IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION,
PIETERMARITZBURG

Case No: 17295/2014

In the matter between:

THE BODY CORPORATE OF THE BEND
(SS 214/2004) **APPLICANT**

and

SHEILA ANNE HOLGADO **1ST RESPONDENT**

DANIA INVESTMENTS (PTY) LTD **2ND RESPONDENT**

THE REGISTRAR OF DEEDS
PIETERMARITZBURG **3RD RESPONDENT**

WAKEFIELDS PROPERTY MANAGEMENT
(PTY) LTD **4TH RESPONDENT**

COLIN TILBURY **5TH RESPONDENT**

SARAH TILBURY **6TH RESPONDENT**

ROBERT DE BRUYNE **7TH RESPONDENT**

ANDREW SMITH **8TH RESPONDENT**

ANDRE NIEMANDT	**9TH RESPONDENT**
ROBFAIR INVESTMENTS NO. 258 CC	**10TH RESPONDENT**
JOANNE WHITACKER-SMITH	**11TH RESPONDENT**
ANTHONY FRASER STEWART	**12TH RESPONDENT**
RIMMEL INVESTMENTS CC	**13TH RESPONDENT**
BEND HOUSING VENTURE CC	**14TH RESPONDENT**
4 FELLOW BENDERS CC	**15TH RESPONDENT**
DAYKEN PROPERTIES CC	**16TH RESPONDENT**
ROYAL ALBATROSS PROPERTIES (PTY) LTD	**17TH RESPONDENT**
ANDREA FLUTTER	**18TH RESPONDENT**
COLLIN HEARD	**19TH RESPONDENT**
GREGORY DAVIS	**20TH RESPONDENT**
MICHAEL DAVIS	**21ST RESPONDENT**
CLAUDE MARTIN	**22ND RESPONDENT**
BRUCE LAVAGNA-SLATER	**23RD RESPONDENT**
TRUSTEES OF THE AROUND THE BEND TRUST	**24TH RESPONDENT**
ROGER SOLIK	**25TH RESPONDENT**
TRUSTEES OF JB MCINTOSH FAMILY TRUST	**26TH RESPONDENT**

ORDER

I make the following order:

(1) The application launched by Biccari Bollo Mariano Incorporated under case number 17295/2014 was not authorised by the Body Corporate of the Bend Sectional Title Scheme No SS217/04 and trustees; and is therefore set aside.

(2) The trustees' meeting of the Bend Body Corporate held on 9 August 2014 was properly convened and duly constituted and the resolutions taken thereof constitute valid and binding resolutions of the trustees of the Bend Body Corporate.

(3) Wakefields Property Management is hereby authorised and directed to enter the minutes of the trustees' meeting of 9 August 2014 in the minute book of the Bend Body Corporate.

(4) The trustees' resolution dated 16 September 2014 is invalid and hereby set aside.

(5) The special levy to the resolution of 16 September 2014 referred to in the letter of 17 September 2014 from Wakefields Property Management to the members of the Bend Body Corporate is hereby set aside.

(6) The notification in terms of s 35 (5) of the Sectional Titles Act 95 of 1986 in respect of the unanimous resolution passed by the Bend Body Corporate on 15 June 2009, signed by Anulric Jacobs and David Ralph Scates, being the document attached to the first respondent's affidavit and marked annexure 'STH21', is invalid and set aside. The Registrar of

Deeds, Pietermaritzburg is directed to expunge the said notification from its records.

(7) Mr Rodney Trotter of Stowell & Co Attorneys, acting on the instructions of any two trustees of the Bend Body Corporate is authorised to prepare and lodge a corrected unanimous resolution, in accordance with the unanimous resolution passed by the Bend Body Corporate on 15 June 2009.

(8) Mr Martin is ordered to pay the costs of the main and counter-applications.

(9) A rule nisi is hereby issued calling upon Biccari Bollo Mariano Incorporated to show cause on _____ August 2018 why an order in the following terms should not be made in the following terms:

(a) Biccari Bollo Mariano Incorporated is ordered to pay the costs of the respondents in the main and counter-application de bonis propriis on a scale as between attorney and own client

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JUDGMENT

Poyo Dlwati J:

[1] The main issue to be determined in this application is whether the applicant is entitled to relief in terms of s 1(3A) of the Sectional Titles Act 95 of 1986 (the Act) . However, a point to be determined in limine, raised by the first and second respondents is whether Biccari Bollo Mariano Incorporated (BBM Attorneys) had authority to represent the applicant in launching these proceedings.

