REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

CASE NO: **A212/2022**

Before ***ALLIE, J et SALIE, J et MANGCU-LOCKWOOD, J***
Hearing: ***17 July 2023; 1 February 2024***
Judgment Delivered: ***13 February 2024***

In the matter between:

THE BODY CORPORATE OF MERRIMAN COURT	1st Appellant
CLAIRE ELIZABETH BLAHA	2nd Appellant
CHARLES ERIC LEONG SON	3rd Appellant
WENDY-LEE DE GOEDE	4th Appellant
ISTVAN GYONGY	5th Appellant
and	
JOHANNES WESSEL GREEFF	Respondent

For the Appellant	**:**	**Adv PA Corbett SC**
Instructed by	:	Van Rensburg & Co (Ref: Leon van Rensburg)

For Respondent	**:**	**Adv Adv RG Patrick**
Instructed by	:	Maurice Phillips Wisenberg (Ref: Hein Lombaard)
Date(s) of Hearing	**:**	**17 July 2023; 1 February 2024**

Judgment delivered on :

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and	
JOHANNES WESSEL GREEFF	Respondent

JUDGMENT ELECTRONICALLY DELIVERED ON 13 FEBRUARY 2024

ALLIE,J:

1. Respondent, is the owner of unit 1 in the Sectional Scheme known as Merriman Court, Green Point, Cape Town.

2. Respondent seeks to extend the building structure of his unit onto a portion of the common property over which he has an exclusive use right, namely a garden area.

3. Appellants opposed the application in the court *a quo* and once the Respondent obtained a judgment in his favour, the Appellants brought this appeal on the following grounds:

   3.1 A challenge to Respondent's assertion that the ordinary meeting of the body Corporate in 2013 accepted his plans for an extension of his unit when in fact he only produced drawings not plans and the Body Corporate accepted the drawings subject to Respondent producing plans for approval;

   3.2 Consequently a challenge to the court *a quo's* finding that the Respondent had acquired a right to extend his unit onto the common area over which he had an exclusive use right;

   3.3 A challenge to the court *a quo's* order that the members of the Body Corporate be compelled to vote at a special meeting, in favour of approval of Respondent's 2019 plans;

3.4 Appellants rely on new points of law foreshadowed in the application for leave to appeal but not raised in the court *a quo,* namely, the Respondent failed to make out a case for the relief he sought in the founding affidavit in that the Respondent's allegations in the founding affidavit are not a completely accurate reflection of the decisions made at the meetings of the Body Corporate as set out in its Minutes and the founding affidavit also contains inadmissible hearsay;

3.5 Respondent sought to make out a case for the relief of a *mandamus* only in the Replying affidavit.

4. Appellants rely on Bank of Lisbon where it was held that:

> *"It is the duty of an appellate tribunal to ascertain whether the Court below came to a correct conclusion on the case submitted to it. For this reason the raising of a new point of law on appeal is not precluded provided that certain requirements are met. If the point is covered by the pleadings and if its consideration on appeal involves no unfairness to the party against whom it is directed, a Court, in an appeal, can deal with it. See Paddock Motors (Pty) Ltd v Igesund (supra at 23D). The new point was not raised in the notice of motion or in the founding affidavit; the first cession had not been placed before the court of first instance; the third, fourth and fifth respondents were not notified that the new point would be argued in the appeal to the Court a quo. Hence, as already emphasised, it should not have been dealt with by that Court. The position in this Court, as already stated, is different. The third, fourth and fifth respondents were well aware that the new point was to be argued before this court. As far as one can judge, its consideration in this Court involves no unfairness to the liquidator or to the third, fourth and fifth respondents or to the Master (who has intimated that he does not wish to appear in this Court). The facts upon which the new point is to be decided are clear; there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset of the proceedings; cf the Paddock Motors case sup cit at 23E. Having regard to the particular facts of this case it seems clear that unnecessary duplication of proceedings can be avoided by this Court deciding the new point. It is for*

the above reasons that I have come to the conclusion, although after some hesitation, that this Court should deal with the new point."

5. Respondent alleged in the founding affidavit that one of the reasons that he bought unit 1 "... *was that it enjoyed exclusive use of the Garden Area, and therefore the possibility to expand the section into the Garden Area".* However the respondent provided no facts from which one can conclude that there was a lawful ground upon which to hold an expectation to acquire a right to expand his building structure onto the garden area, solely because he held an exclusive use right over the garden area.

6. Respondent alleged that in 2007, The Body Corporate granted him permission to build a garage. The minutes of the AGM dated 10 September 2007 read *inter alia* that:

> ***" APPROVED***
>
> *2.2 In principle, additions for a new garage and stairway for Johan Greeff.*".

7. The location of the garage and its size was clearly not recorded nor approved at the AGM.

8. The respondent relied on an informal meeting of the body corporate held on 28 April 2017 to support the relief for a declaratory order.

9. He alleged that the body corporate formally accepted his plans for an extension onto the garden area in 2017.

10. Any acceptance of the plans was conditional as recorded in the minutes as follows:

> *;Unit 1 Proposal*
>
> *- Johan circulated architectural drawings outlining extensions*
>
> *to unit 1*
>
> *- Body Corporate formally accepts the plans*
>
> *- Tony as the chairman will sign any documentation*
>
> *necessary*
>
> *- The stairs could possibly also be used as they are an*
>
> *exclusive use area*
>
> *- Once the roof top is considered a landscaper will be*
>
> *appointed who will review the entire blocks gardens*
>
> *- Suggestion to extend onto steps on the left of the building*
>
> *- Civil engineer and city council approval will be circulated to*
>
> *the trustees as well as building timelines*."

