4/2018
DATE SIGNATURE

In the matter between:

TSHEGOFATSO MALATJA	1ST APPLICANT
ELIKANA DZHIVHUWO	2ND APPLICANT
MAHALI LEMPE	3RD APPLICANT
MONGEZI NONKOMO	4TH APPLICANT
MASEMOLA GODFREY	5TH APPLICANT
CHARMAINE MABENA	6TH APPLICANT
CATHREEN PILANE	7TH APPLICANT
TRACEY TEMBO	8TH APPLICANT
LOTI TEMBO	9TH APPLICANT
JOHANNES PHALADI	10TH APPLICANT
MMAKGOMO UOANE	11TH APPLICANT
MOEPONG MATLALA	12TH APPLICANT
MAHLODI MOFFAT	13TH APPLICANT
HOMSA MOKOENA	14TH APPLICANT
TEBOGO MAHLAHLANE	15TH APPLICANT
HELLEN MAMABOLO	16TH APPLICANT
BOITUMELO MOIMA	17TH APPLICANT
NICHOLAS TSHIVHASE	18TH APPLICANT
KELE MMOPE	19TH APPLICANT
LOVEDALIAHMKHABELE	20TH APPLICANT
KHUTSISO DEBEILA	21ST APPLICANT
MMASELEMA MOAKAMEDI	22ND APPLICANT
RAYMOND DITSI	23RD APPLICANT
TEBEGO MAKHAFOLA	24TH APPLICANT
MHLABUHLANGENE BUTHULEZI	25TH APPLICANT

NTHABESENG MATSOBANE	26TH APPLICANT
BALOYI BUNGI	27TH APPLICANT
MAKGAMATHA MARY	28TH APPLICANT
SAMULE MASHILE	29TH APPLICANT
DANIEL MORUKA	30TH APPLICANT
ANDREW MALEMA	31ST APPLICANT
LESEGO SERWADI	32ND APPLICANT
JAMES CHAUKE	33RD APPLICANT
TSHEPO MAROTOBOLO	34TH APPLICANT
LEFUNO MEKHUMBE	35TH APPLICANT
TSHOLOFELO MOSUWE	36TH APPLICANT
ESTHER MOLUBI	37TH APPLICANT
NKAONE MADUMISE	38TH APPLICANT
MARTHA MORUKA	39TH APPLICANT
MDUDUZI MSIBI	40TH APPLICANT

and

HEATHERVIEW EXTENTION 24 HOME OWNERS ASSOCIATION (NPC)	1ST RESPONDENT
FLAMING SILVER TRADING 140 (PTY) LTD	2nd RESPONDENT
CHRISTOPHER RILEY	3RD RESPONDENT
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	4TH RESPONDENT

JUDGMENT

TLHAPI J

INTRODUCTION

[1] The launch of this application was preceded by the filing of a complaint with the Companies Tribunal. The respondents opposed the matter. The complaint before the Tribunal was not adjudicated upon, the applicants having been advised that the fourth respondent could not assist. This application was consequently launched and the applicants are seeking more or less the same relief sought before the Tribunal.

[2] In this is an application the following orders are sought:

"1. That the development period as provided for in the Memorandum of Incorporation (Articles of Association) of the first respondent is hereby declared to be over and completed;

2. That the first respondent be directed to amend its Memorandum of Incorporation to remove any distinction between the second respondent, on the one hand, and any other member of the first respondent, on the other;

3. That the first respondent be ordered to convene a meeting, in terms of the provisions of section 61(12) read with the provisions of section 61(3) of the Companies Act, 71 of 2008, to be held within 30 (thirty) days of this order, at which meeting the issues listed in Annexure "X" are to be on the agenda;

4. That the Law Society of the Northern Provinces be directed and ordered to appoint an independent person to chair the above mentioned meeting;

5. That the second respondent and third respondent, jointly and severally, alternatively the first and the second respondent, jointly and severally alternatively the first respondent be ordered to pay the costs of the applicants to be taxed on a scale as between attorney and client;

[3] This application is opposed by the first, second and third respondents only and they shall be referred to as the respondents, excluding the fourth respondent.

