IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 46115/21

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED: NO

DATE: 18 December 2023 Signature: _____

In the matter between:

CRYSTAL BALL PROPERTIES 65 (PTY) LTD **1ST APPLICANT**
(REGISTRATION NUMBER: 2006/027260/07)

ALLAN ROBERT DAWSON **2ND APPLICANT**

MICRO-THERM CLOSE CORPORATION **3RD APPLICANT**
(REGISTRATION NO: 1993/019501/23)

MAGHAN 27 CLOSE CORPORATION **4TH APPLICANT**
(REGISTRATION NO: 2002/068466/23)

LIDIA FERREIRA **5TH APPLICANT**

WERNER BOTHA **6TH APPLICANT**

AND

LANDSMEER HOME OWNERS' ASSOCIATION NPC (REGISTRATION NUMBER: 2004/031410/08) **1ST RESPONDENT**

FOOD FAIR (PTY) LTD (REGISTRATION NUMBER: 1973/016741/07) **2ND RESPONDENT**

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 18 December 2023.

JUDGMENT

COLLIS J

1. This is an opposed application wherein as per the Notice of Motion, the Applicants' seek the following relief:

"

1 That the Special Resolution adopted by the members of the First Respondent on 10 June 2021 to amend its Memorandum of Incorporation, by inserting the below clauses, be declared an act by the Company which has had a result that is oppressive and unfairly prejudicial to, and that unfairly disregards the interests of the Applicants in terms of the provisions of Section 163(1)(a) of the Companies Act, No. 71 of 2008 ("the Act"), the offending clauses being as following:

1.1 *"1.6* ***"development period/phase"*** *means the period from the date of establishment of the Association until 29 February 2024 for the current established erven and a further period of three years for any newly created erven from date of establishment or creation";*

1.2 *"7.2 During the initial development period as well as the further development period referred to in paragraph 1.6 above, the developer shall have no liability or obligation to pay or contribute to any levies, building levies or special levies in respect of the erven held by it under the initial and further development periods."*

2 A final order in terms of section 163(2)(d) of the Act to regulate the Company's affairs by directing the Company to amend its

Memorandum of Incorporation ("MOI") by removing the offending clauses referred to in paragraph 1 above.

3 An order in terms of section 163(2)(h) of the Act setting aside any agreement reached between the First and Second Respondents which has the effect of absolving the Second Respondent from liability to pay levies to First Respondent as envisaged in the offending clauses of the MOI referred to in 1 above.

4 That the Resolution adopted by the members of the First Respondent on 10 June 2021 in terms of which the Second Respondent was allowed to pay a reduced amount in respect of the levies and other charges payable to the First Respondent in respect of the Second Respondent's purchase of Erven [redacted] and [redacted], Landsmeer Estate, be declared an act by the company which has had a result that is oppressive and unfairly prejudicial to, and that unfairly disregards the interests of the Applicants in terms of the provisions of Section 163(1)(a) of the Act.

5 An Order in terms of Section 163(2)(h) of the Act, setting aside any agreement reached between the First and Second Respondents absolving the Second Respondent from paying certain levies, charges for grass cutting, VAT corrections and legal fees to First Respondent

in respect of the Second Respondent's purchase of Erven [redacted] and [redacted] Landsmeer Estate.

6 An Order directing the First Respondent to pay the costs of this application.

7 That the Second Respondent be ordered to pay the costs of the application, jointly and severally with First Respondent, only in the event of the Second Respondent opposing the application."

THE PARTIES

2. The six Applicants, three individuals and three artificial persons are all owners of units or erven situated within Landsmeer, and are all members of the HOA.

3. The First Respondent is the Landsmeer Home Owners' Association NPC ("the HOA") and the HOA of a residential township known as the Landsmeer Estate. It is situated on the banks of the Hartbeespoort Dam, at Hartbeespoort, North West Province.

4. The Second Respondent, a limited liability company, is also a member of the HOA, and the developer of the Landsmeer Estate ("the developer").

THE BACKGROUND

5. On 10 June 2021 a special general meeting was held of the HOA. At this meeting the HOA adopted a special resolution ("the special resolution"). This special resolution amended the Memorandum of Incorporation ("the MOI") of the HOA and brought about far-reaching changes on the liability of the developer, relating to the obligation to pay levies to the HOA.

6. As could be anticipated, the adoption of the special resolution created division amongst the members. The applicants are all opposed to the consequences brought about by the adoption of the special resolution. On the other hand, the developer, which enjoys a majority of voting powers, is in favour of the consequences brought about by the adoption of the special resolution.

