

39/56

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

Appellate

Provincial Division).
Provinciale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

CAPE UNITED SICK FUND SOCIETY & ORS. Appellant,

versus

T. G. FORREST & ORS.

Respondent.

Appellant's Attorney
Prokureur vir Appellant

O. C. van R.

Respondent's Attorney
Prokureur vir Respondent

Van der N.

Appellant's Advocate
Advokaat vir Appellant

H. Duncan & Co

Respondent's Advocate
Advokaat vir Respondent

W. A. de Vries, & Co

Set down for hearing on

Op die rol geplaas vir verhoor op

Monday 21st May, 1956.

(CPD)

(Exception)

9.50 - 12.50

2.15 - 5.25

CHV.

— Appeal allowed, with costs, & order made by trial court should be struck out & following order substituted:

- "Exception allowed with costs & plaintiff's
- " declaration set aside. — leave is
- " reserved to plaintiff to file a fresh
- " declaration on or before 31st Oct, 1956."

J. L. van der Merwe

Ref. 25/9/56.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :

CAPE UNITED SICK FUND SOCIETY & OTHERS

Appellants

&

THOMAS GEORGE FORREST & OTHERS

Respondents

CORAM : Centlivres C.J., Hoexter, Steyn, Reynolds JJ.A. et
~~Black J.A.~~ Brink J.A.

Heard : 11th June 1956.

Delivered :- 25. 9. 56

J U D G M E N T

CENTLIVRES C.J. :- This is an appeal, after leave granted, from an order made by the Cape Provincial Division dismissing an exception to the respondents' declaration. I shall refer to the first appellant as the Society, to the other appellants as the defendants and to the respondents as the plaintiffs.

The appeal turns upon the interpretation to be placed on the Society's Constitution which came into operation on April 22nd 1955. According to the declaration an Investigation Committee consisting of seven members of the Society was appointed at a general meeting of the Society on June 4th, 1954 to enquire into the activities and affairs of the Society during the previous six years. All the plaintiffs are members of the Society. The

first plaintiff requisitioned a Special General Meeting of the Society in terms of Rule 79 of its Constitution by lodging with the Society's General Secretary a petition signed by himself, the other plaintiffs and 391 other members of the Society requesting that a meeting be convened to consider the following resolutions :-

- " (1) that the original Investigation Committee appointed on the 4th June, 1954, be empowered in terms of their recommendations
 - (a) that legal opinion be obtained as to the legality of all payment to Management Committee members, past and present, and in the event of such payments being illegal, whether
 - (i) the amounts thereof can be recovered from such member or members of the Committee, past and present,
 - (ii) action can be taken to compel the Management Committee to relinquish office.
 - (b) that the original investigation Committee be empowered to obtain such legal opinion on all points arising from the report at the cost of the Society, and to report back to a Special General Meeting.
- (2) to have Mr. Graeme Duncan, Q.C. opinion, obtained by Mr. B. L. Rubik, placed at the disposal of the Investigation Committee and the members of the Society.
- (3) pending the decision of the Special General Meeting on the legal opinions ~~to~~ to be obtained, the payment of honoraria to Management Committee members be suspended."

The "Management Committee" referred to in the above draft resolutions is the Society's Board of Management.

The declaration averred that the defendants, who were the Society and the members of its Board of Management, wrongfully and unlawfully refused to convene the Special General Meeting which the plaintiffs had requisitioned. The plaintiffs claimed an order directing the Society's Board of Management to give notice of a Special General Meeting in terms of their petition or alternatively authorising the plaintiffs to call such meeting in the name of the Society.

The defendants excepted to the declaration on the ground that it disclosed no cause of action in that upon a true construction of the Society's Constitution it would not be competent for the Special General Meeting of the members to pass the draft resolutions referred to above or alternatively such resolutions if passed would have no force and effect and that consequently the members of the Board of Management were legally entitled to refuse to convene the meeting.

In terms of its Constitution the Society may acquire movable and immovable property. Deeds of transfer and mortgage bonds must be registered in the Society's name (Rule 89). The Society has the right to sue or be sued in its own name (Rule 90).

The object of the Society is to raise funds for the purpose of paying Sick and Death Benefits, retirement gratuities^{to} and ~~also~~ ~~the purpose of~~ furthering members' interests in general (Rule 3).

Rule 30 is as follows :

" The Society shall be governed by a Council and a Board of Management. They shall have the powers and duties assigned to them under these Rules and such further powers and duties as may be validly conferred upon them at any General Meeting. "

The Council consists of the President and Vice-President of the Society and four Councillors - one for each of the four Provinces of the Union (Rule 31). Each of the four Councillors must be elected by a ballot of the members in the respective Provinces (Rule 32). The President and Vice-President are elected at an Annual General Meeting (Rule 56) and nominations for those positions must be signed by five members and two Councillors (Rule 58). The Council functions as a court of appeal from decisions of the Board of Management which affect members (Rules 39 and 91).

Rule 46 provides that the administration and control of all matters, interests, assets and affairs of the Society shall be vested in a Board of Management of 12 members. Rule 47 pro-

vides that "The said Board shall comprise :

The President, vice-President,
6 appointed members (appointed by the Councillors
for the Transvaal, Free State and Natal - 2 each)
and
4 members elected in Annual General Meeting. "

Rule 48 is as follows :-

" 48. The present Management Committee, which shall henceforth be styled 'Board of Management', shall continue in office until the Annual General Meeting in 1956. At that Meeting, elections of the President and vice-President shall be held, and the three Councillors entitled to appoint members on the Board, shall each appoint one member for two years and one member for one year. Thereafter, as and from 1957, at every Annual General Meeting, each of the three Councillors above-mentioned shall appoint one Board member to hold office for two years, in place of the retiring appointed members. At the aforesaid Annual General Meeting in 1956, there shall be elected four Board members, - the two receiving the larger number of votes to serve for two years and the other two to serve for one year. Thereafter, as and from 1957 at each Annual General Meeting there shall be elected two Board members, in place of the retiring elected members. "

There is also an Executive Committee whose duty it is to supervise the work of the officials and staff of the Society and to attend to the general business of the Society and administer its affairs in accordance with the Rules and the direction given to it by the Board of Management from time to time (Rule 63).

There is further a Finance Committee whose duty it is to check sick benefit claims and all claims for gratuity and death benefits and to carry out such duties as may be assigned to it from time to time by the Board of Management (Rule 70).

There are a number of Rules which confer ^{specific} ~~specific~~ powers on the Board of Management. The acceptance or rejection of an application for membership is in the discretion of the Board which has the right to reject any application without having to assign any reason therefore (Rule 5). The payment of benefits to members or their nominees is entirely in the discretion of the Board (Rule 28).

Rules 74, 75 and 76 are as follows :-

" 74. The Board shall have the right to make Standing-Rules and Bye-Laws governing :

- " (a) The conduct, duties and privileges of its members;
- (b) The conduct, duties and privileges of the officials and employees of the Society ;
- (c) The procedure at meetings (Executive, Board and General Meetings) ;
- (d) The procedure governing investigations of complaints against members and the hearing of explanations by such members ;
- (e) The procedure governing the presentation and hearing of Appeals to the Council.

The Board shall have the right to alter and/or amend such Rules and Bye-laws from time to time, as it may deem meet. And provided such Rules and Bye-laws are not in conflict with any of the provisions of this Constitution, they shall have the same force and be of the same effect as if incorporated in this Constitution.

- " 75. All monies received by the Society shall be applied towards the benefits set out in Rule 3 above, the working expenses of the Society, as well as to any other object, except increases in honoraria, which the Board in its discretion, may consider to be in the interests of the Society.

- " 76. The Board of Management shall have the right to impose from time to time, a special levy on members, for the purpose of strengthening the financial position of the Society. "

The Board may give notice of motion to amend the Rules of the Constitution at a General Meeting (Rule 82). This Rule does not require any specific majority for an amendment of the Rules whereas Rule 83 provides that certain rules

cannot be amended at the instance of a member unless the amendment is carried by a majority of two-thirds of the members present, including two provincial Councillors and Rule 84 provides that certain specified Rules cannot be amended at the instance of a member save by a plebiscite resulting in a majority of 51 per cent of the total membership of the Society in favour of the amendment. The Board is empowered to amend any Rules of the Constitution or to ~~form~~^{pass} new Rules in order to bring the Constitution within the provisions of any Act of Parliament (Rule 85). The Board has the power to investigate and consider complaints against a member of the Society (Rule 86). A vote of no confidence against a member of the Board may be ~~passed~~^{passed} by a majority of two-thirds of the members present at an Annual General Meeting including two provincial Councillors (Rule 87). Rule 92 provides that "any point not provided for in this Constitution as well as the interpretation of these rules shall be determined by the Board of Management."