BACKGROUND

[4] The first respondent is a Non- Profit Company and a residential development,

developed by the second respondent. The applicants by virtue of being registered owners in the development are members and shareholders in the first respondent and, the third respondent is the sole shareholder and director of the second respondent. There are 107 erven in the development and one, Erf 636 was owned by the second respondent. Erf 636 was rezoned during 2008, plans were submitted to the relevant authorities during 2014 and approval was granted to the second respondent to develop the said Erf 636 into a sectional title scheme in 2015.

[5] The founding affidavit was deposed to by the first applicant Ms Malatja. It is averred that the applicants are suffering from oppressive and prejudicial conduct at the hands of the second and third respondents and the applicants rely for relief on sections 161 and 163 of the Companies Act 71 of 2008 ('the Act').

[6] Ms Malatja averred that the Memoraundum of Incorporation ('the MOI')) contained clauses which were, unreasonable and draconian and which were used to oppress some of the members of the first respondent and these were found in (i) the developer being the one to determine when the development shall be completed; (ii) the nomination by the developer of seven members who need not be members of erven in the township; (iii) the rights, privileges and discretions available to directors of the first respondent with regard to rules and levies in light of the composition of the board of directors; (iv) during the development period that the quorum at a general meeting would be twenty of members eleven of whom are nominated by the developer; (v) during the development period the second respondent shall have thirty votes in addition to any votes which the second respondent might have as owner of a property in the first respondent; (vi) the first respondent shall have not less than three and not more than twelve directors during the development period, of whom two thirds of the number of directors shall be appointed by the second respondent on notice in writing to the Association; (vii) A director of the first respondent need not be a member of the first respondent;

[7] Furthermore, Ms Malatja averred that the first and second respondent had concluded an illegal lease agreement. The first respondent leased Erf 636 from the second respondent

and the said lease was varied by the third respondent as he wished. The applicants had objected to the lease on various grounds. One being the payment of rent by the first respondent to the second respondent for use of the erf as a point of entry and a construction site and the second being the refusal to provide a copy of the lease agreement to the members. The applicants contend that there was no purpose in further extending the development period because Erf 636 had easy access to the Willem Kruywagen Avenue, and it was therefore possible to finalize the development.

[8] Another concern was that the annual general meetings had become unruly as reflected in some minutes attached to the founding affidavit. On certain occasions the applicants were excluded from such meetings, and concerns raised were not addressed such as those demanded by the members during November 2015. Some members excused themselves from meetings due to unhappiness and a general meeting of 2015 was adjourned indefinitely. None of the applicants received notification of the first respondent's shareholder meeting of 7 December 2015 and no attendance register was annexed to the minutes thereof. The respondents failed to comply with giving proper notification as provided for in the MOI. As a result of the adjournment of the meeting in December 2015 notification was given in January that the levies would remain the same at R819.00 per month.

[9] An independent chairperson was called for in order to enable the members to address their concerns at a general meeting. These concerns related to monies the first respondent paid to the second respondent during the financial years 2012-2013; 2013-2014 and 2014-2015 and 2015-2016; the contraventions by the third respondent of section 75(4) and (5) of the Companies Act; the levies of the Home Owners Association and discrepancies in the financial statements. On 8 June 2016 as per annexure 'H' a shareholders meeting was demanded (i) to resolve that the annual general meeting (AGM) be held within the estate and over weekends; (ii) to resolve to amend the MOI to remove the distinction between first respondent and the second respondent (iii) to resolve that the development period had come to an end. Annexure X called for a meeting with all directors preceding the annual general meeting to determine the resolutions to be taken at the AGM and to decide on a chairperson for the meeting and this was supported by more than 10% of members with

voting rights. It was contended that the last two general meetings as depicted in annexures C and D to the founding affidavit had ended in disarray.

