IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 75783/2013/2013

In the matter between: 20/6/2014

TIMOTHY CHARLES KNOWLES	First Applicant
STEPHEN LEGGATT	Second Applicant
BRADLEY MICHAEL RIEMER	Third Applicant
CARL JANKOWITZ	Fourth Applicant
PETER BOOTH	Fifth Applicant
JACOBUS MARTHINUS LOURENS BASSON	Sixth Applicant
GRAEME BRYSON	Seventh Applicant
BRANDON LEIGH	Eighth Applicant
SEAN REITZ	Ninth Applicant
NICO MAAS NO	Tenth Applicant
BLUE HORIZON PROP 84 (PTY) LIMITED	Eleventh Applicant
BLUE HORIZON PROP 114 (PTY) LIMITED	Twelfth Applicant

and

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

19/06/14
DATE

SIGNATURE

BLAIR ATHOL HOME OWNERS ASSOCIATION	First Respondent
BLAIR ATHOL GOLF HOLDINGS (PTY) LIMITED	Second Respondent
JAMES AINSLEY	Third Respondent

JACO BUITENDACH	Fourth Respondent
JOSEPH ERASMUS DE BEER	Fifth Respondent
MARC BRANDON PLAYER	Sixth Respondent
JOHN LOURENS BOTHA	Seventh respondent

JUDGMENT

Tuchten J:

1 This urgent application, which came before me by direction of the Deputy Judge-President on special allocation, relates on its surface to the right claimed by the applicants to play golf on the golf course within the Blair Athol Estate ("the estate"), a luxurious enclosed and gated residential estate in Gauteng, north of the Lanseria Airport and within the municipal area of Tshwane Municipality.

2 The applicants are members of the Blair Athol Estate Homeowners' Association ("the HOA"), the first respondent. The HOA is what was described in s 21 of the Companies Act, 61 of 1973 ("the old Companies Act"), as an incorporated association not for gain. The applicants are also members of the golf club, an organ of and administered by the HOA. They are in dispute with the developer, Wraypex (Pty) Limited and the HOA. Both Wraypex and the HOA are

controlled by Mr Wray. The applicants have withheld payments of the levies which the respondents say they are obliged to pay the HOA. They have paid their golf club dues. The issue is whether a member of the golf club, who is also a member of the HOA and who has not paid his levies to the HOA, may be prevented from playing golf on the club course. The respondents ground the alleged power to prevent a levy defaulter from playing golf in article 6.10 of the articles of association of the HOA, read in context with certain other instruments. The applicants dispute that article 6.10 means what the respondents say it does. There is a further primary issue before me, ie whether a resolution taken by the board of the HOA imposing liability on members to pay levies, was validly taken. Also in dispute is whether the relief presently sought is interim relief properly so called. As what is sought by the applicants constitutes interdictory relief, the principles applicable to such relief must be considered.

3 Because this application has been brought as a matter of urgency and because what is sought is interim relief, I shall not excessively burden this judgment with recitation of authority. The case was fully argued on all sides, with copious reference to relevant authority, and I bear the submissions of counsel and the authorities cited in mind. I make no final findings of fact or of law for these are the province of the court

hearing the main application. My findings are thus provisional and made on the evidence presently before me.

4 The second respondent ("Holdings") is a company controlled by Wray. It is reflected in the deeds office as having taken transfer of the land upon which the golf course is situated from the HOA, apparently having bought it from the HOA for ten thousand rands.

5 The third to seventh respondents ("the intervening respondents") applied to be joined in the present urgent application by notice served on the applicants' attorneys on 3 June 2014. One of the conditions of joinder urged upon me by counsel for the third respondents was a prayer that the present application be adjourned to allow the third respondents to deliver a full answering affidavit. I ruled that the matter was urgent, refused the adjournment but allowed the joinder. The first and second respondents were jointly represented by counsel. The intervening respondents were separately represented.

6 The estate, some 605 ha in extent, is a low density luxury development centred on a golf course which I was told in argument cost R125 million to build. The estate comprises some 330 residential erven on average 3 700 square metres in extent, equestrian facilities

and an equestrian centre, a clubhouse, an erf for a proposed hotel and the golf course itself.

7 Wray describes himself as an avid golfer. He wanted to build a world class golf course on the estate, one which he says is the first of its kind in South Africa. The estate was conceived and developed by Wray, through his company Wraypex. The conditions on which Wraypex was given permission by Tshwane to develop the estate, which at its undeveloped stage consisted of a number of farms, included one which required that all the land forming the estate be transferred into a "section 21 company".[1] No services were to be provided to the estate by Tshwane, to which the developer and eventually the proposed section 21 company bound themselves to deliver all essential services.

8 The section 21 company was formed by adapting a shelf company and naming it The Blair Athol Home Owners' Association, the first respondent. The articles of the HOA, which were registered on 30 September 2005, have much in common with a shareholders' agreement. This is not surprising as counsel were agreed that the articles of a company, under the regime which operated before the advent of the Companies Act, 71 of 2008 ("the new Companies Act"),

---

1 An association incorporated under s 21 is commonly called a section 21 company and I shall do so, where appropriate, in this judgment.

operate on one level as a contract between the company and its members and between the members as such.

9 The articles provided for two categories of land: *erven*, ie any residential erf resulting from subdivision of land in the estate; and *common property*, ie:

> Any part of the Estate, which is not an erf, including the Eco Park, roads, gatehouses, Clubhouse and related public areas;

10 *Eco Park* means

> common property set aside and maintained by the [HOA] in terms of the approved Environmental Management Plan, including the equestrian centre, nature park, golf course and related facilities.