Rule 71 is as follows :-

" At the end of each financial year the following honoraria shall be awarded :

President £360; vice-President £260; Executive Officer £220; the two additional members of the Finance Committee - £180 each."

Rule 91 provides that "any member, who is personally

"and directly affected by any decision of the Management Board
 "..... shall have the right to appeal to the Council
 "against such decision."

Rule 78 provides that the Board has the right to call
 a Special General Meeting at any time and for any purpose which
 it
 /may deem to be in the interests of the Society. Regulation 79
 provides that, subject to certain requirements, with which the
 plaintiffs ~~xxx~~ in their declaration say they have complied,
 "A Special General Meeting shall also be called on the petition
 "of not less than 50 members, setting out fully and succinctly
 "the resolutions to be proposed at such Meeting."

The Society appears to be what is commonly called a
 friendly society. The plaintiff's declaration alleges that it
 is a corporation but there is nothing ⁱⁿ ~~on~~ the papers to show
 that it is registered under the Friendly Societies Act 1892
 (Cape) or under any other Act. I shall therefore assume
 that the Society has not been registered under any Act of Par-
 liament ; this fact would not per se show that it is not a
 corporation. An unregistered body may function as a corpor-
 ation without the special permission of the State. See Morri-
son v Standard Building Society (1932 A.D. 229 at p. 236). I
 shall deal with this case on the footing that the Society is a

corporation.

It is of prime importance to decide in the first instance how to approach the problem raised in this appeal. The Society's constitution is in writing and, to use the words of Stratford J.A. in Wilken v Brebner & Others (1935 A.D. 175 at p. 187) "we have only to solve the questions submitted to us by "ascertaining the meaning of a written document according to "the well-established rules of construction." This dictum is in consonance with a long line of cases in which emphasis is laid on the necessity of adhering to the terms of the constitution of a body like the Society. Where, for instance, a constitution does not provide for its amendment by a majority vote, the amendment can only be made by the unanimous vote of the members of the body concerned and if a member's rights are transgressed by a majority of his fellow members the Court will come to the aid of the dissentient member. See, for instance, Nederduitsch Hervormde Congregation of Standerton v Nederduitsch Hervormde of Gereformeerder Congregation of Standerton (1893 S.A.R. 69), Coates and Cottrell v St. John's Benefit Society (23 S.C. 38) ; Solomon v Alfred Lodge (1917 C.P.D. 177 at pp. 180 and 184) ; Galloway Exec. S.A. Boilermakers, Ironworkers and Shipbuilders' Society (1921 W.L.D. 20 at p. 26).

An examination of the Society's Constitution shows that the following bodies are vested with certain powers :-

- (1) The Council
- (2) The Board of Management
- (3) The Executive Committee
- (4) The Finance Committee
- (5) A General Meeting of Members.

A General Meeting may alter any of the Rules of the Constitution apparently by a simple majority, at the instance of the Board of Management and that General Meeting may be the Annual General Meeting or a Special General Meeting (Rule 82).

A Special General Meeting requisitioned by a member cannot alter the Rules but an Annual General Meeting may, at the instance of a member, alter some of the Rules by a prescribed majority (Rule 83) but no General Meeting can at the instance of a member alter certain specified rules. In the last mentioned case there must be a plebiscite of all the members

(Rule 84). The reason why a General Meeting can by a simple

majority alter any of the Rules at the instance of the Board

is because the Board ^{which proposes the alteration} is thoroughly representative of members

living in all the Provinces of the Union and the reason why a

prescribed majority is required when an amendment is moved by

a member is because a General Meeting, there being no provision

in the Rules for the giving of proxies, cannot from the nature

of things be as representative as the Board of the general body of members who are scattered throughout the four Provinces of the Union. It is only at an Annual General Meeting that a member of the Board can, at the instance of an ordinary member of the Society be censured and his seat declared vacant (Rule 87). An Annual General Meeting can elect Board members, the President and Vice-President (Rules 48 & 56). It will be seen from the foregoing that the powers conferred on General Meetings are extremely limited and that they are carefully

defined. Rule 79 which enables members ~~to~~ to requisition a Special General Meeting is silent as to what can be done at such a meeting and is in marked contrast to Rule 78 which enables the Board to call a Special General Meeting for any purpose which it may deem to be in the interests of the Society. I think that it is clear from the Constitution read as a whole that a Special General Meeting called at the instance of members is not entitled to exercise any powers.

At first sight it would appear that Rule 30 empowers a Special General Meeting requisitioned by members to confer and impose on the Council and Board such further powers and duties as may be validly conferred or imposed on them, for that Rule says that this may be done at any General Meeting. But the word "validly" must not be overlooked : it connotes that the procedure ^{prescribed} ~~permitted~~ by the Constitution must be followed. A Special General Meeting, when convened at the instance of members, cannot amend, alter, add to or rescind any of the Rules, for that power is reserved under Rule 83 to an Annual General Meeting. And that Rule prescribes a specified majority. Any further powers or duties conferred or imposed on the Council or Board would necessitate an addition to the Rules and Rule 83 would apply. It seems to me that, on the principle generalia

specialibus non derogant, the specific procedure prescribed by Rule 83 prevents a Special General Meeting convened at the instance of members to add to the Rules. But a Special General Meeting convened by the Board would have the power (Rules 78 and 82). A Special General Meeting convened at the instance of members cannot fill any vacancy on the Board, for the right to fill any vacancy is conferred ^{on the Board} by Rule 53. Nor can a vote [^] of no confidence be moved by a member at such a Special General Meeting, for that right can under Rule 87 be exercised only at an Annual General Meeting. The Rules confer no power on any General Meeting to incur any expenditure.

That is a right reserved under Rule 75 to the Board. Here again the framers of the Constitution must have considered it impolitic to confer such a right on an unrepresentative body like a General Meeting. Even the power to impose a special levy is conferred on the Board and there is nothing in Rule 76 to suggest that a special levy must be sanctioned by a General Meeting of members.

In view of all this the question naturally arises : what was the purpose of inserting Rule 79 whereby members can requisition a Special General Meeting ? Clearly it could not have been intended to give greater powers to members assembled at a Special General Meeting than to members assembled at an Annual General Meeting. The only instance where members at an Annual General Meeting can apparently act by a simple majority is when they elect the President, Vice-President and four members of the Board (Rules 47 and 48). These elected members form half of the number of members of the Board, the remaining half are appointed by the Councillors for the Transvaal, Free State and Natal and not elected by a General Meeting. In all other cases where powers are conferred on members at an Annual General Meeting (see Rules 83 and 87) the majority required is two-thirds of the members present including two provincial councillors.

There are four provincial councillors, each councillor being elected in terms of Rule 32 by a ballot of the members in the respective Provinces of the Union. Rule 79 is silent as to the majority required for the passing of a resolution : presumably a resolution can be passed by a simple majority. The absence of a prescribed majority makes it highly unlikely that it was ever intended by that Rule to confer on members assembled at a Special General Meeting, which for the reasons I have given ~~may~~ ~~must~~ be unrepresentative of the general body of members, any power in relation to the affairs of the Society. The only purpose of inserting Rule 79 was apparently to give members of the Society an opportunity of ventilating their views concerning the affairs of the Society. They cannot by resolution compel the Society to incur any expenditure but they can pass a resolution recommending expenditure : such a resolution would have no binding effect on the Board of Management but it may nevertheless persuade the Board to take action.

If I am wrong in the interpretation I have placed on the Constitution the result would be that a General Meeting of members who are, ^{for the reasons I have given,} unrepresentative, ~~for the reasons I have given~~ of the general body of members, will be able to exercise control over the Society. As I read the Constitution it was designedly drafted in order to avoid such a result. In my

view questions of equity cannot, when a contract is clear and unambiguous, affect the interpretation to be placed on it. The Constitution in the present case is nothing but a contract entered into by the members of the Society. No doubt it may be said to be desirable that there should be a provision in the Constitution enabling the members assembled at any General Meeting to remove any member of the Board of Management, provided that members can vote by proxy. There is no such provision : the nearest provision to this is Rule 87 which is strictly limited in its operation and is confined to Annual General Meetings. That Rule is the only effective overriding control over the day to day administration of the Society which is conferred on its members.

