REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Appeal Case No: AR1/2021

In the matter between:

DERBY DOWNS MANAGEMENT ASSOCIATION **APPELLANT**

and

ASSEGAAI RIVER PROPERTIES (PTY) LTD **FIRST RESPONDENT**

MUZIKAYISE MOSES NTANZI N.O. **SECOND RESPONDENT**

ORDER

The following order is made:

1. **The appeal against the judgment of the court *a quo* delivered on 7 July 2020 is upheld with costs, which shall be paid by the first respondent.**

2. **The order made in the court *a quo* is set aside and substituted with the following order.**

   'The applicant's appeal against the adjudication order of the first respondent, and the applicant's application for a declaratory order, are dismissed with costs.'

J U D G M E N T

Delivered on: Friday, 12 November 2021

OLSEN J (STEYN J et PLOOS VAN AMSTEL J concurring)

[1] This appeal (which comes to us with the leave of the court *a quo*, Masipa J) concerns the affairs of the appellant, the Derby Downs Management Association, which was formed and registered in 1997 in terms of s 21 of the Companies Act, 1973. As its memorandum of association records, the appellant is a non-profit company having as its main business and main object the promotion and protection of the interests of property owners in an office park known as Derby Downs Office Park.

[2] The first respondent in the appeal is Assegaai River Properties (Proprietary) Limited. It owns property in the office park.

[3] The second respondent in the appeal (who took no part in the proceedings in the court *a quo* or before us) is Muzikayise Moses Ntanzi, who is cited in his capacity as the duly appointed adjudicator under the Community Schemes Ombud Service Act, 2011. As will be seen the second respondent adjudicated upon an application made by the first respondent against the appellant. He dismissed the application. In the court *a quo* the first respondent sought and was granted an order upholding an appeal against the second respondent's decision, and a declaratory order along the lines of the one the first respondent had sought before the second respondent.

THE FACTUAL BACKGROUND AND EARLIER DECISIONS

[4] The office park comprises a number of separately owned properties on which office buildings have been constructed. The appellant manages the office park. Its directors make rules from time to time for the control and administration of the office park and it attends to the repair and upkeep of the area in question. For that it

requires an income. It is a condition of ownership of any land within the precinct of the office park that the owner shall be a member of the appellant. Such membership obliges each owner to pay levies to meet the expenses of the appellant.

[5] Matters of irrelevant detail aside, the articles of association as originally registered provided for the liability to pay the total sum required by the appellant to discharge its duties to be apportioned between owners according to the area of land comprising each owner's property. The larger the owner's land, the higher the levy the owner would have to pay.

[6] For a number of reasons which are not relevant to this appeal, by 2007 it had become apparent that it would be advantageous to change the basis upon which levies were apportioned between the owners from the original method based on land area to a system based on the extent of each owner's gross lettable area ("GLA"). A special resolution to amend the articles of association was put before the annual general meeting of the appellant on 12 December 2007. The resolution somewhat inelegantly changed the levy distribution system to base it on the GLA of each property. The resolution referred to a list of Erf numbers and the proportion of the levy charges each Erf would bear, being one approved at the meeting of 12 December 2007 and carrying the signature of the Chair of the appellant. However a Mr Diab, a director of the first respondent, recorded his dissatisfaction with the GLA allocated to the first respondent's property. The minute of the meeting recorded that the GLA system of apportionment was "unanimously approved" but that it had been agreed that Mr Diab would review the area allocated to the first respondent's unit as it appeared "to be in excess of the area actually built".

[7] Although it is not fully dealt with in the papers, it does appear that the co-operative spirit regarding the first respondent's complaint, which apparently prevailed at the annual general meeting in 2007, was not maintained after the meeting. Levy claims were raised against the first respondent which it resisted upon the basis that there had not been a proper adjustment of the GLA attributed to the first respondent's property. There was a referral to arbitration, the outcome of which is not dealt with on the papers. The first respondent had the GLA of its property measured by a land surveyor who concluded that it was 1049 square metres, and

not the area of 1175 square metres which generated the appellant's levy claims against the first respondent.