11 The HOA's main object is to

> ... manage, regulate, maintain and control the harmonious development of the Estate and Golf Club of Blair Athol and to maintain all the internal engineering services of the development, (ie water sewage, electricity, and the road and storm water sewers) situated on Portion 2 of The Farm

Vlakfontein and Portions 16,17, 18, 19, 20, 21, of The Farm Riverside 497 JQ.[2]

12 Ancillary objects in article 2, the implementation of which it is provided to be the duty of the board of directors, include:

> 2.1.1 to own, control, improve the common property including the environmental management of the Eco Park;
>
> 2.1.2 to own, control, improve and maintain and to [i]nsure, where necessary, the buildings, structures, installations and equipment relating to the common property;
>
> 2.1.4 to promote, advance and control the communal interests of members and residents;
>
> 2,1,10.1 to maintain all and any internal engineering services.

13 The HOA is responsible for the provision of services to members and residents of erven. These services include water and sewage, but not electricity. Article 8.3 provides in terms that the responsibility in respect of the management, maintenance, upkeep and repair of services will pass from the developer, Wraypex, to the HOA on the date of first transfer of an erf from Wraypex to an owner. Membership

---

2 I have inserted a bracket after the word "development" and a comma between the words "water" and sewage".

of the HOA is mandatory for all owners of erven. Members may not resign their membership.

14 Although under the articles management of the business of the HOA is vested in a board of directors elected at a general meeting of the HOA, this is subject to the provisions relating to the *development period*, as defined:

> ... the period from the date of establishment of the [HOA] until all the erven have been transferred and improved by the erection of a dwelling house; or until [Wraypex] notifies the [HOA] in writing that the development period has ceased, whichever shall first occur.

15 During the development period, the members of the HOA have no rights to vote at general meetings of the HOA. Under article 12 of the constitution of the HOA, the directors of the HOA, described in the constitution as its governors, are appointed, removed and replaced by Wraypex. That is how, during the development period, the HOA is controlled by Wray, through Wraypex.

16 Indeed, Wray asserts that he is in effective control of Blair Athol. He explains that Blair Athol has been for him the culmination of a life long dream to create a residential estate incorporating one of the most magnificent golf courses in the world. The way in which Wray has

exercised his powers of control over the estate, has brought Wray, and his associates, into bitter dispute with certain residents. These disputes focus on, but are by no means limited to, the determination of levies to be paid by members of the HOA.

17 Article 6 of the articles deals with levies. The amount of the levies must be determined by the board of the HOA. The general practice was to consider the amount of the levy to be paid annually and it seems that the practice was to provide that a levy would only be operative for a year, the contemplation being that a fresh levy would be calculated each year, having regard to the financial needs of the HOA.

18 Article 6 contains provisions which exempt Wraypex, the owner of all the unsold erven within the estate, from paying any levies at all "during and after the Development Period" except as provided in article 6.5:

> During the Development Period [Wraypex] shall pay the shortfall between the income derived from levies paid by members in terms of article 6.4 and the actual expenditure of the HOA in each financial year, but shall not otherwise be liable to pay or contribute to any levies or special levies with the provision that once there are 10 or less erven left unsold, [Wraypex] will only be responsible for the unsold erven.

19 The obligation of members (other than Wraypex) to pay levies arises from article 6.4:

> Levies shall be allocated pro rata amongst the members the amount of which shall be calculated with reference to actual or anticipated, as the case may be, number of erven established or to be established within the Estate.

20 So, to summarise, during the development period, Wraypex must pay the shortfall between levies received and the actual expenditure of the HOA. The higher the levies, the less Wraypex will have to pay. The board of the HOA are Wray's nominees. One of the accusations of aggrieved members is that levies have been improperly inflated. Another complaint is that the monies of the HOA have not properly been accounted for.

21 In addition, the aggrieved members complain of the highhanded conduct of Wray and his associates in relation to the conduct of Estate business.

22 On 12 December 2013, the present applicants and others instituted motion proceedings ("the main application") in this court under the present case number. They claim relief from what is described as

oppressive conduct on the part of Wray, his associates and Wray's alter ego companies under s 163 of the new Companies Act:

> Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality 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 an issue or 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;

(k) an order directing rectification of 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.
(4) Whenever a court, on application by an interested person, or in any proceedings in which a company is involved, finds that the incorporation of, or any act by or on behalf of, or any use of, that company constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may declare that the company is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the company, or of such member or shareholder thereof, or of such other person as specified in the declaration, and the court may give such further order or orders as it may deem fit in order to give effect to such declaration.

23 One of the heads of complaint in the main application as initially framed relates to the transfer[3] out of the HOA of some of the common property, including most of the golf course. I say most of the golf course because according to Wray, the 7th and 8th holes of this 18 hole course are situated on portion 12 of the farm Mooiplaats 524. Wray initially did not contemplate that the golf course would traverse this additional land. Of course in accordance with the spirit of the conditions of establishment and the articles of the HOA (if not the

3 I use the term "transfer" loosely. It is not presently clear to me whether the applicants complain that the properties passed out of the ownership of the HOA, in which case they seek re-transfer, or whether they claim that the transfer documents merely gave rise to a mistaken impression which would require simply a cancellation of the relevant deeds of transfer because in fact ownership never passed from the HOA.

letter, a matter on which I express no opinion) this additional land should have been transferred to the HOA together with all the other land forming the common property.

24 The present dispute is one which arose or crystallised after the main application was launched. In a supplementary affidavit sworn on 23 January 2014, the applicants in the main application broadened the reach of the main application to include the complaint that the board of the HOA, acting to further Wray's interests, had been party to the transfer of the administration of the golf club from the HOA to Holdings and that HOA members had received invoices requiring them to pay their golf club subscriptions to Holdings. It seems that the HOA and Holdings had concluded a written administration agreement. Lengthy, prolix, acrimonious correspondence between the attorneys ensued about whether this attempt to transfer rights and obligations was lawful. The applicants asked for a copy of the administration agreement. The HOA refused to give them one.

