THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 12716/2020

In the matter between:

JOHANNES WESSEL GREEF	Applicant
and	
BODY CORPORATE MERRIMAN COURT	First Respondent
CLAIRE ELIZABETH BLAHA	Second Respondent
ANTONIO ROSARIO SCALABRINO	Third Respondent
CHARLES ERIC LEONG SON	Fourth Respondent
WENDY-LEE DE GOEDE	Fifth Respondent
ISTVAN GYONGY	Sixth Respondent

Delivered electronically this 15th day of September 2021 by email to the parties.

JUDGMENT

NDITA; J

Introduction

[1] In this application, the applicant seeks an order:

(a) directing the respondents to consider his request for approval of his plans for construction by way of the extension of section 1 of the Merriman Court Sectional Title Scheme.

(b) declaring that he is in any event permitted to implement his plans for construction by way of extension of section1 of the scheme.

(c) directing that the first, second, fourth, fifth and sixth respondents shall be jointly and severally liable for the costs of this application, the one paying the other to be absolved, save that insofar as the costs arising from the opposition are met or incurred by the first respondent, such costs shall not be recoverable from the applicant and the third respondent.

The parties

[2] The applicant is an adult male, residing at section1 Merriman Court, Merriman Road, Green Point.

[3] The first respondent is The Body Corporate of Merriman Court ("the body corporate") with sectional plan No SS87/1986, established in terms of the Sectional Titles Act 66 of 1971 (Sectional Titles Act') and is responsible in terms of the Sectional Titles Schemes Management Act 8 of 2011 ("The Schemes Management Act") for the enforcement of rules relating to the control,

administration and management of Merriman Court Sectional Title Scheme ("Scheme").

[4] The second respondent, Claire Elizabeth Blaha, is an owner of section 3 and 6, Merriman Court, Green Point. The third respondent is Antonio Rosario Scalabrino, the owner of section 7 and 10, Merriman Court. He resides at 27B, Merriman Road, Green Point. Charles Eric Leong Son is the fourth respondent. He owns section 9, Merriman Court and is a trustee of the Scheme, care of L N Property Management, 91 Kildare Road, Newlands.

[5] The fifth respondent is Wendy-Lee De Goede. She is a trustee of the body corporate of Merriman Court. Istvan Gyongy is the sixth respondent. He is the second respondent's husband and also a trustee of the body corporate of Merriman Court.

Factual Background

[6] The factual background underpinning this application as gleaned from the founding affidavit deposed to by the applicant, Johannes Wessel Greef, may be summarised thus: Merriman Court is a small block of flats situated on Merriman Road, Green Point Merriman Road runs above Ocean View Drive of the slopes of signal hill, close to the City of Cape Town. The applicant explains that Merriman Court was built by the father of the third respondent in 1950 and entails two buildings. The first building comprises of a six

single level apartment block built on four storeys. A separate building comprises of one garage for three cars, domestic worker's quarters and two store rooms. It is common cause that the third respondent inherited the block of flats from his father, and in 1986, he converted Merriman Court into a sectional title scheme. The applicant further states that over time, different owners of sections in the block expanded their sections into the common property. Upper sections expanded into the roof, other sections expanded to incorporate common-property lobbies or adjacent voids beneath the building. The applicant is the owner of section 1 in the sectional title scheme pursuant to him purchasing it on 4 September 2006. He states that one of the reasons for which he purchased the section is that it enjoyed exclusive use of the garden area, and there was a possibility to expand the section into the garden area. His unit is the only unit on the lowest storey.

[7] According to the applicant, at a meeting held in 2007, he applied to the body corporate to build a garage and permission was granted. At a subsequent meeting held by the body corporate on 19 February 2013, which was attended by his wife, he, through her, requested that they be granted the right to extend section 1 into the garden area to build a second bedroom and bathroom, and make

changes to their kitchen. He further states that his wife also indicated at that meeting that they intended, at a later stage to extend the section on both the garden area into the eastern and western side. According to the applicant, the body corporate unanimously approved the request, subject to the approval of the building plans. In addition, it placed no limit on the extension permitted to section 1. The applicant avers that over time, various extensions and changes were also effected by various owners of other sections.

[8] The applicant avers that following a meeting held during February 2013, the third respondent consulted with Paddocks Sectional Title Consultants seeking advice on how to regularise the remaining approved extensions and additions to the various sections which had not been registered. According to the applicant at that meeting, the third respondent confirmed that all sections had been extended and changed, albeit not registered. The applicant further avers that at an annual general meeting held on 23 April 2014, the third respondent presented a proposal prepared by Paddocks Sectional Title Consultants. The body corporate resolved to approve and accept the proposal. According to the applicant, at the 2014 annual general meeting, the body corporate again confirmed his right to extend section 1 into the garden area and erect

a garage as per previous resolutions. The applicant emphasises that at the 2013 annual general meeting, his request for extensions was unanimously approved. The minutes of the annual general meeting held on 23 April 2014, reflect that the minutes of the annual general meeting held on 19 February 2013, were accepted and adopted.

[9] The applicant explains that in 2014 the scheme was resurveyed by Stern & Ekermans Land Surveyors. They prepared the diagrams necessary to regularise the remaining extensions and additions to the various sections, so as to facilitate registration in the deeds office. On 24 June 2016 STBB Attorneys duly registered the extensions in the Deeds Office.

The 2017 plans

[10] The record reflects that on 26 April 2017 the applicant submitted plans to the body corporate for the extension of section 1 into the garden area. He states that he did so in the exercise of his rights first granted in 2013. On 27 April 2017 the body corporate met

and considered the plans. All of the members of the body corporate attended the meeting. The minutes thereof record that:

> "Johan circulated architectural drawings outlining extensions to Unit1.
>
> Body Corporate formally accepts plan."

They also reflect that the body corporate resolved that the third respondent, *"as the chairman, will sign any documentation necessary"* to give effect to the accepted plan. The recordal of the minutes also shows that they were recorded as being minutes of an *"informal meeting held due to the immediate resignation of the Managing Agent"* the previous evening at 22:00. The applicant explains that the reason for the abrupt resignation was that the managing agent fell out with the fourth respondent. According to the applicant, all members of the body corporate however, attended the meeting and no member objected to any procedure, and the decisions made in the meeting are binding. Furthermore, because the scheme comprises of only six owners, all owners were trustees and conducted the scheme upon the basis that all owners would be actively involved in management and decisions concerning the scheme. He states that sometimes matters were informally attended to, and regularised later. But all owners were kept informed and usually attended meetings.

The 2019 PLANS

[11] It is not in dispute that notwithstanding the fact that the applicant's plans, according to his versions, had been approved in 2017, he did not implement them. Instead, he instructed an architect to prepare revised plans in 2019 because of the imminent birth of his son. He states that his intention was for the revised plans not to impose any greater burdens upon the scheme, but to be more aesthetically pleasing, and better cater for his family's requirements. According to the applicant, he did not anticipate that the body corporate could or would object to the revised plans as the revisions are mainly internal and do not affect members of the body corporate and as such, should not overly concern them. The revised plans were prepared for presentation to the 2019 annual general meeting AGM, which was to be held on 5 July 2019.

[12] In response to the request that the 2019 annual general meeting to consider his revised plans, the applicant avers that the fourth respondent, asked that the meeting consider his plans be separated from the AGM, and he agreed. The managing agents therefore prepared a notice to convene a Special General Meeting on 26 July 2019 at 14:00 to consider the revised plans. The applicant avers that after the managing agents had circulated the

notice, in order to try facilitate the meeting on 26 July 2019, he and his architect answered enquiries from the fourth and fifth respondents. He says that he made arrangements for his architect to be present at the meeting so that he could respond to any concerns that might be raised. According to the applicant, the fourth and fifth respondents adopted the position that his request was irregular and could not be granted because section 1 sought to exercise greater rights of extension than had been exercised by other sections. To this end, the fifth respondent wrote thus:

> "I reject your application. It is illegal. I will not vote on something illegal. In addition to my flight and accommodation costs, you will need to consider my per hour costs. I am happy to meet at your cost to tell you what I am telling you now. Your choice."

[13] This was followed by an acrimonious exchange of correspondence between the applicant and the fourth and fifth respondents. The applicant states that he placed on record that the meeting had been correctly called and would proceed - and should there not be a quorum, it would stand over to the following week, as is procedure in terms of the Schemes Management Act and rules. In response to the claims of illegality of his plans, the applicant avers that he explained to the fourth and fifth respondents that the City would not consider granting plan approval unless the plan first is

approved by the body corporate. For this reason, so contends the applicant, the body corporate cannot refuse to approve a plan because it has not been approved by the City, let alone because a plan may not be approved by the City. This, according to the applicant is so because the body corporate approval is a first step.

[14] On 25 July 2019 the third respondent sent an email to the managing agents wherein he set out the history of the expansions in the block for new owners. It reads thus:

> "Dear Justine
>
> According to the flood of emails going hither and thither there seems to be much confusion as to the status of Merriman Court
>
> Perhaps, the historical elucidation might be of some value.
>
> The block was built in the mid 50' s by my father who incidentally motivated the construction of Merriman Road, Sectional Titled the building in the mid 80's. The main building was divided into six sections.
>
> The out-building, containing 3 garages and rooms below, was designated exclusive common property.
>
> The only other exclusive use common property was the front garden area assigned to Section 1.
>
> I sold Sections 1, 3, 4, 5, 6 and exclusive use right of 2 garages.

In the mid 90's M D du Plessis the owner of section 5 applied for and was given permission to extend his unit into the roof space above,

In circa 97 he applied for and was given permission to build a garage on common property adjacent to the garage block.

This is also involved changing the entrance stairway.

In 2007, the owner of Section 1 was given the right to build the garage in the remaining street frontage.

This was recorded in the minutes of 10/19/ 2007 and subsequently mentioned in the minute of 24th March 2009 and 23rd April 2014 (attached).

In 2007, the owner of Section 2 applied for and was given permission to renovate Section 2 and the rooms under the garage block.

In 2013, the owner of Sections 4 & 5 was given permission to consolidate the 2 sections and subsequently renovate them.

He was also given permission to incorporate the escape stair to Section 6, to join the 2 sections on the condition that he would provide an alternate.

By this stage all the sections with the exception of section 1 incorporated pieces of common property.