[10] The answering affidavit was deposed to by Gerhard Vosloo the managing member of JRL Property Management CC, the manager of the first respondent. Firstly, the first, second and third respondents raised the issue of the confirmatory affidavits which predate the launch of the application and contended that the said affidavits were false. Secondly, it contended that the founding affidavit contained limited factual averments as the affidavit was a repeat of the complaint initially lodged before the Tribunal. Thirdly that in this matter the third respondent confirmed the correctness of his affidavit filed with the Tribunal which was annexed as annexure 'C', that the contents thereof be part of the answering affidavit. Annexure C was deposed to by the third respondent herein. The respondents contended that applicants in their founding affidavit selectively dealt with facts stated in annexure C, as a result disputes of fact have arisen.

[11] The respondents deny that the applicants are entitled to the relief sought and contend that no facts have been advanced to prove that they have complied with the prerequisites for the relief claimed in terms of section 163 of the Act. Furthermore, that section 161(1) of the Act was not applicable and, that applicants have failed to make out a case as to what rights need to be determined or which have been endangered. Factual disputes had arisen in this regard.

[12] The applicants were aware as stated in annexure C before launching the application, that the development would be completed once the second respondent's property was fully developed. The first block of sectional titles has been developed and transferred to owners and the second block which was under construction had not been completed. Not only that property, but a substantial portion of the township is yet to be developed and this was the position as stated before the Tribunal.

It was hoped that the development would be completed within 12 to 18 months of the signing of annexure C and depending on the needs of the Home Owners Association.

[13] In addressing the alleged illegal lease agreement (conflict of interest in annexure C) the respondents explained that Erf 636 could not be developed as intended as it was used as an entry point for construction trucks and a builder's yard. A valid agreement was entered into during 2009 when there were three directors in the company, to pay a *quid pro quo* in the form of rent to the developing company. The Act provided for the conclusion of contracts of that nature. In the interests of the Home Owners Association it was decided not to enforce the lease agreement and it was only implemented in 2012. As a concession to the home owners association it was agreed to reduce the amount of rent to R10, 000.00. The lease agreement terminated on the date that development on the second respondent's property commenced during May 2016.

[14] There were accusations of an unjust enrichment which had not merit. These emanated from an erstwhile director of the company, one Mr Rabonda who sought to invalidate the lease agreement on grounds that the third respondent had an interest in the developing company and because he did not recuse himself when the agreement was concluded. It was contended that there would still have been a majority of directors who agreed to the lease agreement even where such recusal had taken place.

[15] The respondent's deny the complaints relating to the annual general meetings. It was contended in annexure C that not all members contested the minutes of the meetings and many had approved them when tabled. Messrs Malatja and Rabonda were the authors of the complaint and they may have persuaded the rest of the applicants in this application. The same applied in respect of the minutes of the of the meeting of 18 June 2013. The applicants had failed to deal in detail with the complaints.

[16] The respondents deny that members were excluded from meetings. It was only those members entitled to vote, being registered owners or joint owners who enjoyed one vote and all being up to date with all monies owed by them to the first respondent. A list of owners who attended the annual general meeting on 30 November 2015 was annexed as 'G'. The said meeting was allegedly disrupted by the applicants and the meeting had to be abandoned for a lack of quorum. At a next annual general meeting of 7 December 2015

many of the applicants were present even those who did not qualify to vote due to their indebtedness to the first respondent. The minutes being annexures C and D to the founding affidavit give indication of what transpired. The general meetings were chaired by third parties Adv Strydom and Attorney Loock. Annexure C indicates that the deponent to the founding affidavit was the cause of the disruption.

[17] In reply the applicants contended that there were logistical problems in consulting, drafting and finalizing the founding affidavit and, that failure to obtain fresh confirmatory affidavits was an oversight, therefore the confirmatory affidavits to the founding affidavit would be filed with this affidavit. Again, that proceedings in terms of section 161 of the Act could only be instituted in motion proceedings. It was also denied that there were disputes of fact present.