7. It is precisely, this discontent which prompted the Applicants to invoke the statutory provisions contained in Section 163 of the Companies Act No 71 of 2008.

8. In essence, they now seek to challenge the legal validity of the adoption of the special resolution reached at the special general meeting, and further

prays for an amendment of the MOI in order to restore the *status quo*.[1] In addition the Applicants also ask for ancillary relief.

THE RESONDENTS CASE IN SHORT

9. The respondents deny that the relief that the applicants seek in prayers 1, 2 and 3 on the basis that the result of the special resolution to amend the MOI, which was adopted by the members of the first respondent on 10 June 2021, is oppressive, unfairly prejudicial to, and unfairly disregards the interests of the applicants as envisaged in Section 163(1)(a) of the Companies Act, 71 of 2008 ("the Act").[2]

10. They further deny the relief in prayers 4 and 5 on the basis that the result of the resolution which was adopted by the members of the first respondent on 10 June 2021 in terms of which the second respondent was allowed to pay a reduced amount in respect of levies and other charges payable to the first respondent in respect of the second respondent's purchase of Erven 409 and 410, is oppressive, unfairly prejudicial to, and unfairly disregards the interests of the applicants as envisaged in Section 163(1)(a) of the Act.[3]

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1 Notice of Motion, par 2, Caselines 001-3.
2 Notice of motion, prayers 1, 2 and 3, Caselines 001-2 to 3
3 Notice of motion, prayers 4 and 5, Caselines 001-3

POSITION PRIOR TO ADOPTION OF SPECIAL RESOLUTION

11. Prior to the adoption of the special resolution the developer, as a member of the HOA, was obliged to pay levies to the HOA in terms of the provisions of the MOI as it read at that stage. This is common cause between the parties.

12. The HOA was incorporated as far back as 28 October 2004. One of the major consequences of the adoption of the special resolution was the amendment of the MOI, so as to provide that the developer does not have any obligation to pay levies for the entire period, calculated from the date of the incorporation of the HOA on 28 October 2004, until the expiry of 3 years, calculated from the date on which the special resolution was adopted.[4]

13. A further consequence of the special resolution relates to the obligation of the developer to pay levies in respect of two erven in the estate which the developer bought at a liquidation auction, pursuant to the winding-up of the company that was the owner of the erven. Originally, in terms of the conditions of sale pertaining to the auction, the developer as the purchaser

[4] Founding affidavit, par 5.3, CL 002-6.

was obliged to pay all arrear levies payable to the HOA in respect of the two erven, as a pre-condition to the transfer of the erven to the developer.[5]

14. Another consequence of the special resolution was that the developer was absolved from this obligation to pay a large portion of this debt.[6]

THE ESTABLISHMENT OF THE HOA

15. The HOA has been established for purposes of the management and administration of the township known as Meerhof Extension 2. This township was proclaimed in respect of the property previously known as Portion [redacted] of the farm Glenogle [redacted], registration division [redacted], North West Province, and now known as the Landsmeer Estate.[7]

16. The HOA was therefore incorporated and registered in terms of the conditions of establishment of the estate. In terms of these conditions, all owners of properties within the township are automatically members of the HOA.

17. The sole director of the First Applicant is Mr Jan-Hendrik Botha ("Mr Botha") an adult pensioner residing in the Landsmeer Estate. He is also the deponent of the founding and replying affidavits. During the period prior to

[5] Founding affidavit, par 5.5, CL 002-6.
[6] Founding affidavit, par 5.6, CL 002-6.
[7] Founding affidavit, par.6.1, CL 002-7.

1 February 2021, Mr Botha as well as Mr Gerald Baird, together with the Erasmus brothers, were the directors at the HOA.

18. However, on 1 February 2021 seven directors were appointed in respect of the HOA. Mr Botha and Mr Baird were not re-elected. The Erasmus brothers, so the Applicants allege, control the board of directors of both the HOA as well as the developer. Their elderly mother is also on the board.

