REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

Case No.: 28281/2012

14/12/2012

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

2012-12-12 DATE

SIGNATURE

In the matter between:

SCHALK LEON BAARD	**FIRST APPLICANT**
BOSVELDSIG SENTRUM CC	**SECOND APPLICANT**
and	
KORO CREEK HOME OWNERS' ASSOCIATION	**FIRST RESPONDENT**
MARJO PROPERTY AND DEVELOPMENT COMPANY	**SECOND RESPONDENT**

J U D G M E N T

HIEMSTRA AJ

[1] The applicants are two owners of erven in the Koro Creek Golf Estate near Modimolle (Koro Creek). The first respondent is the Koro Creek Homeowners Association, a non-profit

company. The second respondent is Marjo Property and Development Company (Pty) Ltd, and the developer of Koro Creek.

NATURE OF THE APPLICATION

[2] The applicant sought the following relief in a Notice of Motion filed with the Registrar on 21 May 2012:

1. Regulating the affairs of the First Respondent by directing First Respondent to impose and collect levies in respect of Koro Creek Golf Estate from Second Respondent mutatis mutandis as from other members of First Respondent;

2. Restraining First Respondent from collecting levies from Applicants without simultaneously collecting levies from Second Respondent in the same amount, and on the same principle as the levies collected from Applicants;

3. That First and Second Respondent must pay the costs of the application jointly and severally.

Together with a Replying Affidavit the applicants filed a Notice of Amendment of their Notice of Motion in which they seek to amend prayer 1 to read as follows:

1. Regulating the affairs of First Respondent by directing First Respondent to impose and collect levies in respect of Koro Creek Golf Estate from Second Respondent mutatis mutandis as from other members of First Respondent, and to amend its Memorandum of Incorporation adopted on 23 June 2012 to reflect that the developer is liable to pay levies since it was not the sole owner of Nylstroom Extension 7, Nylstroom Extension 11, Nylstroom Extension 23 and Modimolle Extension 2.

[3] The application is brought in terms of s163 of the Companies Act, 71 of 2008 (the Act), which provides for relief from oppressive or prejudicial conduct by a company affecting a director or a shareholder. The first respondent does not have shareholders, but its Memorandum provides for voting members in accordance with item 4 of Schedule 1 to the Act. Where the Act refers to shareholders in respect of a profit company, it must be read as "members" in respect of a non-profit company.

[4] The applicants, as owners of erven forming part of the Koro Creek Golf Estate (Koro Creek), were obliged in terms of the now repealed Articles of Association (the Articles) of the first respondent to be members of the first respondent. Each member had one vote at

members' meetings of the first respondent. The developer remains the owner of all erven that have not been sold and had one vote for each erf that it owns. As appears later, these Articles have been replaced by a Memorandum of Incorporation in terms of the new Companies Act 71 of 2008 (the Memorandum). The Memorandum contains similar provisions.

[5] The objectives of the first respondent in terms of the old Memorandum of Incorporation and the new Memorandum are broadly to promote the group interests of the members of the company by maintaining open spaces including the golf course, controlling the aesthetic appearance of improvements in the development.

[6] The first phase of the development comprises 455 residential stands of which 255 have been sold to private individuals and entities. A further phase is still to be developed which will result in a final total of 520 erven at Koro Creek. Therefore, the second respondent still owns 200 erven in the first phase.

[7] In terms of the Articles and the Memorandum, the directors of the first respondent shall from time to time impose levies upon the members for the purpose of meeting all the financial obligations of the company.

[8] Article 5.2 of the Articles provides as follows:

"The members, save for the owner or owners of the property who shall have no liability in this regard, shall be liable in respect of any levy made in terms of Article 5.1 in equal shares, ..." [my emphasis]

[9] The parties are *ad idem* that the article means that it is the developer that is excluded from the payment of levies. "[T]he owner of the property" can only mean the owner of the total undeveloped property prior to the subdivision into erven. That is the developer.

[10] The oppressive conduct that the applicants complain of is that the first respondent does not require the second respondent, which is also a member, to pay levies in respect of the erven not yet sold. This places a heavier burden on the other members.