It was decided that the block should be surveyed. I consulted Paddocks Attorneys who specialise in Sectional Title.

> And on their advice, produced a proposal, which was accepted by the body corporate on the meeting of 23rd April 2014.
>
> Also at that meeting, the owner of Section 1 was given the right to extend his section on the exclusive use of common property designate to his section.
>
> The legal work was done by Peter Arnot of STBB and the survey by Stern & Ekermans, Special resolutions were done for sections with the exception of Section 1 as survey could only be done once they had completed the building work.
>
> All the building work and renovations were approved by the City Council.
>
> Hopefully this may shed some light on the present situation."

The managing agents circulated the above email to all members of the body corporate on the morning of 26 July 2019.

Meetings of 26 JULY 2019 and 2 August 2019

[15] The applicant states that the Special General Meeting which was convened on 26 July 2019, was attended only by himself and the third respondent. It was inquorate, and therefore stood over by one week. On 29 July 2019, the managing agents sent a further notice reconvening the Special General Meeting on 2 August 2019. In attendance, were, once again, the applicant, the third respondent, and the applicant's architect. A representative of the managing

agent chaired the meeting. The third respondent signed off the plans upon the following basis:

> "1. That there will be no substantial difference between these plans and the Council Submission Drawings
>
> 2. That the Council Submission Drawings will be approved by City of Cape Town Building Plans Dept.
>
> 3. That an adequate temporary Access Entrance Stairway be provided during construction
>
> 4. That the temporary stairway will also provide access tothe bin storage area;
>
> 5. That the headroom between the stairs and the soffit of the garage slab be acceptable;
>
> 6. That the dimension of the stair risers and treads be acceptable, which acceptance may not be unreasonably be withheld;
>
> 7. That the colour of the roofs of Section 1 extension be acceptable to the owners of Section 3 & Section 9 which acceptance may not be unreasonably be withheld. On this point a further discussion ensued and the owner will look for alternative roof options, i.e. roof with a rockery and garden which will be aesthetically pleasing.

> 8. That the roof concrete slab on the western side, will be available to the owner of Section 3 in order for her to extend her garden. The owner of Section 1 confirmed that the owner of Section three will be receiving approximately *16 square meters to use for her garden area."*

Events subsequent to the meeting of 2 August 2019.

[16] The applicant states that the second, fourth and fifth respondents objected to the postponed meeting and resolution taken. On 30 August 2019 he received a copy of a letter written to the body corporate by attorneys STBB, acting on behalf of the second and fourth respondents. The letter states that the resolution taken on 2 August 2019 was invalid and must be reconsidered through a special general meeting. The relevant portion reads as follows:

> "It is apparent that this meeting was inquorate and as such did not proceed. Whereafter I am instructed that the owners, whom I represent, were belatedly informed of certain amended building plans which were now being proffered by the Applicant, Mr Greef. As a result, thereof, communications were exchanged between the parties including the management agent in terms whereof the representation was made that a further meeting would be called on 30-days notice in order to permit the appropriate considerations of the proposed plans (as instead of the 2nd August). In the circumstances, my clients were not aware, or privy to,

the fact that it was intended that the special general meeting which had ostensibly been declared inquorate would in fact continue on 2nd August 2019 some days on from the previous meeting.

Unbeknownst to our clients, the special meeting in fact proceeded, a fact that they only became aware of on the 23rd August 2019 when the managing agent provided our client with Minutes of the Meeting.

As such, our clients deny that the body corporate was in a position to appropriately hold the special general meeting on 2nd August 2019. Moreover, and insofar as the meeting was properly convened (which is denied) then the purported Resolution adopted is irregular and falls to be set aside."

[17] According to the applicant, although he disagreed with contents of the above letter, he, on 2 October 2019 offered to convene another Special General Meeting – even though he, according to his version, had obtained valid approval for his 2019 plans, and enjoyed rights in terms of the approved 2017 plans. He states that he also suggested that all the parties have their architects and/or professionals present at the meeting. On 14 October 2019 the managing agent circulated a notice for a new Special General Meeting, to be held on 19 October 2019. On 17 October 2019 Minnie & Du Preez Inc, attorneys for the second and fourth respondents wrote a letter wherein they advised that they would be

attending the Special General Meeting and requested copies of the relevant resolutions as well as sectional title plans. On 18 October 2019, the applicant's attorneys responded to the letter and set out the history of his (the applicant's) rights and the correct position. Members of the Body Corporate permitted their legal representatives to attend the meeting.

Meeting of 19 October 2019

[18] It is common cause that the Special General Meeting was preceded by the annual general meeting. The applicant explains that since 1986 the affairs of the Body Corporate had been conducted upon the basis that all owners are trustees and participate in its affairs. According to the applicant, at the Special General Meeting, the fourth respondent, the fifth respondent (representing one of the second respondent's units) and the sixth respondent (representing the second respondent's units) insisted that only three trustees be elected. The applicant and the third respondent were nominated as trustees, but the fourth, fifth and sixth respondents vote against them and instead, voted themselves in as trustees.

[19] The Special General Meeting commenced with the third respondent briefing all the members about the history of the scheme. The applicant states that this was followed by an extensive

discussion which ultimately led to the fourth and fifth respondents refusing to permit a vote on his plans that he had requested. Ultimately, the meeting was adjourned without any decision on the applicant's plans.

[20] The applicant avers that on 28 October 2019, he received a copy of a document which purported to be minutes of the Special General Meeting. According to him, the document was inaccurate in that it showed that a vote was taken, whereas that was not the case as the fourth and fifth respondents had not permitted it. The minutes of the aforesaid meeting reflect that:

> "70.17 percent of members present at the meeting objected to the plans for the extension to be done on the exclusive use area as well as the plan for the erection of the said garage."

[21] The applicant says that this prompted him on 12 February 2020, to write to the trustees of the body corporate requesting an amendment of the minutes, in line with the notes recorded by his attorney during the meeting. The recording he relies upon reads as follows:

> "Mr Lombaard said that the parties need to understand that there is a difference in that previous owners received common property from the body corporate as opposed to in the current instance Mr Greeff is extending on to exclusive use area which has already been allocated to him and therein lies the difference.

> Mr Greeff went into the history of how he obtained the right to extend the garage regarding contributing towards the cost of the new security gate and the body corporate agreed that he can accordingly build a garage in due course.
>
> Mr Lombard said that clearly there will be no agreement and that there should simply a vote.
>
> Legal representative for units 3 and 6 said that they refused to vote on anything.
>
> No vote was taken despite request."

[22] The trustees did not respond to his request. In the absence of a response, the applicant's attorneys on 12 February 2020 demanded that the Body Corporate sign off his 2017 plans and provide comments with regard to his garage. The lack of response led to the present application.

The relief sought by the applicant

[23] The relief sought by the applicant is that the respondents be directed to consider his request for approval of plans for construction by way of extension of Section 1 of the Merriman Court Title Scheme. According to the applicant, the extension of a section requires a special resolution by the body corporate. Once passed, the special resolution discloses an obligatory agreement in terms of which the owner can implement her/his right to extension. The

applicant relies on section 24 of the Sectional Titles Act, which provides that:

> "(3) If an owner of a section proposes to extend the boundary or floor area of his or her section, he or she shall with the approval of the body corporate, authorised by a special resolution of its members, cause the land surveyor and architect concerned to submit a draft sectional plan of the extension to the surveyor general for approval."

Section 5(1) (h) of the Schemes Management Act in turn reads:

> "In addition to the body corporate's main functions under section 3 and 4, the body corporate must on application by an owner and upon special resolution by the owners, approve the extension of boundaries of floor area of a section in terms of the Sectional Titles Act."

[21] Against this backdrop, the applicant alleges that he is entitled to the relief he seeks. In summary, insofar as the garage extension is concerned, he claims that at the general meeting of 10 September 2007, the body corporate unanimously resolved that:

> "Approved - In principle, additions for the new garage and stair way for Johan Greeff"

According to his evidence, the approval was confirmed in subsequent annual general meetings. In particular, at the annual general meeting of 23 April 2014 it was agreed that;

> "(a)ll units were extended and changed except section 1, who still has this right to do so, as well as building a garage as per previous resolutions at meetings."

[22] The applicant discloses that the second respondent in 2020 advised that she was not aware of the right granted to him to erect a garage at the general meeting of 10 September 2007 where she gave her proxy to him. The applicant contends that the second respondent was present at most of the subsequent annual general meetings where his right was confirmed, in particular the meeting of 23 April 2014. According to the applicant, if the second respondent genuinely disputed his right, she would have raised her dispute long ago and cannot now do so.

[23] Regarding the extension of his section to garden area, the applicant avers that at the annual general meeting of 19 February 2013, the body corporate unanimously resolved that he could extend his section:

> "1.1 K Jackson, proxy for J Greeff, requested permission from the meeting for the later extension of their second bedroom plus a

> bathroom, even changes to the kitchen. This were unanimously approved, subject to plan approval by body corporate and the local authority. Approved"

[24] The applicant further avers that at the special general meeting of 23 April 2014 his right was confirmed. In addition, his 2017 plans were duly submitted and considered by the body corporate at the 2017 annual general meeting in the presence of all the owners. To support this contention, the applicant states that after the meeting the fifth respondent even sent an email to his wife, which confirms his rights and approval of plans. It reads:

> "How are you progressing on getting your construction plan approved? Do you have a date in mind as yet when you intend to "break grounds" for your expansion plans?"

[25] Regarding the 2019 plans, the applicant is adamant that the body corporate is obliged to consider his 2019 plans in good faith, and to grant or refuse its approval of them upon reasonable grounds. He avers that the fourth and fifth respondents have unreasonably refused to do so. He says that he has spent R135 000,00 for preparing his 2019 plans based on the granted rights to extend his section. For all these reasons, the applicant prays for an order in terms of the notice of motion. He further requests that the respondents, other than the third respondent be

directed to pay costs of bringing this application upon the basis that those costs be borne by the second, fourth, fifth and sixth respondents jointly and severally, and, insofar as any costs are paid or incurred by the body corporate in defending this application they should not be recoverable from him or the third respondent.