I shall now consider the draft resolution. Paragraph (1) of those resolutions seeks to confer powers on a body other than the Council and the Board of Management. There is nothing in the Constitution empowering a meeting of members to confer powers on any body other than the Council and the Board. It therefore seems to me that paragraph (1) is ultra vires the Constitution. It further seeks to make the Society responsible for the cost of a legal opinion obtained by the Investigation

Committee. Under Rule 75 the control of expenditure is entrusted to the Board of Management and any resolution seeking to empower another body to ^{incur expenditure at the cost of the} ~~spend moneys belonging to the Soc-~~ ^A ~~iety~~ would be ultra vires. Moreover the Executive Committee, which acts under the directions of the Board (Rule 63) is empowered by Rule 65 to appoint solicitors as well as engage other assistance upon such terms and conditions as they may deem necessary for the proper conduct of the Society's affairs. This ^{provision} ~~provision~~ seems to be wide enough to enable the Executive Committee to obtain counsel's opinion on any matter affecting the Society. It is therefore not the function of a body which is not mentioned in the Constitution to obtain counsel's opinion.

The second draft resolution viz: that Counsel's opinion, which the Society apparently obtained, must be placed at the disposal of the Investigation Committee and the members of the Society is also ultra vires the Constitution. Under Rule 93 members may only inspect the books of the Society other than the minute books but members of the Council and Board are entitled to inspect all the books and records of the Society. It seems to me to follow from this Rule that no person other than members of the Council and the Board are entitled to inspect counsel's opinion obtained by the Society.

The third draft resolution which aims at the suspension of the payment of honoraria to members of the Board is pro tanto an amendment of Rule 71 which can only be amended if the amendment is carried on a plebiscite of all members by a majority of not less than 51 per cent of the total membership (Rule 84). This resolution is clearly ultra vires the Constitution.

As all the resolutions proposed to be moved at a Special General Meeting would be ultra vires the Constitution the Board of Management was, in my opinion, entitled to refuse to convene such a meeting.

It was contended by Mr. de Villiers on behalf of the respondents that mere technical deficiencies in the wording of the proposed resolutions does not justify the refusal of the Board to convene the meeting, for such deficiencies could always be cured by an appropriate amendment. Counsel referred the Court to Palmer's Company Law, 15th ed. p. 174 sub voce Amendments and the cases there cited. None of those cases lay^s down the proposition that the directors of a company are bound to convene a meeting for the purpose of passing resolutions which would be invalid : all that the cases lay down is that amendments can be made to proposed resolutions which are valid provided that the amendments do not cast a greater burden on the company than the resolution notice

of which had been given. Under Rule 79 the petition requisitioning a Special General Meeting must set forth "fully and "succinctly the resolutions to be proposed." This requirement enables the Board of Management to know whether the proposed resolutions are intra or ultra vires the Constitution and if they are ultra vires the Board is fully within its rights if it declines to convene the meeting. It is always open to the petitioners ~~so~~ to requisition on resolutions suitably amended so as to make them intra vires.

Mr. de Villiers also contended that the Society is a corporation capable of suing and being sued in its own name; as such it has all the powers expressly conferred upon it in its constitution and also all such inherent powers as are incidental to ^{and} ~~at~~ conducive to the attainment of its objects and that such powers are prima facie to be exercised by a majority vote of members at a duly constituted meeting. For this proposition counsel quoted Palmer's Company Law 15th ed. p. 251 where it is stated : " It is a cardinal rule of corporation "law that prima facie a majority of its members is entitled "to exercise the powers of the corporation, and generally to "control its operations. Where no special provision is made "by the Constitution of a corporation, the whole are bound by

"the acts not only of the major part but by the major part of those who are present at a regular corporate meeting, whether the number present be a majority of the whole or not." In the present case we are concerned with an elaborately framed Constitution from which it is clear, for reasons which I have already given, that it was never intended that a General Meeting of members should be able by a mere majority vote to control the operations of the Society and Palmer makes it clear that the Constitution of a corporation can modify the common law.

It was further contended by Mr. de Villiers that all functions not entrusted to a select body like the Board of Management remain vested in the general body i.e. the members of the Society convened in general meeting. For that proposition counsel relied on R. v Westwood (5 E.R. 76). In that case a question arose whether a local authority which had apparently been constituted a corporation by letters patent granted by

Charles II had the power to make bye-laws in view of the fact that a select body had been given power to make bye-laws in respect of certain matters. At pp. 98 & 99 Park J. said "I take it "to be quite clear, even since the case of Sutton's Hospital "10 Co. Rep. 30(b), that the power to make bye-laws is incident "to every corporation, where such incidental power is not re- "strained by the words of the Charter. The generality of that "incidental power is restrained by giving a power to a select "body to make bye-laws in certain cases. I admit, that if the "power is given to a select body to make bye-laws in all cases, "that the general power is entirely taken away from the body at "large. But, on the other hand, it seems to me to be no less "clear that if a special power be only given in certain cases, "the general authority in all other cases remains in the body at "large."

It appears from the case of Sutton's Hospital (77 E.R. 960 at p. 970) that according to English law a corporation duly created has a large number of powers implied by the very act of incorporation.

I do not think that R. v Westwood (supra) is of any real assistance to the plaintiffs. It was relied on apparently for the proposition that the general body of members have certain

inherent rights which the Constitution has not taken away from them and that one of those inherent rights is to control the Board of Management. To my mind the fallacy in this contention is that the plaintiffs have joined a society the rules of which form its constitution ; and the only powers which a general meeting of members has must be derived from the express terms of that constitution or by necessary implication. There is no express power entitling a general meeting of members to pass the resolutions proposed and such a power cannot, in my view, be inferred by necessary implication from the Constitution on the principles applied by this Court in Mullin (Pty.) Limited v Benade Limited (1952 (1) S.A. 211). On the contrary the implication seems to be against the plaintiffs in view of the specific requirements of Rule 87 in relation to the removal of members of the Board of Management. The Constitution may be a foolish contract as far as the general body of members is concerned but this Court has no power to make a new contract for members.

Great stress was laid by Mr. de Villiers on Rules 46 and 30. He contended that under Rule 46 only the administration and control of all matters, interests, assets and affairs of the Society are vested in the Board and that other

powers must still be vested in a General Meeting of members seeing that Rule 30 provides that the Council and Board shall have the powers and duties assigned under the Rules and such further powers and duties as may be validly conferred upon them ^{apart from his construction which I have already placed on the Rule} at any general meeting. [^] I do not think that that ~~provision~~ rule carries the matter any further : it was probably put in ex abundanti cantela in case it was discovered that either the Council or the Board should have further powers and duties : it does not show that it was intended that a General Meeting should in any way usurp the functions conferred on the Board under Rule 75 of controlling the expenditure of the Society. Nor does it show that a General Meeting ^{can} ~~should~~ exercise any powers save those specifically conferred on it by the Constitution.

It was also contended on behalf of the plaintiffs that as the object of the proposed Special General Meeting is a further investigation into the alleged irregular disposal and appropriation of the funds of the Society by some or all of the members of the ^{Board} ~~Board~~ of Management, that meeting is entitled to act in protection of the interests of the Society as such vis-a-vis the members of the Board and that this cannot be said to be a matter of administration and control which under

Rule 46 is vested in the Board. It was contended that the words "administration and control" in that Rule indicate that all that was entrusted to the Board was the function of ordinary management. I do not think that this contention is sound as the word "control" has a very wide meaning, and includes "domination" and "command" (Shorter Oxford Dictionary). It would be a contradiction in terms to say, in view of the provisions of the Constitution, that the matters, interests, assets and affairs of the Society are controlled by the Board, if a General Meeting of members had the power to control the Board.

The only power given under the Constitution to a General Meeting of members to express dissatisfaction with the Board is to be found in Rule 87. If the members of the Society have lost their confidence in the Board it can be removed from office, provided that the majority in favour of removal is that which is prescribed in Rule 87. It is that Rule which gives a General Meeting - and it must be the Annual General Meeting - an indirect control over the Board.