[2] The applicant is the Body Corporate of the Bend, which is a Sectional Title Scheme situated in the Natal Midlands at D361 off Loteni Road. It is a Body Corporate established in terms of the Act and has the necessary capacity to sue and to be sued. The second respondent owns and operates an Hotel which is situated in the scheme and is also the owner of units 1 and 2 in the applicant's scheme. The second respondent is the erstwhile developer of the applicant's scheme and is the owner of unit 19 in the applicant's scheme. It also holds the remaining rights to extend the scheme which right is reserved in terms of s 25 of the Act. The first respondent together with her son, Matthew James Holgado are shareholders of the second respondent.

[3] There seemed to have been a long history of unhappiness, mistrust and acrimony within the residents of the Bend. What promised to be a place of peace and tranquillity has turned out to be the opposite. Mr Claude Egner Martin, the deponent to the founding affidavit has blamed this squarely on the first respondent. The brief background to the application was that there was a belief amongst the residents of the Bend that the first respondent was abusing her majority rights vote in the scheme by promoting and achieving her own interests and agenda at the expense of the other residents. She also used her majority control to appoint majority trustees in the applicant in order to exercise unilateral control in the way trustees passed their resolutions.

[4] Mr Martin averred that the Management Rules of the scheme from which the first respondent derived power and control were invalid and unenforceable for the following reasons: The Rules were inequitable and prejudicial to all other members of the scheme in that the second respondent as the holder of the right to extend the scheme, obtained voting rights in respect of the reserved

rights and was also liable to pay levies for such rights and this, according to Mr Martin was contrary to the Act.

[5] Furthermore, the allocation of expenditure which was supposed to be categorized as either base or as services was initially allocated as 60 per cent to base and 40 per cent to services and this was supposed to be considered and determined at each general meeting. However, according to Mr Martin, this had always been retained as 60 per cent / 40 per cent without any consideration or deliberation due to the first respondent's abuse of her majority votes as she would simply overrule views, issues and options of certain members of the scheme.

[6] For the above reasons and especially the fact that the first respondent used her majority votes in the scheme to get her way with various issues, Mr Martin and other trustees of the applicant deemed it fit to launch this application in order to try and break the first respondent's domination of the scheme. Mr Martin and Mr Tweedy, who in Mr Martin's view, were the only qualifying trustees in the scheme to vote on the issue sought legal advice from Ms Northmore of BBM Attorneys on two issues namely:-

(a) whether or not it was in the best interests of the applicant to take steps to oppose the second respondent's counter-application (in which the applicant was a respondent).

(b) the first respondent's tyrannical control of the applicant and its Board of Trustees.

[7] From the advice received from Ms Northmore, it was clear to Mr Martin that the Management Rules of the scheme had to be amended. In terms of the Act, this ought to be done by unanimous resolution failing which it had to be

declared invalid and unenforceable by a court of law. Mr Martin believed that they would be unable to reach or obtain a unanimous resolution because of the first and second respondent's attitude hence it was agreed to launch this application in terms of s 1(3A) of the Act.

[8] According to Mr Martin, with Mr Tweedy's agreement, a meeting of trustees was convened for 10 March 2014 in order to resolve the appointment of BBM Attorneys. This issue was referred to as: 'Legal advice and assistance' under item 1.2 of the notice and agenda of the trustees meeting attached to the founding affidavit as annexure 'J'. Mr Martin, Mr Tweedy and the first respondent participated in the meeting and its minutes were attached to the founding affidavit as annexure 'K'. The underlined portions of such minutes were the first respondent's comments made after the meeting. I will revert later in this judgment about the particular resolution for appointment of BBM Attorneys.

[9] Subsequently BBM Attorneys were instructed by Mr Martin and Mr Tweedy to consider amongst other things the Management Rules of the scheme and to provide advice about their validity, force and effect and the first respondent's control of the applicant and its trustees. Initially the first respondent had shown an interest to discuss the matter on condition that the resolution resulted in the separation of the Hotel from the scheme. However, Mr Martin had no faith in this resolution as according to him even though this had been previously discussed the first respondent had been "all talk, no action" on the issue.