The respondents' answering affidavit

[26] In an affidavit deposed to by the fourth respondent, the first, second, fourth, fifth and sixth respondents oppose the relief sought by the applicant. The trustees for the time being of the first respondent, being the fourth, fifth and sixth respondents, duly resolved that the first respondent must oppose this application and authorised the fourth respondent to depose to the opposing affidavit and instruct the legal representatives of the respondents. For ease of reference the first, second, fourth, fifth and sixth respondents are referred to as respondents.

[27] The respondents raise four preliminary points, being firstly, that the founding papers were not lawfully served on the fourth, the fifth respondent and the sixth respondent. Secondly, the applicant should not have joined, the second, third, fourth, fifth and sixth respondents to this application. Thirdly, the applicant is not entitled to the relief sought as, *inter alia*, his unit in the Merriman Court

sectional title scheme was never lawfully extended, nor did the first respondent ever lawfully or validly consent or agree to such an extension. Fourthly, the second, third, fourth, fifth and sixth respondents should not have been joined in these proceedings. In addition, the applicant is not entitled to perform any construction on the common property of the Scheme, whether in terms of approved building plans or not.

No service on fourth to sixth respondents

[28] The respondents allege that the applicant attempted to serve the founding papers in this application on the fourth, fifth and sixth respondents by instructing the sheriff to deliver same to the office of the current managing agent of the first respondent. According to the respondents, Rule 4(5) of the Management Rules of the first respondent, as prescribed by section 10(2)(a) of the Schemes Management Act 8 of 2011, provides that the service address for any legal process or delivery of any other document to a member of a body corporate, is the address of the primary section registered in that member's name, provided that a member is entitled by written notice to the body corporate to change that address. The fourth respondent states that he is a member of the first respondent and because he never appointed an alternative service address, the founding papers in the application had to be served on the primary

section of the Scheme registered in his name, being section 9. However, the fifth and sixth respondents are not members of the first respondent, and the fifth respondent does not even reside at Merriman Court but in Johannesburg. According to the fourth respondent, neither of them ever appointed the first respondent's managing agent to accept service of any process on their behalf, in writing or otherwise. As such, the application was never served on them and these proceedings are void as far as we are concerned.

[29] The respondents nonetheless concede that the trustees were notified of the application, received the founding papers and are opposing the application.

Joinder of second and third respondents

[30] According to the respondents, the first respondent is a juristic person created by statute, in particular the Sectional Titles Act. It has legal personality, can acquire rights and liabilities and own assets apart from its members, has perpetual succession and can sue and be sued in its own name as far as allowed by statute. In the result the relief sought by the applicant in his Notice of Motion can only be sought from and granted against the first respondent. The second and third respondents are only members, not even trustees for the time being, of the first respondent. As such, no relief can competently be granted against them and they should never have

been joined to this matter. For this reason, the application should thus be dismissed as against the second and third respondents on this ground alone.

Joinder of the fourth to sixth respondents

[31] The respondents further aver that the applicant joined the fourth, fifth, and sixth respondents to this application in their personal capacities whereas the fifth and sixth respondents are not members of the first respondent. They say that the fourth to sixth respondents, in terms of section 7 of the Management Act, in their capacities as the trustees for the time being of the first respondent, perform and exercise the functions and powers of the first respondent, subject to the provisions of the applicable legislation, the Management and Conduct Rules of the Scheme and any restriction imposed or direction given at a general meeting of the members of the first respondent. The respondents contend that as the relief sought by the applicant in his Notice of Motion can only be sought from and granted against the first respondent, the fourth to sixth respondents should never have been joined to this application, either in their capacities as trustees, or in their personal capacities. For this reason, the application should thus be dismissed against them.

The merits

[32] As to the merits of this application, the respondents aver that the fact that the applicant, as owner of Section 1, had the exclusive use, occupation and enjoyment of the garden area did not entitle him to extend or expand his section into such area as of right, especially as it includes a staircase/fire escape and covers more than half of the entire property on which the Scheme is situated, being Erf 1306, Green Point, Cape Town. They deny that the applicant could or did regard such a possible extension as a factor that influenced his decision to acquire Section 1. According to the respondents' version, the applicant never made a formal application to construct a garage in 2007, nor did he give any notice to the first respondent or its members that he intended to raise such an issue at the annual general meeting of the first respondent held on 10 September 2007. The respondents state that the applicant simply raised the possibility of constructing a garage at such meeting which possibility was, according to the minutes thereof, approved in principle only. The respondents further aver that the second respondent did not attend such meeting. She gave a proxy to the applicant to attend the meeting and vote on her behalf as she was informed that her votes (for Sections 3 and 6) were required to change the then managing agent of the first respondent. According

to the respondents, the applicant never informed her that he intended to request that he be allowed to construct a garage, and that he would use the proxy she gave to him to vote in support of such a request. According to the respondents, the second respondent was very upset when she established that he did so. On 1 July 2020, the second respondent informed the applicant, by way of a WhatsApp message, of her dissatisfaction with his conduct. It reads thus:

> "Johan
>
> I need to make it clear to you and your lawyers and the judge that at that time i was not at the meeting,
>
> and that a Mr Du Plessis asked me to give my
>
> two proxies to you for only one reason, and that was to have a management change.
>
> From Mr Scalabrino to Wilma Meyer, no mention was made of me handing my proxies to you for you to vote yourself a garage.
>
> I am prepared to testify in court to that effect.
>
> Claire Blaha."

The respondents further contend that if the applicant had wished to extend his section in terms of section 24 of the Sectional Titles Act, by constructing such a garage, any such extension must be approved through a majority vote at a special general meeting. In seeking the approval, the applicant not only had to give timeous

notice of his intention to seek such a resolution at the annual general meeting held on 10 September 2007, and that he complied with all the prescribed formalities, the agenda of such meeting also had to contain a description of the general nature of all business and a description of the matters that would be voted on at such meeting, including the proposed wording of any special or unanimous resolution. According to the respondents, the applicant did not comply with any of these requirements prior to, or at the annual general meeting held on 10 September 2007. As such, so allege the respondents, the alleged decision of the first respondent relied upon by the applicant to claim that he is entitled to construct a garage, is void.

[33] The respondents further aver that even if such approval or decision is not void, any alleged right of the applicant in this regard constituted a *"debt"* in terms of the Prescription Act 68 of 1969. As more than three years have elapsed after the *"debt"* arose, any right or claim of the applicant in this regard has prescribed. According to the respondents, it is clear from the minutes of the meeting, that, on the applicant's own version, he simply sought and obtained permission to extend his section. The respondents further aver that no indication is given as to where, when or to what approximate extent the section would be extended, as such, any alleged approval

in this regard was nothing more than an indication that any such proposed extension would be considered once detailed and proper plans had been submitted. According to the respondents, because this could only be done in terms of section 24 of the Act, the applicant not only had to give the requisite notice of his intention to seek a special resolution to extend his section at the annual general meeting held on 19 February 2013, the agenda of such meeting also had to contain a description of the general nature of all business and a description of the matters that would be voted on at the meeting, including the proposed wording of the required special resolution. The respondents state that the applicant did not comply with any of these requirements prior to, or at such meeting. As such, the alleged decision of the first respondent relied upon by the applicant to claim that he is entitled to extend his section into the garden area, is void. [34] The respondents concede that the affairs of the first respondent had been conducted quite informally, and without always complying with the formalities and procedures prescribed by the applicable legislation and the Management Rules of the first respondent. They confirm that at the annual general meeting held on 29 June 2011, because of a motion brought by the applicant, the first respondent resolved to have the Scheme re-surveyed with the intention of regularising the position by amending the sectional plans

of the Scheme to reflect the actual size and locality of the sections in the Scheme. As part of this process, during or about 2012, the sectional plans of the Scheme were duly amended and registered to provide, *inter alia*, for the extension of Section 2 and the subdivision thereof into Sections 7 and 8. The respondents further state that during or about 2013, the sectional plans of the Scheme were again amended and registered to provide, *inter alia*, for the extension of Sections 4 and 5, as well as the consolidation thereof to form Section 9.

[35] It is the respondents' version that the extensions to the sections in the Scheme and issues that arose as a result thereof, were again discussed at the annual general meeting held on 19 February 2013. Subsequent thereto, the third respondent approached Paddocks Attorneys for advice. Having done so, the third respondent prepared a proposal that was submitted to and accepted by the first respondent at its annual general meeting held on 23 April 2014. The respondents point out that the draft plans annexed to such proposal showed that sections 3 and 6 of the Scheme would be extended by, *inter alia*, incorporating two garages in "Building 2" in such sections, whilst Section 9 would also be extended by the incorporation of a garage constructed adjacent to "Building 2". The respondents contend that the proposal also clearly

recorded that no changes would or had to be effected to Section 1, being the applicant's section. They aver that the aforesaid proposal was then adopted at the annual general meeting whereupon the amended sectional plans were duly registered.

[36] It will be recalled that the applicant in his founding affidavit averred that in April 2017 he submitted plans to the body corporate for the extension of section 1 into the garden area, thereby exercising his rights first granted in 2013. In response thereto, the respondents deny that the applicant had, or has, any right to extend Section 1 either by extending it into the garden area or by erecting a garage on the common property. Furthermore, so goes the averment, the plans that the applicant refers to, are mere architectural sketches with very little detail and do not constitute proper building plans. In addition, they do not contain any plans or sketches relating to the construction of any garage by the applicant, nor do they indicate the extent to which the proposed construction of the applicant's section would encroach upon the garden area or any other common property of the Scheme. The respondents consider the applicant's purported plans to be mere drawings.

[37] The respondents admit that the drawings were circulated to the members of the first respondent at the meeting held on 28 April 2017. They were discussed and were regarded as little more than

an indication of the possible intentions of the applicant once he should decide to proceed with the renovations to his section. The fourth respondent states that according to his own understanding, the applicant would, in due course, prepare and submit proper and detailed building plans to the first respondent and its members so that the proposed construction could be properly considered.

[38] Regarding the applicant's revision of the 2017 plans in 2019, the respondents aver that, notwithstanding the fact that the applicant did not have any right to effect renovations or construction in terms of the drawings, by revising the plans in 2019, he clearly waived any rights he may have obtained in 2017. Furthermore, so aver the respondents, the revised plans not only differed materially from the drawings in that they, *inter alia*, provide for the construction of a garage that would severely affect the privacy and natural light of Section 6. Furthermore, the implementation thereof would have a massive impact on the first respondent and its members.