25 Wray, through his various alter egos, took the position that a failure to pay golf club subscriptions to Holdings entitled the golf club to prevent golf club members from playing and even justified the termination of golf club membership. In a letter dated 19 March 2014, Wray's attorney wrote that the HOA and the golf club were "two separate

entities" and that "[m]embership of the Golf Club, the administration of the Golf Club's affairs and the ownership of the golf course" were issues separate from the administration of the HOA as such. The attorney pointed to the fact that members of the golf club had concluded golf club membership with the golf club and not the HOA.[4]

26 In a letter written by Mr Botha, the golf director of the golf club, dated on 13 March 2014 to Mr Francois Botes,[5] the HOA, however, took the position that there was linkage between the obligations of HOA members to the HOA and to the golf club. The HOA asserted, through Mr Botha, that "good standing" with the HOA was a prerequisite for good standing with the golf club. Good standing with the HOA in this context meant being up to date with the payment of levies.

27 The context is that several persons, including the applicants, had refused to pay levies demanded by the HOA for the current financial year. I shall not delve into their motives. I am concerned only with the legal issues raised by the demand for levies and the refusal to pay them.

---

4 As I have pointed out, the respondents do not take that position. They accept that the golf club is an organ of the HOA.

5 Member no 537 with another person of the class of "concerned members" who are the first applicants in the main application.

28 Motive, however, certainly of the HOA and those who represent it and perhaps also of the main application applicants, is certainly relevant to the determination of the main application. The applicants in the present application ("the golf application") contend that the HOA position that the payment of HOA levies is a prerequisite to the right to play golf, is part of the oppression for which they seek relief in the main application. The relationship between Wray and his associates, on the one hand, and the main application applicants, on the other, has degenerated into hostilities. There was certainly at least one threat of violence which, while not acted upon and perhaps not meant seriously, is strongly to be deprecated and is an indication of how passions have become inflamed.

29 It is important to see the dispute in context. I said that on the surface it was about the right to play golf. The combatants are all rich, financially sophisticated people who act constantly on carefully considered legal advice. The reactions on both sides to the moves of the other are strategic, designed to embarrass the opponent, make him expend his resources and frustrate him in his desires. Golf is not merely a pastime for many golf club members but a sophisticated marketing tool. Frustrating these golfers' desire to display their wealth and power by inviting their acquaintances to play golf on this golf course strikes at their patrimonies as well as their senses of self

worth. Frustrating Wray in his desire to become a significant figure in world golf has the same effect.

30 I must determine whether the relief presently sought is merely interim in form and thus final in substance or genuinely interim relief. The applicants have been prevented from playing golf because while they have paid their dues to the golf club, a matter I shall later discuss, they have not paid to the HOA the levies determined by the board of the HOA. Their case is that the ruling that they may not in these circumstances play golf until they have paid their levies is under attack in the main application and that they seek in the present proceedings merely to regulate the position in the interim until the main application has been determined. In my view this submission is correct. I hold that the present application is for interim relief.

31 I proceed to discuss the two claims of oppression that are relevant to the present application: firstly, relating to the transfer away from the HOA of the golf course and, secondly, the question whether the HOA can legitimately prevent its members who are also members of the golf club from playing golf while their levies are in arrears.

32 In that context, I must point out that the HOA and Holdings reversed the decision to transfer the administration of the golf club to Holdings. The decision to transfer the administration arose from a resolution taken by the board of the HOA at a meeting on 10 December 2013 and the subsequent administration agreement concluded between the HOA and Holdings.[6] At the time the administration transfer resolution was taken, one of the board members, Mr Knowles, the first applicant in this application and the second applicant in the main application,[7] was under suspension. The board had purported to suspend him by resolution taken at a meeting on 15 October 2013. I say "purported" because the main application applicants say that the suspension was unlawful and part of Wray's campaign of oppression and because the board later lifted the suspension and allowed Knowles to resume his duties. Counsel for the first and second respondents stated during argument that for purposes of the present application, I should treat Knowles' resumption of his duties as a cancellation of his suspension.

---

6 The first and second respondents have withheld the administration agreement from the applicants and the court. Their attorney referred in correspondence, coyly, to "what you call the administration agreement". The expression "administration agreement" may therefore not be completely accurate.

7 Mr Knowles is cited in the headings to documents in both applications as litigating in a representative capacity. I think that this citation may be a mistake.

33 During the period that Knowles was under suspension, the board, as constituted without Knowles, purported to approve the budget of the HOA prepared under the direction of the estate manager, Mr Dare. The main application applicants took the position that all resolutions passed during the period Knowles was prevented by suspension from participating in board meetings were invalid.

34 The resolution imposing levies for the 2014 financial year was taken in Knowles' absence during December 2013. By circular dated 12 December 2013, the board of the HOA announced to members that levies for the 2014 financial year would be R77 520, down from the previous year's R96 900. This was explained to be due to an "agreement reached between the developer and your HOA".