[10] In any event, Mr Martin and Tweedy were advised by Ms Northmore that the trustees did not have the authority to conclude a settlement agreement relating to the separation of the Hotel from the scheme as same required a unanimous resolution in terms of s 17(1) of the Act. Furthermore an amendment to the terms and conditions of the scheme's developmental approval would be required and the whole process of separation, if agreed to, would take a significant period of time to achieve. Nothing seems to have happened thereafter about the first respondent's proposal.

[11] Thereafter Ms Northmore sent a letter to the first respondent's legal representative with the proposed amendment to the Management Rules with a view of obtaining a unanimous resolution. That proposal was rejected by Mr Hendey on behalf of the first respondent on the basis that Ms Northmore was not authorised to act on behalf of the applicant. According to Mr Martin, this was an indication that a unanimous resolution could not be approved, hence the need to launch this application. Mr Martin averred further in his founding affidavit that he intended to report to the applicant's members on these issues and to ascertain their support (or lack thereof, as the case may have been) as to the action to be taken.

[12] A meeting for those purposes was arranged for 14 June 2014. The first respondent and Mr Hendey attended. After intense deliberations it was agreed that Mr Martin would ascertain the homeowners' support on the appointment of a mediator in order to deal, amongst other things, with the proposed Rule amendment, levy liability and voting rights issue. Mr Thornhill, however, who is one of the homeowners in the scheme, when asked when he would be building his unit, indicated that he would not be investing his money anymore on such a troubled estate. The relevance of this according to Mr Martin was that

until Mr Thornhill built and registered his section, no other section would be built and registered. This meant that the first respondent would continue to maintain her dominance.

[13] According to Mr Martin, various homeowners supported the launch of this application (to which I shall also refer to as the main application) and other conditional reliefs claimed. It was on those bases therefore that the application was launched so that the Rules could be amended in order to be in line with the Act. This, according to Mr Martin would allow levy liability and voting rights to be relative to the size of each owner's section even though the first respondent would still hold more than 50 per cent of the voting rights.

[14] The first and second respondents opposed the application. They challenged the appointment of BBM Attorney's authority to act for the applicant in these proceedings. They also filed a counter-application where various other reliefs were sought.

[15] The basis for the challenge on BBM Attorney's authority to act was based on the fact that Mr Hendey had, on behalf of the first and second respondents, advised BBM attorneys in a letter dated 6 August 2014 that they did not hold any authority to represent the applicant or its trustees in respect of new litigation concerning the amendment of the scheme's Management Rules. Mr Hendey, in his affidavit in support of the authority challenge averred that at a properly constituted meeting of the trustees of the applicant on 9 August 2014 it was agreed that BBM Attorneys had no authority to represent the applicant. He further averred that in that meeting it was agreed that mediation would be pursued in respect of the issue of the amendment of the Management Rules and

thus the whole issue about the court proceedings to amend the Management Rules fell away.

[16] Furthermore, after the application had been launched, a further meeting of the trustees was held on 1 February 2015. In that meeting, the minutes of the 9 August 2014 meeting were approved. Savage, Jooste & Adams attorneys (Savage Attorneys), being Mr Hendey's firm, was approved to defend these proceedings as launched by BBM Attorneys. In this regard a notice in terms of Uniform rule 7 was filed and served on BBM Attorneys and launch a counter-application. They, however, failed to respond meaningfully to the notice.

[17] A counter-application was subsequently launched, again on behalf of the applicant seeking an order declaring that the application launched by BBM Attorneys was not authorised and ought to be set aside. The application also sought to have certain Rules of the scheme deemed invalid and set aside. This meant that a new set of Rules had to be lodged. The further relief sought included the setting aside of the meeting and the resolution taken on 16 September 2014 and declaring the meeting of 9 August 2014 to have been appropriately held. This would then mean that some entries by Wakefields Property Management (Wakefields) in the scheme's minute book had to be rectified accordingly.

[18] The first respondent, in the affidavit seeking to set aside the initial proceedings as being unauthorised, averred that she was authorised by the applicant in launching the counter-application. Even though her affidavit is a founding affidavit for the notice of motion attached to it, in my view it also served as an answering affidavit to the main application. The first respondent averred that the legal issue referred to in the agenda of 10 March 2014 could not

have been a reference to the main application but to a counter-application she had lodged against the Dayken Properties application (to which various owners had brought an application seeking to try and avoid costs of maintaining the servitude area within the scheme). In her view, therefore, attorneys had to be appointed in order for the applicant to obtain legal advice as to whether to oppose the counter-application she had lodged.