19. The Landsmeer Estate comprises of 122 erven, 120 of which are *"Res1 erven"*, and two are *"Res3 erven"* (erven [redacted] and [redacted]). In addition, 36 flats and 10 shops have been built on erven [redacted] and [redacted]. According to the answering affidavit, the developer has 50 unsold erven. However, in contrast to other members the developers pay levies only in respect of erven [redacted], [redacted] and [redacted].[8]

20. It is common cause on the papers that the developer has traditionally not contributed to the payment of levies to the HOA. This, according to the applicants, is due to a misinterpretation by the Erasmus brothers of the relevant provisions of the MOI of the HOA. As a result, apart from the 3 erven mentioned by the HOA and the developer in the answering affidavit,

[8] Answering affidavit, par.21, CL 031-16 to 031-17.

the developer has not been paying levies to the HOA since the latter's incorporation during 2004.[9]

21. It is the applicants' case that during August 2020, they became aware of the – ***Heritage Hill Devco (Pty) Ltd v Heritage Hill HOA***[10] judgment ("the Heritage Hill decision").

22. The applicants further allege that in accordance with the Heritage Hill decision the definition of *"member"* in the MOI of the HOA, as it then read, included the developer and consequently the developer, as a member, would be liable for levies.

23. Having made this discovery, Messrs Botha and Baird instructed the current attorney representing the Applicants to address a letter to the HOA in terms of Section 165 (2) of the Act, demanding that the HOA bring an application *inter alia,* for the procuring of a declaratory order to declare the developer liable for the payment of levies. In addition, it was required that the HOA should commence with recovery steps against the developer.

[9] Founding affidavit, par 6.10, CL 002-8.
[10] 2016 (2) SA 378 (G).

24. This step so taken on behalf of the applicants to the HOA, prompted the Erasmus brothers to bring, in the name of the HOA, an application in terms of Section 165(3) of the Act, in order to set aside the demand made on behalf of the applicants. The applicants then filed their answering affidavit in order to oppose that application.

25. Thereafter, it is common cause that the parties met in November 2020 in an endeavour to resolve the issues between themselves. According to the applicants the meeting ended on the expectation that a settlement offer, on behalf of the Erasmus brothers, would be forthcoming. However, instead of receiving a settlement offer, the applicants received a letter dated 6 November 2020. In the letter the Erasmus brothers advised that they intend to convene a special general meeting in order to amend the MOI. In addition, Mr Botha was informed that a complaint which he lodged at the Community Schemes Ombud Service ("CSOS") allegedly contains defamatory matter, and that a defamation application would be instituted against him.[11]

26. The Erasmus brothers proposed an amendment of the MOI to the effect that the developer be exonerated from paying all levies which had been due historically, as well as future levies until the expiration of a period of 3

[11] CL 020-1 to 020-3.

years.[12] The Erasmus brothers attempted to impose these changes by virtue of the majority rights which they enjoyed through their associated entities.[13] In terms of the MOI as presented by the Erasmus brothers, the developer would be absolved from paying all levies which had been due historically, as well as the future levies until the expiration of the 3-year period, to the detriment of the other members of the HOA.

27. The applicants were unhappy with the stance adopted by the Erasmus brothers and instructed their attorney to respond as follows:[14]

27.1 The applicants point out that in terms of clause 14.1.13 of the original MOI the developer reserved for itself additional voting power. In terms of that clause, the developer enjoys an additional vote for each property still owned by it. As a result thereof, so the applicants point out, the developer enjoyed two votes for each property owned by it.[15]

27.2 The Erasmus brothers and related family members control the following entities:

27.2.1 The Erasmus Family Trust;

[12] Founding affidavit, par 6.22, CL 002-11.
[13] Founding affidavit, par 6.23, CL 002-11.
[14] Annexure JHB19, CL 021-1 to 021-9.
[15] Founding affidavit, par 6.28, CL 002-12.

27.2.2 Cold Creek Investments 187 (Pty) Ltd;

27.2.3 The MN Erasmus Family Trust.

27.3 The applicants allege that the voting powers which vest with the Erasmus brothers due to their control in the aforementioned entities, plus their control of the developer, results in the Erasmus family enjoying a total of 203 votes, opposed to the 54 votes of the rest of the members of the HOA.[16]

27.4 The Applicants apportioned the members' interest held by the Erasmus brothers against the contributions made by them. In this context the applicants pointed out that whilst the Erasmus brothers enjoyed by far the majority of the votes by virtue of their control in the aforementioned entities and the developer (79% of the total votes), the contributions made by these entities are only 25.5% towards the total levies payable to the HOA.[17]

28. It is the applicants' case, that the aforementioned situation is not only unjust and unfair, but also detrimental for the healthy growth and good governance of the HOA.

[16] Founding affidavit, par 6.29, CL 002-12.
[17] As above, n14.