Another contention advanced by counsel for the plaintiffs was based on the principle that an agent's authority to act on behalf of his principal does not include authority to act where his, the agent's, interest is in conflict with that

of his principal. I do not see how this principle is of any assistance to the plaintiffs. The Board's principal is the Society and it is the Society which is entitled to take action against members of the Board, if the Board has been guilty of irregular and unlawful disposal of the Society's funds. As long as the present Board functions such action would no doubt not be taken by the Society but the remedy of members of the Society lies in Rule 87 under which a new Board may be elected and that new Board would be entitled to cause the Society to take any action that may be necessary against any members of the present Board.

In my view the appeal should be allowed with costs and the order made by the Cape Provincial Division should be struck out and the following order substituted : "Exception allowed with costs and plaintiffs' declaration set aside." Leave is reserved to the plaintiffs to file a fresh declaration ~~within one month of the date of delivery of this judgment.~~ on or before October 31st, 1956."

Louster JA. } concur.
 Brink JA. }

Record.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

CAPE UNITED SICK FUND & OTHERS

Appellants

and

THOMAS GEORGE FORREST & OTHERS

Respondents

Coram: Centlivres C.J., Hoexter, Steyn, Reynolds
et Brink, JJ.A.

Heard: 11th. June, 1956.

Delivered: 25-9-56

J U D G M E N T

STEYN J.A. :- The issues raised in this appeal appear from the judgment of the Chief Justice which I have had the advantage of reading.

It has not been seriously contested that the scope of the functions of the numerous organs of this society is determined, primarily if not exclusively, by its written constitution. It is conceivable that the rules of the common law may supplement the express terms of a corporation's constitution, but we have not been referred to any common law authorities setting forth any rule which would be applicable in this case. As will appear from what follows, the answer to

the/.....

the question raised is to be found in the terms of the society's constitution. I shall confine myself, therefore, to a consideration of the meaning of the relevant provisions therein.

In interpreting these provisions it is necessary, I think, first of all to examine the general framework according to which the society has been constituted. Its members are servants of the Railway Administration, and may be in employment anywhere in the Union and South-West Africa. Distance and the exigencies of their service no doubt make it impossible for all members or even the majority of them to meet at regular intervals for the purposes of the business of the society. It is not surprising therefore that large powers fall to be exercised by the governing bodies created by the constitution. The chief of these is the Board of Management, consisting of twelve members, of whom six are elected at an annual general meeting and the others are appointed by councillors elected for the Transvaal, the Orange Free State and Natal. One councillor is elected for each province of the Union by members in that province and each councillor for the province mentioned appoints/.....

appoints two members to the Board. The councillor for the Cape Province has no such power of appointment, probably because the headquarters of the Society being in Cape Town, general meetings would normally be held there, with the result that members in that province would have a better opportunity of attending such meetings and taking part in the election of members of the Board. By this procedure it is presumably sought to achieve a wider, albeit it partly indirect representation upon the Board than would have resulted from the election of all its members at a general meeting.

Extensive powers are conferred upon the Board. By Rule 46 it is vested with "the administration and control of all matters, interests, assets and "affairs of the Society". The Executive Committee, consisting of the President, vice-President and an executive officer elected by the Board from its members, acts under the directions of the Board (Rule 63), while the Finance Committee, consisting ^{of} the the members of the Executive Committee and two other members of the Board elected by it, carries out, in addition to the checking of claims for benefits, such duties as may be assigned to it by the Board (Rule 70). Subject to the provisions of the constitution/.....

-stitution, the Board may make standing rules and bye-laws governing inter alia the procedure at general meetings (Rule 74). Apart from the payment of benefits to members provided for in the constitution and of the working expenses of the Society, it may apply the funds of the Society to such objects (except increases in honoraria) as it may consider to be in the interests of the Society (Rule 75), and may from time to time impose a special levy upon members for the purpose of strengthening the financial position of the Society (Rule 76). It determines any point not provided for in the constitution (Rule 92).

In order to assess the effective extent of these and other powers of the Board, it is necessary to consider what residuary or overriding control, if any, the constitution leaves in the hands of the persons who have composed themselves into this society. Apart from the provision in Rule 84 for a plebiscite, the relevant provisions here are those dealing with general meetings, the assemblies of the general body of members. These, as is not unusual in such cases, fall into the two categories of annual and ^{special}~~general~~ meetings. The distinction is based upon differences in times, procedures and business to be transacted. In principle a special general meeting is as

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much an assembly of the general body of members as an annual general meeting. Admission to both is "by rule book" (Rule 81), and any member may attend. In terms of Rules 40 and 52 it is the duty of all councillors and of all members of the Board to attend every general meeting, irrespective of whether it is a special or annual meeting. The only differences in attendance ~~at~~^{at} such meetings are that any provincial representative who may have been appointed by a councillor is required to attend the annual meeting (Rule 37), but need not apparently attend a special meeting; and that a special meeting called at the instance of members has to be attended by at least 100 members (Rule 70), whereas the quorum at other general meetings is 50 (Rules 77 and 78).

What control, then, is left to the general body of members in general meeting? There is, in the first place, special provision dealing with amendments of the constitution. Under Rule 82, a general meeting, whether a special meeting or an annual meeting, may, on notice of motion by the Board, amend any rule, including a rule dealing with the constitution, powers or duties of the Board, or the payment of honoraria to its members. An annual meeting may on notice of motion by a

member/.....

member, amend certain rules only, and then only by a majority of two-thirds of the members present, including two of the councillors (Rule 83). The rules which may be so amended do not include the rules relating to the Board. These, as well as others excluded from the operation of Rule 83, may only be amended on the motion of a member by a plebiscite at which fifty-one per cent of the total number of members vote in favour of the amendment. It would appear, therefore, that a special meeting called at the instance of members, cannot deal with amendments of the constitution, and is to that extent debarred from effecting any change in the prescribed powers and duties of the Board. In terms of Rule 30, the Council and the Board "shall have the powers and the duties assigned to them under these rules and such further powers and duties as may be validly conferred upon them at any "General Meeting." There is no distinction here between the various general meetings but if the further powers or duties are to be conferred by the promulgation of an additional rule, it may be doubted whether that would be competent for a special meeting not called by the Board, or for an annual meeting, except in pursuance of a general notice of motion by the Board, as such an extension

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of powers or duties may be said in effect to amend the constitution. What is clear, however, is that by the vote of two-thirds of the members present at an annual meeting, including two councillors, a motion of no-confidence in any member of the Board may be passed at the instance of any member of the Society (Rule 87). The member of the Board concerned thereupon automatically vacates his seat. This applies also in respect of members of the Board not elected by an annual general meeting. From Rule 77 it is also clear that an annual meeting is called upon to consider the annual report and balance sheet. It follows, I think, that it may adopt resolutions arising from such consideration, which may affect the manner in which the Board is to conduct the affairs of the Society.

It is apparent, therefore, that the administration and control vested in the Board is by no means unassailable or of an entirely independent nature. Although the Board's position is to a considerable extent entrenched by restrictions against amendment and interference, the general body of members have not been deprived of all powers of determining what the Board's powers and duties are to be, how they are to be exercised, what

remuneration/.....

remuneration members of the Board may receive, and whether or not they are to continue in office. It is incorrect to suggest, therefore, that the Board's powers of administration and control are ^{so} comprehensive and complete as of necessity to exclude any initiative or overriding action by a general meeting of members. These powers to which I have referred suggest ~~ed~~ very strongly, moreover, that any residuary power necessary for carrying on the activities of the Society resides where one expects it to be, that is, with the members in general meeting in one or more of its various forms.

However wide the powers of the Board may be, they can, I think, in any case not be held to embrace the exclusive function of carrying out such investigations as may arise from an allegation of irregular disposal of monies by the Board itself or as may be necessary for the purposes of a vote of no-confidence in the members of the Board. That would be in open conflict with the most elementary concepts of equity and efficacy and against all reason. I have no doubt that by initiating and directing such investigations, a general meeting would not in any way be trespassing upon the domain allocated to the/.....

the Board alone. Expenses to be incurred in carrying out such investigations may reasonably be regarded as part of the working expenses of the Society towards the payment of which ^{the} moneys of the Society may be applied under Rule 75. I can find nothing in this Rule which makes the Board the sole arbiter of working expenses to be incurred, or which precludes a general meeting from directing that working expenses incurred in pursuance of a resolution passed by it, be paid.