[19] She further supported her contention by making reference to various emails (annexures 'S7H1' to 'STH16') that were exchanged between her and other members of the applicant about legal fees that related to the counter-application launched against the Dayken application. She therefore contended that for those reasons BBM Attorneys were never instructed and had no authority to launch the main application. In any event, so went her contention, any trustee who attended or did not attend the meeting would never had foreseen that BBM Attorneys would be instructed to launch the application as the issue of the Rules was never on the applicant's agenda with clear precision. In her view, trustees would have understood this item as relating to the issue of the counter-application which was at hand or falsified Management Rules which the first respondent had complained about.

[20] Furthermore, the first respondent was not in agreement with the purported minutes of the meeting of 10 March 2014. In her view the only issue where BBM Attorney's legal advice would have been sought was in relation to the Dayken properties counter-application and the validity of certain Management Rules. To this extent the first respondent challenged Mr Martin to produce an electronic recording of the meeting as he usually recorded meetings. The further contention of the first respondent was that even if BBM Attorneys were

instructed in terms of that resolution, her understanding was that they had to give advice and make recommendations to the applicant on those issues.

[21] The first respondent further contended that she, through her legal representatives, had suggested mediation as a way of resolving disputes between the parties but this was not heeded to by Mr Martin and those aligned to him. Instead at another applicant's AGM held on 14 June 2014 Ms Northmore conveyed her advice to the members of the applicant. The proposed resolution to the Management Rules was different to what she had proposed in her letter of 1 April 2014. Even then, mediation followed by arbitration was still suggested as a way to reach an amenable solution to the issue of the Management Rules. Furthermore, BBM Attorney's authority to deal with the issue was challenged.

[22] The first respondent further contended that it was evident that the issue regarding BBM Attorney's authority to act on behalf of the applicant had been accepted as a dispute as demonstrated on an agenda meant for the applicant's AGM scheduled to take place on 9 August 2014 (attached to her affidavit as annexure 'STH51'). That meeting was purportedly unilaterally cancelled by Mr Martin, which according to the first respondent he had no right to do hence the meeting proceeded in his absence. According to the first respondent, therefore, paragraph 3 of the agenda to that meeting made it clear that it would only have been at that meeting that BBM Attorney's authority to act to institute these proceedings would have been approved.

[23] In a letter accompanying the agenda, Mr Martin had advised the trustees as to which trustees would be eligible to vote in that meeting. On 7 August 2014, the first respondent sent Mr Martin an email advising him about the legal

advice she had received about who was entitled to vote at the meeting. It was as a result of this communiqué that Mr Martin purported to cancel the meeting at 12H55pm on 8 August 2014, which cancellation was not accepted by the first respondent and other trustees (three out of five trustees having been present at the meeting). Various resolutions were taken at the meeting of 9 August 2014 and the minutes of that meeting are annexed to the first respondent's affidavit as annexure 'STH59'.

[24] One of the resolutions taken at that meeting was that mediation on all issues concerning the applicant had to be explored except the amendment of the participation quota Rule which was resolved to be attended to by Mr Rodney Trotter of Stowell & Co Attorneys. It became evident to all concerned at that stage that there was no unanimity by the trustees of the applicant and this resulted in the launch of the main application by BBM's Attorneys and the subsequent counter-application by Savage Attorneys.

[25] The first respondent further contended that a meeting of the trustees of the applicant seemed to have been convened and held on 16 September 2014. However, herself, Mr Holgado and Mr Thornhill were not given notice of that meeting on the basis that they were conflicted to vote on the issues that were going to be discussed. According to the first respondent, Mr James McIntosh was designated as a third trustee in such a meeting but as he was an alternate to Mr Martin, he could not have any status if Mr Martin was also in attendance at the meeting. According to the first respondent, this was done in order to circumvent the issue of the quorum at the meeting as without a third trustee there would have been no quorum.

[26] The minutes of that meeting were attached to the first respondent's affidavit as annexure 'STH63'. It seems that it was at that meeting that a resolution was taken to institute these proceedings (main application) and authorised Mr Martin to sign all affidavits. For obvious reasons, the first respondent also regarded the special levy levied by Wakefields as a misrepresentation by Mr Martin. It was for those reasons that she sought an order annulling the meeting and for Wakefields to expunge these resolutions from the minute book.