29. In this regard the applicants alleges that the Erasmus brothers are abusing their powers as the majority shareholders in the HOA for their own financial benefit, which ultimately results in the detriment of the interests of rest of the members.[18]

30. On 10 June 2001, a special general meeting was held. At this meeting by way of the special resolution, the Erasmus brothers proposed certain amendments to the MOI. The proposed amendments, which have been explained above, were duly accepted by majority vote.[19]

31. This amendment introduced, clauses 1.6 and 7.2 in the amended version of the MOI. It is these clauses the developer is absolved from paying any levies from the date on which the HOA was established until 29 February 2024.[20]

32. The applicants alleges that the adoption of the aforementioned special resolution was the Erasmus brothers' response to being made aware of the

[18] Founding affidavit, par 6.31, CL 002-12.
[19] Founding affidavit, par 7.3, CL 002-13.
[20] Founding affidavit, par 7.4, CL 002-13.

fact that the developer must also be regarded as an ordinary member of the HOA which is liable to pay levies.[21]

33. The adoption of the special resolution had the effect that the developer was absolved from paying a total sum of levies amounting to approximately R25 million. This amount had accumulated from the date of inception of the HOA in 2004.[22]

THE RBA REBATE:

34. RBA Executive Homes (Pty) Ltd ("RBA"), previously owned erven [redacted] and [redacted] in the estate. It fell in arrears with the payment of levies for the respective erven. The amounts owed by RBA to the HOA in respect of the aforementioned two erven had accumulated to approximately R2 million. RBA was eventually liquidated. Mortgage bonds were registered over both properties. The developer bought the properties at a liquidation sale held at the behest of the liquidators.[23]

35. In terms of the conditions of sale under which the developer purchased the abovementioned erven, any buyer was obliged to pay the outstanding

[21] As above, n18.
[22] Founding affidavit, par 7.5, CL 002-13.
[23] Founding affidavit, par 8.1, CL 002-14.

levies as well as municipal rates and taxes due in respect of the properties. This was expressly conveyed to those in attendance at the auction by the auctioneers.[24]

36. The applicants alleges that, the developer who acquired the two erven, requested a rebate of approximately R1.5 million. There was a request for all penalty levies, charged as a result of a failure to commence with building works *"so-called building levies"*, and all interest charged thereon, be reversed.[25]

37. The applicants further alleges, that prior to the liquidation sale the erstwhile directors of RBA, in particular one Mr Stegman, approached the directors for a rebate on the then outstanding debts owed by RBA. By then Mr Botha was still a director. He explains that the request was considered at a board meeting, but exercising their majority influence the Erasmus brothers immediately decreed that no rebate would be granted to RBA.[26]

38. However when the developer acquired the properties, the same people who earlier voted against the approval of a rebate in respect of the

[24] Founding affidavit, par 8.5, CL 002-15.
[25] Founding affidavit, par 8.6, CL 002-15.
[26] Founding affidavit, par.8.3, CL 002-14.

outstanding levies, were now the ones asking for the implementation of precisely that which they earlier rejected.

39. The applicants further alleges that the earlier refusal by the board of the first respondent, to afford RBA a rebate on the levies, contributed to the winding-up of RBA.[27] It is on this basis that they allege, that the aforementioned conduct is a classic example of a conflict of interests.[28]

40. The applicants furthermore explain that pursuant to this request for a rebate by the Erasmus brothers, the applicants were advised that the directors do not have the power to waive these provisions of the MOI. According to the advice given to them it was only the members present in general meeting that had such powers.[29] In the result Mr Botha, who was at that stage still on the board, refused to consent to the granting of the rebate on the RBA account. Mr Botha alleges that at the subsequent meeting where this was discussed, a heated argument erupted, and those in attendance came close to a physical confrontation. Mr Botha explains that he was simply not prepared to back down since he considered the conduct by the Erasmus brothers as glaring nepotism and totally

[27] Founding affidavit, par 8.8, CL 002-15.
[28] Founding affidavit, par 8.10, CL 002-15.
[29] Founding affidavit, par 8.11, CL 002-16.

unacceptable conduct. The Erasmus brothers had acted with only their own interest at heart.[30]

41. At this same meeting Mr Botha also pointed out that if the first respondent adopts such a resolution, and subsequently acts fairly towards all the members of the HOA, the first respondent would be dumped into financial ruin if it has to reimburse other members from whom contributions were collected.[31] In addition, the consequence of the writing off of this debt would result in an increase of between 5% to 10% of the monthly levies payable by the members if a deficit was to be avoided.[32]

42. Mr Botha further alleges, that he and Mr Baird were intimidated at the directors' meeting. The chairman of the HOA, one of the Erasmus brothers, even went as far as misrepresenting the facts by arguing that it would actually be in the best interest of the HOA to write off the debt. As the applicants rightly point out, quite the converse is true.[33]