[39] As to the special general meeting of 26 July 2019, which was attended by the applicant and the third respondent only, the respondents aver that the notice of the meeting, was only emailed to the second respondent and the fourth respondent. As such, it was never delivered to them by hand or by registered post, as required by section 6(3) of the Schemes Management Act and Rule 15(6) of

the Management Rules. Nonetheless, the respondents acknowledge that although the email does not specify what building plans the applicant referred to, it meant the plans that were attached to the notice. It also appears from the other emails annexed to the founding affidavit that the fourth and fifth respondent had numerous difficulties with the plans. The respondents state that the notification of the meeting was received by the fourth and fifth respondents from Justine Lotz, who represented Sandak Lewin, the managing agent of the first respondent at that time. According to the respondents, the fourth and fifth respondents were astounded by this attitude as they had raised numerous lawful and valid concerns regarding the plans which had not been addressed despite the applicant acknowledging the validity thereof. The respondents lament the fact that the applicant furnished them with further information and changes to the plans as late as 24 and 25 July 2019, whilst the meeting was on the 26 July 2019. They state that that they needed time to consider the plans and obtain an architect's advice. The respondents deny that they told the applicant that the first respondent would only approve the plans once same had been approved by the local authority. Besides, so continues the averment, the applicant confirmed that all he sought at the meeting was the preliminary approval of the plans, and no more.

[40] It will be recalled that the applicant stated that in the morning of 26 July 2019, the third respondent circulated an email detailing the historical context of how the applicant had acquired the right to effect extensions in his Section. The respondents deny that the applicant ever acquired the rights, or still has the rights to extend Section 1, either by way of construction in the garden area or by the construction of a garage. The respondents further deny that the failure of the second, fifth or sixth respondents to attend the meeting was because they were being obstructive. They state that they simply required more time to consider the further information and drawings received from the applicant on 24 and 25 July 2019. As far as they were concerned, the applicant was acting very unreasonably in refusing to postpone the meeting. Furthermore, so contend the respondents, it is clear from the emails of the fourth and fifth respondents that the queries and concerns they raised were not in the least "*obstructive*". The respondents allege that on the contrary, their concerns were relevant and material.

[41] With regard to the meeting of 2 August 2019, the respondents aver that they still had not had the opportunity to properly consider the further plans and drawings furnished to them on 24 and 25 July 2019. This, according to them is so because the fourth and fifth respondents intended to consult with their architect regarding the

new and additional plans prior to the meeting but it was not possible to do so. Thus, the fifth respondent informed Sandak Lewin through an email on 31 July 2019, that it would not be possible to consider the additional and/or new plans prior to the further meeting on 2 August 2019. It reads as follows:

> "Hi Justine
>
> These drawings are new and we have not had sight of them before. It is completely unreasonable to request a meeting with ne wdoings [sic] in 2 days that leaves us no opportunity to review and respond critically.
>
> Can we please agree that the meeting be postponed until we have had a chance to engage expects to evaluate the proposal. We will not be able to make an informed decision on this on Friday.
>
> Please can you advise alternative dates in the future that we can all agree is convenient and please ca it be on a Sunday morning so this does not affect business."

Sandak Lewin reverted to the fourth and fifth respondents later that day by return of email wherein she informed them that:

> "We will have to recall the meeting with the 30 day notice unless all owners agree to a shorter notice period. Alternatively the reconvened meeting proceeds".

The second respondent and the fifth respondent, with the knowledge and consent of the fourth respondent, notified Sandak Lewin on 31 July 2019, that they agreed that the further meeting be postponed for 30 days. The respondents further aver that neither of them received a response to this email, and as such, they accepted that the further meeting would be, postponed for 30 days. They only became aware that the further meeting proceeded on 2 August 2019 when Sandak Lewin furnished them with the minutes on 23 August 2019.

[42] The respondents dispute that the applicant's plans were approved at the meeting on certain conditions as alleged by the third respondent. According to the respondents the minutes of the further meeting in annexure **"JWG21"** show that what was approved at that meeting was the extension of section 1 by 97 m² by extending it into the exclusive use area allocated to such section, being the garden area, as well as by a further 26 m² for the erection of a garage. In any event, so counter the respondents, any decision in this regard is clearly invalid or void as no notice was given that any special resolution would be sought. According to the respondents, not only was the Notice never properly served or delivered, it did not advise that such a matter would be voted on at the meeting, nor did it contain the proposed wording of any special or unanimous

resolution. This, according to the respondents, does not even take account of the fact that the applicant repeatedly confirmed that all he sought at the meeting and the further meeting was the provisional or preliminary approval of the plans especially as he clearly believed that he already obtained the rights to extend Section 1. Moreover, aver the respondents, it is clear from the email of the fifth respondent dated 25 July 2019 that any formal resolution to extend Section 1 would have been vehemently opposed.

[43] Insofar as the applicant's allegation to the effect that notwithstanding prior approval of his plans, on 2 October 2019, he convened a special meeting which was held on 19 October 2019, the respondents emphasise that the notice of that special general meeting was only emailed to the second, fourth and the fifth respondents. As such, it was never delivered to them by hand or by registered post, as required by section 6(3) of the Schemes Management Act and Rule 15(6) of the Management Rules prescribed in terms of such act. In addition, it did not contain the wording of the proposed special resolution, as required in terms of prescribed Management Rule 17(7). However, regardless of the short notice, the second, fifth and sixth respondents state that they attended the meeting.

[44] It is common cause that before the annual general meeting of 19 October 2019, a special meeting was held wherein trustees of the body corporate were nominated. The respondents however, flatly deny the applicant's allegations to the effect that the fourth and the fifth respondents captured the first respondent. According to the respondents, the absurdity of this allegation is clearly demonstrated by the fact that they immediately agreed to impose a maximum spending limit of R15 000.00 on the trustees which could only be exceeded if approved in the prescribed manner.

[45] The fourth and fifth respondent do not dispute that at the meeting they refused to permit a vote, even though the applicant had requested it, and that the meeting was accordingly adjourned without any decision upon the applicant's plans. However, the respondents explain that although they were perfectly entitled to refuse to entertain the special resolution on the basis that it did not comply with 6(3) of the Management Act and Rule 15(6) of the Management Rules. Furthermore, the real reason why they did not vote and rejected the plans is because they required further information in the hope of finding some middle ground, in the light of the fact that the applicant refused to concede that any decision taken at the further meeting was null and void. Furthermore, at that

stage, neither the second respondent, the fourth respondent , fifth respondent, nor the sixth respondent, had thoroughly or properly investigated the background to the applicant's claims, namely, that he has the right to extend his section by constructing a garage or utilising the garden area or the legal requirements in this regard. It was only later that they were advised by STBB Attorneys, which advice was subsequently confirmed by their current legal representatives that the applicant did not have any valid or lawful right to extend his section. In addition, the respondents state that it is unclear why the applicant alleges that the minutes of the October meeting are not accurate as no mention of a vote being conducted is made; the recording is that "*70.17% of members present at the meeting objected to the plans for the extension to be done on the exclusive use areas as well as the plans and erection of the said garage*". The respondents deny that the minutes of the meeting drafted by Justine Lotz of Sandak Lewin, were incorrect and that the minutes recorded by the applicant's attorney correctly reflected what transpired at such meeting.

[46] With regard to the applicant's assertion that his plans were considered and approved at the 2017 annual general meeting, and that pursuant thereto, the fourth respondent sent an email to the applicant's wife enquiring about the progress on getting the

construction plans approved and when the applicant intended to *"break grounds*", the fourth respondent admits sending the email. However, he explains that his true motivation for sending it to was to establish whether the applicant had already submitted building plans to the relevant local authority. The fourth respondent further explains that he also wanted to establish whether the so-called 2017 plans, which in his opinion were in fact drawings, were the same as those submitted by the applicant to the local authority.

[47] The respondents aver that by asking this court to compel the first respondent to consider his "2019 plans", as being the plans, the applicant clearly acknowledges that such plans were not lawfully and validly approved at the further meeting. This averment is, according to the respondents, confirmed by the applicant's allegations to the effect that the plans "*have been left in limbo*". Furthermore, so goes the averment, according to the minutes of the further meeting, the plans considered and ostensibly approved at that meeting, were contained in the applicant's architect's proposal. The revised plans are clearly not the same as the original plans. According to the respondents, the applicant, nonetheless does not have any right to compel the first respondent to consider the plans (or even the revised plans) as his section has not been extended and as he does not have the right to extend his section.

[48] The respondents ask the court to dismiss the applicant's application with costs. As to the costs order sought by the applicant, the respondents dispute his entitlement thereto.

The replying affidavit

[49] The applicant retorts to the respondents' objection to the effect that this application was not lawfully served on them by stating that this ground of opposition is bad, firstly, because the respondents have all received notice of the application, secondly, because the managing agent advised his attorneys that that the body corporate's new *domicilium citandi et executandi* was c/o LN Property Management of 91 Kildare Road, Newlands, Cape Town. According to the applicant, Neville Minnie, (an attorney who had been involved with the fourth and fifth respondents), in response to the applicant's attorney query regarding addresses of the trustees, advised on 21 July 2020 that the trustees had no obligation to provide their addresses to the applicant. He specifically advised that *"all Trustees have elected our office [in Gauteng!] for service of any formal process, alternatively the offices of the newly appointed managing agent".*

[50] The applicant emphatically denies that his unit was never lawfully extended, and the body corporate did not ever lawfully or

validly consent or agree to such an extension as alleged by the respondents.

[51] Regarding the limit on the powers of the trustees not to take any decision which entails expenditure of more than R15 000, the applicant states that the decision to oppose this application was a decision to spend more than R15 000. According to the applicant, this contention is fortified by the resolution of the trustees passed on 4 November 2020 which discloses that the trustees purported to have incurred costs of R84 527,50 to oppose the litigation, including a deposit of R42 775 – which the trustees already purport to have bound the body corporate to have loaned from the second respondent. This is also apparent from the invoice of Van der Walt attorneys' invoice dated 30 October 2020. Accordingly, so contends the applicant, there is no lawful opposition to his application by the first respondent as the trustees could not resolve, and have not lawfully resolved, to oppose this application or appoint J van der Walt attorneys. Nor can J van der Walt attorneys accept any funds or instruction from the trustees or the body corporate or continue to act.