35 In 2011, the then board of directors, acting under Wray's dictation, sold certain parts of the common property, including the golf course to the second respondent ("Holdings") for ten thousand rands and immediately bonded the golf course to the Standard Bank, the ninth respondent in the main application for ten million rands. The golf course cost R125 million, I was told, to build and has a revenue earning capacity. It of course is costly to maintain and in the hands of a developer, would be very valuable indeed. The HOA's ownership of the golf course was apparently replaced with a 99 year lease. The

applicants complain that members only learnt of the alleged lease in December 2012. In addition, Wray is in the process of taking transfer of the land upon which the clubhouse stands. The applicants charge that these transfers were effected in breach of the fiduciary duties of the directors of the HOA and that Wray was party to these breaches because he was a director of the HOA at the relevant time and indeed dictated the acquiescence of the other directors and ask for orders that the appropriate deeds office transactions be effected to reflect once more the ownership of the HOA in the common property transferred away to Holdings.

36 The transfers away from the HOA required the consent of Tshwane. Apparently this consent was obtained.

37 Passions ran high amongst members in relation to the transfers. Wray took the advice of junior counsel at the Johannesburg bar. Counsel opined, in a written memorandum dated 12 September 2013, that the directors of the HOA had complied with their fiduciary duties in authorising the transfer out of the HOA of the golf course.

38 The answering affidavits of the respondents in the main application had not yet been delivered when the golf application was argued before me. Counsel for the HOA and Holdings told me that the

defence of the first and second respondents to the charge relating to the transfer of the golf course away from the HOA was that the HOA merely "warehoused" the golf course (and presumably the other common property) which remained, as between the HOA and Wray, the property of Wray, to deal with as he pleased. The first and second respondents say in their answering affidavits in the golf application that the transfer of the golf course took place pursuant to an arms' length sale between the HOA and Wraypex. Why there should have been a sale at all when, on their version, the HOA was merely warehousing the land, they do not say in these papers.

39 The only real documentary evidence suggested by counsel as giving rise to this "understanding" (as Wray describes the alleged warehousing arrangement) is a resolution of the HOA dated 13 October 2005 in which Wray and his then co-director, Mr Waldeck, record in resolution 3 that

> ... the [HOA] enters into written agreements with Wraypex ... and RS Wray, acting on behalf of a company to be established at the instance of RS Wray, for purposes of -
>
> 3.1 disposing of any rights and interests of the [HOA] in and to the Golf Course to be established and constructed on the ...Estate, and all portions and facilities relating to or constituting the Golf Course are subdivided from the property or properties and facilities relating to and constituting the Golf Course

are sub-divided from the property or properties owned or to be owned by Wraypex ... forming or to form part of the ... Estate in the process of or following the establishment of the ... Estate at the instance of Wraypex ...;

3.2 entering into a long-term Lease, to be duly registered against the Title Deed/s of the Golf Course after its sub-division into an Erf or Erven on the ... Estate, with a view to regulating the long-term use and benefit by and for the Association of the Golf Course;

3.3 disposing of any rights and/or interests of the Association in and to any Hotel-related facility to be established and constructed on the ... Estate, as and when such Hotel-related facility, are sub-divided from the property or properties owned or to be owned by Wraypex ... forming or to form part of the ... Estate, in the process of or following the establishment of the ... Estate at the instance of Wraypex ... .

40 It is, as I see it, a fair inference that Wray paid mere lip service to the condition imposed by Tshwane that the common property vest in the "section 21 company" and thus the HOA. Section 21(2) of the old Companies Act provides:

a) The income and property of the association whencesoever derived shall be applied solely towards the promotion of its main object, and no portion thereof shall be paid or transferred, directly or indirectly, by way of dividend, bonus, or otherwise howsoever, to the members of the association or to its holding company or subsidiary: Provided that

nothing herein contained shall prevent the payment in good faith of reasonable remuneration to any officer or servant of the association or to any member thereof in return for any services actually rendered to the association

b) Upon its winding-up, deregistration or dissolution the assets of the association remaining after the satisfaction of all its liabilities shall be given or transferred to some other association or institution or associations or institutions having objects similar to its main object, to be determined by the members of the association at or before the time of its dissolution or, failing such determination, by the Court.

41 The clear purpose of the establishment condition under which the property was to vest in the section 21 company was to ensure that all the common property was to vest in that entity in the full legal sense of the term. But Wray, from the outset, had a plan to circumvent the establishment condition. Transfer out of the HOA would frustrate the legislative purpose of s 21(2)(b) which was to ensure that no member of the section 21 association benefited from the common property otherwise than by enjoying it as a member of the association. There is nothing as matters now stand to prevent Wray from selling the golf course on or to prevent any new owner from taking steps to disestablish the golf course and rezone it for, eg, housing. Of course the consent of the authorities would have to be obtained and the members of the HOA would be entitled to object. But the transfer

takes the golf course out of the control which they would have over the golf course as owners through the HOA, pursuant to which they would never be exposed to the risk of losing the golf course or having the golf course lose its character as such. It also renders the members of the HOA vulnerable to any change of policy regarding golf course fees and playing conditions which, as I shall show, the HOA presently controls and which, its articles contemplate, will ultimately fall under the direct control of members, once the development period has passed.

42 There is not the slightest suggestion on the papers before me that Wray took members and prospective members as a group into his confidence when he was marketing erven to prospective purchasers or even that he canvassed their views before he transferred the golf course out of the HOA.

43 The purchase price of ten thousand rands is sought to be justified on the basis that this sum represented the municipal value of the golf course. This is *prima facie* absurd. It also raises the question why, if the HOA was never the beneficial owner of the golf course, Wray had to buy it at fair value rather than simply take it back as his property.

44 Consistent with my intention to make only provisional findings, I hold that the applicants have substantial prospects of success in the main application on the claim relating to the transfer of the golf course.

45 It seems likely, too, that Wray sought to take the administration away from the HOA and into Holdings to strengthen his control over the administration of the golf course. This was the case made by the main application applicants. The HOA then reversed its stance. By circular dated 3 April 2014, the HOA informed members that at a meeting on 1 April 2014, the board of the HOA had decided to suspend the transfer of

> ... inter alia the Golf Club, golf course, food and Beverage, Spa and Equestrian centre from the {HOA] to ... Holdings.