[27] Finally, the first respondent contended that none of the proposed resolutions pertaining to the amendment of the Rules were ever discussed in any meeting of the trustees of the applicant. The applicant therefore could not have launched the main application with the relief being sought in terms of s1 (3A) of the Act. Instead the launch of the counter-application was authorised at the meeting of the trustees of the applicant held on 1 February 2015 where the majority of trustees were in favour of the resolution. The meeting, according to the first respondent was also confirming the resolution that had been taken on 9 August 2014 including the challenging of authority of BBM Attorneys in launching the main application. The first respondent therefore sought the setting aside of the proceedings launched by BBM Attorneys and further ancillary relief related thereto.

[28] I turn now to deal first with the issue of BBM Attorney's authority to launch the main application. It was contended that this authorisation was derived from the resolution of the meetings of 10 March 2014 and 16 September 2014 respectively. I will deal first with the resolution of 10 March 2014 which is annexure 'A1' to Mr Martin's affidavit. Perhaps to fully

understand the context upon which the resolution was taken, one must refer to the agenda and minutes of such meeting first.

[29] The notice and agenda to the meeting was dispatched to other trustees on 2 March 2014 by Mr Martin. The relevant item for purposes of this matter is item 1 which reads as follows:

'BBC Board of Trustees Composition, Roles and Responsibilities CM/ALL

1.1 Alternative trustees

1.2 Legal advice and assistance'.

[30] The minutes of the meeting appear as annexure 'K' to Mr Martin's affidavit. Paragraph 2.2 thereto reads as follows:

'2.2 CM and GT said that the body corporate needs legal assistance. The Developer has initiated legal proceedings against the Body Corporate and has, via its directors and its legal representative, made various demands and assertions to the Body Corporate, including but not limited to the validity or otherwise of certain Management Rules and the consequent effect on the value of the Developer's vote and the Developer's liability for contributions to the Body Corporate. The Body Corporate is in need of independent legal advice and assistance in respect of the aforegoing. Therefore it is resolved that the Body Corporate of the Bend mandate and appoint Biccari Bollo Mariano Incorporated to provide legal advice and recommendations to the Trustees in respect of the above, and thereafter to defend and/or initiate, as the case may be, and to represent the Body Corporate in pending legal proceedings or whatsoever further legal proceedings may ensue, and to provide assistance ancillary thereto. The Body Corporate has not contested the action within the prescribed period so the basis for this is flawed'.

[31] On my reading of the above resolution I get the impression that it related to a pending application by the developer against the applicant. BBM Attorneys had to give legal advice in relation to that application and make recommendations to the trustees prior to any further action. It cannot be said that the resolution as it stands alluded to, in any way, the relief sought in the

main application. The relief sought in this application was in my view, never discussed in any of the meetings of the applicant (I will revert to this issue later in the judgment). In my view, if proceedings had to be initiated, that would have been the recommendation of BBM Attorneys and the applicant would have to resolve accordingly.

[32] This finding is validated by BBM Attorney's letter of 1 April 2014 (annexure 'L' to Mr Martin's affidavit) addressed to Savage Attorneys where the following is stated at the bottom of page 2:

'The Trustees have requested that we consider and provide advice regarding the reasonableness and equal application of the New rule and the Rule, especially in so far as it effectively places Mrs Thornhill-Holgado in a position of control of the Body Corporate, and in general regarding the validity and enforceability of those rules. We have duly done so and we are firmly of the view that both of the rules are unreasonable and inequitable, and for those reasons as well as others, are invalid.' (My emphasis.)

In my view, this paragraph contains what BBM Attorneys, at that stage, considered their mandate to be. There is nothing in the letter that suggests that even BBM Attorneys, at that stage, considered the launching of the main application to have been their mandate.

[33] This is further confirmed by BBM Attorney's letter (annexure 'S') of 1 July 2014 to Savage Attorneys where they questioned (page 6 of the letter) how the first respondent could contend that the decision to appoint an attorney to provide legal advice and assistance in respect of the validity of the amended Management Rule did not fall squarely within the parameters of Rule 23, being the duties of the applicant. In the second paragraph thereto Ms Northmore explained the advice she gave to the applicant and the way to cure the problem being to 'take steps to replace the amended and the original management rules.'

At that stage still, it was advice and a recommendation to the applicant but there was nothing about launching the main application.