I return then to Rule 87 and the explicit authority it confers upon an annual general meeting to pass a vote of no-confidence in members of the Board. For the fair and effective performance of its functions under this Rule, it would not only be desirable, but indeed imperative for the general meeting to be placed in possession of all the relevant facts, not only in the interest of the Society itself but also in the interest of any member of the Board against whom the motion is brought. The proposer and seconder of the motion would, under Rule 93, not be entitled to inspect all the books and records of the Society, with the result that it may be quite impossible for them to ascertain all the facts or to place before the meeting what may provide conclusive proof

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of their assertions. There may, further, be a conflict of evidence which could only be resolved by more complete information not available to the proposer and seconder.

It must follow, I think, as a necessary implication arising from the very nature of the function to be performed and ~~upon~~^{from} the circumstances attending its performance, that it would be competent for an annual general meeting to cause such investigations to be made as may be essential for the proper consideration of a motion of no-confidence. The obtaining of counsel's opinion for the guidance of the meeting upon doubtful issues may be regarded as a legitimate part of such investigations. Under Rule 65 the Executive Committee is the organ designated to appoint solicitors for the Society, but all its members are also members of the Board, and for the reasons already mentioned in connection with the alleged exclusiveness of the Board's powers of administration and control, I do not think that this power of appointment, inconclusive as it is in itself, can preclude a general meeting from seeking counsel's opinion on any matter in which the conduct of the members of the Executive Committee themselves, even though in another capacity, is called into question. The proposed resolution, therefore, in so far at any rate as it contem-

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-plates a legal opinion on the question whether certain payments to members of the Board are illegal and if they are, whether action can be taken to compel them to relinquish office, could, therefore, validly be passed by an annual general meeting. But that, of course, is no answer to the exception raised. The draft resolution is intended not for an annual but for a special general meeting to be called at the instance of the plaintiffs. It is the competency of such a special meeting which the exception places in issue. The question on this part of the appeal then is whether a special meeting held under Rule 79 would have the same power in this regard as an annual meeting.

Rule 79 does not define the nature of the resolutions which may be passed at such a meeting or specify the matters with which such a meeting may concern itself. As already indicated, in so far as the nature of the composition of the meeting is concerned, there is nothing to render it inherently less authoritative than an annual meeting, or a special meeting called by the Board. For distinctions in function and power one looks therefore to specific provisions differentiating between the various categories of meetings. It does not follow

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that such a special meeting under Rule 79 has no real powers merely because no particular powers are specified. By the clearest implication it is authorised to deal with resolutions properly placed before it. But the scope of what may so be placed before it must be determined by the express and implied provisions limiting the functions of such a meeting. The proposed resolution, in so far as it relates to the matters mentioned above, would come within the jurisdiction of an annual meeting as a necessary incident in the transaction of business left in the sole competence of such a meeting. As such it may be said to be assimilated into the specific power conferred upon an annual meeting only and by inference to be excluded from the jurisdiction of a special meeting under Rule 79, which has no such express power to serve as the source of any similar implied authority. It may be that in certain circumstances a motion of no-confidence could be disposed of more conveniently and with greater dispatch if such a special meeting could deal with further matters arising in the course of investigations set in train by an annual meeting, but if such a concurrent jurisdiction having its origin in an exclusive function ^{assigned} ~~essential~~ to an annual meeting, had been intended by the framers of the constitution/.....

-tion, one would expect some provision to that effect. It is not, I think, a jurisdiction so clearly required for business efficacy that it should be implied in spite of the specific provision entrusting the main subject matter exclusively to an annual meeting and the intention to the contrary which may be inferred from that provision.

The next question is whether the part of the proposed resolution which relates to the recovery of allegedly illegal payments from past and present members of the Board (or its predecessor, the Management Committee) is likewise beyond the jurisdiction of a special general meeting held under Rule 79. The recovery of such payments is clearly ~~recoverable~~ - separable and distinct from a motion of no-confidence in members of the Board. I can find no specific provision, as in the case of proceedings aimed at the removal of members of the Board from office, excluding such a matter from the competence of such a meeting by assigning it solely to another organ of the society. For reasons already indicated in another connection, the Board's powers of administration and control cannot include any exclusive authority to decide whether or not payments made to members of the Board in pursuance of resolutions by the Board should, if illegally

made/.....

made, be recovered. Similar considerations apply in regard to Rule 90, which vests in two members of the Executive Committee the function of representing the Society in all legal proceedings. As they ~~w~~^{could} also be members of the Board, this provision cannot apply where the conduct of the whole Board is being impugned. Rule 90, moreover, does not provide that the Executive or any two members of it may decide whether or not to institute or defend legal proceedings on behalf of the Society. It merely authorises two members to represent the Society in such proceedings. Ordinarily the Board would decide whether or not to recover and instruct the Executive accordingly. But where, as here, neither the Board nor the Executive can act, the question arises whether the members in general meeting may cause to be carried into effect the indisputable right of the Society to recover what is payable to it. In my view, having regard more particularly to the measure of residuary power which may be said to be vested in the members assembled in general meeting, there is no other body created by the constitution which could more properly do so. It is arguable that the recovery of such payments could be left in abeyance until the members of the Board vacate or are removed from office, but that would mean that the Society would be precluded

from asserting its right to recover such irregular payments in a court of law, unless it got rid of the members of the Board, and it may not consider it necessary to do so. There may be a bona fide dispute and the members of the Society may be quite content to leave the members of the Board in office, whatever the outcome of the proceedings may be. I can find no reason why the Society should be forced to elect either to abandon its claim to the money or else to have a new Board constituted. In the absence, therefore, of a specific limitation in this regard upon the functions of a general meeting, either annual or special, it would seem to be within its competence to deal with a proposed resolution aimed at the recovery of the payments in question. In my view this part of the proposed resolution would not exceed the jurisdiction of a special meeting held under Rule 79. It is conceded that the exception should not be allowed unless the whole of the proposed resolution would be beyond the powers of such a meeting.

In my ^{opinion} ~~view~~ the appeal should accordingly be dismissed with costs.

L. E. Styrer.

Record

IN THE SUPREME COURT OF SOUTH AFRICA
(Appellate Division)

In the matter between:-

CAPE UNITED SICK FUND SOCIETY AND OTHERS PLAINTIFFS

versus

THOMAS GEORGE FORREST AND OTHERS RESPONDENTS

CORAM: Centlivres C.J. Hoexter, Steyn, Reynolds et
Brink JJA.

HEARD: 21/5/56:.....

DELIVERED: 25/9/56:...

JUDGMENT:

REYNOLDS. J.A.

In this judgment the first appellant is referred to as the Society, the other appellants as the defendants, and the respondents as the plaintiffs. The relevant rules of the Constitution of the Society are set out in the judgment of the Chief Justice. From the allegations in paragraphs 4 and 5 of the Declaration, it appears that an investigation Committee was appointed at an adjourned Annual Meeting of the Society held on the 4th of June, 1954, that the Committee submitted its report at an Annual General Meeting on the 22nd April, 1955, that after some discussion a motion by the Chairman of the meeting, (One of the defendants), that the report be referred to the Attorney-General was defeated, that immediately after that the Chairman declared the meeting to be

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closed and did so without affording the members present at the meeting an opportunity of voting on the report and certain recommendations made therein. From para 7 it is clear that the report recommended that legal opinion should be obtained as to the legality of payments to members of the Management Committee or Board of Management, past and present, and that in the event of these payments being advised to be illegal, whether these amounts could not be recovered from these members, and action taken to remove these members from their office. In view of the fact that the report was thus not considered at the Annual Meeting of 22nd April, the plaintiffs used Rule 79 of the Society to request that a Special General Meeting be held to consider whether the Committee should not be empowered to take legal opinion in terms of the recommendation of the Committee already referred to, that this opinion be obtained at the expense of the Society as to all matters arising from the report, and that the Investigation Committee should report back to the Special General Meeting.

Taking the first resolution sought to be passed by the Special General Meeting, it will be seen that this was only
X to empower the Committee^{to} take legal advice on the information revealed in the report on matters which had not been discussed

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at the Annual General Meeting owing to the action of the Chairman already set out, further, that this waste be done at the expense of the Society and the Committee was to report back to the Special General Meeting. It is contended for X the Society and defendants that a Special General Meeting had⁵ no power to pass such a resolution, that the advice be taken at the expense of the Society, that it would accordingly be useless to call such a meeting, and so the refusal was justified. The fact that the resolution proposed to be submitted to the Special General Meeting required the Committee to report back to the Meeting does not seem to figure in this objection. This portion of the resolution does not seem to mean more than that the Meeting should be told of the result of the obtaining of the advice, and does^{nd-} of necessity ~~not~~ mean that the Meeting would do more than consider the matter, and decide whether the advice warranted the matter being again laid before an Annual General Meeting which would then have the guidance of the legal advice in deciding what course it would take. The reference to the removal of members of the Board makes that even more clear for only an Annual General Meeting can exercise that power under Rule 87. The whole question really comes down to whether a Special General Meeting can authorise a Committee appointed by the Annual General Meeting to take legal advice at the expense of the Society and for the

information of the Annual General Meeting, or its guidance, on matters in the report of the Committee.