[52] According to the applicant, on 25 November 2020, his attorneys delivered a notice in terms of Rule 7 to J van der Walt

attorneys. In response thereto, J van der Walt attorneys referred the applicant's attorneys to the resolution annexed to the founding affidavit as **"MC1"** and wrote:

> "(i)t is clear that I am authorised to act on behalf of [the body corporate] and that the [body corporate] is authorised to oppose your client's application".

The applicant contends that the second, third and fourth respondents could not, by their ostensible resolution as apparent trustees lawfully instruct J van der Walt attorneys to oppose this application for the body corporate, or indeed resolve to oppose this application for the body corporate. This is so because other members of the body corporate were not consulted when the resolution to spend more than R15 000.00 was made. In addition, so avers the applicant, J van der Walt attorneys may not recover their fees and disbursements in purporting to represent the body corporate to oppose this application from the body corporate or members of the body corporate as such.

[53] On 25 November 2020 the managing agent provided an email from J van der Walt attorneys wherein the latter proffered the following advice to the trustees:

> "If the trustees of the body corporate agree to appoint me on behalf of the body corporate, to investigate all the problems facing Merriman Court and to investigate all the recent transactions regarding the changes to the sections and whether the correct procedures were followed, then they will be acting within their powers to do so. Does the body corporate already have an attorney representing it in litigation? I am concerned about the possibility that the body corporate might have two attorneys but the trustees must motivate their decision to appoint me, in the resolution appointing me. I suggest that all the trustees sign the resolution appointing me. Once the resolution has been signed, I suggest that the trustees notify all the members of the body corporate of my appointment.
>
> Please note that my rate is R 2 200.00 per hour or part thereof."

The applicant avers that the advice provided by J van der Walt attorneys is incorrect, in that it failed to appreciate that the trustees were not empowered to incur costs in excess of R15 000, as the appointment undoubtedly would entail.

[54] Insofar as the assailed joinder of the second and third respondents, the applicant explains that they have been cited because of their interest in the application, and – in the case of second respondent – because a costs order is sought which affects her as a member of the body corporate. The fourth, fifth and sixth

respondents are, according to the applicant cited because of their interest in the application, because they purport to have voted themselves to be trustees, and because the applicant requests a costs order which affects them. The applicant says that the fourth respondent is also cited because of his interest as a member of the body corporate.

[55] The applicant, in reply to the respondents' contention to the effect that the exclusive use, occupation and enjoyment of the garden area did not entitle the owner of section 1 to extend his section into such an area as of right includes as it includes a staircase/fire escape, states that this allegation is not relevant to his right to extend his section onto the common property. He explains that the reason for this is that his section is the lowest section in the block (on the ground floor). Furthermore, no occupant of the block is required to traverse his section in order to gain access to or from his/her section ordinarily, or in the course of a fire. He/she need only to be able to access the two fire escape routes and the access route, as he shall be able to do upon extension of his section in accordance with his plans. The applicant further avers that his attorney has confirmed this with the local fire safety authority.

[56] Regarding the applicant's alleged misuse of the proxy of the second respondent to exercise her vote to vote in favour of his constructing a garage in 2007, the applicant avers that the issue is irrelevant because what was required, at that stage, was a special resolution – being a resolution passed by a majority of three-fourths of the votes (reckoned in value) and not less than three-fourths of the votes (reckoned in number) of members of the body corporate who are present or represented by proxy. According to the applicant, the second respondent's failure to attend, failure to vote, or even notional vote against the resolution would not have and does not defeat it. The applicant reiterates that on 24 March 2009 and 23 April 2014 there were meetings which the second respondent attended, and at which his right to construct a garage was referred to and confirmed. The applicant states that at not even one of these meetings did the second respondent express any disquiet concerning his right to construct a garage. Nor did she do so upon receipt of the minutes of those meetings. According to the applicant, in the circumstances, there was a duty on the second respondent to have spoken up if she disputed his right to construct a garage, she never did so. By failing to do so, so contends the applicant, the second respondent represented that she did not dispute his exercise of her proxy in 2007, or indeed that he had acquired the right to

extend his section by constructing a garage, and he has relied on that representation by acting as he has to implement the permission granted to him. The applicant avers that the second respondent and the respondents are estopped now from denying the truth of that representation.

[57] One of the allegations made by the respondents is that the garage extension and other resolutions and meetings failed to comply with formal notice requirements. The applicant denies this and further explains that the records disclosing such notice can no longer be found. According to the applicant, members of the body corporate did not require formal notice. On the contrary, they considered the resolution and dealt with it, thereby waiving their rights to formal notice. Besides, continues the applicant, it is common cause, as conceded by the respondents that the affairs of the body corporate were conducted in an informal manner. When other members were afforded the rights to extend their sections, they were afforded such rights without formal notice as the fourth respondent alleges now is required.

[58] It will be recalled that the respondents allege that the notice of the meeting to be held on 19 October 2019 *"did not contain the wording of the proposed special resolution, as required in terms of*

prescribed Management Rule 17(7)". The applicant states that he inadvertently attached the incorrect notice to the founding affidavit. The applicant further states that on 14 October 2019 the managing agents sent a notice containing the wording of the proposed special resolution. It reads thus:

> **'RESOLUTON TO APPROVE THE PLANS TO EXTEND SECTION 1 IN TERMS OF THE SECTIONAL TITLES SCHEMES MANAGEMNET ACT, 2011 (Act No 8 of 2011) AND SECTIONAL TITLES ACT, 1986 (Act.95 of 1986) OF THE MERRIMAN BODY CORPORATE SCHEME NO, SS97/1986**
>
> Whereas the members of the Merriman Court Scheme No SS97/1986, previously unanimously approved the extension of Section 1 and the erection of a garage, subject to the approval of building plans by the Body Corporate and the City of Cape Town. The members subject to the suspensive condition set out below, hereby approve the attached draft plans reflecting the areas to be added to section 1inclusive of the erection of a garage. The general scope of the works is shown on the attached document. The owner of section 1 ("the owner") is authorized to extend the owner's section in accordance with the draft plans attached to tis resolution, in terms of the provisions of the Sectional Titles Schemes Management Act, 2011 (Act No 8 of 2011) and Sectional Titles Act, 1986 (Act No1986).

A. The owner of section 1 shall be liable for all costs associated with the extension of section 1, including but not limited to building costs, approval and registration of amending sectional plans of extension and repairs to the common property arising from the building works.

B. From the dates of when beneficial occupation of the extended area is possible, the owner of section 1 wil be liable for levies on the full floor area of the section as if the amending sectional plans of extension have been registered in the Cape Town Deeds Registry.

C. The owner of section 1 shall not be entitled to receive levy clearance in terms of the provisions of Section 15 B3(1)(a) of the Sectional Titles Act until such time as the amending sectional plans of extension have been registered in the Cape Town Deeds Registry"

[59] The applicant in reply bemoans the fact that although the fourth respondent would have received a copy of the correct notice, he failed to disclose this fact in his answering affidavit. Instead, he (the fourth respondent), made allegations at odds with the correct factual position of which he was aware, and sought – on that basis - to exploit the incorrect attachment to the founding affidavit.

[60] The applicant denies the respondents' allegation to the effect that his right to extend his section comprises a debt which has prescribed. With regard to the respondents' characterisation of the approved plans as drawings, the applicant states that the approved plans contained sufficient detail for the body corporate to grant its approval, and it was satisfied that it could do so, and indeed it did

so. The applicant reiterates that plans were approved upon the basis that the third respondent was authorised to sign any documentation necessary – which would include any further plans required for submission to the local authority.

[61] The applicant assails the fourth respondent's assertion that he understood that the applicant would – in due course – *"prepare and submit proper and detailed building plans to the [body corporate] and its members so that the proposed construction could properly be considered"*. According to the applicant, such an understanding is at odds with the minutes which disclose that the body corporate characterised what the applicant had provided to it as *"plans"*. The minutes specifically record that the body corporate *"formally accepts the plans"*. The minutes further expressly record that what was required to be circulated going forward was not any further plans, but only *"(c)ivil engineer and city council approval"*.

[62] Likewise, according to the applicant, the fourth respondent's apparent understanding is at odds with the emails he sent on 7 August 2017 in which he enquired as to how the applicant and his wife were progressing in getting our plans approved by the City, and his comment to the effect that he did not know that it could take so long to get approval of plans.

[63] The applicant denies the respondent's assertion to the effect that the decision made at the body corporate meeting in 2017 was not binding and explains that the minutes expressly record that the body corporate *"formally accepted"* his plans. According to the applicant, the use of those words shows that members intended their decision in this regard to be binding. Furthermore, so contends the applicant, the minutes of the meeting of 7 December 2017 support his case (that the decision at the April 2017 meeting was binding), and contradicts the respondent's allegations (that the decision at the April 2017 meeting was not binding). This, according to the applicant is particularly so because on the first page of the minutes (annexure **MC7**), next to the heading "APPROVAL OF PREVIOUS MINUTES" it is recorded that at the meeting of 7 December 2017, the minutes of the meeting held on 28 April 2017 were taken as read and adopted thus:

> "(t)he minutes of the Annual General Meeting of the body corporate held on 28th April 2017 having been circulated with the notice of the meeting were taken as read and adopted by the meeting").

The body corporate expressed no disquiet or difficulty with the decision taken on 27 April 2017.

[64] The applicant contends that there was a duty upon its members to express any disquiet or difficulty with the decision taken on 27 April 2017, when the body corporate met for the first time after its meeting of 27 April 2017 and on 7 December 2017, when the body corporate considered the minutes of the meeting of 27 April 2017 which recorded the grant of formal approval. No member of the body corporate did so. The applicant further contends that in this way, the body corporate represented that his plans were lawfully approved. He states that he had acted upon this representation by seeking to implement the approval. In the circumstances the body corporate is, according to the applicant estopped from denying that he was granted formal approval lawfully to extend my section on 27 April 2017.