[8] In the result, in 2015 the first respondent launched an application in the KwaZulu-Natal Local Division, Durban, for an order directing the appellant to cause a measurement of the GLA of all the properties in the office park to be made by a land surveyor. The appellant opposed the application and delivered a counter-application seeking payment of arrear levies from the first respondent. The case served before Gorven J on 27 May 2016. The learned judge raised the question as to whether the 2007 special resolution around which the arguments revolved had ever been registered. The case was adjourned for the parties to investigate the position and it was found that the resolution in question had not been registered. In the result the learned Judge held in his judgment delivered on 28 September, 2016 that the special resolution passed at the 2007 annual general meeting had lapsed and was void. Both the application and the counter application had to be dismissed. Both were premised on the proposition that the GLA method had been lawfully introduced, notwithstanding the dispute about its effect on the first respondent's liability for levies.

[9] Following and in consequence of the judgment of Gorven J, an extraordinary general meeting of the members of the appellant was held in 2017. Its purpose was to consider and pass three special resolutions. The first two sought to address the fact that, unbeknown to the appellant and its members, all levies had been charged for the previous 10 years upon an incorrect basis. For the purpose of this narrative it is sufficient at this stage to say that this appeal concerns the efficacy and validity of those two resolutions. The third resolution introduced an altogether more refined version of the GLA method of apportioning levies. All three special resolutions passed with the requisite majority on 15 June 2017. The first respondent was the only member who voted against the adoption of the resolutions. But there is no dispute between the parties as to the fact that levies are now properly charged and raised under the new refined GLA method.

[10] Being dissatisfied with the first two 2017 special resolutions, the first respondent made an application in terms of the Community Schemes Ombud

Service Act, No 9 of 2011 for an order that the levies which had been raised between 2007 and 2017 should be adjusted to reflect an apportionment on the basis of land area. The first respondent argued that the resolutions passed in 2017 did not have the effect desired by the majority, of regularising the apportionment of levies during that period according to the GLA of each property. The second respondent dismissed that application. He held that the shareholders could ratify what had been wrongly done, and that they did so. The second respondent's decision turned on questions of law. The first respondent accordingly had a right of appeal to the High Court on those questions of law in terms of s 57 of Act No 9 of 2011.

[11] The first respondent exercised that right of appeal and sought orders from the court *a quo* upholding an appeal against the second respondent's adjudication order and setting it aside; and a declaratory order that the levies payable by members of the appellant during the period of implementation of the void 2007 special resolution was the regime which subsisted prior to the passing of that resolution. That relief, accompanied by a costs order, was granted by the court *a quo*.

[12] I have refrained from mentioning the precise dates between which the erroneous levies were raised and paid by all owners except the first respondent. These dates appear in the orders sought and in the resolutions, but the accuracy of them was not addressed in argument, and I am not certain that all of them are necessarily correct. Counsel addressed us upon the basis that the issue was whether levies raised on the GLA method, in the mistaken belief that it was authorised by the 2007 special resolution, can now be regarded as having been validly raised. Questions about the beginning and the end of that period of charging are not presently material.

THE CHALLENGED RESOLUTIONS

[13] Resolution No 1 passed on 15 June 2017 read in its essential part as follows:

'The Special Resolution passed and purporting to alter the articles of Association at the AGM held on the 12th December 2007 be and are (*sic*) ratified.'

A restatement of the 2007 Special Resolution follows the text above in the minute of the meeting.

[14] The second Special Resolution of 15 June 2017 reads as follows.

'That the levies as charged for the period 1 March 2008 to date of this Extra Ordinary General Meeting be and are hereby approved and ratified.'

[15] The meaning of and intent behind the second resolution seems perfectly obvious. The same cannot be said for the first resolution. It was approached in the court *a quo* and before us as either

(a) a device to regularise and resurrect the 2007 resolution by ratifying it; or
(b) an attempt at retrospective amendment of the articles of association (by then part of the appellant's memorandum of incorporation).

The first resolution certainly had no future operation when it was passed, given that the third resolution, amending the memorandum of incorporation, deleted the whole of the article which had dealt with the subject of apportionment of levies, and replaced it with an entirely new one.