46 The circular went on to say, in effect, that the HOA would accept payment of 2014 golf subscriptions from members of the golf club. It then gave a warning relating to the board's perception of the linkage between payment of levies to the HOA and the right to play golf. The board's warning was different to that previously given to Mr Botes. The board warned that all members of the HOA who had not paid their levies would be in breach of the rules of the golf club by virtue of their breach of the rules of the HOA and for that reason would be liable to be suspended by the golf club.

47 The board of the HOA took legal advice on the attack on its suspension of Knowles. In a letter to Knowles dated 5 March 2014, the HOA told Knowles that his suspension had been lifted. The ground of the suspension seems to have been that it was inappropriate that Knowles remain in office after he had accused the other board members of being Wray's puppets. Why this accusation, if true, should disqualify the one director who was certainly *not* Wray's puppet from continuing in office is not clear to me but nothing turns on that in the present application.

48 The letter to Knowles continued to state that a board meeting would be held the following day but gave no agenda. By letter dated 6 March 2014, Knowles' attorney complained of the brief notice period and asked for an agenda and other information, including

> ... agreements concluded between the [HOA] and any third party during the period [of Knowles' suspension] including ... agreements with ... Holdings.

49 The proposed board meeting on 6 March 2014 was either not held or nothing of significance in the present context took place there. By letter dated 12 March 2014, the HOA's attorney stated that the meeting would now be held on 19 March 2014. The HOA refused to provide an agenda but stated, through its attorney that the agenda, in

broad terms, would be to ratify the resolutions taken by the board during the period of Knowles' suspension. There then followed two most singular paragraphs, numbered 7 and 8 in the letter:

> Our client has compiled a file of the resolutions to be ratified and the file is at the [HOA's] offices at Blair Athol. The file may be viewed by your client and only your client and he is welcome to contact [the estate manager] for the purpose of making arrangements to view the file. Given the fact that Mr Knowles wears two opposing hats, namely as director of the [HOA] and as litigant against the [HOA], our client is not prepared to make copies of the resolutions available, whether to you or to Mr Knowles. Mr Knowles will be able to appraise himself of the content of the resolutions upon a simple reading of the file and he will also be in a position to decide whether he intends to vote for or against the ratification of these resolutions, which is of course his right. The aforegoing adequately covers the request contained in paragraphs 7.1 to 7.4 of your letter.[8] It is not clear from a simple reading of paragraph 7.5 of your letter what it is that you require but what we will say is that your client, being a party to litigation against the [HOA] together with persons who are not directors, is not entitled to call for documents that are confidential to the [HOA] *that would assist him (and for that matter all of your other clients) in the conduct of the litigation against the [HOA].* Such documentation will not be provided to him. [my emphasis]

---

8 In which access to board agendas, minutes and records of voting was sought.

50 The passage I have quoted is singular for two reasons. The first reason is that it is trite that a company is entitled to the collective wisdom of all its directors present at a meeting and not merely a majority of them. A director, even if it is known that he will be in the minority on the proposal in issue, is entitled to adequate notice of the meeting. In this context adequate notice means enough time to prepare himself for and get to the meeting and all relevant information under the control of the company. At the meeting, he is entitled to an opportunity of stating his views, even though ultimately he may have to submit to a majority decision. The sufficiency of notice will depend upon how contentious the business under discussion is: the more contentious, the more need to give each director adequate notice. The purpose of adequate notice is not merely to enable the director to formulate his own views, but also to put him in a position to try to persuade his co-directors to his point of view. These principles, which I repeat are trite, mean that Knowles was entitled to see the documents for which he had called or to be informed of their full terms before any decision was taken.[9]

---

9 *Novick and Another v Comair Holdings and Others* 1979 2 SA 116 W 128D-E; *South African Broadcasting Corporation Ltd v Mpofu and another* [2009] 4 All SA 169 GSJ paras 38 and 45

51 The plain language of the emphasised portion of the HOA's attorney's letter dated 12 March 2014 shows that there was available to the other directors documentary material which would help the main application applicants in their case against the HOA under its present management. The irresistible conclusion on the material before me is that the other board members concealed from Knowles material which would point to the wrongdoing (in the present context) of all or some of the board members. If the other members of the board had been confronted by Knowles with such material, it is conceivable that one or more of the directors in the majority faction might have reconsidered the error of their ways.

52 The position taken by the majority on the board prevented Knowles from showing the text of the resolutions to his attorney for the purpose of taking legal advice. It is no answer to the manifest prejudice which the majority position caused, and intended to cause, that Knowles could copy the text of the resolutions in his own hand or memorise their contents. A director is entitled to have the text of all material available to other board members. But the real problem is not that the mere text of the resolutions was withheld from Knowles but that the crucial underlying documents were withheld. And withheld, moreover, to keep Knowles in ignorance of the true position in relation to the issues of alleged oppression raised in the main application.

53 It is similarly no answer to say, as the majority on the board does, that Knowles was conflicted. The answer was to obtain an undertaking that board confidentiality, properly so called, would be respected. Such confidentiality could hardly extend, of course, to suppressing from members of the HOA evidence which supported the contention that directors had acted oppressively by breaching their fiduciary duties.

54 I have emphasised the triteness of these propositions. I do so because the majority on the board are wealthy, financially sophisticated men. They had access to seasoned lawyers and employed both senior and junior counsel in this application. Their decision to deny Knowles access to information was taken in consultation with their attorney, who wrote the letter in which such access was refused. They must have been told that their stance was legally untenable. Counsel for the first and second respondents suggested during oral argument that the majority refused the access sought simply because they wanted to be difficult. I strongly doubt that they were behaving thus. It would have been irrational to do so. The most likely inference is that they had something significant to hide.