THE LAW

The lack of confirmatory affidavits by the second to the fortieth applicants

[18] It was submitted for the respondent that where a certain percentage of members was a prerequisite for seeking relief, the first applicant on his own did not qualify. It was contended that the applicant sought to mislead the court by attaching confirmatory affidavits which predated the founding affidavit. This pertains to the first applicant standing alone in this application as a result of the lack of confirmatory affidavits of the rest of the applicants to the founding affidavit. It is my view that it is possible for a sole member to suffer oppression and that his / her complaint could be dealt with if proved to the satisfaction of the court.

[19] Confirmatory affidavits are commonly used in motion proceedings where there is more than one applicant or respondent. Depending on the circumstances they confirm the contents of the founding or answering or replying affidavit in as far as it related to the deponent concerned. It is common cause that in this matter the confirmatory affidavits of the second to the fortieth applicants predated the founding affidavit by four months in that they were signed in April of 2016 and the founding affidavit in August of 2016.

[20] The application was launched by the applicants as a group. The confirmatory affidavits in light of their complaints served as founding affidavits of the second to the fortieth applicant. The April 2016 confirmatory affidavits read:

> " the contents of this affidavit fall within my personal knowledge, unless the contrary is indicated, and are to the best of my knowledge and belief both true and correct."

The November 2016 confirmatory affidavits annexed to the replying affidavit read:

> "Paragraph 2
> I have read a version of the founding affidavit which is, for the most part similar to the final founding affidavit herein, during April 2016 and confirmed the contents thereof.
> Paragraph 3
> I have subsequent thereto, read the founding affidavit by the first applicant which was deposed to and filed in this Honourable Court and herewith confirm the contents thereof in as far as they relate to me.
> Paragraph 4
> I have further read the replying affidavit by the first applicant and in as far as it relates to me confirm the contents thereof as true and correct in as far as it concerns me."

[21] In my view four months is a lengthy period. The explanation given in reply in an attempt to rectify the irregularity is not satisfactory. The replying affidavit and subsequent confirmatory affidavits indicate that the April 2016 founding affidavit was amended, though it is alleged that it was for the most part similar to the final August 2016 founding affidavit. No further explanation is given except for what is contained in reply, that there were logistical problems and that the first affidavit was amended and revised. No attempt was made to seek leave to file an explanatory affidavit in order to give the respondents an opportunity to reply. The applicants conduct is tantamount to them as affected members making out their individual cases in reply. It was trite that an applicant is expected to make out its case in the founding affidavit and not in reply, *Director of Hospital Services v Mistry* 1979 (1) SA 626(A) , unless there exists special circumstances for the admission of such affidavits, *Poseidon*

Ships Agencies Pty Ltd v African Coaling and Exporting Co.(Durban) Pty Ltd 1980 (1) SA 313 (DLD). In my view the November 2016 confirmatory affidavits in as far as the content relates to the founding affidavit should be rejected.

Relief sought in terms of the Act

[22] The applicants initially referred the matter to the Companies Tribunal in terms of section 166 of the Act. This referral was abandoned and the explanation proffered by the applicants was that they were advised that the Tribunal would not assist to resolve their concerns. Section 166 provides for alternative dispute resolution processes in the form of conciliation, mediation and arbitration. It is a process that could have been utilized to resolve the disputes arising in this matter and in my view it offers a much more cheaper and speedy resolution to the problems. There is therefore no good reason why that process was abandoned.

[23] In this application the applicants rely on section 161 alternatively and 163 of the Act. Section 161 affords protection to the applicants of their rights and a determination of such rights in terms of the Memorandum of Incorporation or the Act, by the courts by the granting of declaratory relief in the event of a breach of such rights. Section 163 of the Act provides that a shareholder may apply to court for relief and entitles the court to grant orders, but not limited to those in 163 (2) in granting relief. Section 63 (1)(a) (b) and (c) relate to conduct in the form of an act or omission that was oppressive or unfairly prejudicial to, or that unfairly disregards the interests of a director of the company, shareholder, the business of the company or the powers of a director.