[11] It was argued on behalf of the applicants that it was the clear intention of the parties that this would only prevail during the "development period", which is defined as:

"the period from the incorporation of the company until the developer ceases to be the registered owner of more than 50% of the erven."

The second respondent denies that the exemption only applies during the development period.

[12] I can find nothing in the Articles that point to such a "clear intention". Reference to the development period is made in several articles, but in each instance the aim is to ensure that the developer retains control of the affairs of the company during the development period.

[13] The following clauses make provision for the rights of the developer during the development period:

[13.1] Article 4, which reads as follows:

"4. MEMBERS

4.1 The following persons shall be the first members of the company

4.1.1 During the development period 6 nominees of the developer who are registered owners of the land; and

4.1.2 any person, including the developer, who is the registered owner of the land."

"[T]he land" is defined as:

"any Erf on the property, or any approved subdivided portion thereof excluding the streets."

The significance of the six nominees of the developer escapes me. These nominees must be owners of "the land" and therefore qualify for membership in terms of 4.1.2 in any event. Any other person who is the registered owner of the land is also a member in terms of 4.1.2, even during the "development period".

Article 4.6 provides that the developer shall cease to be a member when it is no longer the registered owner of any erven. In terms of Article 4.5, the same applies to any other member.

[13.2] Article 13.3 provides for a quorum at meetings of members and provides as follows:

"13.3.1 during the development period, seven members, of whom one members shall be a nominee of the developer, personally present and entitled to vote;

13.3.2 after the development period, members representing 25% of the total number of stands, personally present and entitled to vote. Provided that there shall never be less than seven members present in person."

[13.3] Article 14.1 deals with voting rights of developer at meetings of the company and provides in 14.1.2 that the developer shall:

"14.1.2.1 during the development period, have the same number of votes as there is the number of members in the company, excluding the developer, in addition to the vote conferred upon the developer in terms of Article 14.1.1;

14.1.2.2 after the development period, one vote for each portion of land or Erf still registered in its name."

[13.4] Article 15 provides for the number of directors of the company and sub-article 15.1.2 provides that:

"During the development period the developer shall be entitled to appoint seven directors on written notice to the company and, on similar written notice, to remove and replace any such directors."

[13.5] Article 21 deals with proceedings of directors. Sub-article 21.7 provides that during the development period not less than 2 of directors required to constitute a quorum shall be directors appointed by the developer.

[14] There is nothing in the articles that limits the developer's exemption from paying levies to the development period. The only significance of the "development period" seems to be that during the period, the developer controls the first respondent through the measures specified above. After the development period control of the company shifts the members who have become owners of erven. I therefore disagree with the applicant that the special dispensation for the developer in respect of the payment of levies was intended to prevail only during the development period. After the development period, the members of individual erven may amend the Memorandum in any way they can achieve through their voting power.

THE FACTUAL BACKGROUND

[15] The first respondent filed an affidavit, but indicated therein that it does not oppose the application. The affidavit, according to the deponent, aims to place the first respondent's actions or inactions in perspective. The first respondent further asks that the contents of the affidavit be considered when the court exercises its discretion in making a costs order. The deponent states that the first respondent had considered amending the Articles to make provision for the payment of levies by all members, including the developer. However, it decided against it because an amendment of the Articles required a special meeting convened for that purpose at which 75% of members vote in favour of the amendment. The second respondent controlled, according to the deponent, 43% of the votes, so that it would be in the position to block any amendment. The first respondent further wished to maintain *a good relationship with the developer.*

Application to strike out

[16] In the second respondent's answering affidavit, the deponent states that whatever the position might have been in terms of the Articles, the situation has been put to rest by the adoption of the Memorandum at the first respondent's Annual General Meeting (AGM) held on 23 June 2012. (This was after the founding affidavit had been deposed to and this application had been launched). The notice of the AGM included the following:

"4. MEMORANDUM OF INCORPORATION

4.1 In consequence of the new Companies Act (Act 71 of 2008) ("the Act"), the company's current Articles need amendments to comply with the requirements of the Act.