[34] The second paragraph concludes by Ms Northmore stating that she had advised the other trustees that without the support of the first respondent for a unanimous resolution, the appropriate recourse for the applicant would be to approach the court for relief in terms of s 1(3A) of the Act. In any event, Mr Martin's concession in his replying affidavit (paragraph 132) that there was no indication in the agenda item as to the nature of or reason for legal advice to be sought is telling. In fact what is more astonishing is that the proposed resolution had been prepared prior to the meeting for consideration at that meeting which resolution was then subsequently approved. If nothing untoward was intended by such a resolution why did Mr Martin not circulate the resolution prior to the meeting?

[35] Furthermore, Mr Martin and Mr Tweedy knew exactly what they wanted to be achieved at the meeting as they had consulted Ms Northmore on the issue. I find that their acts were disingenuous and mischievous in this regard. Hence I am satisfied that BBM Attorneys was not authorised by the applicant at the meeting of 10 March 2014 to launch the main application. This is furthermore so as Mr Martin made it clear in his founding affidavit at paragraphs 51 and 52 that he intended to report to the applicant's members on the aforementioned issues and to ascertain their support (or lack thereof, as the case may have been) as to the action to be taken. That meeting was arranged for 14 June 2014.

[36] This then leads me to the resolution of 16 September 2014. Perhaps it is important at this point to make reference to the minutes of 14 June 2014 where the issue was discussed. In that meeting the authority of BBM Attorneys to act

on behalf of the applicant was challenged but Mr Martin contended that they were properly instructed as per meeting of 10 March 2014. I agree that BBM Attorneys was properly instructed to give advice and recommendation on the issues that were discussed at the meeting of 10 March 2014 but this did not include the institution of the main application.

[37] At the meeting of 14 June 2014 it was agreed that mediation needed to be explored in respect of various issues and litigation had to be avoided. To this extent Mr Martin was to solicit the views of the different owners. There was then a response from various homeowners about their support for litigation and not mediation. However, I do not know and it is not clear on the papers what Mr Martin's email to the homeowners encapsulated and I therefore cannot form an opinion whether the issue was appropriately referred to in that email.

[38] A subsequent meeting was convened for 9 August 2014. However, that meeting was purportedly cancelled by Mr Martin as he believed that the meeting would degenerate and evolve into only fighting about who was entitled or disqualified to vote at such a meeting. I will revert later to this issue. However, it is necessary to refer to the agenda for the meeting that was to be held. Same is attached as Annexure 'V' to Mr Martin's affidavit. Paragraph 2 thereto reads as follows:

'2. To discuss, deliberate and vote whether mediation is a viable and appropriate method to pursue in resolution of the dispute between the Trustees on the one hand and the developer and the owner of the Hotel on the other hand regarding the status and validly(sic) of the Management Rules and purported amendments thereto.

3. If mediation is not approved as an appropriate method to pursue – to consider, deliberate and vote on whether to proceed with the initiation of legal proceedings for relief as contemplated in section 1(3A) of the Sectional Titles Act in terms of which the Management Rules pertaining to the calculation and apportionment of levies and the value of each owner's

vote are to be replaced by the proposed new Management Rule and for relief complementary and/or ancillary thereto, as may be advised by the Body Corporate's attorneys, and that BBM Attorneys be mandated to so act for the Body Corporate'.

[39] In my view, therefore, it is evident from this agenda that it would only have been at the meeting of 9 August 2014 that the institution of these proceedings would have been resolved and also BBM Attorneys would have been authorised to launch the main application. Mr Martin therefore believed that it was no longer necessary to schedule any other meeting but instead circulated the resolution attached to his affidavit as annexure 'Y' to those trustees that he believed were not conflicted to vote on the issues hence it was signed by three trustees and dated 16 September 2014. That resolution purported to authorise the institution of the main application and for BBM Attorneys to act for the applicant in those proceedings.

[40] In my view, there can be no reliance on such a resolution as it was never discussed or put to any meeting of the applicant. See *Du Rand NO & others v Faerie Glen Renaissance Scheme* [2010] 1 ALL SA 383 (SCA) para 5. It is evident from the signatures in that resolution that it was merely caused and circulated amongst those that were seen to be in agreement with the changing of the Rules but not those who were considered to be in opposition of the change. In my view, that resolution was not properly taken as firstly, there was no quorum of the trustees of the applicant to deal with such a resolution; and secondly, the issue was never discussed at any properly convened meeting of the applicant ; and thirdly there is no provision in the Management Rules of the applicant that allowed the trustees to have dealt with the issue by way of round robin under circumstances where it was not necessary to do so.