[24] In *Grancy Property Limited v Manala* [2013] 3 All SA 111 (SCA) Petse JA examined the jurisprudence behind the meaning or oppressive conduct and cited with approval the meaning attributed in *Aspek Pipe Company Pty Ltd v Mauerberger* 1968 (1) SA 517 (C) where Tebbut AJ (at 525H -526E) stated that oppressive conduct was '*unjust or harsh and unlawful or tyrannical or burdensome or…. which involves at least an element of probity or fair dealing, …..a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is*

entitled to rely'. In describing oppressive conduct under section 111 *bis* of the Companies Act 46 of 1926 it was stated at 527 H that:

> "...for relief under the section it is unnecessary for an applicant to establish tyrannical conduct or a tyrannical abuse of power. He would be entitled to relief in my view, if he establishes that the majority shareholders are using their greater voting power unfairly in order to prejudice him or are acting in a manner which does not enable him to enjoy a fair participation in the affairs of the company"

[25] In *Grancy supra* at paragraph [26] the concept of interest was said to be *'much wider than the concept of rights.....that section 163 must be construed in a manner that will advance the remedy that it provides rather than limit."* At paragraph [27] " *...it is not the motive for the conduct complained of that the court must look at but the conduct itself and the effect which it has on the other members of the company"*

[26] On each complaint advanced by the applicants, the respondents have contended that there were factual disputes articulated in Annexure C to the answering affidavit. Where there are material bona fide disputes of fact the applicant stood the was a risk of the application being dismissed because of the impossibility of resolving the disputes on paper, *Room Hire Co. Pty Ltd v Jeppe Street Mansions Ltd* 1949 (3) SA 153 (T). As advanced by counsel for the respondents in his heads of argument and in oral submissions the matter stood to be decided according to the principles laid down in *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), that the order sought may only be granted if the facts averred in the applicant's affidavit, that have been admitted by the respondent, together with the facts alleged by the respondent justify the relief sought.

<u>The development period in the Memorandum of Incorporation to be declared over and completed.</u>

[27] The development period is defined as 'the period from the incorporation of the association until the developer notifies the association that it has completed the development of the township.' In my view annexure B which is an aerial view of the Heatherview Property

Extension 24 cannot be used to support the contention by the applicants that erf 636 on which there is a sectional title development has been completed. A dispute of fact arises because according to the respondents only the first bloc of sectional title stands has been built and transferred to owners and that the second block of the sectional title development is still to be completed. Furthermore, that there were other erven which had not been developed. In reply the applicant contends that the development of erf 636 was over on date of registration of the erf. The applicants have failed to give reasons for this view despite the later rezoning of the erf.

[28] If initially the second respondent owned erf 636 and was a member of the whole of that property, as soon as a sectional title development was approved, a different set of rules applied. In my view, Erf 636 would then fall to be dealt with in terms of the Sectional Titles Act of 1986, subject to whatever rights the developer has registered for continued presence as a developer on that property together with his rights in terms of the MOI. Outstanding would also be the development of those stands the respondents averred had not been completed and the applicants have failed to address the existence of such undeveloped site in reply.

[29] For example, clause 2.10.4 of the MOI provides that the rights of the developer will terminate immediately in respect of a property against transfer of property to the purchaser. In as far as transfer of certain stands in the sectional title scheme has not occurred and depending on the circumstances the developer will remain a developer and also a member of the first respondent. The applicants have not shown how the continued presence of the second respondent is prejudicial to them given the above facts.

<u>Amendment of the Memorandum of Incorporation to remove any distinction between the second respondent as developer and any member of the first respondent</u>

[30] The MOI distinguishes between who the developer is in relation to the erven in the township on the one hand and the developer who owns a specific erf in the township on the other hand, as one of the members of the first respondent by virtue of ownership of a particular property in the development being erf 636. This distinction is evident in clauses

2.6 and 2.10.4 of the MOI. The latter clause was addressed above. In terms of clause 2.6 the developer shall cease to be a member of the first respondent when it ceases to be the owner of any erf in the township. This in my view includes the separate units in the sectional title scheme.