THE JUDGMENT OF THE COURT *A QUO*

[16] In analysing the position and stating the reasons for reaching her decision, the learned Judge *a quo* concentrated on the first resolution which sought to ratify the 2007 resolution. She spoke of it in her judgment as having been "ruled void" and having been "declared void" by Gorven J in the matter he decided in 2016 (see paragraph 8 above). The learned Judge reasoned along the lines that the case turned on what exactly the effect was of the judgment of Gorven J. She held that the issue was whether the appellant could ratify a resolution "which was declared void by the court".

[17] The learned Judge considered the meaning of the word "void" and appeared to accept the definition that it was something "having no legal force or binding effect; unable, in law, to support the purpose for which it was intended" (see the judgment of the court *a quo*, para 27). She continued as follows.

'Arising from the definition of the word void, and upon a consideration of the judgment by Gorven J, it is accepted that the resolution of 2007 no longer existed after the court ruled it to be void. If this is the case, then such resolution could subsequently not be ratified by the members of [the appellant]. Once this decision is arrived at in respect of the first resolution it follows that the second resolution could also not be ratified since it is based on the legal validity of the first resolution. While the parties agreed the special resolution of 2007 was invalid, they seem to have overlooked the wording of the judgment by Gorven J. Not only did it declare the resolution invalid, it went further to declare it void.'

[18] On that basis the learned Judge held that the second resolution could not be sustained and both had to be set aside. The result was the upholding of the appeal against the second respondent's adjudication order, and a declaration that

'[t]he levies payable by members of the [appellant] from 1 March 2008 to 23 November 2017 fall to be calculated in accordance with the method of calculation of the levies which subsisted prior to 1 March 2008.'

ON APPEAL

[19] Both the contested resolutions purport to ratify something. That is where the similarity between them begins and ends. The second resolution seeks to ratify conduct. Although the first resolution is not as easily construed, it appears to evidence an intention to ratify and thereby bring into conformity with law a resolution passed 10 years earlier, with a view to bringing about that during that 10 year interval the articles of association of the applicant should be regarded in law as having been amended by the 2007 resolution, despite the fact that the articles of association were not amended through or in consequence of the resolution of 2007.

[20] The appellant argues that the first resolution achieved its intended purpose of bringing about that, when considering the period between 2007 and 2017, the articles of association must be taken to have been amended by the 2007 resolution, that being a consequence of ratification of that resolution. On that basis the conduct of the directors of the company in those years with regard to the raising of levies

could not be challenged. There was no need for Resolution No 2. However that does not mean, as was held in the court *a quo*, that the validity of the second resolution rested on the validity of the first. If the first resolution was invalid, then an alternative question needs to be answered in order to determine the fate of the second resolution. Could the members of the company by special resolution ratify and put beyond challenge the conduct of the directorate of the company in raising levies on a basis not sanctioned by the articles of association?

[21] On that analysis one must resolve the argument over the first resolution before considering the second one.

ON APPEAL : RESOLUTION 1 OF 2017

[22] Counsel for the appellant has argued that the learned Judge in the court *a quo* erred in coming to the conclusion that Gorven J had declared the resolution of 2007 void. As I understand the argument, because Gorven J made no such declaratory order, the "voidness" in the resolution of 2007 followed from the failure to register it within the six month period allowed by the Companies Act, 1973. For that reason, argued counsel, it could be revived and operate through the ratification effected by Resolution No 1 in 2017. In support of this last mentioned proposition counsel cited a passage at page 802 of the report of the judgment in *Neugarten and Others vs Standard Bank of South Africa Limited* 1989 (1) SA 797 (A). *Neugarten* concerned a dispute over a guarantee provided by a company in breach of s 226(1) of the Companies Act, 1973. Section 226(2) would have permitted the guarantee if, *inter alia*, it was furnished with the consent of all the members of the company. All the members save one agreed. The passage relied upon comes from the judgment of Nicholas AJA and reads as follows.

'It is not the rule that in all cases where the consent of some person is a prerequisite (whether at common law or by virtue of a statutory provision) to the validity of the transaction, it must be prior consent. A statute may indeed so provide. So, in *Incorporated Law Society of Natal v Van Aardt* 1930 NPD 69, a by-law provided for a consent "previously had and obtained". It was held that these words clearly meant that the consent must be

obtained beforehand (see at 76). Generally speaking, however, consent may be given *ex post facto* by subsequent ratification.' (My emphasis.)