[41] In fact Mr Martin himself had deemed it necessary that these issues be discussed in a meeting as they would have been on 9 August 2014 but for whatever reason he changed his mind and deemed it appropriate to just circulate a resolution for approval without even the knowledge of all of the applicant's trustees That, in my view, cannot be. In fact there was no quorum either to have the resolution passed as it is common cause that Mr McIntosh was Mr Martin's alternate. Mr Martin had conceded this much in his answering affidavit and stated that Mr McIntosh signed the resolution as a matter of precaution but not to constitute a quorum.

[42] At the very least the agenda of 9 August 2014 should have been discussed by all trustees. If voting was required, then only at that stage maybe that the ones that were seen to be conflicted could not be entitled to vote. It is only then that the application in terms of s 1(3A) of the Act could have been brought. In the circumstances, I am satisfied that BBM Attorneys had no authority to launch the main application and it ought to be set aside. This was made clear from the onset by the launch of the Uniform rule 7 challenge. See *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at 207 H-I. It follows therefore that the resolution of 16 September 2014 is hereby set aside and any consequences that follow from it are reversed.

[43] As Mr *Stewart* on behalf of the applicant argued that both the main and counter-applications be dealt with and not only the pointin limine.I proceed then and deal briefly with the other reliefs sought by the first and second respondents in their counter-application. These are related to the Management Rules that were registered in the Pietermaritzburg Deeds Office subsequent to the AGM of 15 June 2009 and also the validity of the meeting of 9 August 2014 despite 'the cancellation' by Mr Martin. It is quite evident that every homeowner in the

Bend is not happy with the current Management Rules that were registered subsequent to the AGM of 15 June 2009 even though for different reasons.

[44] Even though for different reasons, Mr Martin conceded in his answering affidavit (paragraph 71) that the Management Rules in question were invalid. Whilst Mr Martin purports to deny that the Management Rules recorded in the Deeds Office subsequent to the AGM of June 2009 were incorrect, the objective evidence before me points otherwise. The minutes of the 15 June 2009 AGM were approved on 17 April 2010. However, what was signed by Messrs Jacobs and Scates as reflected in annexure 'STH21' was incorrect if one has to compare same to the agenda and minutes of the AGM. This is especially so in paragraphs (iv) and (vi) of the schedule attached thereto.

[45] This error is readily conceded by Mr Trotter, the conveyancer responsible for registering same at the Deeds Office, in his letter dated 15 September 2014 and confirmed by his confirmatory affidavit. This error is patently clear from annexures 'B' and 'D' of Mr Trotter's letter. Mr Martin, however, contended that Messrs Scates and Jacobs had advised him that there was no error in those rules and were correct as registered in the Deeds Office. There were no confirmatory affidavits by either of them despite Mr Martin's undertaking in his affidavit of obtaining same. What Mr Martin said about them is hearsay and must be disregarded. See *The Master v Slomowitz* 1961 (1) SA 669 (T) at 672 A-B. As Mr Martin was not a trustee at the time, he therefore does not have an independent knowledge of what happened.

[46] Mr Martin, at paragraph 95.4 of his answering affidavit, conceded that Messrs Scates and Jacobs amended the draft which was handed to them by Mr Trotter even though according to him this was done in order to accurately

reflect what they (Messrs Scates and Jacobs) understood and believed to have been a Rule that had been approved at the meeting. Despite all of this being hearsay, it is alarming that Mr Trotter seemed not to have been advised of their amendment which again supports the first respondent's contentions in this regard.

[47] As Mr Martin has failed to seriously and unambiguously address this issue (see *Wightman t/a J W Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) para 13), I therefore do not believe that there is a bona fide genuine dispute of fact that I am unable to decide this issue on the papers before me, (see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-5). The contrary is true. That the first respondent has taken a long time to have the records corrected is neither here nor there. A notice was served on the Registrar of Deeds as required by s 56 of the Act and to all the homeowners in the Bend. None have opposed the relief sought. Accordingly, the Rule must be amended in accordance with the resolution of 15 June 2009.