11. The respondent alleged that in 2013, the body corporate "… *unanimously approved* …" his wife's request that the body corporate "… *grant me the right to expand my Section into the Garden Area* …" Which expansion would allegedly be without limitation; and "… *when one day we could afford to do so – on both the eastern and the western side*."

12. As with the 2013 AGM minutes, the AGM minutes of 23 April 2014 do not support the respondent's allegation that an extension into the exclusive use area was approved. The minutes read *inter alia* that:

> "*3.3 All units were extended and changed except section 1, who still has the right to do so, as well as building a garage as per previous resolutions at meetings.*"

13. No mention is made in the minutes of the 19 February 2013 AGM about the 2007 "*in principle*" approval of the "… *new garage and stairway* …" The respondent did not address this in the founding affidavit.

14. The decision taken at the AGM of 2019, pertaining to the respondent's unit, is recorded in the minutes as follows:

> "***3.7 FLAT 1***
>
> *No changes or extensions had been required, as J Greef has changed nothing in his unit and the garden is his exclusive use area.*
>
> *K Jackson, proxy for J Greef requested permission from the meeting for the later extension of their 2nd bedroom plus a bathroom, even changes to the kitchen. This (sic) were unanimously approved, subject to plan approval by the Body Corporate and the local authority – Approved*"

15. Clearly the wife of the respondent was not recorded as having sought permission to extend the unit onto the common property by any specified number of square metres. The recordal appears to refer to mainly internal changes to the unit.

16. In 2019, respondent had caused revised plans to be drafted by his architect and it was agreed that a Special General Meeting be convened on 26 July 2019, to discuss the respondent's proposed plans. The meeting was inquorate and it was postponed to 2 August 2019.

17. On 2 August 2019, only respondent, his architect and one, Scalabrino attended. Scalabrino signed off the acceptance of respondent's preliminary plans on the following basis as recorded in the minutes:

17.1.1.1. That there will be no substantial difference between these plans and the Council Submission Drawings;

17.1.1.2. That the Council Submission Drawings will be approved by the City of Cape Town Building Plans Dept;

17.1.1.3. That an adequate temporary Access Entrance Stairway be provided during construction;

17.1.1.4. That the temporary stairway will also provide access to the bin storage area;

17.1.1.5. That the headroom between the stairs and the soffit of the garage slab be acceptable, which acceptance may not be unreasonably withheld;

17.1.1.6. That the dimension of the stair risers and treads be acceptable, which acceptance may not be unreasonably withheld;

17.1.1.7. That the colour of the roofs of Section 1 extension be acceptable to the owners of Section 3 & Section 9 which acceptance may not be unreasonably withheld. On this point a further discussion ensued and the owner will look for alternative roof options .e. roof with a rockery and garden will be aesthetically pleasing.

17.1.1.8. That the roof concrete slab on the western side, will be available to the owner of Section 3 in order for her to extend her garden. The owner of section 1 confirmed that the owner of Section 3 will be receiving approximately 16 square metres to use for her garden area.

18. The ostensible approval by the Scalabrino on behalf of the body corporate is clearly not unequivocal. It sets out conditions that were still to be further investigated, such as a different type of roof cover, future acceptance of certain aspects of stair dimensions and location and City of Cape Town approval.

19. What is astounding about the recordal of the discussions and approval in the meeting of August 2019, is the scant attention paid to the fact that the garden area constitutes a portion of common property real estate and the decision to ”give away” a portion of immovable property owned by the body corporate, is not recorded as a pre-circulated written resolution to dispose of property belonging to all the members of the body corporate as common property. Similarly, with regard to the proposed roof area on the proposed extension of respondent’s property which respondent appears to have agreed to “give” a portion of, to the owner of Section 3. That “arrangement “ offends against section 2 of the Alienation of Land Act, if it is contemplated that by extending onto his section, respondent acquires ownership of the garden area and he grants to the owner of Section 3, ownership or some other limited real right, to a portion of the newly extended roof.

20. If however a lease of the garden area was contemplated and not acquisition of rights of ownership, the Minutes do not reflect any discussion concerning the payment of *quid pro quo* for the right to build on a common area belonging to the members of the body corporate.

21. Upon consideration of the allegations made by the respondent pertaining to the 2013 meeting, the Appellants allege the following facts :

    This alleged “*unanimous approval*” was based on inadmissible hearsay. The respondent did not attend the meeting where the alleged approval

was granted. The meeting was attended by his wife, who did not deliver any affidavit in the proceedings before the Court *a quo.*

22. At the Special General Meeting held on 19 October 2019, the majority of members present objected to the plans for the extension of respondent's section and for the building of his garage.

23. Respondent alleged that the Minutes of that meeting do not correctly record the discussions but he however, failed to follow the requisite procedures to have the Minutes corrected.