Nicholas AJA went on to hold that a distinction had to be drawn between a transaction absolutely prohibited and illegal *per se* (such as was considered in *Cape Dairy and General Livestock Auctioneers vs Sim* 1924 AD 167), and a case where the transactions are prohibited and illegal only in the absence of some stipulated consent. He continued as follows at 803:

'If the requisite consent is given to the transaction *in initio,* it is a valid transaction. If the transaction is subsequently ratified by the non-consenting members, the ratification relates back to the original transaction and the position is the same as if consent had originally been given.'

Counsel for the appellant argues that the 2007 resolution was not inherently invalid; it required registration to achieve validity, and that requirement should be regarded as no different to the requirement of consent which was at the centre of the issue considered in *Neugarten*. Accordingly, argued counsel, registration of a ratifying resolution solved the problem of the initial invalidity of the 2007 resolution.

[23] However the judgment penned by Nicholas AJA in *Neugarten* was a minority judgment. The majority judgment of Kumleben JA took a contrary view. The learned Judge held that an agreement made contrary to the provisions of s 226 of the Companies Act, 1973 was a nullity and that an analysis of the provision does not suggest that "any qualified form of voidness was intended". He endorsed the proposition, with reference to *Schierhout v Minister of Justice* 1926 AD 99 at 109, that

'since the guarantee at the time it was signed was a nullity, it follows that it "is not only of no effect, but must be regarded as never having been done".'

The majority judgment applied the

'well-settled law that there can be no ratification of an agreement which a statutory prohibition has rendered *ab initio* void in the sense that it is to be regarded as never having been concluded …' .

[24] In the present case the intention of the legislature was conveyed in express language. Section 202 of the Companies Act, 1973 provided as follows.

'Any special resolution of which a copy is not lodged with the Registrar and registered by him within six months from the date of the passing of that resolution shall, unless the court otherwise directs, lapse and be void.'

[25] Here the special resolution of 2007 was not lodged with the registrar at all. As Gorven J correctly pointed out in his judgment:
'No court order relating to the resolution has been made. As such, the special resolution passed at the 2007 AGM has lapsed and is void. Article 14.7 remains unamended.'

[26] On the authorities already mentioned, and with *Neugarten's case* confirmed and followed in *Hanekom v Builders Market Klerksdorp (Pty) Limited and Others* 2007 (3) SA 95 (SCA) at para 4, and *Gihwala and Others v Grancy Property Limited and Others* 2017 (2) SA 337 (SCA) at para 115, the resolution of 2007 cannot be revived, or have life breathed into it by ratification, as was sought to be done through Special Resolution No 1 passed by the appellant in 2017. (I should mention the fact that, like the appellant, the Supreme Court of Appeal in *Lynn N.O. and Another v Coreejes and Another* 2011 (6) SA 507 (SCA) at para 13 mistakenly attributed the outcome of the appeal in *Neugarten* to the reasoning adopted in the minority judgment. However the context in which that was done seems to me to have no bearing on the enquiry in the present case, and to the extent that it matters, the endorsement of the majority judgment in *Neugarten* by *Gihwala's* case post-dates the judgment in *Lynn's* case.)

[27] I am in respectful disagreement with the view taken in the court *a quo* that it was the fact that Gorven J "declared" the 2007 resolution void which meant that it could not be revived or given life through ratification. I am also in respectful disagreement with the submission made by counsel for the appellant that it is significant that Gorven J made no declaratory order to the effect that the 2007 resolution was void. Gorven J found that the resolution was void because the Companies Act was to that effect. He did not make a declaratory order because he was not asked to do so; but that did not render his finding any less significant to the litigants before him than would have been the case if he had made a declaratory order. Courts do not create "voidness" by declaring the coming into being of that condition. Courts declare something void because it is void. What the courts are

required to do in such cases is determine whether the conditions laid down by the law for such a finding exist. A finding that, for instance, a contract is void will only result in a declaration to that effect when that is the relief which a litigant seeks. Where, as happened in the case before Gorven J, other forms of relief dependent on a transaction not being void are denied, because the court finds the transaction to be void, that finding, which is not expressed in declaratory form, has the same significance as a declaratory order would have had if it had been sought.