4.2 A copy of the concept Memorandum of Incorporation is attached and Members are required to file their written proposals, if any, before 12h00 on Wednesday, 20 June 2012 at the offices of the HOA. To assist Members in this regard, they can contact Bennie Burger at ... [Bennie Burger is the attorney of the first respondent]

4.3 The following resolution is required:
Resolution: That the Company's current Articles be replaced with the Memorandum of Incorporation, attached as Addendum "A"

[17] The amended Memorandum contains (clause11 of Part E of Schedule 1) that reads as follows:

"The members, save for the developer who shall have no liability in this regard, and owners of sectional title units within then development who shall be levied in terms of paragraph 12 hereof, shall be liable in respect of any levy made in equal shares ..."

The resolution was adopted by a vote of 36 against 2. The second respondent abstained from voting and thus did not utilise the block of votes it had in accordance with the number of erven it still owned. It was therefore carried by a majority of members other than the developer. The clause is not a new provision. It simply removes any uncertainty that might have existed in Article 5.2., mentioned above. It makes it clear that the party exempted from paying levies is the developer.

[18] The adoption of the Memorandum was first revealed in the second respondent's answering affidavit. In fact it took place after the application had been launched and the founding affidavit deposed to. This prompted the applicant to amend its Notice of Motion to incorporate a prayer for an order directing the first respondent to amend its Memorandum in order to reflect that the developer is liable to pay levies and to attempt to make out a case in its replying affidavit for such relief. It is trite that an applicant must make out its case in its founding affidavit and not make out a new case in its replying affidavit. The second respondent accordingly applied for the striking out of the offending paragraphs. I do not find it necessary to deal with each paragraph sought to be struck out. It is in essence all the paragraphs dealing with the allegations regarding the adoption of the Memorandum of Incorporation.

[19] The new matter set out in the Replying Affidavit and the amendment of the Notice of Motion were clearly caused by new developments and the information brought to light in the answering affidavit. It may, in the discretion of the court be allowed. This is a case where the court should permit the applicant to amend its notice of motion and to make out a case for the new relief sought. The second respondent has in any event filed a Duplicating Affidavit dealing with the allegations made in the Replying Affidavit. This obviates the need to consider the striking out of the impugned parts of the Replying Affidavit.. I allowed the second respondent to file such an affidavit.

[20] I shall therefore decide the case on all the material before me.

THE AMENDED MEMORANDUM

[21] The issue of the exemption of the developer to pay levies first became contentious on 30 April 2010. It was raised per letter by the first applicant, through his attorney, in which he enquired from the first respondent whether there existed an agreement with the second re-

spondent that the second respondent would not pay levies. The first respondent replied that no such agreement existed. The first applicant's attorney then enquired as to the reason why the second respondent did not pay levies. The first respondent's attorney replied on 3 June 2010 and referred the first applicant's attorney to Article 5.2 which exempts the developer from paying levies. The matter was then raised at the first respondent's Annual General Meeting of 1 May 2010. The minutes reflect that the meeting had decided that it was a matter between the first applicant and the developer and was not to be discussed at the meeting. The deponent to the founding affidavit says that the issue had been "brushed aside" The second respondent denies this and says that it had not been on the agenda and that it was not an issue that could be discussed and decided without it being placed on the agenda with a motivation. Annual General Meetings were held in 2011 and on 23 June 2012 without the applicants or any other members raising it.

[22] The first applicant admits that the Memorandum had been adopted by a vote of 36 to two. He admits that proper notice had been given of the meeting, that the adoption of the Memorandum had been on the agenda, and that a copy of the proposed Memorandum had been attached to the notice. He says, however, that no mention was made of the proposed clause 11 of Part E of Schedule 1, which specifically excludes the developer from the payment of levies. As a lay member, as in the case of other lay members, he had merely glanced at the proposed Memorandum and accepted that the substitution of the Articles was a mere technical requirement of the Act. The first applicant did not attend the AGM. However, he attached a confirmatory affidavit by a certain Mr Jacob Stolp who had attended the meeting. He said that at the meeting, Mr Bennie Burger, a director of the first respondent and attorney of the first respondent, made a presentation of about 30 minutes explaining the reasons for the proposal to adopt the Memorandum, but that he made no mention of the impugned clause. He further said that Mr Burger had mentioned that there had been a dispute between the developer and an owner of erven in Koro Creek, but said that the first respondent would abide by any court order as it did not wish to become involved in a dispute between neighbours. It is not stated explicitly, but the dispute to which Mr Burger referred is probably the dispute which is the subject matter of this application.