43. As at 10 June 2021, an amount of approximately R2.7 million was owed to the HOA by the developer. At this AGM, the Erasmus brothers then

[30] Founding affidavit, par 8.12, CL 002-16.
[31] Founding affidavit, par 8.14, CL 002-16.
[32] Founding affidavit, par 8.15, CL 002-16.
[33] Founding affidavit, par 8.17, CL 002-17.

enrolled a proposal on the agenda that the obligation by the developer to pay the outstanding levies in respect of the two stands, which at that stage was the equivalent of approximately R2.25 million, ought to be sharply reduced and substituted with a requirement to pay only an amount of R200 000.00.[34]

44. The applicants further alleges that, prior to the writing off of the levies otherwise payable by the developer, the HOA had reserves of R373 631.00 and retained income of R2 923 991.00.[35] According to the management accounts for the 10 months up to 31 December 2019, the surplus before tax was R819 725.00. However, after the RBA write off, it would have reflected a deficit to the tune of R350 000.00 in that year. The deficit would have to be set off against the retained income or be recovered from the owners by way of a special levy of R4 500.00 per owner. Alternatively, the then monthly levy would have to be increased from approximately R1 420.00 to R1 800.00. This would translate to an increase of approximately 26.5%.[36]

45. It is on this basis that the applicants argue that the amendment of the MOI as set out above, constitutes a failure by the Erasmus brothers, in their

[34] Founding affidavit, par.8.21, CL 002-17.
[35] Founding affidavit, par 8.24, CL 002-18.
[36] Founding affidavit, par 8.25, CL 002-18.

capacities as directors of the HOA, to comply with their duties in terms of Section 76(3) of the Act.

RELIEF SOUGHT IN PRAYERS 4 AND 5 OF THE NOM

46. In relation to the relief set out in prayers 4 and 5 of the NOM the respondents had replied as follows: The deponent to the respondents' answering affidavit and his brother, Des, had discussions with the deponent of the founding affidavit, Mr Botha, surrounding the fact that the first respondent would be unable to recover the outstanding levies from the liquidator or from a purchaser of the said two erven, given that the amount of the arrear levies, together with interest, had exceeded the value of the erven and that a substantial portion thereof had become prescribed. Mr Botha nevertheless requested the second respondent to purchase the erven in order to develop same, albeit not to utilise the full financial potential of the erven as allowed in terms of the zoning[37] (Mr Botha and the second respondent decided that the latter would not build high density homes on the erven for which they were zoned.

47.The amount of the reduction agreed upon in essence is equal to the portion of the outstanding levies, which had become prescribed.[38] The

[37] Answering affidavit, par.13 and 14, caselines 031-12 to 13, par.46, caselines 031-26
[38] Answering affidavit, par.48.2, caselines 031-28, par.51.2, caselines 031-3, par.54.4, caselines 031-32

respondents deny that the conditions of sale obliged the purchaser to pay all the outstanding levies, but that a new purchaser, was only to pay levies, rates and taxes which were due and payable[39], as admitted in the replying affidavit.[40] It follows that the portion of the outstanding levies, rates and taxes which had become prescribed, were not *"due and payable"*.

48. It is on this basis that the respondents contend they were only liable to pay levies at the time which had become due and payable.

49. The admission made under oath on point by the applicants in the replying affidavit that the respondents only become liable for levies which had become due and payable is sufficient for the Court to conclude that the applicants would not be entitled to the relief which they seek in paragraph 4 and 5 of the NOM.

50. As a consequence it follows that this relief so sought ought not to be granted and is accordingly refused.

[39] Answering affidavit, par.47, caselines 031-27
[40] Replying affidavit, par.43, Caselines 032-26

THE RELIEF SOUGHT IN PRAYERS 1,2 AND 3 OF THE NOM.

51. Section 76(3) section reads as follows:

"A director of a company, when acting in that capacity, must exercise the powers and perform the functions of director:

51.1 In good faith and for a proper purpose;
51.2 In the interest of the company."

52.Secondly, the conduct constitutes oppressive and unfairly prejudicial conduct as contemplated in Section 163(1) of the Companies Act.[41]

53. Furthermore, it triggers a liability for the directors for the loss sustained by the company in terms of Section 77(3)(c) of the Act.[42]

ARGUMENTS ADVANCED ON BEHALF OF THE APPLICANTS IN RESPECT OF PRAYERS 1,2 AND 3 OF THE NOM.