[65] The applicant alleges that he learned for the first time that the body corporate has only four members after the fourth respondent had deposed to the answering affidavit, the result being that all four members, were the trustees of the body corporate. According to the applicant, it therefore was not lawful for the fifth and sixth respondents, who are not members of the body corporate to purport, on 19 October 2019, to exercise a vote as proxy for the same member, the second respondent, to stipulate only three trustees. Let

alone that two of the three trustees would be themselves. He further disputes that the fifth and sixth respondents were lawfully appointed as proxies by the second respondent. The applicant states that he and the third respondent in an email dated 21 November 2020 and 25 November 2020, respectively, expressed consternation to the fourth respondent's, (a tenant) appropriation for herself the role of chair of the apparent three-trustee one-member board of trustees of the body corporate, by loaning it money which it must pay with interest and purporting to have instructed attorneys on its behalf. In response to those emails, the fifth respondent accused the applicant and the third respondent of sabotaging the management of the body corporate and being obstructionist.

[66] The applicant denies that he waived his rights to implement the old plans by preparing new plans as alleged by the respondents. He states that he prepared the new plans to reconfigure the internal layout of the apartment to accommodate his family. He says that he did not, by preparing the new plans, waive his rights. Regarding the respondents' assertion that the revised plans adversely affected other sections, the applicants avers that such comments are irrelevant for the purpose of this application and fall to be made upon

consideration of the revised plans. Thus, so continues the averment, he, in this application requests that the revised plans be considered.

[67] The respondents in the answering affidavit allege that the real reason why the fourth and fifth respondents did not vote and reject the plans in the meeting of 19 October 2019 is because they required further information in the hope of finding some middle ground and as the applicant refused to concede that any decision taken at the further meeting was null and void. In response thereto, the applicant avers that the meeting of 19 October 2019 was convened at the fourth and fifth respondents' request to reconsider the decision made at the reconvened meeting held on 2 August 2019. The fourth and fifth respondent, according to the applicant made that request on 30 August 2019. The applicant further contends that they could not have requested a decision be reconsidered, and then refuse to make a decision because by requesting reconsideration of the decision, they disclosed that they were ready to do so. Besides, so contends the applicant, in the course of August 2019 the fourth and fifth respondents had taken advice from attorneys about the decision and plans, and by 19 October 2019, they had had at least two months to obtain all the information they required in order to deal with the issue substantively as they indicated they would, on 19 October 2019. The

applicant bemoans the fact that on 19 October 2019, instead of reconsidering the decision made on 2 August 2019 in good faith as was incumbent upon them to do, they simply refused to make a decision.

[68] As to the respondent's assertion to the effect that they were not certain why the applicant alleges that the minutes of the reconvened special general meeting of 19 October 2019 are inaccurate, the applicant replies by stating that the minutes inaccurate because they fail to show that the fourth and the fifth respondents refused to vote as alleged in the founding affidavit. In addition, points out the applicant, the respondents' failure to answer to this averment discloses an admission that his allegation is correct. Furthermore, contends the applicant further, the respondents fail to disclose any particular respect in which they are incorrect. According to the applicant, the minutes based on his attorney's notes are a recording of the meeting and accurately reflect what transpired and as confirmed by his attorney.

[69] The applicant denies the respondents' averment to the effect that he does not have any right to compel the body corporate to consider the plans. He states that he is a member of the body corporate and the meeting of 19 October 2019, was convened at the request of members of the body corporate to reconsider the

resolution approving the plans, taken at the meeting held on 2 August 2020. In the circumstances the members of the body corporate are, according to the applicant subject to a duty to consider his 2019 plans. Moreover, the members of the body corporate could not call the meeting of 19 October 2019 to reconsider the resolution approving the plans and then fail to do so. In general, and in any event, the members of the body corporate are subject to a duty to consider his request, and as his neighbours, they must act fairly, in good faith.

[70] The respondents in the answering affidavit allege that the applicant merely sought *"preliminary approval"* of the plans. The applicant in reply explains that what he conveyed by this was that he sought the body corporate to approve his plans as a first step, so that he could proceed to obtain local authority approval and then implement them – in accordance with the *modus operandi* followed by all other owners who had extended sections in the scheme. He further states that other members of the body corporate will have understood what he conveyed, because he acted in a manner consistent with the historical *modus operandi*, and because of the historical context of how the body corporate conducted its affairs as explained by the third respondent to them. In fact, so reiterates the

applicant, the fourth respondent's email to his wife enquiring about the progress of having the plans approved by the city council and when they intended to *"break grounds"* plans is consistent with the understanding that the body corporate had granted the applicant approval as required. Furthermore, so contends the applicant, the fourth respondent's averment in the answering affidavit to the effect that his motivation for sending the email was *"to establish whether [I] has already submitted building plans to the relevant local authority, If [I] had submitted such plans"* then, alleges Leong Son, he *"also wanted to establish whether the so-called 2017 plans, being the Drawings, were the same as any plans submitted to the local authority"* is at odds with what he wrote in two emails he sent on 7 August 2017 – for in neither of those emails did he ask to see the plans submitted to the City. More importantly, contends the applicant, even if the third respondent's motivation was as he has alleged, that motivation does not change what his email reveals: which is that he understood that the applicant's plans were already approved by the body corporate.

Issues for determination

[71] It will be recalled that the relief sought by the applicant in the notice of motion is an order that the respondent must consider his

request for the approval of his 2019 building plans. In addition, he seeks a declaratory order that he is in any event permitted or entitled to implement his 2017 building plans. The respondents initially opposed the matter on the grounds that the application was never properly served on the fourth respondent to sixth respondents, and that the second to sixth respondents should not have been joined in this application. During argument they indicated that they no longer persisted with the two issues, and that the matter should be determined on the merits. However, they emphasise that the issues were in any event properly and correctly raised. Against this backdrop, the issues for determination may be summarised thus:

71.1 Did the first respondent authorise the construction of a garage on section 1 at its annual general meeting held on 10 September 2007?

71.2 Did the first respondent authorise and approve the extension of the applicant's unit into the garden area allocated to him as his exclusive area at its annual general meeting held on 19 February 2013.

71.3 Was the special general meeting convened on 2 August 2019 properly convened? Were the resolutions taken thereat valid?

71.4 Has the applicant's purported right to extend his unit in the sectional title scheme prescribed?

The applicable legal principles

[72] The applicant seeks final relief, therefore the evidence in the affidavits must be evaluated by applying the rule in *Plascon Evans Paints Ltd v Van Riebieck Paints (Pty) Ltd* 1984(3) SA 623 (A), which states that the application falls to be resolved on the respondent's version – unless that version discloses *"bald or uncreditworthy denials, raise(s) fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting [the respondent's evidence] merely on the papers."*

[73] Rule 30 (g) of the standard Management Rules prescribed in terms of section of the Schemes Management Act provides that a member of the body corporate shall not construct, or place any structure or building improvement on an exclusive area which in practice constitutes a section or an extension of the boundaries or floor area of a section without complying with the requirements of the Scheme Management Act and the Sectional Titles Act. Section 5(1) of the Schemes Management provides that the body corporate must *"on application by an owner and upon special resolution by the owners, approve the extension of the boundaries of floor area of a section in terms of the Sectional Title Schemes Act."* Section 5(1)

(h) therefore requires an application by the owner to extend, and a special resolution by all owners. Section 1 of the Sectional Titles Act provides that a special resolution can be obtained in one of two ways, *viz,* when passed by 75 percent votes, calculated both in value, and in number of the votes of the members of the body corporate who are represented at a general meeting, or when agreed to in writing by members of body corporate. A member of the body corporate desirous of constructing or placing any structure or building improvement on an exclusive use area must seek and obtain an extension of his section in terms of section 24 of the STA. Section 24 (3) of the Sectional Titles Act further provides that if authorised in terms of section 5(1)(h) of the Schemes Management Act, an owner who proposes to extend the boundaries of the floor area of his/her section must submit a draft sectional plan of the extension to the Surveyor-General for approval.

[74] In a nutshell, in terms of the Schemes Management Act, and Sectional Titles Act, where an owner of a section in the body corporate wishes to extend, her/his section the following steps must be taken:

74.1 She/he must apply to the body corporate:

74.2 The body corporate must consider and vote in the application;

74.3 If the body corporate votes by special resolution to extend the section, the presentation of a sectional plan of the section, the preparation of sectional plan of the extension for presentation to the Surveyor-General must follow;

74.4 The Surveyor-General must consider the application and approve or reject it.

At this stage, no consent is required from the municipality.

[75] Regarding the special resolution to be taken by the body corporate, it is required that the notice of the aforesaid meeting must contain the agenda of the meeting, specifying the proposed wording of the resolution. Section 6 (2) of the Schemes Management Act provides that at least 30 days written notice of the meeting, in which the proposed resolution is specified, must be given to all members of the scheme and such a notice must be delivered by hand to a member, dispatched to by prepaid registered post to the address of the member's section in the relevant scheme, or sent by prepaid registered post to a physical address in the Republic of South Africa that a member has chosen in writing for the purpose of such notice. Both the Schemes Management Act and the STA provide in addition thereto, that any notice may be sent to a member by fax or email.

[76] In terms of section 6(5) to 7 of the Sectional Titles Act, a member may be represented by proxy at such a meeting and where

votes are being calculated in value, each member's vote is calculated either (a) as the total of the quotas allocated to the sections registered in that member's name, or (b) in accordance with a rule made in terms of section 10 (2), whichever is applicable.

Evaluation

[77] In evaluating the first two issues for determination, namely, whether the first respondent authorised the construction of a garage on section 1 at its annual general meeting held on 10 September 2007, and approved the extension of the applicant's unit into the garden area allocated to him as his exclusive area at its annual general meeting held on 19 February 2013, it is necessary to revert to the factual matrix as borne out in the affidavits. It was contended on behalf of the applicant that the facts establish that the second respondent authorised and approved the extensions proposed by the applicant. Counsel for the respondents on the other hand argued that the extensions sought by the applicant could only be approved by way of a special resolution, and the applicant in seeking them did not comply with the prescribed procedure in that he did not give any notice, whether in writing or otherwise indicating that he would seek an extension of his unit. More specifically in relation to the 2007 application to construct a garage, the respondents contend the applicant never made a formal application and the approval granted

by the body corporate was only in principle. The respondents also suggest that the applicant in any event obtained the approval by unlawfully using the proxy of the second respondent.