[28] Counsel for the first respondent has also considered the issue of the first resolution of 2017 in a way which implies a wider interpretation of the resolution, as one which, despite the use of the word "ratified", does not seek to lend legal force to what was done in 2007. Rather, approaching the interpretation of the resolution generously, it might be read as a resolution passed and registered in 2017 then and there to amend the articles of association (by then the memorandum of incorporation) in exactly the same manner as had been contemplated in 2007, but subject to the rider that the amendment would operate retrospectively with effect from 2007. It is difficult to tease that meaning out of the wording employed in resolution No 1 of 2017. But, on the other hand, this interpretation of the resolution certainly reflects what the supporters of the resolution sought to achieve, namely that the articles of association should be regarded as having been amended in 2007 despite the fact that no such amendment was made in 2007.

[29] Read this way resolution No 1 has two components. One is an act of amendment. The second is a provision, not express but implied, that despite the fact that the amendment was only effected in 2017, it operates retroactively from 2007.

[30] Counsel for the first respondent points out correctly, in my view, that if this is what was intended, and if this is the proper way to construe resolution No 1, then the decision that the amendment should operate retrospectively is in conflict with the provisions of the Companies Act, 2008. Section 16 of that Act deals with amending the memorandum of incorporation. It may be done by special resolution. In terms of s 16(7) of the Act the company must file a notice of amendment within the prescribed time after amending its memorandum of incorporation. Section 16(9)(b) of the Act then provides as follows. (Sub-section (a) does not apply in this case.)

‘(9) An amendment to a company’s Memorandum of Incorporation takes effect –

(a) …

(b) In any other case, on the later of –

(i) the date on, and time at, which the notice of amendment is filed; or

(ii) the date, if any, set out in the notice of amendment.’

[31] The following are the significant features of this provision.

(a) The provision does not determine when the special resolution takes effect. Its subject is the amendment itself. When does it take effect?

(b) A valid date for the amendment to take effect, contemplated by ss (9)(b)(ii) would have to be after the date of filing of the notice of amendment. That is because it is the later of the date of filing and the stipulated date which determines when the amendment takes effect.

(c) The purpose of s 16(9) is to determine when the amendment “takes effect”. If the resolution in this case is regarded as containing a stipulation that the amendment would operate retrospectively to 2007, then the resolution purports to bring about that the amendment (not the resolution) takes effect from 2007. That is plainly in conflict with s 16 (9).

[32] The conclusion must be that Special Resolution No 1 passed in 2017 did not validly bring about changes to the governing instrument of the company during the period 2007 to 2017, as the appellant contends it did. If the resolution arguably has any other meaning it was impermissibly vague. On any basis it must be regarded as invalid and of no force and effect.

ON APPEAL: RESOLUTION 2 OF 2017

[33] The second resolution of 2017 must be dealt with on the basis that the scheme for the apportionment of levies employed between 2007 and 2017 was not sanctioned by the articles of association of the appellant. The resolution approved

the levies that had been charged in that period and "ratified" them, meaning that the authority of the directors and the company to charge those levies was conferred after the event.

[34] Counsel for the appellant argued at the outset that the second resolution was an agreement. With reference to the judgment in *Gohlke and Schneider v Westies Minerale (Edms) Bpk and Another* 1970 (2) SA 685 (A) at 692, he argued that the members of a company may by agreement depart from the provisions of the articles of association. This argument raises two questions:

(a) can the parties by agreement depart from the provisions of the articles of association (now the memorandum of incorporation)? If so

(b) can special resolution No 2 be regarded as an agreement?

[35] *Gohlke and Schneider* concerned a company incorporated under the then South West Africa Companies Ordinance, 19 of 1928. Its articles of association laid down a process for the appointment of directors. All the shareholders agreed to the appointment of a director otherwise than in accordance with the provisions of the articles. The passage in the judgment relied upon by counsel for the appellant reads as follows.