54. In this regard the applicants refute the argument made on behalf of the HOA and the developer, that the Heritage Hill decision changed the law.

[41] Founding affidavit, par 8.27, CL 002-19.
[42] Founding affidavit, par 8.28, CL 002-19.

55. On the argument advanced on behalf of the HOA and the developer that prior to the Heritage Hill decision, the law was to the effect that a developer is not liable to pay levies, although it has been recognised that the developer remain the owner of the units unsold. But when the Heritage Hill decision was handed down, it changed the law and imposed a liability on the developer which did not exist previously.[43]

56. In this regard the respondents alleged that the initial Articles of Association and its replacement, the MOI, formed the basis of a contractual relationship between the first respondent and purchasers or owners of erven, in that new purchasers subject themselves to the terms of conditions thereof.[44]

57. Furthermore, that the respondents, as well as the owners of erven (i.e. members of the first respondent) at all times since 2004 (until July 2020) accepted that the developer had no obligation to pay levies in respect of unsold erven, notwithstanding the fact that neither this nor the converse, had been expressly stated by the initial Articles of Association or the MOI.

[43] Answering Affidavit, par 10.4, CL 031-6.
[44] Answering affidavit, par.10.6, caselines 031-7

58. The applicants subjected themselves to the MOI as well as the fact that the second respondent had not been paying levies, as neither the respondents, nor the applicants, had been aware of the Heritage Hill decision prior to July 2020.[45]

59. This argument made out by the respondents that both sides accepted that the second respondent had not been paying levies and the failure by the parties to act in accordance with the changed legal position is of no moment and I find to be irrelevant.

60. In law the second respondent was obliged to pay levies, and ignorance of the law in this regard is simply not an excuse not to be held liable.

THE ARGUMENTS ADVANCED BY THE RESPONDENTS IN RESPECT OF PRAYERS 1,2 AND 3 OF THE NOM

61. On behalf of the respondents it was submitted that the amendment of the MOI, is not oppressive or a wrongful exercise of a majority vote, but simply to bring the MOI in line with what the legal position was prior to the handing down of the Heritage Hill decision.[46]

[45] Answering affidavit, par.10.5, caselines 031-6
[46] Answering Affidavit, par 10.11, CL 031-9.

62. In response to the above arguments advanced, the applicants had argued that the Heritage Hill judgment did not create any new law. It simply gave a judicial pronouncement on an existing legal position. It brought clarity. It made the existing legal position clear, that developers are liable to pay levies. It is a judicial pronouncement on a set of existing facts. The legal pronouncement can never change the facts. This is not an instance where there was a legislative enactment which changed the law.

63. It is the respondents' argument that according to the HOA and the developer, the developer was actually not a member of the HOA prior to the Heritage Hill decision. They explain that the developer was not the registered owner of the unsold "*erven*" as envisaged by clause 5.1 of the MOI.[47]

64. It is their argument that the Heritage Hill decision had the effect that unsold erven were suddenly created upon proclamation.[48] In developing the argument, they explain further that, whereas the unsold erven were not previously deemed to have created upon proclamation, the erven were now, in terms of the Heritage Hill decision, declared to have been created

[47] Answering affidavit, par 10.3, CL 031-6.
[48] Answering affidavit par 10.4

upon proclamation. They further point out that, as they understand the position, the developer *"suddenly"* became the registered owner of the unsold erven.

65. This position adopted by the respondents the applicants argue is simply farfetched and untenable. This I am in agreement with. That is that upon the handing-down of the Heritage Hill decision the developer simply mutated into a member of the First Respondent whereas it was no such member before that decision.[49]

66. The further ground upon which the respondents alleges, this Court should not grant prayers 1,2 and 3 of the NOM is that the initial Articles of Association and the replacement MOI came into being whilst all concerned suffered under the *bona fide*, but mistaken belief that the legal position regarding the creation of erven had been correctly interpreted, decided and stated by the court in the Kosmos Ridge case.[50] When the Heritage Hill decision however came to the knowledge of the respondents and the applicants in July 2020, the first respondent (through its members), became entitled either to resile from the MOI, or to seek rectification or the amendment of the MOI. The first respondent and the majority of its

[49] Replying affidavit, par 4.4, CL 032-7.
[50] Answering affidavit, par.10.12, caselines 031-9; paragraph 29.2, caselines 031-20

members obviously chose the latter. This decision so taken was clearly taken to the exclusive benefit of the respondents.