[23] According to the first applicant, supported by Mr Stolp, the first and second respondent had "sneaked" the new clause into the Memorandum.

[24] It is difficult to accept this contention. The Memorandum did not change the meaning of Article 5.2. It merely clarified it. It maintained the status quo. It must be remembered that the applicants' contention is not that the Article 5.2 obliges the second respondent to pay levies, but rather that that the exemption applied only during the development period. As I have said, there is nothing in the Articles that limits the exemption to that period.

[25] The correct course of action for the applicants to compel the second respondent to pay levies is to place the issue on the agenda of a general meeting of members, to debate it and to vote for an appropriate amendment of the Memorandum. The members who have purchased erven now represent a majority of the members. In terms of s 16(1)(c)(ii) of the Act, the memorandum of incorporation of a company may be amended by special resolution if it is adopted at a shareholders meeting. S 1 of the Act defines "special resolution" as

"(a) In the case of a company, a resolution adopted with the support of at least 75% of the voting rights exercised on the resolution, or a different percentage as contemplated in section 65(1)—

(i) At a shareholders meeting, or

(ii) ..."

[26] Article 3.8 (2) of the amended Memorandum of Incorporation has, in accordance with s 65(1) of the Act, determined a different percentage for the adoption of a special resolution, namely 65%. At the time of the signing of the founding affidavit, the developer still controlled 43% of the votes and the other members 57%. Assuming that the percentages are the same by the time of such a meeting of members, and assuming that the developer exercises its full voting power in opposition to such an amendment, and all the other members vote in favour of the amendment, the proposal would be defeated. Of course, the situation will change as more erven are sold and the members who have purchased erven will in due course command sufficient votes to enforce the amendment.

[27] The question before me is whether the situation as described above constitutes oppressive conduct on the part of the first respondent, justifying an order directing the first respondent to amend its Memorandum to reflect that the developer is liable to pay levies

SECTION 163 OF THE COMPANIES ACT, 71 OF 2008

[28] The section provides as follows:

"163 Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality[1] of company

(1) A shareholder or a director of a company may apply to a court for relief if—

(a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;

(b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant, or

(c) the powers of a director or prescribed officer of the company, or a person related to the company are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.

(2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including—

(a) An order restraining the conduct complained of;

(b) An order appointing a liquidator, if the company appears to be insolvent;

(c) An order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6, if the court is satisfied that the circumstances set out in section 131 (4) (a) apply;

(d) An order to regulate the company's affairs by directing the company to amend its Memorandum of Incorporation or to create or amend a unanimous shareholder agreement;

(e) An order directing the issue of exchange of shares;

(f) An order—

(i) appointing directors in place of or in addition to all or any of the directors then in office; or

(ii) declaring any person delinquent or under probation, as contemplated in section 162;

(g) an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares , or pay the equivalent value, with or without conditions;

(h) an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement;

(i) an order requiring the company, within a time specified by the court, to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine;

(j) an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;

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[1] "the abuse of separate juristic personality" in the heading to the section is a relic of the wording of the section before it was amended by the s 102 of the Companies Act Amendment Act 3 of 2011.Before its amendment, subsection (4) dealt specifically with abuse of the separate juristic personality of a company. That subsection has been deleted. The retention of the words in the heading is clearly an oversight.

(k) an order directing rectification or the registers or other records of a company, or

(l) an order for the trial of any issue as determined by the court.

(3) If an order made under this section directs the amendment of the company's Memorandum of Incorporation—

(a) the directors must promptly file a notice of amendment to give effect to that order, in accordance with section 16 (4); and

(b) no further amendment altering, limiting or negating the effect of the court order may be made to the Memorandum of Incorporation, until a court orders otherwise."