[48] The final issue relates to the status of the meeting of 9 August 2014. The meeting was initially convened by Mr Martin but he purported to cancel same on 8 August 2014 at about 12H55pm. This, according to the first respondent, was after she had sent to the other trustees her views and advice about BBM Attorneys authority and who would be entitled to vote on the issues in the agenda. Mr Martin, on the other hand, believed that there was no point in holding the meeting as it would degenerate into discussing voting rights despite other important issues.

[49] Paragraph 15(2) of the Management Rules of the applicant gives authority to a trustee to convene a meeting of trustees by notice of not less than

seven days and specify the reason for calling such a meeting. As the notice was already given by Mr Martin within the required time limits together with the agenda for the meeting, it was not necessary in my view for the first respondent to give another notice relating to the same meeting. This is also more so as there were no new items added on to the agenda. The issue therefore is whether the first respondent was entitled to proceed with such a meeting despite a purported cancellation by Mr Martin.

[50] Rule 15(2) makes provision for a trustee to convene a meeting and in my view this is not only limited to a chairperson. The first respondent therefore was entitled to proceed with the meeting which had initially been convened by Mr Martin who was a trustee and chairperson of the applicant. There is no complaint of any prejudice as a result of the meeting having been held. In my view, therefore, the meeting was held in accordance with the Management Rules of the applicant and it ought to be recorded as such.

[51] There remains the issue of costs of the two applications. The first and second respondents challenged the appointment of BBM Attorneys' authority to institute the proceedings in the main application prior to it being launched. Mr Martin despite this challenge persisted with the proceedings. BBM Attorneys was also aware of this challenge but also chose to proceed anyway. In my view, Mr Martin pursued his personal gripes with the first and second respondents as demonstrated in this judgment. I am unable to find that he was acting in the best interests of and trying to enforce any Management Rules of the applicant as required in terms of the Act. He ought to pay for those costs personally.

[52] BBM Attorneys, on the other hand, have not filed any affidavit in response to the challenge of their authority. I am therefore of the view that they

must be given an opportunity to respond to the allegations against them. It will suffice therefore that a rule nisi issue for them to show cause why they ought not to be ordered to pay the costs of these applications with Mr Martin.

Order

[53] Accordingly I make the following order:

(1) The application launched by Biccari Bollo Mariano Incorporated under case number 17295/2014 was not authorised by the Body Corporate of the Bend Sectional Title Scheme No SS217/04 and trustees; and is therefore set aside.

(2) The trustees' meeting of the Bend Body Corporate held on 9 August 2014 was properly convened and duly constituted and the resolutions taken thereof constitute valid and binding resolutions of the trustees of the Bend Body Corporate.

(3) Wakefields Property Management is hereby authorised and directed to enter the minutes of the trustees' meeting of 9 August 2014 in the minute book of the Bend Body Corporate.

(4) The trustees' resolution dated 16 September 2014 is invalid and hereby set aside.

(5) The special levy to the resolution of 16 September 2014 referred to in the letter of 17 September 2014 from Wakefields Property Management to the members of the Bend Body Corporate is hereby set aside.

(6) The notification in terms of s 35 (5) of the Sectional Titles Act 95 of 1986 in respect of the unanimous resolution passed by the Bend Body Corporate on 15 June 2009, signed by Anulric Jacobs and David Ralph Scates, being the document attached to the first respondent's affidavit and marked annexure 'STH21', is invalid and set aside. The Registrar of

Deeds, Pietermaritzburg is directed to expunge the said notification from its records.

(7) Mr Rodney Trotter of Stowell & Co Attorneys, acting on the instructions of any two trustees of the Bend Body Corporate is authorised to prepare and lodge a corrected unanimous resolution, in accordance with the unanimous resolution passed by the Bend Body Corporate on 15 June 2009.

(8) Mr Martin is ordered to pay the costs of the main and counter-applications.

(9) A rule nisi is hereby issued calling upon Biccari Bollo Mariano Incorporated to show cause on 21August 2018 why an order in the following terms should not be made.

(a) Biccari Bollo Mariano Incorporated is ordered to pay the costs of the respondents in this application de bonis propriis on a scale as between attorney and own client.

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Poyo Dlwati J

APPEARANCES

Date of Hearing	: 20 April 2018
Date of Judgment	: 25 July 2018
Counsel for the applicant	: M E Stewart
Instructed by	: Northmore Montague Attorneys
Counsel for the first respondent	: J D Maritz SC
Instructed by	: Savage Jooste & Adams Attorneys