At the outset of his argument for the Society and dependants, Mr. Duncan pointed out that there is a great difference between this Society and a limited liability Company. In the case of the Society the members by themselves, and by a necessary majority, can change the objects and powers of the Society, whereas the powers and objects of a Company are limited by those set out in the Memorandum of Association and can only be altered in the manner laid down by the Acts relating to Companies. That is so as regards the objects and powers of the two bodies, but there is a close analogy, at least, between the Rules laid down in the Constitution of the Society and the Articles of Association which regulate the internal affairs of the Company. The Rules of the Society constitute a contract regulating the rights of the members against the Society and the rights of the Society against the members, as was readily admitted by both Counsel. In the same way, however, the Articles of Association constitute the contract regulating the same rights, leaving the rights of members against each other intact. HALSBURY 3RD ED (SIMONDS EDITION) PARA 269 ; QUINN AND AXTED LTD. VS SALMON 1909 A.C. 442. On this question, at least, authorities on Company matters will be applicable, though it is always best, where possible, to decide the matter on the

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language of the rules of the Society.

Turning to the Rules of the Society, it can scarcely be doubted that the powers of Management conferred on the Board are most extensive. Rule 46 is very clear on this point, and it is difficult to see how Rule 30 can help plaintiffs in view of the word "validly" occurring therein. This may best be shown by considering Rule 46, and then the meaning of Rule 30. Rule 46 conferring the widest powers on the Board is definitely a term of the contract between the members of the Society and binding on them, is just in the same position as a provision in Articles of Association of a Company conferring complete management on Directors, and the position as regards Companies is set out in para 602 of the SIMONDS EDITION OF
X HALSBURY where it is stated;

"Where, under the Articles, the business of the Company is to be managed by the Directors and the Articles confer on them the full powers of the Company subject to such regulations, not inconsistent with the Articles, as may be prescribed by the Company in General Meetings, the shareholders are not enabled by resolution passed at a General Meeting, without altering the Articles, to give effective directions to the Directors how the Company affairs are to be managed, or to overrule any decision come to by the Directors in the conduct of the business."

This statement is fully borne out by such authorities as the QUINN AND AXTED CASE just quoted, and SHAW AND SON LTD.
VS SHAW 1935 (2) K.B. PER GREER L.J. AT P. 134.

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Hence the word "validly" in Rule 30 means only that the Society can in an Annual General Meeting held in accordance ^{or at a General Meeting under proposed Rule 82, amended} with Rule 83, its constitution so as to give to the Society a power to control the Board and that power is not yet in existence. Obviously a Special General Meeting cannot alter Rule 46, but that Rule can only be altered on due motion by members asking for an amend-ment at the Annual General Meeting under ^{or at a meeting summoned by the Board under Rule 82} the terms of Rule 83. Ofcourse, it may be a question whether the resolution now examin-ed really does at all purport to control the powers of the Board. It may be that the resolution only empowers information to be obtained for the benefit of the members of the Society as to how the business of the Society is being conducted by the Board and as to the legal effect of that conducting of the business, and does not amount to control until the Society takes some action in the matter to control and interfere with the conduct of the business by the Board. But in the view taken in this case on another ground, it is not necessary to decide this point and it is assumed - but assumed only - that the resolution amounts to something more than getting information for members at the expense of the Society and is an attempt to control the Board, and would be a violation of Rule 46 if it dealt with powers conferred on the Board by Rule 46.

But the emphasis in the authorities is on the fact that

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the Society, like a Company, cannot control the Board, or Directors, in matters in which authority is conferred on the members of the Board to manage the affairs of Society, or Company. But here the Court is dealing with questions of illegal payments to the members of the Board of money of the Society. By Rules 71 and 75 only stipulated honoraria can be paid to these members, and the illegal payments can only refer to amounts in excess of the amounts allowed to be paid.

The fact that legal advice is to be sought by the Board as to whether the payments to members of the Board are illegal clearly indicates that facts have been revealed in the report that these have been payments over and above the Rules, and it is the legality of these payments which is questioned by the Committee and legal advice to be sought thereon. In the report the question of legality is clearly raised, and also the power of the Board to make these payments, and the Rule in the Constitution ^{which} confers any possible powers in the Board, is Rule 46.

These payments so questioned by the Committee will be referred to hereafter as "illegal payments". It is quite impossible to see how Rule 46 can confer power on the Board to make illegal or unlawful payments to its members - certainly not make payments in excess of those allowed. It would require strong wording to cover that position and then, in any event, a question would arise as to the legality of such a power. Here there is

no such strong wording and it is clear that the right to make such payments is not conferred on the Board. Consequently it would not be necessary to enable this money to be recovered by the Society that any amendment of the Rule 46 should take place under Rule 83, so as to control the Board in regard to those payments for there is no Rule in the constitution of the Society giving a power to make these payments to be exercised by the Board.

Mr. Duncan rightly agreed that neither Rule 46, nor any other Rule, conferred this power on the Board and that the Board could be controlled or interfered with, in this respect. His point, however, was that a Special General Meeting had no power to pass the resolution now considered, for the constitution gives it no power to act in the matter and to authorise the taking of legal advice at the expense of the Society. He pointed out that ^{confusion} ~~this constitution~~ is not a technical one for the funds of the Society should not be wasted by every member, or number of members, who thought a grievance existed, but only by those who in the Rules are given the right to use the funds of the Society in this way. He urged that there were other remedies, and that even if these other remedies were not adequate - which he did not admit - that was the fault of the members who entered into the contract, as members, without making provision for other remedies, and so they are themselves to blame.

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The remedies he outlined do not seem very adequate. Dealing with them, it may be said that they may exist, but it does not seem very helpful to request the Board to take the opinion in a matter in which they are concerned, and where they may elect to consider that the Special General Meeting has no power to compel them to take legal advice. Nor is it very helpful that individual members of the Society, or of the Investigation Committee, could take advice at their own expense, or to await the Annual General Meeting in April held under the provisions of Rule 87, or 83, and either unseat members of the Board or make a belated effort to amend any Rules, and in the meantime the illegal payments may continue and the members of the Board be "men of straw", or the annual meeting may not wish to unseat them under Rule 87, because of past services, even though satisfied there have been illegal payments. But unsatisfactory as these remedies may seem, Mr. Duncan is right in saying that is not a matter for the Court to remedy if the Rules do not provide for more adequate remedies. The members are bound by their contract. It remains therefore to consider, whether as regard illegal payments as described, a Special General Meeting cannot validly authorise an Investigation Committee appointed by an Annual General Meeting, to take legal advice at the expense of the Society for the information of the members of the Special Meeting, or all members, or for the information of an Annual General Meeting as to whether, in law, the payments are illegal.

It has already been indicated that here the Court is dealing with the question of illegal payments or whether payments are illegal and with conduct of the Board in regard to those payments quite outside the powers conferred on it by the Rule 46 and sight must never be lost of this fundamental fact. In dealing with the question whether a Special General Meeting has power to pass such resolution so that the resolution is valid, it will be best to consider (i) has an Annual General Meeting of the Society such a power, and, (ii) if it has, is there anything in the Rules of the Society so distinguishing the powers of a Special General Meeting from those of an Annual General Meeting that the Special General Meeting has not the power to authorise the taking of legal advice at the expense of the Society to the extent set out in the resolution.

Under the Rules of the Society the Annual General Meeting has to be held in April, but to some extent these Meetings may differ in their composition. For an Annual General Meeting, not dealing with a matter under Rules 83 and 87, the quorum by Rule 77 is 50 members and 30 days notice of it seems required. It is not stated what majority is required to pass resolutions, and it is not necessary to decide that point. The quorum indeed is a small one, but that is the rule of the Society, and by it the members are bound, and common law does not enter into the matter. This meeting in this
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judgment will be called an Ordinary Annual General Meeting.