24. On behalf of the appellants, it was submitted that the Minutes record the following, *inter alia:*

> "*Mr Lombaard representing Mr Greeff requested from the meeting if they will be approving the exclusive use extension.*
>
> *Members noted that they will not be approving any plans with regards the extensions of unit 1 till such time that the owner of section 1 provides the extent of the exclusive use areas and the value of the said extension. Members further objected to the proposed structure that will be erected, which will be unsightly.*
>
> *…*
>
> *70.17 percent of members present at the meeting objected to the plans for the extension to be done on the exclusive use areas as well as the plan for the erection of the said garage.*"

25. On behalf of appellants, it was argued that respondent did not explain why he did not, when he received the minutes:

25.1. Provide details to the other members of the body corporate about "… *the extent of the exclusive use areas* …", or "… *the value of the said extension …*"; or

25.2. Attempt to address the complaint of the other members of the body corporate that the proposed structure of the respondent will be "*unsightly*." In terms of section 7(1)(b)(ii)(aa)(bbb) of the *National Building Regulations and Building Standards Act*, 103 of 1977 ("*the Building Standards Act*"), a municipality cannot approve a building plan if the proposed building will be "*unsightly*."

26. Respondent sought the following relief in the court *a quo*:

26.1. A declaratory order that he has a:

26.1.1. purported right to implement "… *plans for construction* …," which the respondent alleges are already approved by the body corporate;" and

26.1.2. A right to extend the respondent's aforesaid immovable property onto the common property.

26.2. Respondent's relief for a Mandamus is predicated upon an assertion of a perceived right allegedly acquired in 2017, when the ordinary meeting of the Body Corporate accepted what Respondent had produced and

sent to them, was proposed building plans of the proposed internal reconfiguration of his unit.

26.3. An order for costs against all the appellants, provided that no costs would be recovered from the first appellant and a Mr Scalabrino, who was the third respondent in the Court *a quo*

27. If the order of the court *a quo* is implemented it would lead to the following consequences:

27.1. The respondent would exercise rights of proprietary ownership over the exclusive use garden area which forms part of the common property belonging to the members of the Body Corporate without paying any remuneration for those square metres of vacant land and without a special express resolution having been taken to alienate that land to the Respondent;

27.2. The order effectively enables the respondent to apply to the Municipality for permission to build a structure on immovable property that he does not have ownership of and he will be attaching that built structure to section 1, which he does have ownership of, thereby creating an anomalous situation where part of the structure stands on land owned by him and part stands on land not owned by him;

28. Respondent has not proved that there exists a prior approval of plans to erect a garage in 2007. In fact he has only shown in principle approval subject to him providing the body corporate with further information.

29. At the 28 April 2017 meeting, the respondent once again allegedly failed to submit to the body corporate, building plans. The minutes record that respondent submitted *drawings* but then it goes on to state that the body corporate formally accepts the *plans* which could mean Respondent's intention to build i.e. his plan. Having been favoured with legible copies at the stage of the appeal, it can be determined that they were in fact building plans. However, respondent didn't follow the requisite procedure to have the minutes amended to reflect that building plans and not drawings were submitted.

30. The minutes state further that there is a possibility that the stairs could be used as well and the rooftop remains open for consideration in the future because the minutes record that "*once the rooftop is considered*", certain further issues will be considered. That decision is clearly a conditional acceptance subject to further consideration and further information being provided. What is clear from those minutes however, is that no special resolution as defined in the Act was passed to allow Respondent to extend the unit in its entirety as he now seeks to do.

31. Respondent's revised plans drafted in 2019, differed substantially from the 2017 plans he submitted. The fourth and fifth appellants addressed emails to the respondent setting out their concerns with the revised 2019 plans as follows:

31.1. The construction of a garage that would negatively affect the privacy and natural light of section 6 in the sectional scheme.

31.2. The proposed garage, included a double-storey building with a flat above it, and a wrap-around balcony;

31.3. A substantial enlargement of section 1 to incorporate the whole of the garden at the scheme;

31.4. Material changes to an external staircase and fire escape; and

31.5. *The plans did not provide for any side views*.

32. The appellants made it clear to the respondent, when the draft plans were distributed, that they had various difficulties with the plans.

33. Respondent said that he did not seek final approval of the draft building plan. He only sought "… *Preliminary approval … subject to adhering to ALL Cape Town and Green Point* ".

34. Appellants submitted that adherence to the local planning legislation would be impossible. The proposed building plans could not be approved without the approval by the Municipality, of numerous permanent departures, from the local

authority's zoning scheme. There were certain encroachments, reflected in the proposed building plans, on the statutory building lines on all boundaries of the erf where the sectional scheme is situated. Section 7(1)(a) of the Building Standards Act precludes the approval of building plans when such plans conflict with the municipality's zoning scheme.

35. The respondent's architect confirmed the need for planning departures in order to have the building plans approved. Those departures could only be applied for by the body corporate, to the City of Cape Town.

36. A carriage way crossing departure would also be required, again necessitating a formal application by the body corporate.

37. Appellants submit that the decision at the meeting of 2 August 2017 was an irregular decision because no formal written resolution encapsulating the decision was circulated in advance to members nor was there a formal notice to members of the intention to consider a decision of that nature, namely a decision to effectively alienate from the body corporate members', a portion of the common area without receiving any remuneration therefor.