55 I therefore find that the applicants have good prospects of showing in the main application that Knowles did not have adequate notice (in the extended sense that this term is used in the present context) of the

meeting of the board of the HOA on 19 March 2014 and that the resolutions approving the budget of the HOA and the levies to be paid by members of the HOA for the 2014 financial year were not validly taken. It follows from this finding that the applicants have good prospects of showing that the HOA cannot not lawfully enforce payment of these levies because the essential prerequisite for enforcement, a valid resolution of the board, was absent. So too, it follows, firstly that members who refused to pay their levies to the HOA were not legally obliged to do so; and, secondly, that even if, which I proceed to consider below, the non-payment of levies to the HOA entitles the HOA to prevent golf club members from paying golf, the HOA cannot do so at present because the levies in question are not due.

56 Counsel for the first and second respondents, however, argued that Knowles had acquiesced in a situation in which Knowles was content to proceed with the meeting in ignorance of the true position. Acquiescence was not asserted on the papers. Counsel made the submission on the strength of the transcript of the meeting which was held on 19 March 2014. Acquiescence is a form of waiver. Waiver is not lightly found proved in our law. Knowles would have also drawn the inference that something significant was being concealed from him. He must have known that he was, as it were, onto a winner. It is

highly unlikely that he would have acquiesced and elected to remain in ignorance of the true position as he suspected it to be. I do not think that acquiescence has been established on these papers. Had the acquiescence submission been raised in proceedings for final relief, I should, in accordance with the procedural rule in *Plascon-Evans*, have rejected it on the papers.

57 I turn to the question whether, assuming the levies claimed by the HOA are due and remain unpaid, the HOA is entitled to deny he applicants the right to play golf on the estate golf course. This is a question purely of contract. For this purpose I must construe and interpret the relevant contracts. These fall into two categories: firstly, contracts between members of the HOA in their capacities as such and the HOA; and, secondly, between members of the HOA who are also members of the golf club in their capacities as members of the golf club and the HOA as administrator of the golf club.

58 In *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 6 SA 520 SCA para 16, the modern approach to the interpretation of documents, whether contractual or statutory or otherwise was articulated:

> *Chartered Accountants (SA) v Securefin Ltd and Another* and *Natal Joint Municipal Pension Fund v Endumeni Municipality* ... make it clear that in interpreting any document the starting point is inevitably the language of the document but it falls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset. [Footnotes omitted]

See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 SCA paras 17-26.

59 The starting point is the articles of association of the HOA. Counsel were agreed that the only possible source of the power for which the HOA contends is art 6.10, read in its context. Art 6.10 reads:

> No member shall be entitled to the *privileges of membership* unless and until he shall have paid every levy and other sum, if any, which may be due and payable to the [HOA] *in respect of his membership*. Access cards may be invalidated until all arrears have been paid, at the discretion of the Manager. [my emphasis]

60 Counsel were agreed that *privileges* in this context means rights. The question is, then, what does *membership* mean? It certainly includes membership of the HOA. Does it include membership of the golf club? Counsel for the applicants submitted that it did not. Counsel for the intervening respondents submitted that it did. Counsel for the first and second respondents accepted, by implication, that it did not for they argued that the only relevant "privilege" was that membership of the HOA as such entitled a member of the HOA to *apply* for membership of the golf club.

61 I proceed to consider the context. There are a number of other articles within the articles of association of the HOA and other contractual instruments relevant to this enquiry. The other articles within the articles of association are the definition of *member* in art 1.1 and arts 3,11-3.15, 3.18 and 6.1. In addition there are the golf club rules which were enacted as an annexure to the articles of association. The other articles within the articles of association which appear to me to be relevant to the present enquiry read:

> 1.1 ... "member" means a member of the [HOA].[10]
>
> 3.11 Every member shall comply with:

---

10 Unless the context otherwise indicates. None of the counsel suggested that it did and I do not think it does.

3.12 the provisions of these presents, the Code of Conduct, Builders Code of Conduct and Contractor Activities, Golf Club Rules and all other rules and regulations made or promulgated by the [HOA], the Golf Club and the Equestrian Club, or the Board;

3.13 any agreement concluded by the [HOA] or the Board or [Wraypex] insofar as such agreement may directly or indirectly impose rights or obligations on a member;

3.14 the provisions of any Environmental Management Plan and Conditions of Establishment of any township(s) within the Estate and any directive issued by the [HOA] in this regard; and

3.15 any directive given by the [HOA], the Board, [Wraypex] or the Manager in the enforcement of these presents

3.18 Membership of the [HOA] shall include social membership of the golf club, but shall not include golfing or equestrian membership. Membership of the golfing section of the golf club and equestrian centre shall be by application to the [HOA] or [Wraypex] and subject to the rules governing the management of such facilities and entrance fees that may be applicable from time o time.

6.1 The Board shall from time to time impose levies upon the members for the purpose of meeting all the expenses in relation to the facilities and service for or in connection with the Estate, and for the payment of all expenses necessarily or reasonably incurred in connection with the management of the [HOA] and its affairs, including the Eco Park. In calculating the amount of the levies, the Board shall take into account income from other sources if any, earned by he [HOA].

> 8.1 The responsibility for the provision of services, namely facilities, utilities, services and amenities of whatever nature as may be provided by or on behalf of the [HOA] for members or residents of erven within the Estate, excluding such facilities, utilities, services and amenities as are situated within the boundaries of an erf shall pass from [Wraypex] to the [HOA] on the date of the first registration of transfer of an erf from [Wraypex] to an owner.