But if Rules are to be amended in any way under Rule 83, at the instance of members, three months notice before the Annual General Meeting has to be given of the motion, it has to be signed by the proposer and ten others, reasons for it have to be given, and two provincial councillors must be present, and X the majority must be a two thirds one, of the meeting, including the councillors. A no confidence motion which will occasion a displacement of a member of the Board under Rule 87 must be made at an Annual General Meeting, again two councillors must be present, the proposer and seconder of the motion of no confidence must give reasons when sending in the motion, and the majority must similarly be one of two thirds. The quorum of 50 members under Rule 77, remains the same for these meetings. These Annual General Meetings dealing with a matter under Rules 83 and 87 will hereinafter be called plenary Annual General Meetings for they can exercise all the powers of an Annual General Meeting but in dealing with a matter under Rules 83 and 87 have the special conditions as to majority, notice to^{be} given, and special powers as set out etc.

Dealing now with the powers of an Ordinary General Annual Meeting as regards any resolution or acts by it, it is clear that its powers are restricted in two respects. The first is that it cannot deal with matters under Rules 83 and 87,

resolve at an ordinary Annual General Meeting so to do, and can equally validly resolve to investigate payments possibly illegal, and resolve further that legal advice be taken at the expense of the Society as to whether the payments are illegal before litigation is embarked upon. The "furtherance of members interests in general" is one of the objects of the Society by Rule 3 and to see that a Board does not act illegally in such a matter is obviously in the general interest.

The question really comes down to whether in the Rules of the Society, the powers of the Special General Meeting held under Rule 79, are so differentiated from those of the Ordinary Annual General Meeting, that it cannot validly resolve that legal advice be taken at the expense of the Society either for its own consideration or for the consideration of an Ordinary Annual General Meeting, if it thinks this ought to be done. X re a matter of illegal payment to itself, or its members, the Board had no power to make. All the meetings in question are called "General Meetings" in the Rules and merely have an adjective before the word "Meeting" to indicate what meeting is referred to, though the ordinary Annual General Meeting can only occur X once a year. Certainly the word "Special" as distinct from "Annual" before the word "Meeting" cannot of itself draw any distinction as to the powers of these meetings. In this

respect these Rules seem to bear analogy to the usual General Meetings of a Company, and these General Meetings of a Company are distinguished by having before the word "Meeting" the distinction "Annual General Meeting", "Extraordinary General Meeting" and "Statutory Meeting". But they are all General Meetings (⁴GORE BROWNE 34TH ED PAGE ³³⁹~~PYDMONT 4TH ED PAGE~~).

In the Companies Act they are dealt with under the same heading and the distinction as to their powers must be sought in the Act and in the Articles, whereas in the case of the Society any distinction can only be founded on the Rules. It seems, therefore, that the Ordinary Annual General Meeting and the Special General Meeting would have the same powers unless there is something to the contrary in the Rules, which set out the contract to which the members have agreed. It is not enough to show that there is some distinction drawn between the powers of the Special and Ordinary Annual General Meeting. The position must be established that the matters withdrawn from the powers of the Special General Meeting cover the matter now in dispute. In one respect the Special General Meeting is the same in its powers, or lack of powers, as is the Ordinary Annual General Meeting. As regards powers conferred on the Board, by Rule 46, neither of them can control the Board and can only give advice etc., or make requests, which are not binding on the Board. But, as indicated before, illegal payments do not



fall under Rule 46. Then as regards Rules 83 and 87, the Special General Meeting and the Ordinary General Meeting are in identically the same position. By Rule 87 the power to pass a motion of no confidence in a member of the Board only resides in a plenary General Meeting, and the position is the same as regards a motion by a member to amend Rules under the Rule 83. What is the position as regards other motions or petitions dealt with at the plenary Meeting does not arise, though it would seem that these Rules only require the two thirds majority in dealing with the motions of no confidence or amendment of Rules. Hence neither Rule 83 or Rule 87 can be relied on to draw any distinction between the powers of the Ordinary Annual General Meeting and the Special General Meeting under Rule 79.

Nor can any distinction be drawn from the question of what majority is required to carry a resolution etc. at the ^{Ordinary} Annual General Meeting, or one called by the Board under Rule 78, or the one called by members under Rule 79.

- X All three of these Rules are completely silent as^{to} whether the majority is to be a simple one or a two thirds one, and it is not necessary to decide what is to be the nature of the majority for, whatever it is, it is the same in all three Meetings and no distinction can be drawn.

Next may be considered Rule 78 to see if it effects any difference between the powers of the Meeting under Rule 79 and Ordinary Annual General Meeting. Both Rules 78, 79 and 80 come under one general heading in the Constitution of "Special General Meeting", and for both Meetings under Rule 80, there must be 14 days notice and only the items on the agenda can be considered at the Meetings. The Board can call this Meeting under Rule 78 for any purpose it may think to be in the General Interest of the Society. Rule 79, of course, deals with the calling of the Special General Meeting by members of the Society. The way in which these two meetings are called is different. Under Rule 78 the Board just calls the Meetings after 14 days notice under Rule 80, and of its own initiative may choose the agenda for the Meeting. By Rule 79 the members petitioning for the calling of the Meeting must number 50, the petition must set out succinctly the resolution, a deposit of twenty guineas must be made, the quorum is 100 members, and only the proposed resolution can be considered. But, standing by themselves, the two Rules only differ as to the way in which they are called, as to the quorum, and as to the resolution having to be set out in the petition, whereas under Rule 78 it is sufficient for the items to be considered to appear on the agenda. It is quite possible that the meeting called under Rule 78 may discuss more matters than that called under Rule 79,

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but that is no ground for holding that the powers are different for each matter. So that these Rules, by themselves, give no ground for holding that the powers of the two meetings differ. But then Rule 46 comes in giving the control to the Board of all matter³ confided to their control by that Rule. The effect of that Rule is that the Ordinary Annual, and both the Special General Meetings under 78 and 79 are in exactly the same position. By reason of the rule of law, already discussed in the beginning of this judgment, that the control of the Board in matters falling under Rule 46 cannot be interfered with by the members in any meeting until Rule 46 is altered, the Ordinary Annual General Meeting can only give advice, make requests etc. in such matters and do nothing binding on the Board. The meeting called under Rule 79 is in exactly the same position, as to these matters falling under Rule 46. The meeting called under Rule 78 is again in the same position, for though the Board calls the meeting and may ask for advice etc., such is not binding on it. Hence in matters coming under Rule 46, ever there is no distinction between the powers of the Ordinary Annual Meeting and the Special General Meeting under Rule 79, nor indeed the powers of the Meeting under Rule 78. A fortiori there is no distinction between the powers in regard to a matter not coming under Rule 46 such as the present question of illegal payments. Hence Rule 78 cannot be held to show any distinction

between the powers of the Ordinary Annual General Meeting and that of either a meeting called under Rules 78 or 79, in the matter of these payments.

There remains Rule 82 to be considered to see if it effects a distinction between the powers of the Ordinary Annual General Meeting and the Meeting called under Rule 79 in regard to a matter such as the present. By Rule 82 the Board has the power to call a "General Meeting" after thirty days notice for the purpose of altering the Rules. ^{Meeting} "General" is not defined in any way in Rule 82 and the remainder of the Rules do not give the quorum for a General Meeting, as such. But the words may mean one or other of the meetings for which the quorum is given. It is not, however, necessary at all to decide or consider this. Both Rules 82 and 83 in the Constitution come under the one heading "Alteration of Rules" and by their terms are confined to the alteration of Rules. They give the powers to alter the Rules and the procedure, but have nothing at all to do with any other powers, and do not in any way touch upon, or define, or limit the powers of Annual or Special Meetings dealing with other subjects such as the present one. No distinction can be drawn from either of them as to any difference of powers of the Ordinary General Meeting and the Special General Meeting under Rule 79, when dealing with the present matter.

Then Rules 48 and 53 must be considered. The former says that certain members of the Board "shall be elected" at the Annual General Meeting, and Rule 53 says that a vacancy in the Board "shall be filled by the Board". The Special General Meetings under both 78 and 79 are not mentioned as having any such power, and it may be that they have no such power. On the other hand it may be contended that such a view might have curious results. The object of the Rules 48 and 53 may be argued to be to ensure that there will always be a full Board, and that is why "shall" is used in the Rules, and what will be the position if all the members of the Board resign without nominating successors, or all members are involved in a common catastrophe, ^{and} unless there is some power in the Special General Meeting in that event, must the Annual Meeting in April be awaited? But it is quite unnecessary to decide this point or consider whether the case of ISLE OF WIGHT RAILWAY CO. VS TAHOUDIN 25 Ch.D. 320. has any bearing on this point. It will be assumed - but assumed only - that there is a difference in powers on this point between the powers of Ordinary Annual General Meetings and that called under Rule 79. But that will not help to draw any distinction between the powers of these two meetings on the matter now in question. ~~That~~ ^{The} fact that there may be a difference in these powers on one point does not decide whether there is a difference of powers on ano-

ther point. That is particularly so in regard to the election of officials, like members of a Board or Directors, which are usually elected at Annual Meetings, whatever different powers are given to other meetings as regards other matters.