38. If there was a prior acceptance of the extension of section 1's building onto the common area, as alleged by respondent, then the meeting of 2 August 2017, would have been superfluous. What respondent failed to address, was the extent

to which the revised 2019 plans differ from the 2017 drawings and the need for a special general meeting to accept the revised plans.

Applicable Law

39. Section 24(3) of the Sectional Titles Act 95 of 1986, reads as follows:

> "*(3) If an owner of a section proposes to extend the boundaries or floor area of his or her section, he or she shall if authorised in terms of section 5(1)(h) of the Sectional Titles Schemes Management Act, cause the land surveyor or architect concerned to submit a draft sectional plan of the extension to the Surveyor-General for approval.*"

40. Section 5(1)(h) of the Sectional Title Schemes Management Act ("STMA") reads as follows:

> "*(5)(1) In addition to the body corporate's main functions and powers under sections 3 and 4, the body corporate-*
>
> *…*
>
> *(h) must, on application by an owner and upon special resolution by the owners, approve the extension of boundaries or floor area of a section in terms of the Sectional Titles Act; and* " (emphasis added)

41. Section 5(1)(a) of the STMA requires the adoption of a unanimous resolution for the alienation of common property, before a section can be extended by special resolution onto that common property in terms of section 5(1)(h).

42. Section 5 (1) (a) reads as follows:

> "*5. (1) In addition to the body corporate's main functions and powers under sections 3 and 4, the body corporate— (a) may, upon unanimous resolution, on direction by the owners and with the written consent of any holder of a right of extension contemplated in section 25 of the Sectional Titles Act, alienate common property or any part thereof, or let the common property or any part thereof under a lease, and thereupon the body corporate may, subject to section 17(1) of the Sectional Titles Act, deal with such common property or such part thereof in accordance with the direction and may execute any deed required for this purpose, including any deed required under the Sectional Titles Act;*" (emphasis added)

43. Section 17 of the Sectional Titles Act provides as follows:

> *" (1) The owners and holders of a right of extension contemplated in section 25 may, if authorised in terms of section 5(1)(a) of the Sectional Titles Schemes Management Act direct the body corporate on their behalf to alienate common property or any part thereof, or to let common property or any part thereof under a lease, and thereupon the body corporate shall notwithstanding any provisions of section 20 of the Deeds Registries Act, but subject to compliance with any law relating to the subdivision of land or to the letting of a part of land, as the case may be, have power to deal with such common property or such part thereof in accordance with the direction, and to execute any deed required for the purpose: Provided that if the whole of the right referred to in section 25 or section 60(1)(b) is affected by the alienation of common property, such right shall be cancelled by the registrar with the consent of the holder thereof on submission of the title to the right.*
>
> *(2) Any transaction referred to in subsection (1) shall be accompanied by a copy of the authorisation concerned, certified by two trustees of the body corporate: Provided that where the transaction in question requires to be notarially executed, such authorisation so certified shall be produced to the notary public concerned and be retained by him or her in his or her protocol.*" (emphasis added)

44. The only way to regularize the contemplated structure that respondent intends to build, is to pass ownership to him of that portion of the common property that he intends to build on and incorporate it into his existing unit.

45. Therefore, contrary to Respondent's counsel's submission that only section 5(1)(h) is the operative provision *in casu* a reading of section 5(1)(a) reveals that it is the pre-cursor provision that must first be complied with before section 5(1)(h) applies.

46. In short, the body corporate "may" by unanimous resolution alienate common property and executed a deed for that purpose (s 5(1)(a)) and thereafter "must" by special resolution approve the extension of a unit (s 5(1)(h).

47. Both section 2 of the Alienation of Land Act and section 17 (2) of the Sectional Titles Act, require a written recordal of a decision by all the members of the body corporate to alienate a portion of the common property (*in casu*, to the respondent). Decisions taken at meetings and recorded in minutes not subjected to signature by all the members of the Body Corporate are not substitutes for a written recordal of unanimous directions to the Body Corporate.

48. The Sectional Titles Management Act and its Rules define how a Special General Meeting ought to be convened and how a unanimous resolution ought to be recorded.

49. A decision to alienate a portion of common property must conform with the section 5(1)(a) of the STMA in both form and substance, unanimously, therefore,

it must be an informed decision and not a decision taken merely by default. Proof must be provided that the meeting at which the decision was taken was properly convened. The *ipse dixit* of Respondent that it was properly convened by persons who acquiesced or participated in what appears to be poor management of the Body Corporate's affairs, is insufficient. There has to be objective proof that it was properly convened.

50. The management of a sectional title scheme is not akin to private treaty agreements where interested parties can simply strike informal deals. It is regulated by statutes so that members, the developer, mortgagors and third parties' rights are all protected.

51. Clearly the authorization granted by owners of sections in the scheme, to alienate common property or a portion thereof, must in terms of section 17(2) of the Sectional Titles Act, be in writing and must consequently reflect an understanding by the members of the body corporate, that they are alienating a portion of common property.

52. The rationale for the requirement of written direction or authorization by individual members, to the body corporate is consonant with the structure and purpose of the Sectional Titles Act and the Sectional Titles Management Act.