[31] In terms of the Act the MOI can only be amended in terms of the requirements set out in section 16 of the Act, furthermore provision is made for an amendment by order of court. The distinction requested is that of removing the position of the second respondent from being that of the developer to being an ordinary member like the applicants of the first respondent. According to the second respondent the second part of the development of the sectional title was expected to have been finalized within 18 months of its signature to its response to the Tribunal, (annexure C).

[32] The MOI provides that the second respondent as developer shall loose its position as soon as the development has been completed. The applicants have not shown that the second respondent's position as developer has come to an end and they have not shown how they are being prejudiced in their interests by the position the second respondent holds even where it is evident that the development has not been completed.

The Lease Agreement

[33] It was contended by counsel for the applicant that the first respondent as a non-profit company was prohibited in terms of item 1(3) of schedule 1 to the Act from entering into an agreement either directly or indirectly, which would result in payment of its income or transfer of any of its assets to ' any person who was an incorporator of the company or a member or director or any person appointing such director.' This rendered the lease agreement entered into between the first and second respondent unlawful. Counsel for the respondents contended that applicants failed to give consideration to one or more of the listed exceptions provided for in the schedule. In my view the issue the applicant had to address was how this agreement was unethical; how it affected the applicants in the conduct of the business of the first respondent, to the extent that it was oppressive and prejudicial to their interests. The applicants have failed to show how they were being prejudiced.

[34] According to the respondent a *quid pro quo* was agreed upon to pay rent for the use of erf 636 as a truck entry point and as a builder's yard. Although the agreement was entered into during 2009 the first respondent only commenced paying rent during 2012 and that the lease terminated in May 2016 when development of the sectional title scheme commenced.

It should also be noted that the notice of motion does not call for a determination to be made on the legality of the lease agreement.

Issues raised in paragraphs 88 and 89 of the founding affidavit

[35] It is not clear from the founding affidavit whether the payments referred to in paragraph 89.1 relate to the payment of rent or whether it is alleged that such payments were irregular and therefore prejudicial for some other reason. The applicants fail to address what the financial statement reflect regarding such the payments to be for or and the nature of the alleged discrepancies in the financial statements. It is further not clear whether a demand was made to the third respondent to scrutinize his personal finances and why it is contended that the third respondent has contravened section 75(4) and (5) of the Act. The issue around the levies is also not addressed.

The first respondent be ordered to convene a meeting in terms of section 61(3) and 6(12) of the Act

[36] In terms of section 61(3) of the Act the applicants as shareholders are entitled to demand that a general meeting be convened and to table the issues to be dealt with at such meeting. In the event that the directors fail to heed the demand the applicants in terms of section 6(12) are entitled to approach the court for relief. In the request for a meeting dated 17 November 2015 was the issue relating to the venue where meeting should be held convenient to all members and the day on which such meetings should be held and, the need to table the resolutions to be adopted and choice of the chairperson for the AGM. Items 2 and 3 of the notice dated 8 June 2016 have been dealt with in paragraphs 27 to 32 above.

[37] The first respondent was registered during 2008. The development in the view of the applicants has taken long to be completed, however, this may have been as a result of the rezoning of erf 636 and the approval into a sectional title scheme in 2015. An extension of the period of development should have been registered. While I have found that the applicants have not made out a case, it would be prudent for the parties to convene a meeting to identify the issues of concern before holding an annual general meeting. No case has been made out why the Law Society should be involved in appointing a neutral chairperson, or why it would be difficult for the parties to agree on one in order to avoid the meetings being disrupted.

[35] In the result the following order is given:

1. The application is dismissed.
2. The applicants are ordered to pay the costs of the application.

TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	**30 JANUARY 2018**
JUDGMENT RESERVED ON	:	**30 JANUARY 2018**
ATTORNEYS FOR THE APPLICANTS	:	**HACK STUPEL & ROOS**
ATTORNEYS FOE THE RESPONDENTS	:	**E Y STUART**