[29] I have quoted the full section in order to demonstrate the wide powers of the court in applications of this nature. The power that the applicants seek this court to exercise is the one set out in s 16(2)(d), namely an order to regulate the company's affairs by directing the company to amend its Memorandum of Incorporation.

[30] S 163 is the successor of s 252 of the old Companies Act, but it is not identical. Both refer to acts or omissions that have certain results. The results of the alleged acts or omissions are described in different terms, but their meanings are essentially similar. S252 uses the words "unfairly prejudicial, unjust, or inequitable" while s 163 uses the words, "oppressive", "unfairly prejudicial" and "unfairly disregards the interests of the applicant." The heading to s 252 also uses the word "oppressive" but it does not appear in the section itself. S 163 sets out the nature of the orders a court may make in the event of such conduct and it includes an order an order to regulate the company's affairs by directing the company to amend its Memorandum of Incorporation or to create or amend a unanimous shareholder agreement. (Sub-section (2) (d)).

HAVE THE APPLICANTS ESTABLISHED OPPRESSIVE CONDUCT?

[31] The question before me is whether the omission of the first respondent to impose levies on the second respondent is oppressive, prejudicial or that it unfairly disregards the interests of the applicant. It could also be argued that the alleged "sneaking-in" of the new Clause 11 of Part E of Schedule 1 into the Memorandum is an act that constitutes oppressive conduct.

[32] The applicants set out the degree to which the monthly levies imposed on them and other owners of erven have increased over the years. They have increased from R500 to

R990 per erf. They contend that these levies are almost double of what they could have been had the developer also paid levies.

[33] The second respondent, at the time of the signing of the Founding Affidavit owned 200 erven. Its monthly liability for levies, had it been obliged to pay them, would on that basis amount to R198 000. It cannot be established from the papers whether the second respondent can afford such a liability.

[34] The second respondent contends in the Answering Affidavit, that it had incurred huge capital expenditure in the development of Koro Estate which it has to protect. The applicants, on the other hand, state that they agree that this is the case, but that the capital expenditure had already been incurred and that there is no reason why the second respondent should continue to enjoy the exemption after the development period.

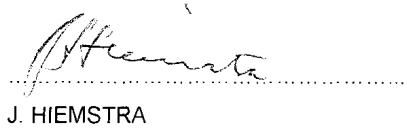
[35] I am not convinced that the applicants' contention in this regard holds water. It may well be that the second respondent has already done the development, but that does not mean that it has recouped its investment. It derives its profits from the selling of the unsold erven. However, if that is offset by huge levy obligations, it may not be able to do so. The second respondent's liability will of course decrease as it sells more erven to members of the public. At the same time the members who purchased erven will gain more voting power and will eventually command sufficient votes to force and\ amendment of the Memorandum.

[36] It was held in the unreported judgment by Murphy J in *The Wilds Home Owners Association & Others v Van Eeden & Others*, Case No. 53643/09 that the amending of the articles (or memorandum of incorporation) of a company should only be ordered as a last resort. The articles (and the memorandum) are the contract bringing about the association and the basis for the members doing business together. By becoming a shareholder (or member) in a company a person agrees to be bound by the decisions taken in accordance with the provisions and prescriptions of the articles or memorandum. A court accordingly should be loath to re-write the bargain struck between the members with each other, especially where the impetus to do so is at the instance of a minority who think that the terms of the agreement are unfair or no longer in their interests. The articles or memorandum may be changed by a special resolution, which can only be carried by the prescribed majority of members.

[37] Any unfairness or oppression, if such exists, is of limited duration. The members who have purchased erven are already close to the required 65% majority. If there is support for their case, they should in the near future have the necessary votes to amend the Memorandum.

[38] I therefore find that the applicants have failed to make out a case for the relief they seek.

In the result, the application is dismissed with costs.



J. HIEMSTRA
ACTING JUDGE OF THE HIGH COURT

Date heard:	19 November 2012
Date of judgment:	12 December 2012
Counsel for the applicant:	Adv J.G. Bergentuin SC
Attorney for the applicant:	Abel Muller & Son, c/o Ross & Jacobsz
Counsel for the respondent:	Adv M.P. Van der Merwe
Attorney for the respondent:	J.C. Grobler & Burger Attorneys