53. The opening of a sectional title register, as a first step to registration of a sectional title scheme, itself is subject to a surveyor drafting a sectional plan,

which is eventually registered with the Surveyor-General and in the Deeds Registry, precisely so that ambit and extent of the scheme inclusive of its individual divided sections and its undivided common property, are known and reduced to writing. The applicable legislation leave no room for informal disposition of portions of common property because each registered owner of a section, also has recorded on his/her Title, an undivided share in the common property in accordance with his/her participation quota.

54. Once members have unanimously agreed to dispose of any portion of common property, consequently, the size of each member's share in the undivided common property would be diminished and their title deeds would have to record such diminution.

55. The court *a quo* did not address this statutory requirement because it was not favoured with argument in support of the contention that one structure cannot be built on land owned by two different persons without a written recordal of where and how ownership of the structure will vest in terms of applicable legislation.

56. *The court a quo* granted leave to appeal on the basis that non-compliance with section 5(1)(a) of STMA , section 17 and section 25 of the STA were not canvassed before it.

57. The court *a quo* cited the following extract from Paddock Motors (Pty) Ltd v Igesund[1] at 24 B – C in support of the need to consider new points of law as follows:

> *"If e.g. the parties were to overlook a question of law arising from the facts agreed upon, a question fundamental to the case they have discerned and stated, the Court could hardly be bound to ignore the fundamental problem and only decide the secondary and dependent issues actually mentioned in the special case. This would be a fruitless exercise divorced from reality and may lead to a wrong decision. It follows that the court cannot be confined in all circumstances to the issues of law explicitly raised in the stated cases."*

58. Remaining mindful that the respondent relies on rights allegedly granted as long ago as 2007 (for a garage) and 2013 (for extension into the garden area), no rights of extension were recorded in the amended sectional title plans submitted and accepted at the annual general meeting of 23 April 2014. Plans had to be adopted and implemented in order to regularise the affairs of the body corporate.

59. I have no doubt that the Body Corporate's affairs were not adequately managed. That however does not mean that its bad practice can lead to a re-writing or variation of the applicable law.

60. On behalf of the appellants it was submitted that the appellants took the position in the Court *a quo* that no notice was given that any special resolution would be sought at the meeting of 2 August 2017. Respondent's view that he already had

[1] 1976 (3) SA 16 (A)

a right to build an extension on his section, is contrary to the respondent's repeated confirmation that he only sought "*preliminary approvals*" from the body corporate in 2017. By 25 July 2019, the respondent knew that any formal resolution to extend section 1 would be vehemently opposed .The appellants also complain about a lack of proper notice for the meeting of 19 October 2019, including a lack of notice of a special resolution sought to be passed.

61. The lack of proper notice pertaining to the meetings prior to 2019, was answered as follows by the respondent:

61.1. Due to the lapse of time the records disclosing proper notices can no longer be found.

[However, the lapse of time does not evince proof that records of notices of meetings that included a written copy of a resolution that would be passed at the meetings, ever existed. Based on the *Plascon-Evans* rule, the version of the appellants (as respondents *a quo*) about the lack of proper notice must be accepted as correct.]

61.2. The respondent's allegation that the affairs of the body corporate were conducted in an informal manner means that the body corporate dispensed with the need for formal notices and compliance with statutory requirements.

[In the absence of a case having been made out that some legitimate expectation flowed from the incorrect conduct of meetings or that a practice prevailed that was capable of overriding statutory provisions, the parties remain bound by the applicable legislative provisions and rules.]

61.3. The written format of the special resolution to be adopted at the meeting of 19 October 2019, was distributed on 14 October 2019 (i.e. five (5) days before the meeting of 19 October 2019). That too, constitutes non compliance with section 6(2) of the STMA which reads that:

> "*(2) The body corporate must, at least 30 days prior to a meeting of the body corporate where a special resolution or unanimous resolution will be taken, the proposed resolution give all the members of the body corporate written notice specifying, except where the rules provide for shorter notice.*"

62. Unanimous resolution is defined in the STMA as: a resolution passed by all the members of a body corporate at which:-

(i) At least 80% calculated both in value and in number, of the votes of all members of a body corporate or represented; and

(ii) All members who cast their votes do so in favour of the resolution; or agreed to in writing by all members of the body corporate.

63. Section 3(1)(t) specifically lists as one of the obligatory functions of a body corporate, to control, manage and administer the common property for the benefit of all owners.(emphasis added)

64. That provision underscores the fact that the common property is owned by all owners. The body corporate has an obligation to ensure that common property is managed for the benefit of all owners. No proviso or exclusion exists for common property subject to exclusive use rights.

65. Section 4(h) of the STMA authorizes the body corporate to let a portion of the common property to any owner or occupier after a special resolution by its members to that effect has been passed.

66. There is no special resolution to that effect *in casu.*

67. Clearly no written unanimous resolution as defined in the Act was passed to alienate a portion of the common property to the respondent either.

68. The resolutions relied upon by the respondent to show an alleged right to extend his unit onto the common property, do not comply with section 6 nor does it comply specifically with section 6 (8) where the unanimous resolution would have an unfair adverse effect on a member, namely the owner of unit 6, the resolution is not effective until the affected member consents in writing within 7 days of the date of that resolution. The owner of unit 6 has not consented in writing.

69. Section 8 (3) not only sets out the fiduciary duties of the trustees toward the body corporate but also provides in subsection (3) a punitive and redress measure in the event that the trustees, in fact breach their fiduciary duties. Those measures do not include invalidating the decisions of the trustees.