[78] Insofar as the 2007 application by the applicant to construct a garage, it is not in dispute that he was granted the requisite approval by the body corporate. The papers do not show that there was any dissensus amongst the members of the body corporate with regard to the manner in which they were served and received the applicant's application. It is not difficult to understand why this was the case because the evidence of the third respondent to the effect that the scheme rules were not particularly enforced, and the issues of extensions were dealt with on an informal basis is uncontroverted. In addition, the applicant's approval to construct a garage was reaffirmed in the subsequent annual general meeting of 23 April 2014. I consider it quite disingenuous of the fourth respondent to raise the issue of notices when the minutes of subsequent meetings do not reflect that it was ever his, or any of the respondents' concern that the applicant's notices were defective. This is the case even at the stage the applicant's alleged right to construct the garage was confirmed after the body corporate resolved at the 2011 annual general meeting to have the scheme resurveyed in order to regularise the position relating to extensions by section owners. One

understands that at that stage the fourth respondent was not a member of the body corporate as he subsequently became a member on 12 February 2014. However, he deposed to the answering affidavit on behalf of the other respondents who were present and did not rise an ire with regard to the applicant's defective notice, on the basis of which he was granted approval to construct a new garage in 2007. But at the annual general meeting on 23 April 2014, the issue of the approval of the adding of a new garage by the applicant was once again affirmed, albeit in principle. None of the respondents protested that the very premise on which the approval was granted was defective.

[79] One of the issues raised by the respondents is that the applicant obtained the approval of his plans for the construction of a garage in 2007 by stealth in that he unlawfully used the proxy of the second respondent. The applicant in reply claims that the second respondent is estopped from raising the complaint because he was present at subsequent meetings where his right was confirmed. I find it striking that the respondents in the answering affidavit do not specifically explain when the second obtained knowledge that her proxy was used by the applicant to achieve his ends. This I say because once again there is no indication that the second respondent took any steps to nullify a decision based on a vote that

was obtained by less than worthy ways. It seems to me that she acquiesced to the illegality up to the point where she wanted to use it as a weapon to discredit the applicant's acquisition of the approval. I say this because the applicant's assertion to the effect that the second respondent was present at the subsequent meeting is uncontroverted. In my view, it would have been important for the second respondent to state categorically that when she attended the annual general meeting, wherein the applicant's right to construct a garage was confirmed, that she was not aware of the fact that the applicant had misused her vote without her consent. Nowhere in these papers do the respondents make a full disclosure of when the second respondent obtained this information and what she did about it. In the result, I find this contention equally unmeritorious.

[80] I now turn to consider the second issue for determination, namely, whether first respondent authorised and approved the extension of the applicant's unit into the garden area allocated to him as his exclusive use area at its annual general meeting held on 19 February 2013.

[81] According to the applicant, at the annual general meeting held in 2013, he, through his wife, sought approval to extend his section into the garden area to build a second bedroom, bathroom, and make changes to his section's kitchen. The minutes of the meeting

reflect that these changes were unanimously approved subject to planning approval by the body corporate and the local authority. The respondents deny that the aforesaid approval by the body corporate has any significant meaning. According to their version the approval was "*nothing more than an indication that any such proposed extension would be considered once detailed proper plans [had] been submitted"*, and that could only be done in terms of section 24, and that the applicant failed to comply with the requisite formalities. The issue then turns to the interpretation of the recorded approval.

[82] At the annual general meeting of 23 April 2014 the applicant's right to extend section 1 and build a garage was unequivocally acknowledged and endorsed as follows:

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

It must be mentioned that in the same meeting, the minutes reflect that additions for a new garage and stairway for the applicant was approved in principle. In line with the understanding of the respondents, the applicant during April 2017 provided the plans to the body corporate for the extension of section 1 garden area. In the same meeting, additions for a new garage and stairway for the applicant was approved in principle. The minutes reflect of the informal meeting of 28 April 2017 show that the applicant circulated

architectural drawing outlining the extensions to his unit. It is plain from the evidence that the body corporate accepted the applicant's architectural plans notwithstanding the fact that the meeting at which they were presented became informal when the managing agent resigned. The difficulty I have with the fourth respondent's denial that the applicant's plans were approved on an informal basis and that decisions taken at that meeting were non-binding, is that shortly thereafter, the fourth respondent made utterances to the applicant's wife which demonstrate that his understanding to be at odds to what he has attested to in the answering affidavit. In an email to Ms Jackson (the applicant's wife), he said the following:

> "How are you progressing on getting your construction plan approved? Do you have a date in mind as yet when you intend to "break grounds" for your extension plans?"

The aforegoing, even when interpreted restrictively, leaves no doubt that the fourth respondent knew that the applicant was getting construction plans, which he could not apply for without first obtaining the approval of the body corporate. Put differently, it is difficult to comprehend why the fourth respondent would contemplate the applicant's "breaking of ground", if, as he alleges, there never was a formal approval of the extensions by the body corporate. As correctly contended by counsel for the applicant, a

conclusion that the fourth respondent understood that the body corporate had granted its approval, even if informally, and that the next step was naturally the approval by the local council and, thereafter construction, is inescapable. Furthermore, it is in my view, disingenuous of the fourth respondent to now claim that the decisions of the informal meeting were not binding, because at a formal annual general meeting on 7 December 2017, and in his presence, minutes of the informal meeting of 28 April 2017 were formally approved and adopted.

[83] I now turn to consider whether the meeting of 2 August 2019 was validly convened and its resolutions binding.

[84] It was contended on behalf of the respondents that the applicant is not entitled to the relief that he seeks because he did not comply with the necessary procedures and requirements prescribed by the Schemes Management Act and Management Rules of the first respondent in seeking approval of the 2019 plans at the special general meeting which was to be held on 26 July 2019, but was reconvened for 2 August 2019. According to the respondents, this is so because the notice of such meeting did not stipulate the wording of any special resolution proposed to be adopted at such meeting. Therefore, so goes the contention, such meeting was not properly convened, and any alleged resolutions

taken thereat, purporting to grant the applicant the right to extend his unit in accordance with the 2019 plans, is void. The applicant in his replying affidavit averred that, he mistakenly attached to his founding affidavit the wrong resolution. In his replying affidavit, he attached what he claims is the correct resolution stipulating that he was seeking approval of his 2019 plans. By attaching the resolution to his replying affidavit, the applicant effectively introduced new evidence.

[85] It is trite that all necessary allegations upon which the applicant relies must appear in his founding affidavit, as he generally will not be allowed to supplement the affidavit by adducing supporting facts in a replying affidavit. In *Mostert and Others v FirstRand Bank Ltd t/a RMB Private Bank and Another* 2018 (4) SA 443 SCA, the court restated the principles as follows:

> "[13] It is trite that in motion proceedings affidavits constitute both the pleadings and evidence. As a respondent has a right to know what case he or she has to meet to respond thereto, the general rule is that an applicant will not permitted to supplement his or her case in the replying affidavit. This, however, is not an absolute rule. A court may in the exercise of its discretion in exceptional cases allow new matter in a replying affidavit.
>
> . . .

> In the exercise of this discretion a court should in particular have regard to (i) whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the court (ii) whether the determination of the new matter raised in the replying affidavit will prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs; (iii) whether the new matter was known to the applicant when the application was launched;(iv) whether the disallowance of the new matter will result in unnecessary waste of costs."

[86] In the matter at hand, all the applicant seeks is to introduce the correct resolution, having made the averments concerning it in the founding affidavit. I do not envisage any prejudice to the respondents if the introduction of the resolution is allowed because it does not purport to introduce new matter, nor does it amount to an abandonment of the original claim, thereby introducing a new cause of action. After all, the respondents were, according to the applicant, served with the correct resolution, and it therefore cannot be said that they have been caught unawares. I therefore hold that the applicant is permitted to introduce the aforesaid resolution. That said, the permission granted to the applicant renders the respondents' contention that the notice of the meeting is void because no resolution was attached nugatory.

[87] The respondents have also raised the defence of waiver. They state that even if it is accepted the first respondent had granted the applicant approval in 2017, he (the applicant) had *"abandoned he Drawings [i.e the 2017 plans and replaced same with revised plans in 2019"*, thereby waiving the rights he obtained in 2017. What the respondents are suggesting is that this court should draw an inference that by '*abandoning'* the 2017 plans, the applicant had waived his right to whatever approval he may have been granted.

[88] In assessing this contention, I find necessary to recapture the factual matrix. It is common cause that the applicant did not implement the 2017 plans. The undisputed evidence establishes that in anticipation of the birth of their child, the applicant and his wife in 2018 reconfigured the 2017 plans in order to change the internal arrangement of the extended apartment, and on 10 June 2019, he presented them to the managing agent. The second and fourth respondents objected to the plans but as the evidence reveals, on 2 August 2019, the special general meeting was reconvened but was attended by the applicant, his architect, and the third respondent only. The plans were signed off by the third respondent and the minutes emailed to the respondents. The reconvened meeting was held on 19 October 2019 and it was

adjourned without a decision or a vote on the applicant's plans. Thus, the present application.

[89] The principle of inferred waiver is explained in Christie, *The Law of Contract* at page 511as follows:

> "Having gone to the trouble to acquire all the contractual rights, people are, in general, unlikely to give them up. There is therefore a presumption, even a strong one against waiver. That means not only that the onus is on the party asserting the waiver to prove it, but that although, as in all civil cases, the onus may be discharged on balance of probabilities. It is not easily discharged. In *Hepner v Roodeport-Maraisburg* Town Council, Steyn CJ, said:
>
> > There is authority for the view in the case of waiver by conduct, the conduct must leave no reasonable doubt as to the intention of surrendering the right in issue (*Smith v Momberg* (1895) 12 SC at p 304; *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1, at p 62) but in *Martin v Kock* 1946 (2) SA 719 (AD) at p 733 this court indicated that that view may possibly require consideration. It sets, I think, a higher standard than that adopted in Laws v Rutherford 1924 AD at p 263, where Innes CJ says:
> >
> > > "The *onus* is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it." (footnotes omitted)

[90] In *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA), Nienaber JA, reviewing the requirements of inferred waiver, stated that:

> "[16] The test to determine intention to waive has been said to be objective. That means, first, that intention to waive, like intention generally is adjudged by its outward manifestations, secondly, that mental reservations not communicated, are of no legal consequence and, thirdly. That the outward manifestations of intention are adjudged from the perspective of the other party concerned." (authorities omitted)

[91] In the instant case, it is difficult to infer that the applicant had waived his right to rely on the 2017 plans when regard is had to the facts of this matter, namely, that the configuration of the extended apartment was only internal. Furthermore, on 10 June 2019, the applicant presented them to the managing agent. There is no evidence to suggest that what was configured had an impact on the external outlook of the plans, and that in my view infers that the original plans or intention remains intact. I am not persuaded that the applicant's conduct of presenting the revised plans is inconsistent with waiver.