'As to the articles, it will be immediately apparent that the section does not render them absolutely binding on the company and its members as though they were statutory enactments, which the court *a quo* seems to have assumed. The company and its members are bound only to the same extent *as if* the articles had been signed by each member, that is, as if they had contracted in terms of the articles. The articles, therefore, merely have the same force as a contract between the company and each and every member as such to observe their provisions [authorities omitted]. Now that contract is not made immutable or indefeasible by the Ordinance in any respect relevant here. Consequently, I can see no reason why, as with any other contract, it cannot be departed from by a *bona fide* agreement concluded between the company and all its members to do something *intra vires* of the company's memorandum but in a manner contrary to the articles, and why that agreement should not bind them, at least for so long as they remain the only members.'

[36] According to the appellant's argument special resolution 2 must be regarded as an agreement between members of the appellant. However s 15(7) of the Companies Act, 2008 is to the following effect.

'(7) The shareholders of a company may enter into any agreement with one another concerning any matter relating to the company, but any such agreement must be consistent with this Act and the company's memorandum of incorporation, and any provision of such an agreement that is inconsistent with this Act or the company's memorandum of incorporation is void to the extent of the inconsistency.'

Having regard to that provision, if the special resolution is regarded as a contract between the members of the company which seeks to avoid the provisions of the memorandum of incorporation of the appellant, to that extent it appears to be void and unenforceable. However one should note that *Gohlke and Schneider* endorsed the enforceability of a *bona fide* agreement concluded not only by all its members, but between the company and all its members. For present purposes we may leave open the question as to whether a contract *bona fide* concluded between the company and its members in conflict with the memorandum of incorporation is hit by the provisions of s 15(7) of the Companies Act, 2008. The argument of the applicant falls on its second leg, with the result that there is no need to consider that question, nor to attempt a reconciliation of s 15(7) and s 20(1) of the Act, to which I will turn shortly. (As to this latter issue, the starting point of the exercise of reconciling the provisions may be that whereas s 15(7) has to do with agreements in conflict with the memorandum of incorporation, the subject of s 20(1) of the Act is action on the part of the company concerned.)

[37] Turning to the second question posed above, counsel for the first respondent argued, initially in any event, that special resolution No 2 could not qualify as an agreement between the members of the appellant because at least one of the members, the first respondent, did not agree to the content of the resolution. In my view that is a complete answer to the argument initially advanced by counsel for the appellant. As the extract from the judgment in *Gohlke and Schneider* quoted above reveals, what the court was talking about there was an agreement concluded between the company and "all its members" to deviate from the articles.

[38] After initial heads of argument had been delivered for the purpose of this appeal, the parties were requested to prepare to deal in argument with the question of the significance of s 20(2) of the Companies Act, 2008 in determining the fate of the second resolution taken in 2017. That section had not been drawn to the attention of the learned Judge *a quo*.

[39] The structure of s 20 of the Companies Act, 2008 needs to be considered in order to see where s 20(2) fits in. I will attempt a precis in order to avoid quoting the entire section in this judgment. I will attempt to avoid distracting details which are not relevant to the exercise.

(a) Perhaps one needs start with s 15(6). That provides that a memorandum of incorporation is binding between the company and each shareholder, and between and among the shareholders.

(b) Section 20(1) deals with the case of a memorandum of incorporation which "limits, restricts or qualifies the purposes, powers or activities" of a company. It is to the effect that no action of the company is void only because it was prohibited by such limitations, or because, in consequence of the existence of those limitations, the directors had no authority to authorise what the company did. The section goes on to provide that outsiders may not rely on any such limitation, restriction or qualification to say that what the company has done was void. However in proceedings between the company and its shareholders, directors or prescribed officers, or between those persons themselves, it may be asserted that such conduct is void.

(c) Section 20(2) must be quoted in full.

> 'If a company's Memorandum of Incorporation limits, restricts or qualifies the purposes, powers or activities of that company, or limits the authority of the directors to perform an act on behalf of the company, the shareholders, by special resolution, may ratify any action by the company or the directors that is inconsistent with any such limit, restriction or qualification, subject to sub-section (3).'

Sub-section (3) is to the effect that action or conduct in contravention of the Companies Act itself cannot be ratified under ss 2. That is not an issue in this case.