70. Management Rule 17(7) sets out how an agenda for special general meetings are to be drafted and what they should contain. Notably, it provides that any resolution sought to be passed at the meeting must be set out its precise wording in writing in the agenda of the meeting.

71. Rule 17(7) reads as follows:

> *(7) Subject to sub-rules (5) and (6), the trustees determine the agenda for an annual or special general meeting; provided that the agenda must contain— (a) a description of the general nature of all business, and (b) a description of the matters that will be voted on at the meeting, including the proposed wording of any special or unanimous resolution.*

72. There is no written agenda attached to the papers evincing the precise wording of the proposed resolutions upon which the respondent rely for his alleged clear right.

73. Respondent's counsel submitted that it must be inferred that if the minutes of the meeting passing the resolution were adopted at a subsequent meeting and if the minutes record that an agenda existed, then a written copy of the resolution must have been circulated to the members in accordance with Rule 17(7).

74. However, the informal manner in which decisions and ostensible resolutions were taken and the lack of written proof of its propriety, leaves this Court with unease about the existence of a prior written resolution having been circulated timeously to all members. It is not a matter of elevating form over substance but rather a necessity for compliance with statutory and regulatory prescripts that would ensure that all members made informed decisions that are unassailable in both form and substance, when deciding to effectively alienate or forego the rights of all members, save the respondent, to a portion of the common property that respondent wishes to extend a building on.

75. In my view, respondent does not even make it out of the starting blocks to establish the criteria necessary for the grant of a declaratory and mandatory order.

76. He has not established a clear right worthy of protection nor a *prima facie* one, open to some doubt.

Locus standi and authority to litigate on behalf of the Body Corporate

77. The respondent cited the body corporate of the sectional scheme as a party to the litigation, when the application was first launched. As the body corporate has a clear interest in the common property which forms the basis of the application, such a citation was unavoidable. Control, management and administration of the common property rests with the body corporate. Nonetheless, the respondent objected to any attempt by the first appellant to oppose and be represented

before the Court *a quo*. The respondent argued that:

> The body corporate's decision at the AGM on 19 October 2019 limited spending by the trustees to items not exceeding R15 000.

78. Respondent alleged that the subsequent decision of the trustees of the body corporate to oppose this litigation at a cost of more than R15 000, was in breach of the aforesaid decision taken at the AGM of the body corporate.

79. Thus, so the respondent argued, there was no valid opposition by the first appellant before the Court *a quo*, as its attorneys were not lawfully authorised.

80. The relevant decision of the body corporate, taken at the AGM decision on 19 October 2019, was recorded as follows:

> "*The members placed following* [sic] *directions and Restrictions on the Trustees:*
>
> ***Restrictions:***
>
> *The members agreed to a restriction of R15 000 on any item and if this is to be exceeded, then a notice must be sent to all owners advising of the need to exceed the restriction. If in response more than 25% of members object to the request to exceed the restriction, then a special general meeting must be held.*"

81. To pursue this argument, the respondent delivered a notice in terms of rule 7(1), disputing the authority of the attorneys acting on behalf of the body corporate.

82. A special general meeting of the body corporate was held on 28 May 2021, which meeting was attended by all members of the body corporate (either in person or

by proxy). At that meeting it was decided that:

> "*1. the spending restriction to be lifted with no maximum amount but only insofar as it concerns the costs of litigation in this matter (and future litigation costs in this matter)*"

83. The Court *a quo* agreed with the arguments of the respondent and non-suited the body corporate. The Court *a quo* relied in this regard on the judgments in *North Global Properties*[2] and *Steyn* [3] and held as follows:

> "*[100] It is common cause in these proceedings that it is a substantive requirement of the body corporate that the powers of the trustees be limited to incur expenses of R15 000. … It also is undisputed that the decision to oppose the present application was a decision to incur costs in excess of the previously mentioned amount … the terms of restrictions imposed on the trustees specifically outline that it was not a decision which the trustees could make, unless they had afforded a notice to all owners advising of the need to exceed the restriction and, in the event of objections, holding a special general meeting about the decision. …*"

84. When leave to appeal was sought by the appellants, the respondent again delivered a rule 7(1) notice dated 21 October 2021, and raised the same complaints, as before to non-suit the first appellant.

85. In response, the appellants' attorney delivered a power of attorney, supported by:

85.1. The minutes of a special general meeting of the body corporate, of 28 May 2021; and

85.2. The minutes of a special general meeting of the body corporate, of

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2 *North Global Properties (Pty) Ltd v Body Corporate of the Sunrise Beach Scheme* (12465/2011) ZAKZD (17 August 2012), para 12

3 *Steyn and Others NNO v Blockpave (Pty) Ltd* 2011 (3) SA (FB), para 24

26 November 2021;

both of which meetings were attended by the respondent and at which meetings the respondent exercised his vote as a member.