AN ANALYSIS OF THE HERITAGE HILL DECISION

67. An analysis of the Heritage Hill decision however bears closer scrutiny. The Heritage Hill HOA, who was the Respondent in the Full Bench appeal, instituted as Plaintiff an action in the Court *a quo* against the Appellant, the developer. The action was for the recovery of levies. The trial came before Kollapen J. The HOA succeeded, but the Court *a quo* granted leave to appeal.

68. In this matter the dispute related to the Louwlardia Estate. The case by the HOA against the developer was based upon the contention that the developer is the owner of the various erven situated in the estate. Here the developer denied in its plea of being the registered owner. The developer argued that in terms of Section 46 of the Deeds Registries Act, 47 of 1937 ("the Deeds Registries Act"), an erf in a township is only created and commences to exist as an individual erf upon transfer thereof from the developer into the name of a purchaser. Here the developer further pleaded that in terms of clause 9.1 of the Articles of Association the definition of *"property"* means an erf in a township, and as the developer is not the owner of the unsold erven it is not liable for levies.

69. In the said judgment the Court analysed various provisions of the Deeds Registries Act, including the definition of *"erf"* as well as Section 47 of that Act. The Court concluded that the substratum for registerable transactions is the general plan, and that substratum comes into being once the general plan is registered in the Deeds Registry.

70. In the present context the developer argued that it is no more than the owner of the remainder of the township. The Court concluded that the developer's contention is not sustainable and further concluded that the Cosmos Ridge judgment, which upheld the argument of the developer, was wrongly decided.

71. The Full Court on appeal agreed with the reasoning of the Court *a quo*. It also referred to the fact that in another judgment in KwaZulu-Natal, ***Prospect SA Investments v Lanarco***, Kruger J agreed with the judgment of the Court *a quo*. The result being that the appeal was dismissed with costs, and the judgment of the Court *a quo* was confirmed.

72. In *casu* the wording of the relevant Articles of Association which deals with *"membership"* has been quoted in paragraph 22 of the Heritage Hill judgment. It is apparent from a reading of the definition of membership in

the Articles of Association that the wording corresponds substantially with the definition of membership in the MOI of the First Respondent.

73. It is clear from a reading of the Heritage Hill judgment that the Court simply made a correct pronouncement and the interpretation of already existing law (the provisions of the Deeds Registries Act) and applied that law, which has existed for decades, to the facts of the matter, which is namely the wording of the Articles of Association which casted an obligation on a member to pay levies. The Court concluded, not with reference to the Articles of Association, but with reference to the Deeds Registries Act, that the developer is in fact in law the owner of the erven which have not yet been transferred to purchasers. On the basis of that ownership in law, which has been the position at least since the pronouncement of the Deeds Registries Act in 1947, the owner is a member of the HOA and as such liable for levies.

74. A forerunner to the present Section 163 of the new Companies Act, was Section 252 of the previous 1973 Companies Act. The sections are both aimed at achieving the same result, namely to give the Court a very wide power to give any order it thinks fit, in order to curtail, restrict or limit *"acts or omissions by a company that are unfairly prejudicial, unjust or inequitable"*.

75. In this context it has been held that the phrase *"the affairs of the company are being conducted"* is wide enough to cover conduct by any one who is taking part in the conduct of the affairs of the company, whether *de facto* or *de jure*, and would include the conduct of the developer in the general meeting and its nominated directors on the board, insofar as that conduct relates to the corporate affairs of the HOA.[51]

76. Resolutions of the board of directors are decisions of the company and the consequences of them are consequences brought about by the conduct of the company.

77. The test for the application of provisions such as Section 163 of the new Company Act is essentially one of fairness. The predecessors of Section 163, such as Section 252 and its earlier statutory equivalent targeted *"oppressive conduct"*, which meant conduct which was burdensome, harsh and wrongful. In modern times the requirement is less onerous. What is now required is fair play or fair dealing. A member will usually be entitled to relief where a dominant group of shareholders use their greater voting

[51] Re HR Harmer Ltd (1958) 3 All ER 689 (CA) 698 Heckmair v Beton & Sandstein Industrië (Pty) Ltd 1980 (2) SA 363 (SWA) at 359 Wilds HOA & Others v Van Eden & Others (53643/09) (2011) ZAGPPHC 101 (25 May 2011) at par.102

power unfairly, disabling others from enjoying fair participation in the affairs of the company.[52] In *casu* this is precisely what has transpired.