So that on consideration of all the Rules, it seems that there is no distinctions between the powers of the Ordinary Annual General Meeting, and that called under Rule 79, in regard to the matter now in question even if there be some distinctions in other matters, though the distinctions do not seem very great. That being so, and both of these meetings being General ones, it is difficult to see how there can be any distinction such as reduces the powers of the meeting called under Rule 79 to mere advice on matters not falling under Rule 46. Of course it has been pointed out that the quorum required for a meeting called under Rule 79 as a Special General Meeting, is larger than that required for the other General Meetings. I do not think, however, that any deduction can be drawn from ^{that} ~~the~~ fact that the meeting called under Rule 79 has any larger powers than the other meetings, for, despite the larger quorum, that meeting would still not be able to control the directors in matters falling under Rule 46.

Since there is so little distinction between the powers of the Ordinary Annual General Meeting, and the Special

....Cont'd/21.

X one called under Rule 79, may be contended that this logically means that this Special General Meeting can even take action at law to restrain the actions of the Board, or recover the amounts which are illegally paid. . There would be nothing very strange or startling if it had that power. If the Annual General Meeting in each April has to be awaited before action is taken, the illegal payments may continue and the members of the Board, or one or more of them, may be "men of straw", or else their financial position deteriorate in the meantime. But it is not necessary really to consider that point. The resolution under consideration does not in any way authorise legal action on behalf of the Society or any kind of action. It merely deals with the case where the Society at an Annual General Meeting has authorised an investigation, when the report of that Committee has come up before the Annual General Meeting when it was not accompanied by any legal advice as to the legality of the payments but only a recommendation that such advice be taken, and when the Chairman of the meeting closed that meeting without allowing any discussion on the report, save as to forwarding the papers to the Attorney-General. That cannot conclude the matter or prevent the report being considered in the future by an Annual General Meeting. The Committee of Investigation, or one of its members, can bring up the matter again on due notice. Any members can do so including

those who asked for the meeting under Rule 79, nor is there anything to prevent the Special General Meeting itself bringing the matter up again. It would be of much importance at any future Annual General Meeting, considering the report, that members should know the effect of the legal advice obtained, even if the opinion itself be not disclosed in full, and that would most likely influence the voting. Indeed persons requiring the report to be considered at the Annual Meeting may give notice of a motion under Rule 87 of no confidence in the Board, or some members of the Board, and legal opinion as to the effect of the actions of the Board would in all probability influence the voting one way or the other. There is, therefore, the position here that the Special General Meeting, if the resolution were carried, would only have used the funds of the Society to get information at the expense of the Society as to the legal position, and this information to members should be at least at the Annual Meeting in the interests of the Society. It is difficult to see how the Rules of the Society reduce a Special General Meeting to such impotence that, pending the calling of the Annual General Meeting in April, that General Meeting cannot even authorise the Investigation Committee to get advice at the expense of the Society where the information contained in legal advice may influence the actions of the Annual General Meeting in preserving for their right purpose

I come to the conclusion it would be within the power of the
X Special General Meeting to consider and pass ^{the first part} it as it stands,
and therefore the Society and defendants could not refuse to
act under Rule 79 and call this meeting. It is with some
relief that this conclusion is reached so that the members of
the Society, acting within the terms of the Rules, do not have
to leave the matter over until a General Meeting in April and
cannot even take steps by the getting of legal advice to warn
the Board as to the effect of illegal actions. It seems to
me, with respect, that COTTON L.J. expressed the position well
in the ISLE OF WIGHT RAILWAY CO. case where, in dealing with
the powers of refusing to call an extraordinary meeting under
the Companies Acts, he said:

"It is a very strong thing indeed to
prevent shareholders from holding a meeting of the Company,
where such a meeting is the only way in which they can inter-
fere if the majority of them think that the course taken by the
Directors in a matter which is intra vires of the Directors is
not for the benefit of the Company".

LINDLEY L.J. and FRY L.J. were equally of the same
view, and it seems to me that these views apply a fortiori when
the meeting required to be called is, as here, to deal with a
matter outside the powers of the Board, when the Chairman at
the Annual Meeting has prevented the matter being discussed
there, and where legal advice is information which the members

should have if the matter is again brought before an ^{Annual} General Meeting, as it can be, to consider what action should be taken in the matter, including indeed the moving of motions of no confidence.

The second resolution stands on a different footing. From the Declaration it appears that the resolution is for the disclosing not only to the Investigation Committee but also to each member of the Society of the actual full opinion of Counsel, as being a document belonging to the Society. As regards the disclosure to members, at least, the resolution would infringe Rule 9th which only gives members a right to see the ~~minute~~ ^{though not the Minute Books} Books. Without an amendment striking out this portion of the resolution, the resolution would to that extent be invalid, and the position would be quite different from what it was in the ISLE OF WIGHT RAILWAY CO. case where the Court of Appeal held that no amendment was necessary for the resolution to be considered by the Extraordinary General Meeting. It is however, suggested that if the Special General Meeting had been called, an amendment could have been made to make the resolution a valid one. Some colour may be given to this view by a passage in SIMONDS (VOL 6 PARA 683) where it is stated:

"Any amendment fairly arising on a resolution which is specified in the notice of the meeting and within the scope of the notice may be proposed and passed at the meeting, and the Chairman has no right to refuse to put such

an amendment".

The authorities quoted in support of this statement, however, make it clear that this passage refers to what may be done at a meeting called to consider a resolution which was a valid and intra vires one in the original form in which it appeared when the petition for calling the meeting was lodged with the Company. Such a case was HENDERSON VS BANK OF AUSTRALASIA 45 Ch. D. 330 C.A. where the original resolution in regard to which the Special Meeting was called was quite a valid one which the meeting could pass, and it was merely held that the resolution could be amended at a meeting that was actually duly held. The position was the same in the other authorities supporting the passage in Simonds, which really only deals with what may occur at a meeting validly and actually called to consider a resolution valid in its original form. But the position is quite different when the original resolution or an integral portion of it, is quite outside the powers of the meeting sought to be called. Then the officials of the Society or a Company, do not know whether a proper amendment will be proposed at the meeting, if it is called, for those petitioning for the calling of the meeting, may refuse to amend it and insist on the original resolution being passed, and thus the calling of the meeting becomes useless and abortive. Hence it seems to me that the Society and its officials could legally

refuse to call the meeting to consider this resolution.

This also settles the matter of the Third Resolution, which is admittedly ultra vires, in so far as it contravenes Rule 71.

In the result both resolutions two and three were ultra vires the Special General Meeting as the Constitution at present stands, but the First was intra vires and the meeting should have been called to consider it. If all three resolutions were integral portions of one resolution, then the Society would not have been compelled to call any meeting to consider even the first one, but that first resolution is separate and distinct from the others, and their invalidity would not affect it. (SIMONDS VOL 6 PARA 682), and so the meeting ought to have been called to consider it.

The exception was correctly taken to the Declaration as a whole, and so even allowing for the fact that two of the resolutions were ultra vires, yet the Declaration does reveal a cause of action as the Society was compelled to call the meeting, as regards the First Resolution. The position is the same as was the case in SOUTH AFRICAN RAILWAYS VS WARNEKE 1911 A.D. P.657. In that case in the court a quo, the plaintiff sued for the damage alleged to be suffered in the loss of his wife owing to the negligence of the Railways, and he claimed

damages on the two grounds (i) loss of consortium and (ii) loss of the wife's help as a housekeeper ⁱⁿ ~~and~~ her assistance in bringing up the children of the marriage. The Court a quo held that he was entitled to damages on both grounds and overruled the exception, but this Court decided that he was only entitled to damages on the second head, and not on the first one, but dismissed the appeal and the exception to a Declaration still revealing a cause of action on the second head. I think therefore, that the appeal should be dismissed with costs.