[92] The second and fourth respondents objected to the plans but as the evidence reveals, on 2 August 2019, the special general meeting was reconvened, but was attended by the applicant, his architect, and the third respondent only. The plans were signed off

by the third respondent and the minutes reflecting same, emailed to the respondents. The reconvened meeting was held on 19 October 2019 and it was adjourned without a decision or a vote on the applicant's plans. Thus, the present application.

[93] The respondents contend that the applicant's right to extend his unit in the sectional title scheme prescribed because on his own version, the aforesaid right arose on 10 September 2007. According to the respondents, all the applicant's rights to extend his section, if any, have long prescribed, even it may be argued that the first respondents acknowledgement or admission of such alleged rights at the annual general meeting held on 23 April 2014 interrupted the running of prescription in terms of section 14 of the Prescription Act 68 of 1969 ("Prescription Act"). Furthermore, so goes the argument, even if the first respondent had approved the plans at a meeting on 28 April 2017, thereby interrupting the running of prescription, it (prescription) had already been completed by that time.

[94] The applicant counters this contention by stating that the body corporate granted its approval at the December 2017 annual general meeting, and the notice of motion was issued in September 2020, within three years.

[95] What must first be determined is whether the right to act upon an approval to extend a unit in a sectional title is a debt within the

meaning of Prescription Act to which a prescriptive period of three years applies. In *Makate v Vodacom Ltd* 2016(4) SA 121 (CC) at paragraph 92, the court held that 'debt' in the Prescription Act means *'an obligation to pay money, deliver goods, or render services'* and that a debt does not extend to a general "*obligation to do something or refrain from something'*. I am not convinced that the rights conferred on the applicant by the approval of his plans, by their nature, were debts, which prescribed. This I say because the granting of approval to extend a section does not create an obligation on the applicant to do so.

[96] Even if I may be wrong in finding that the approval of the applicant's plans to extend his unit does not constitute debt as envisaged in the Prescription Act, on the factual level, as correctly contended by counsel for the applicant, the approval has not prescribed. This then turns into a factual enquiry of precisely when can it be said that the approval was granted by the first respondent. The contention proffered by the respondents is that it was granted on 28 April 2017, which means that by the time this application was moved in September 2020, a period of three years had lapsed. However, the fourth respondent earlier on in the answering affidavit bemoaned the fact that the plans approval the meeting whereat the plans were approved was an informal meeting due to the abrupt

resignation of the managing agent, and as such *"members did not intend any binding decision to be taken*". Therefore, according to their version, the decision taken at the informal meeting has no force and effect. It is undisputed that the minutes of the informal were approved and adopted in the annual general meeting of 7 December 2017. Flowing therefrom, it is plain that the formal approval was given when the minutes of the informal meeting were approved and adopted. The respondents cannot approbate and reprobate. On the one hand, they state that the decisions taken in the formal meeting were not intended to bind members of the body corporate, but when pleading prescription, they recognise them as binding. It is my judgment that at the time when the notice of motion was issued, the running of prescription had not commenced and would only do so on 7 December 2020.

The Rule 7(1) application

[97] The applicant seeks costs of suit against the respondents, jointly and severally, save that insofar as the costs arising from opposition or incurred by the body corporate, such costs should not be recoverable from the applicant and the third respondent. In considering the question of costs against all the respondents, I must first determine whether the first respondent is properly before court. As earlier alluded to, in the summary of the parties' affidavits, the

applicant on 27 November 2020, filed a notice in terms of Rule 7(1) disputing the authority of J C Van der Walt attorneys to act on behalf of the first respondent, and the authority of the first respondent to oppose this application. The applicant alleges that the respondents, by appointing J C van der Walt attorneys acted *ultra vires* as the costs incurred would exceed the amount of R15 000, which is the limit of the amount the trustees are permitted to incur. Furthermore, because the body corporate has not lawfully resolved to oppose the application, no costs order may be made against it.

[98] The respondents do not dispute that the trustee's powers are limited in that they may not take any decision that may entail incurring an expenditure of more than R15 000.00. It is also undisputed that J C Van der Walt attorneys' disbursements total an amount of R84 527.50. It will also be recalled that the fourth respondent deposed to the answering affidavit on behalf of all the respondents.

[99] In response to the Rule 7 (1) notice, the respondents attached a resolution signed by the fourth, fifth and sixth respondents. It reads thus:

MERRIMAN COURT BODY CORPORATE

TRUSTEE RESOLUTION

4 November 2020

In term of the Prescribed Management Rules of the Sectional Titles Act, 1986 (Act 95 of 1986), per PMR 31(4), we, the trustees are raising a special levy upon the owners of the Merriman Court Body Corporate to pay for legal fees, which were not included in the current budget. The body corporate is being sued in the High Court, & has a fiduciary responsibility to defend itself, hence the special levy.

The amount of R84,527.50 is to be paid by participation quota (PQ) per the attached schedule.

The special levy will be charged in the December 2020 levy statements, & the owners have been requested to make the payment immediately.

The initial deposit of R42,775 – which was paid out of funds due Wendy de Goede for various payments made on behalf of the body corporate. This amounts needs to be recouped to ensure full payment is made per her accountant's schedule.

The initial payment of R42, 752.50 needs to be re-couped to ensure the body corporate has thus far funds to pay regular expenses.'

[100] Rule 7 provides that where the authority of anyone acting on behalf of a party is disputed, such person may no longer act unless

he satisfies the court that he is authorised to act. In *Erasmus Superior Court Practice* at B1-59, the following remarks are made:

> "The type of authority contemplated by this rule means that the special type of power which is given by a client to his or her attorney to authorise him or her to institute or defend legal proceedings on the client's behalf; it does not contemplate a general authority by one person to another to represent him or her in legal proceedings. If an attorney acting for a party is authorised to act, there is no need for ny other person, whether he or she be a witness or someone who becomes involved, to become additionally authorised."

[101] It is common cause in these proceedings that it is a substantive requirement of the body corporate that the powers of the trustees be limited to incur expenses of R15 000.00. This is, especially so, as was held in *North Global Properties (Pty) Ltd) v Body Corporate of the Sunrise Beach Scheme* (12465/2011) ZAKZD47 (17 August 2012) at paragraph 12, because *"it impacts substantively on the pockets of all members of the body corporate".* It also is undisputed that the decision to oppose the present application was a decision to incur costs in excess of the previously mentioned amount as is evident from the invoice of J C Van Der Walt attorneys. The fact that the trustee resolution of 4 November 2020 was not supported by all members of the body corporate, is likewise uncontroverted. Furthermore, the terms of restrictions

imposed on the trustees specifically outline that it was not a decision which the trustees could make, unless they had afforded a notice to all owners advising of the need to exceed the restriction and, in the event of objections, holding a special general meeting about the decision. In this matter, it is not alleged that the trustees afforded a notice to all owners advising them of the need to exceed the restriction. It follows that the decision to incur expenditure in excess of the amount of R15 000.00 is therefore *ultra vires*. (See *Steyn v Blockpave* 2011 (3) SA 528 at 533 paragraph 24). Likewise, the arbitrary decision by the three trustees, fourth, fifth and sixth respondents to accept payment by the fifth respondent of the initial deposit of R42,775 – on behalf of the body corporate is equally *ultra vires* to the extent that it does not enjoy the support of members of the body corporate.

[102] It therefore is plain form the aforegoing that the instructions to J C Van Der Walt attorneys was irregular. The corollary of these findings is that the first respondent is not properly before court and therefore may not be mulcted with costs of this application. Neither can it recover costs it incurs from the applicant and the third respondent in relation to this application.

Conclusion

[103] In this application, the applicant seeks an order compelling the respondents to consider his requests for approval of his 2019 plans for construction. In addition, he seeks a declaratory order to the effect that he is permitted to implement his plans allegedly approved in 2017 for the extension of his unit, section 1 of the scheme. I have in this judgment held that in 2017 the body corporate approved the applicant's plans by adopting the minutes of the resolution in terms of section 5(1) of the Schemes Management Act, approving same in April 2017. The inevitably result of this finding is that the applicant has established his right to an order entitling him to implement the 2017 plans. Insofar as the 2019 plans are concerned, I have found that the plans constitute an internal configuration of the extended apartment and that such configuration does not amount to the waiver of the applicant's approval obtained in 2017. As to the respondents' claim of prescription, I have found that both on the facts and on the law, the approval of the plans has not prescribed. Finally, I have held that the first respondent is not properly before court as the resolution which purports to extend the restriction of the amount of R15 000.00 on the costs incurred is *ultra vires* as members of the body corporate were not consulted. In similar vein, I have held the appointment of J C Van Der Walt attorneys to be

irregular. It follows that in the light of the success of the applicant's application, the costs should be borne by the second, the fourth, the fifth and the sixth respondents jointly and severally, the one paying, the other to be absolved.

Order

[104] In the circumstances, the following order is issued.

104.1 The respondents are directed to consider the applicant's request for approval of his plans for construction by way of the extension of section 1 of the Merriman Court Sectional Title Scheme attached to annexure JWG 15 of the founding affidavit.

104.2 It is declared that the applicant is permitted to implement his 2917 plans for construction by way of the extension of section 1 of the Merriman Court Sectional Title Scheme, which are attached as annexure JWG13 to the founding affidavit.

104.3 The second, fourth, fifth and sixth respondents shall be jointly and severally liable for the costs of this application, the one paying, the other to be absolved.

NDITA; J

JUDGE	:	NDITA, J
JUGDMENT DELIVERED BY	:	NDITA, J
FOR APPLICANT	:	Adv. R G PATRICK
FOR RESPONDENT	:	Adv. D VAN DER MERWE
DATE OF HEARING	:	21 April 2021
DATE OF JUDGMENT (Reasons)	:	15 SEPTEMBER 2021