86. At the meeting of 28 May 2021 all spending restrictions on the trustees were lifted, in respect of this litigation

87. At the meeting of 26 November 2021, the following resolution was adopted:

> "*2.1 All limitations on spending, previously imposed on the trustees, are hereby lifted.*
>
> *2.2 The body corporate as the first respondent in case 12716/2020 is authorised to defend itself and the trustees are mandated to act on behalf of the body corporate in this regard. They are authorised to do anything and everything reasonably required, including but not limited to the appointment of an attorney and / or an advocate as well as the prosecution of all appeals until this case is finally determined.*
>
> *2.3 The authority granted in paragraph 2.2 will also extend to any and all other legal matters, wherein the body corporate or the trustees are cited as parties or wherein they have an interest, irrespective whether the relevant proceedings need to be instituted, or defended, and not only pertaining to case 12716/2020.*"

88. The respondent did not explain why he delivered a rule 7(1) notice in October 2021, at the time that leave to appeal was sought by the appellants, when he had been at the meeting of 28 May 2021. However, when presented with the power of attorney and the supporting minute of the meetings of 28 May 2021 and 26 November 2021, the respondent changed his argument. He alleged that the trustees who signed the special power of attorney in favour of the attorney of

record could not do so, because of a conflict of interests on their part.

89. The Court *a quo* upheld the conflict of interests argument, when it handed down a separate judgment dealing with the question of authority on the part of the body corporate. The learned Judge found, despite the finding on the issue of authority in paragraph 100 of the main judgment, that:

89.1. The relevant question is whether the body corporate lawfully decided to instruct an attorney in the application for leave to appeal;

89.2. The fact that a resolution was taken at a special general meeting to authorise the trustees did not legitimise the trustees' conflict of interest, as the trustees owe the body corporate a fiduciary duty, which they breached.

89.3. The trustees' signature of a power of attorney gave rise to an inference of … a*buse of the trust form*.

90. The findings by the Court *a quo* did not take account of the resolutions of the special general meetings of 28 May 2021 and 26 November 2021.

The body corporate was legally obliged, pursuant to section 7(1) of the STMA, to appoint the trustees to oppose the respondent in the litigation when the special general meetings adopted the applicable resolutions. Similarly, the trustees were obliged to ensure implementation of those resolutions. Section 7(1) of the STMA reads: "*(1) The functions and powers of the body corporate must, subject to the provisions of this Act, the rules and any restriction imposed or direction given at a general*

meeting of the owners of sections, be performed and exercised by the trustees of the body corporate holding office in terms of the rules."

91. Also, Standard Management Rule 9 determines *inter alia* that:

"*The trustees must –*

…

(b) exercise the body corporate's powers and functions assigned and delegated to them in terms of section 7(1) of the Act in accordance with resolutions taken at general meetings and at meetings of trustees;"

92. The judgment of this Court in *Rapallo Body Corporate*[4] confirms the applicability of section 7(1) of the STMA and the duty of the trustees in the context of litigation wherein a body corporate is a party:

"*[39] … Section 2(7) of the STMA provides that a body corporate has perpetual succession and is capable of suing and being sued in its own name in respect of, amongst other matters, any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under that Act or any rule. … In terms of s 7 of the STMA, the powers of a body corporate must be exercised by the trustees of the body corporate. … Management rule 9, to which the owners' counsel referred, and which provides that the trustees must exercise the powers and functions entrusted to them in terms of s 7(1) of the STMA 'in accordance with resolutions taken at general meetings and at meetings of the trustees', merely confirms the effect of s 7. It does not add to or detract from the empowering effect of s 7 or the restriction thereon provided for in that section. As it was, the institution of the current proceedings was in accordance with a resolution taken at a trustees' meeting.*

[40] The trustees would, of course, be ill advised to institute and prosecute litigation on the Body Corporate's behalf without

[4] *Rapallo Body Corporate v Dhlamini NO and Others* (12572/2019) [2020] ZAWCHC 97 (10 September 2020)

> *adequate provision for the cost thereof. Should the Body Corporate suffer any loss in consequence of an ill-advised decision, the trustees might find themselves personally liable in terms of s 8(3) of the STMA. Such exposure to potential personal liability does not, however, detract from the trustees' authority to institute proceedings in the Body Corporate's name. It would, of course, be open to the members in general meeting to restrict or prohibit the exercise by the trustees of the Body Corporate's power to litigate, but, as I have said, the owners have not identified the existence of any such restriction or prohibition."* (emphasis added)

93. The trustees proceeded, in compliance with their statutory duties and in accordance with the resolutions taken at the abovementioned special general meetings, to appoint an attorney for the body corporate, to pursue this litigation.

94. A conflict of interest did not exist when the trustees appointed an attorney for the body corporate (at least not after the special general meetings of 28 May 2021 and 26 November 2021), because the decision of the trustees to appoint an attorney was approved by a general meeting of the body corporate, where all its members were present or represented. This follows the leading English judgment on conflicts of interest, in *Regal (Hastings) Ltd v Gulliver*,[5] which has been accepted as correct in South African law by the Supreme Court of Appeal in the judgment of *Fieldstone Africa*.[6] In *Regal (Hastings) Ltd*, Lord Wright held that:

> *"… it was questioned by that Court that the opportunity of making the profits came to the four Respondents by reason of their fiduciary position as directors. But the Court of Appeal held that in the absence of any*

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5 *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 (HL)

6 *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA), para 31

dishonest intention or negligence or breach of a specific duty to acquire the shares for the Appellant Company, the Respondents as directors were entitled to buy the shares themselves. Once, it was said, they came to a bona fide decision that the Appellant Company could not provide the money to take up the shares, their obligation to refrain from acquiring those shares for themselves came to an end. But with the greatest respect, I feel bound to regard such a conclusion as dead in the teeth of the wise and salutary rule so stringently enforced in the authorities. It is suggested that it would have been mere quixotic folly for the four Respondents to let such an occasion pass when the Appellant Company could not avail itself of it. But Lord Chancellor King faced that very position when he accepted that the person in the fiduciary position might be the only person in the world who could not avail himself of the opportunity. It is, however, not true that such a person is absolutely barred, because he could by obtaining the assent of the shareholders have secured his freedom to make the profit for himself. Failing that the only course open is to let the opportunity pass."