62 It will be seen that one of the "privileges of membership" contemplated by the articles is "social membership of the golf club" (art 3.18). As I shall show, the golf club also provides swimming and other sporting facilities. It may be that some or all of these sporting facilities other than golf may be enjoyed by social members. I need not decide this. But the articles draw a clear distinction between social and golfing membership and I shall refer in the present context to social and golfing membership.

63 The golf club rules provide for the golf club to have a board of governors. This use of the term "governors" in contradistinction to "directors" in different sections of the same instrument is to my mind a strong indication that the composition of the board of the golf club was to be separate from the board of directors of the HOA. There is however no indication in what is before me that any board of

governors was ever constituted. The following rules are to my mind relevant:

1.1.17 Use of the Club Facilities may be restricted or reserved from time to time by the Club.

1.1.18 Violation of these rules or conduct in a manner prejudicial to the best interests of the Club will subject the person in violation to disciplinary action in accordance with the Bylaws of the Club.

1.1.19 The Board of the Club reserves the right to amend or modify these rules as it determines appropriate from time to time and will notify the membership of any change.

1.2.2 A Member is entitled to credit and charge facilities at the Club so long as his or her Membership is in good standing.

1.2.3 All food, beverages merchandise and services of the Club charged to the Member's Club account will be billed monthly and is due in full upon receipt.

1.5.2 A Membership may be suspended or terminated by the Club if, in the sole judgment of the Board, the Member ...

e) Fails to pay any amount owed to the Club in a proper and timely manner.

f) Fails to abide by the rules and regulations as set forth for use of the Club Facilities.

h) Engages in any other conduct or obligation determined by the Club as appropriate for suspension or termination of Membership.

1.5.3 The Club may at any time and from time to time restrict or suspend, for cause or causes described in

> the preceding paragraph, any Member's rights to use any or all of the Club Facilities.

64 The golf club rules provide that in addition to the golf course facilities, the club also provides social, tennis, squash and spa facilities. The rules as a whole make plain that the government of the club is in the hands of its own board and a manager. Both the articles and the rules refer to a "manager". The manager contemplated in the articles is appointed by the board of the HOA. (Art 20.3.1). The rules do not define or provide for the appointment of the golf club manager. The most probable inference is that because the government of the golf club is in the hands of its governors, the governors should appoint the manager of the golf club.

65 The rules also provide that the golf club raises its own revenue from its members and from the goods and services provided to them. The articles expressly distinguish between "social membership" of the golf club and the membership of the golf club contemplated by the rules, which confers the right to use the golf club's golfing, as opposed to social, facilities. There is no indication in the rules that the board of governors is to be in any way subordinate or subject to the direction of the board of the HOA. Nor is there any indication in the rules that a golfing member's standing with the HOA in any way bears upon his golfing membership of the golf club. In this regard, it is significant that

rule 1.5.2, which provides for "suspension or termination by the Club", does not make non-payment of levies to the HOA a ground fo suspension or termination of social or golfing membership of the golf club.

66 I have alluded to the constitution of the HOA. The papers before me are silent on when and in what circumstances the constitution was adopted. The constitution purports in s 2 to establish the HOA as a voluntary association, which seems to me to be in conflict with the factual position, which is that the HOA was established under s 21 of the old Companies Act and that every owner of an erf is obliged to become and remain a member of the HOA, but nothing appears to turn on this. The constitution follows, but is not substantively identical to, the articles. It defines the HOA's manager. "Member" is as defined in the articles. It includes a definition of *membership*, a term which is not defined as such in the articles. *Membership* as defined in the constitution draws the same distinction as does art 3.18 of the articles between social and golfing membership of what the constitution calls the "country club". It makes Wraypex in its capacity as developer or its successor in title a member of the Association, together with all owners of erven. It reproduces substantially in ss 7.10 and 9 the provisions of arts 6.10 and 8 of the articles.

67 The constitution vests the government of the HOA in a board of governors. I was asked to treat the "governors" of the constitution as the directors provided for in the articles. I shall do so and therefore say no more on this topic.

68 The HOA has a written code of conduct. Common property is dealt with in s 5 which records that numerous open areas have been provided to enhance the lifestyle of residents. Section 2.16 suggests that there are monkeys and other wild life within the estate. Section 12.3 of the code provides that if levies are in arrears, the HOA will be entitled to disable

> ... automatic biometric access of guilty owners and their visitors until such monies are paid in full. Access during this period ... will be granted on a manual basis by completing the visitor book.

69 Section 13.1 of the code provides when levies become due. But the code of conduct is silent, as is the constitution, on the consequences of non-payment of golf club subscriptions or the alleged linkage between golf club subscriptions and the withholding of rights of membership of the HOA. Indeed, s 14.5 of the code provides that the rules pertaining to the use of the golf course and club facilities will form part of the golf club rules.

70 Golfing membership of the golf club is regulated by the provisions of a document styled in its heading as the membership agreement and by-laws of the golf club. The membership agreement provides that m]embership is a "contractual privilege". A person who has applied for membership of the golf club and who has been accepted as such becomes a member of the golf club. Membership entitles a member, against payment of an initial once-off entrance fee and annual membership fees, to the use of the facilities of the golf club. Membership is said to be restricted to residents of the estate[11] and is subject to the "applicable rules" of the HOA. One of those applicable rules is that ownership of an erf entitles the owner to social membership of the golf club. Failure to pay membership fees or similar charges is expressed to be grounds for immediate revocation of membership and all membership privileges. Membership may be suspended or terminated by the golf club.