78. It is clear that under the authority of Section 163 of the new Companies Act, and its forerunner Section 252 of the previous Companies Act, the Court has the necessary power to amend a Memorandum of Incorporation. The decided case of ***Bader & Another v Weston & Another***[53], per Corbett J, as he then was, is an example where the Court expressed *"no doubt"* that it is necessary to amend the articles of the company with a view to bring to an end the matters complained of.

79. In this regard it has previously been recognized that there is a unique relationship, in the context of company law, in a developmental scheme. In assessing whether the affairs of the company have been conducted in an unfair manner, it must be recognised that the relationship is *sui generes*. The members are not typical shareholders who have invested money in the company. The company is an association incorporated not for gain. Its main objective is the promotion of communal or collective interests. The relationship of the members with each other is akin to that of members of a voluntary association established in pursuit of a social or cultural

[52] Aspek Pipe Co (Pty) Ltd v Mauerberger 1968 (1) SA 517 (C) at 527
[53] 1967 (1) SA 134 (C) at 147F.

objective. The members are individual home owners, whilst the developer is a member by virtue of its position as promotor and its continuing ownership of the undeveloped erven.[54]

80. The section is clear and provides a Court with very wide and almost unrestricted powers to give appropriate relief, such as what was given by the SCA in The Wilds HOA v Van Eden & Others.[55] The wide powers bestowed upon a Court by Section 163 of the Companies Act was also invoked in Grancy Properties Ltd v Manala.[56]

81. In the latter decision, the applicant in an urgent application in the High Court in Cape Town, moved for an order for the appointment of objective and independent directors for a company, Seena Marena Investments (Pty) Ltd ("SMI"). The applicant was a shareholder. The High Court dismissed the application. However, on appeal the relief was granted. The Court considered the meaning of *"oppressive"* as used in Section 163. It found that in the past *"oppressive"* had been variously defined as *inter alia, "unjust or harsh or tyrannical"*, burdensome and wrongful. The Court concluded that there is no onus on an Applicant in terms of Section 163 to establish tyrannical conduct. The Court also held that *"interests"* in the

[54] Wilds n42 supra at 109.
[55] (2012) ZASCA 113
[56] (2013) 3 All SA 111 (SCA)

section is much wider than *"rights"*. This meant that Section 163 ought to be given a broad, rather than a narrow interpretation. It held that the list of orders which a Court can award is non-exhaustive and open-ended. The Court also emphasised that in deciding whether or not to grant relief, the focus should not be on the intention behind the conduct, but rather at the conduct itself and the effect that such conduct will have on the other members of the company.[57]

82. In terms of Section 163, which clearly broadens the scope of the relief, an aggrieved minority shareholder can now apply to Court to request an order from a whole list of other orders, including an order appointing independent directors to act as a company board.

83. It is on this basis that the applicants contend that they are entitled to relief in terms of Section 163. There has clearly an abuse of power with the result of it being unfair.

84. This Court however remains vigilant that an amendment of a MOI in terms of Section 163(2)(d) of the Companies Act, should only be ordered

[57] Livanos v Swartzberg 1962 (4) SA 395 (W) at 399

as a last resort, the present facts presented before this Court however supports such relief.

ORDER

85. Consequently the following order is made:

85.1 That the Special Resolution adopted by the members of the First Respondent on 10 June 2021, or any other agreement to that effect between First and Second Respondents, to amend its Memorandum of Incorporation, by inserting the below clauses, be declared an act by the Company which has had a result that is oppressive and unfairly prejudicial to, and that unfairly disregards the interests of the Applicants in terms of the provisions of Section 163(1)(a) of Act 71 of 2008, the offending clauses being as following:

85.1.1 "1.6 **"development period/phase"** means the period from the date of establishment of the Association until 29 February 2024 for the currentestablished erven and a further period of three years for any newly createderven from date of establishment or creation";

85.1.2 "7.2 During the initial development period as well as the further

development period referred to in paragraph 1.6 above, the developer shall have no liability or obligation to pay or contribute to any levies, building levies or special levies in respect of the erven held by it under the initial and further development periods."

85.2 A final order in terms of section 163(2)(d) of Act 71 of 2008 to regulate the Company's affairs by directing the Company to amend its Memorandum of Incorporation ("MOI") by removing the offending clauses referred to in paragraph 85.1 above.

85.3 The First and Second Respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the Applicants' costs, such costs to include the costs consequent upon the employment of Senior Counsel.

C.J. COLLIS

JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

APPEARANCES:

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Attorney for the Respondents: Linda Erasmus Attorneys

Date of Hearing: 4 November 2022

Date of Judgment: 18 December 2023