The legal position in South Africa is the same as recorded in *Regal (Hastings)*. The SCA confirmed this in the *Fieldstone Africa* [7] judgment, which was also a confirmation of an earlier judgment in *Robinson*.[8]

95. Section 8(4) of the STMA is also relevant. It reads as follows:

> "*(4) Except as regards the duty referred to in subsection (2)(a)(i), any particular conduct of a trustee does not constitute a breach of a duty arising from his or her fiduciary relationship to the body corporate if such conduct was preceded or followed by the written approval of all the members of the body corporate where such members were or are cognisant of all the material facts.*" (emphasis added)

96. The respondent argued in the application for leave to appeal that the position of the trustees is informed by the costs order granted against them by the Court *a*

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7 At para 31

8 *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168

quo. In this regard, Standard Management Rule 8 is relevant. It determines in paragraph 8 *inter alia* that:

> "*(1) The body corporate must reimburse trustees for all disbursements and expenses actually and reasonably incurred by them in carrying out their duties and exercising their powers.*
>
> *…*
>
> *(4) The body corporate must indemnify a trustee … against all costs, losses and expenses arising as a result of any official act that is not in breach of the trustee's fiduciary obligations to the body corporate.*"

97. Section 2(5) of the STMA determines that:

> *"The body corporate is, subject to the provisions of this Act, responsible for the enforcement of the rules and for the control, administration and management of the common property for the benefit of all owners."*

98. There can be no doubt that the body corporate has a substantial and material interest and *locus standi* in this litigation. The Constitutional Court in *Spilhaus* recorded that:[9]

> "*[15] It cannot be gainsaid that legal standing is necessary for the exercise of the right of access to court. Without it, a litigant may not have its dispute resolved by a court. Legal standing is key to accessing every court for purposes of resolving disputes. Therefore, an interpretation of a statute that denies a litigant standing implicates the right of access to court. Consequently, s 39(2) was triggered.*
>
> *…*

[9] *Spilhaus Property Holdings (Pty) Limited and Others v MTN and Another* 2019 (4) SA 406 (CC)

> *[19] This, together with the Supreme Court of Appeal's failure to invoke s 39(2) of the Constitution, suggests that there are reasonable prospects of success."*[10]

99. Section 34 of the Constitution[11] guarantees, as a fundamental right to everyone, the right -

> "… *to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.*"

100. Non-suiting the body corporate amounts to a serious limitation on the rights of all the appellants, especially the first appellant.

101. It further amounts to a denial of the section 35 fundamental right of the body corporate, to legal representation. If one cites a respondent in an application and then argues against that respondent's rights to defend itself, and succeeds with such argument, then there can be little doubt that the section 34 right of that respondent would be violated. Any interpretation of the law, that denies a litigant who was cited as such by the party seeking to challenge *locus standi,* the right to legal representation and the right to oppose the litigation, removes that litigant's right of access to court.

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[10] Section 39(2) reads as follows: "*When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights*."

[11] *Constitution of the Republic of South Africa*, 1996

102. From the time that the pending limitations were lifted at the special general meetings mentioned above, there was lawful authority for the body corporate to oppose the application of the respondent. Similarly, this appeal is being lawfully prosecuted on behalf of all the appellants.

103. At the hearing of this appeal, the appellants brought an application for condonation for the late filing of Powers of Attorney on behalf of each of them. The respondent's counsel elected not to oppose the condonation application and to have the merits of the appeal adjudication instead.

104. Therefore, the issue of *locus standi* and authority to oppose this appeal, has become moot on appeal.

Prescription

105. The argument for the appellants about prescription is an alternative argument, which only applies in the event that the Court were to find that the respondent acquired some form of right to extend his unit onto the common property.

106. Since the Court does not make that finding, the argument about prescription does not require further consideration.

Conclusion

107. In the result, I am of the view that the Respondent has failed to prove both an adoption of a unanimous resolution in terms of s 5(1)(a) of the STMA, to alienate a portion of the common property to Respondent and an adoption of a special resolution to allow Respondent to extend his unit onto the common property in terms of s 5(1)(h).

108. Having not proved a right of extension, the respondent ought not to succeed in the relief he seeks.

IT IS ORDERED THAT:

1. The appeal is upheld;
2. The orders of the court *a quo* dated 15 September 2021 and 16 March 2022 are set aside; and
3. The respondent's application is dismissed with costs.

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JUDGE R. ALLIE

SALIE, J:

I agree.

_____

JUDGE G. SALIE

MANGCU-LOCKWOOD, J:

I agree.

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JUDGE N. MANGCU-LOCKWOOD