71 A clear picture emerges from the provisions with which I have dealt: the legislative scheme is that although the golf club is an organ of the HOA, a distinction is to be drawn between the administration of the estate and the administration of the golf club. Separate contractual regimes govern the relationship of a member with the HOA as administrator of the estate and the relationship of that same member

---

11 Although this is not enforced in practice. The seventh respondent is not a resident.

with the golf club. Administration of the golf club vests in the board of governors of the golf club while administration of the HOA vests in the board of directors of the HOA. Although one of the privileges of membership of the HOA is to entitle the member to apply to the board of the HOA or to Wraypex for membership of the golf club, the decision whether to accept any such person as a member of the golf club vests in the board of governors of the golf club. The financial affairs of the golf club are managed under the control of its own board of governors, not by the board of directors of the HOA.

72 Membership, for purposes of the articles implicitly, and for purposes of the constitution expressly, means membership of the HOA. Both these instruments draw a sharp distinction between membership of the HOA and golfing membership of the golf club. From the bundle of rights and obligations conferred and imposed by membership of the HOA *qua* erf owner, golfing membership of the golf club is expressly excluded.

73 So the context supports the conclusions firstly that the phrase "privileges of membership" in art 6.10 of the articles refers to membership of the HOA in the narrow sense and does not include the privileges of membership of a golfing member of the golf club; and, secondly, that the schemes of administration of the HOA and the golf

club, properly construed, provide that the power to withhold the right to play golf vests in the board of governors of the golf club and not in the board of the HOA..

74 So, in my view, does the language of art 6.10. Put at its highest, non-payment of levies might disentitle a member of the HOA from demanding that the board of the HOA or Wraypex pass on the defaulting member's application to be a golfing member of the golf club to the board of governors of the golf club. But that is not in issue here. This case does not concern aspirant golfing members but golfing members who have paid up their golfing dues. A power to withhold this postulated right does not imply a power to deny golfing members who have paid up their golfing dues the right to play golf.

75 At a linguistic level, if "privileges of membership" were to entitle the board of the HOA to withhold the right to play golf for non-payment of levies, it would also entitle the board of the HOA to withhold the privileges of membership of the HOA from non-payers of their golfing dues. Counsel for the intervening respondents declined to avow this proposition, an alarming and untenable one, because it would empower the HOA to deny a non-payer of golfing dues automatic access to the estate, use of the roads, open areas and other facilities and even water and refuse removal.

76 Counsel submitted that the construction he urged upon me should work one way but not the other because membership of the golf club was elective while membership of the HOA was mandatory. I am unable to see that this distinction can save the construction urged upon me by counsel for the intervening respondents from linguistic absurdity.

77 It follows that as I see it there is no power vested in the board of the HOA to prevent a golfing member of the golf club from playing golf at the estate golf course on the ground that *qua* member of the HOA, such golfing member has not paid any levies which may be due to the HOA. Nor, for that matter, is there any power vested in the board of governors of the golf club, to prevent golfing members of the golf club, who are not in arrears to the golf club, from playing golf there because they are in arrears with their levies to the HOA.

78 None of the other requirements for an interim interdict was urged upon me as a ground for non-suiting the applicants. The balance of convenience favours the applicants. I have considered whether provision should be made in the order I shall grant to accommodate the reasonable financial needs of the HOA and the golf club *pendente lite*. I did so because of certain tenders made by the applicants in their affidavits. Arising from a draft order put up by the applicants in relation

to concerns I expressed as to the incorporation of the tenders into the draft order, I heard further argument from the parties on19 June 2014.

79 I have decided that no order need be made in relation to the applicants' tenders. In its capacities as administrator of the estate and of and the golf club which I have identified above, the HOA has remedies. If its financial needs are not met from levy income, the HOA can look to Wraypex to make up the deficit. Convenience does not require that the HOA receive additional protection in the present context. The order which I shall make is not to be interpreted as restricting the HOA from proceeding, as resolved by its appropriate organs, against any member of the HOA or any golfing member of the golf club who the HOA believes is in breach of his contractual obligations.

80 I make the following order:

1 Pending the final determination in this court of the main application launched in this court under this case number by notice of motion date stamped 12 December 2013:

1.1 the first respondent must immediately reinstate the full membership rights and privileges of the applicants as members of the Blair Athol Golf Club ("the Club");

1.2 the first and second respondents are interdicted from preventing any of the applicants from playing golf on the Blair Athol golf course ("the golf course") on the ground that any of the applicants has not paid levies allegedly due to the first respondent in its capacity as the administrator of the Blair Athol Golf and Country Estate;

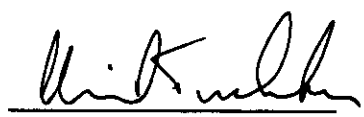
1.3 the first and second respondents are interdicted from preventing, restricting or prohibiting (in any manner) , on the ground that any of the applicants has not paid such levies, any of the applicants and their guests from playing golf on the golf course and from making use of the facilities of the Club provided for golfing members of the Club;

1.4 the first and second respondents are directed forthwith to take all steps necessary to ensure the reinstatement of the applicants' affiliation status with the South African Golf Association.

2 Nothing in this order shall prejudice the right of the first respondent to proceed as it may see fit against any applicant or other person on the ground that any such person has not paid to the first respondent levies due by such applicant or has otherwise breached the terms of any agreement between such

applicant and the first respondent, whether as administrator of the estate or as administrator of the Club or otherwise.

3 The costs of this application and of the application to intervene brought by the third to seventh respondents, including the question whether the employment of both senior and junior counsel was justified, are reserved for determination by the court hearing the main application.



NB Tuchten
Judge of the High Court
19 June 2014

KnowlesBlairAtholGolf75783.13