(d) Section 20(5) allows shareholders, directors or prescribed officers of a company to apply to the High Court for an order restraining the company or the directors from doing anything inconsistent with any of the limitations, restrictions or qualifications referred to in s 20(2). It therefore speaks to future conduct. That reinforces what appears plain on a reading of s 20(2) (which has to do with "ratification"), that s 20(2) deals with past "misconduct".

(e) Section 20(6) provides that a shareholder of a company has a claim for damages against any person who "intentionally, fraudulently or due to gross negligence" causes the company to do things inconsistent with any of the limitations, restrictions and qualifications referred to earlier. But the claim does not exist if the "misconduct" has been ratified by the shareholders in terms of s 20(2).

[40] It was undisputed before us, and correctly so, that the provisions of the appellant's original articles of association limited and restricted the power of the appellant to the regime based on land area when raising levies against its members. As a consequence of that the directors had no authority to authorise the appellant to do otherwise. There was accordingly "misconduct" of the type contemplated by s 20(2) of the Companies Act, 2008 between 2007 and 2017 which, according to the plain wording of that section, the members could ratify as they did by special resolution. The context within which s 20(2) lies furnishes no reason to doubt that the plain meaning of the words employed in the provision coincides with the proper construction of the provision.

[41] Confronted with all of this counsel for the first respondent changed tack, and now adopted the argument that in fact the second resolution of 2017 was in fact an agreement, and that it amounted to one contemplated by s 15(7) of the Companies

Act, 2008, with the result that it was void. There is no merit in that argument. The resolution was not an "agreement" as that term is employed in s 15(7). A special resolution can only be called an "agreement" by using that term in a very loose sense; that is to say in the sense that having subscribed to, or being taken to have subscribed to, the memorandum of incorporation of a company, the shareholders agree that resolutions passed in general meetings with the requisite majority will be regarded as binding.

[42] Furthermore, the provisions of sections 15(6) and (7) of the Companies Act, 2008, must not be read in isolation, but must be considered in context, and especially in the light of the provisions of s 20 of the Act. Section 20 has the effect, as between the company and its shareholders, directors and prescribed officers, and as between those shareholders, directors and prescribed officers themselves, that past "misconduct" can be regularised through ratification, but future or anticipated "misconduct" may be restrained by a court order.

[43] The second resolution passed in 2017 accordingly achieved its intended purpose of regularising the apportionment of levies between the members of the appellant which had been implemented during the previous 10 years or so.

CONCLUSION

[43] The relief sought by the first respondent from the second respondent was (as the second respondent recorded it in his adjudication order) the

> 'adjustment of the levies which were introduced from 1 March 2008 from the gross lettable area basis to the plot area basis which was the basis which prevailed before the resolution was passed on 12 December 2007'.

That relief was denied. Indeed, in furnishing his reasons for denying the relief, the second respondent referred to s 20 of the Companies Act, 2008 and found that where the directors act outside the scope of their authority "the shareholders can ratify (approve respectively (sic)) any action by way of a special resolution". That mirrors the conclusion reached in this judgment. The appeal against the second respondent's decision ought not to have been upheld.

[44] For the same reasons the declaratory order sought by the first respondent in the court *a quo*, which was in all material respects the same as the order which the second respondent refused to make, ought not to have been granted by the court *a quo*.

The following order is accordingly made.

1. **The appeal against the judgment of the court *a quo* delivered on 7 July 2020 is upheld with costs which shall be paid by the first respondent.**

2. **The order made in the court *a quo* is set aside and substituted with the following order.**

   'The applicant's appeal against the adjudication order of the first respondent, and the applicant's application for a declaratory order, are dismissed with costs.'

OLSEN J

I agree

STEYN J

I agree

PLOOS VAN AMSTEL J

Date of Hearing:	Wednesday, 13 October 2021
Date of Judgment:	Friday, 12 November 2021
For Appellant:	Mr AJ Troskie SC
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Second Respondent:	Muzikayise Moses Ntanzi N.O. Second Respondent Community Schemes Ombud Service 7th Floor, Aqua Sky Towers 275 Anton Lembede Street Durban (Tel: 087 – 805 0235)