



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO:
22616/2019

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHERS JUDGES: NO
- (3) REVISED

20/1/19

DATE

[Signature]

SIGNATURE

In the matter between:

HEATHERVIEW ESTATE EXTENSION 24

HOME OWNERS ASSOCIATION (NPC)
(Registration number: 2006/024/076/08)

Applicant

And

MAHLATSE TRADING ENTERPRISE CC AND 101 others

Respondents

JUDGMENT

RANCHOD J

[1] I heard this application in the urgent motion court where it is often difficult, if not impossible to give a detailed judgment due to constraints of time and the many matters enrolled for the week. One does the best one can in the circumstances.

[2] In this matter, the applicant – a Home Owners Association, which is a not-for-profit company (NPC) - seeks on an urgent basis relief as set out in the notice of motion. Prayer 1 is the usual application to dispense with the forms and services provided for in Uniform Rule 6(12). I detail the relief sought in the prayers:

- “2. It is declared that the purported shareholders meeting that was held on 25 March 2019 was unlawful and invalid;
3. It is declared that all of the resolutions that were purportedly adopted at the unlawful and invalid meeting of 25 March 2019 are unlawful and void;
4. Any and all of the 1st to 56th respondents are interdicted and restrained from:
 - 4.1. Holding themselves out to be directors of the applicant;
 - 4.2. Exercising or purporting to exercise any of the powers of the directors of the applicant;
5. The 1st to 56th respondents pay the costs of this application on a scale as between attorney and client, jointly and severally, the one to pay the other to be absolved;
6. Further and/or alternative relief.”

[3] It should be noted that although 102 respondents are cited (they are all the members of the applicant) the relief sought is against the 1st to 56th respondents.

[4] The answering affidavit is headed "1st to 43rd, 47th to 52nd, 55th, 56th and 79th respondents' answering affidavit." That is, a total of 52 of the 102 respondents. The deponent to the Answering Affidavit says they are the majority of the homeowners of the applicant and its shareholders and who are the "disgruntled members / shareholders of the NPC."

[5] For the sake of convenience, my reference to "the Respondents" will henceforth be a reference to these disgruntled members.

[6] The respondents oppose the application firstly, on the grounds it lacks urgency. After hearing the parties on the question of urgency, I ruled that the matter was indeed urgent and the parties then argued the matter on its merits.

[7] The applicant alleges that the respondents are members of the applicant and are part of what it calls a "dissident group of members", who have unlawfully and in contravention of both the Act and the applicant's MOI purported to convene a members' meeting on 25 March 2019. At this unlawful meeting, the dissident members purported to adopt resolutions to remove the applicant's lawfully appointed directors and to substitute them with new directors; remove the applicant's duly appointed manager, JRL (the 101st respondent); and amend the MOI by deleting article 3.13 (being the article that prohibits members that do not pay their levies from voting)

without having given proper notice of the meeting; without a quorum being present; and in circumstances where they were barred by the MOI from voting. The applicant further alleges that the dissident members did so despite been aware that they cannot resort to self-help and should approach a court for an order that the directors convene such a meeting - the vast majority of the dissident members previously having unsuccessfully applied to this court for precisely such an order and already having made application to the Community Schemes Ombud Service (the CSOS) - which application is still pending - for the same relief as that which the dissident members attempted to obtain through the unlawful self-help meeting. The unsuccessful application was dealt with by Thlapi J.

[8] I must say that the reference to the Memorandum of Association appears to be incorrect. The annexure to the papers, which is referred to as the MOI is in fact the Articles of Association (the AoA). I will therefore refer to it as the latter.

[9] It is further stated by the applicant that having purportedly adopted the resolutions, the supposed new directors, without disclosing their identities, sent correspondence to all of the applicant's members to advise them that an alternative bank account had been opened into which levies are to be paid and that the lawfully elected directors of the applicant are no longer recognized as board members of the applicant. Further, the supposed new directors went on to state that JRL is no longer recognized "as a board member of the applicant" and a meeting is to be convened to appoint a task team that will source and appoint "new administrators"; and the new directors "are working on the handover plan of the [applicant's]

bank account as well as detail line transactions of the [applicant's] financials".

[10] The applicant goes on to say the practical effects of this conduct of the supposed new directors and misrepresentations are that members do not pay their levies to the applicant which in turn leads to the applicant being unable to pay its debts as and when they become due and payable. It then goes on to detail the further negative effects of the actions of the respondent's and the supposed new directors. I will not detail them here as they are in the application. In any event they are not germane to the crisp issue.

[11] The crisp issue before me is whether the respondents held a lawfully constituted meeting with the required quorum and whether the resolutions passed have legal effect.

[12] Central to this issue is the meaning and effect of section 61 of the Act - in particular subsections (3) and (12).

[13] On 20 February 2019, the respondents caused a notice for an Annual General Meeting (AGM) to be attached to the main entrance of the Township. The deponent to the Founding Affidavit says it was visible for all members entering and exiting the premises. The next day the respondents' legal representatives sent a notice on their behalf in terms of section 61(3) (a) of the Companies Act to the then board of directors asking them to convene a meeting of members. The respondents say there was no response from the board or from the managing agent, JRL. It is further

alleged, that the signatories to the notice now constitute the majority of the respondents and the majority of members of the Association. The notice of the meeting was also circulated on 22 February 2019 amongst those members who were part of a WhatsApp group who, it is alleged, are the majority of the members of the Association and therefore all communication is mainly within that group. Thereafter on 17th of March 2019, say the respondents, each homeowner was directly approached and handed a copy of the notice.

[14] Section 61(3) provides, and I quote:

"Subject to subsection (5) and (6) the board of a company, or any other person specified in the company's memorandum of incorporation or rules, must call a shareholders meeting if one or more written and signed demands for such a meeting are delivered to the company, and

(a) each such demand describes the specific purpose for which the meeting is proposed; and

(b) in aggregate, demands for substantially the same purpose are made and signed by the holders, as of the earliest time specified in any of those demands, of at least 10% of the voting rights entitled to be exercised in relation to the matter proposed to be considered at the meeting."

[15] The applicant submits that the relevant section provides that it is the directors who must convene the meeting and therefore the convening of the meeting by the respondents on their own volition was unlawful. Furthermore, says the applicant, if the board fails to convene the meeting in response to the notice in terms of section 61(3) then the respondents

should proceed in terms of subsection (12).

[16] Subsection (12) provides:

"If a company fails to convene a meeting for any reason other than as contemplated in subsection (11) -

(a) at a time required in accordance with its memorandum of incorporation;

(b) when required by shareholders in terms of subsection(3); or

(c) within the time required by subsection (7),

a shareholder may apply to a court for an order requiring the company to convene a meeting on a date, and subject to any terms, that the court considers appropriate in the circumstances."

[17] The respondents' stance is that they were not obliged to approach the court having regard to the fact that the word 'may' is used in subsection (12). Hence they convened a meeting themselves. The applicant concedes that the word 'may' is not peremptory.

[18] Section 61(1) provides:

"The board of a company, or any other person specified in the company's memorandum of incorporation or rules, may call a shareholders' meeting at any time."

[19] It is not the respondents' case that they are empowered by the MOI (or the AoA for that matter) or any rules of the applicant to convene a shareholders' meeting.

[20] In the general notes to section 61 in *Henochsberg on the Companies Act 71 of 2008*, volume 1 published by LEXIS-NEXIS it is stated in relation to section 61(1) that:

"General meetings are ordinarily convened by the directors, and a majority shareholder cannot usurp this power."

[21] In *Commentary on the Companies Act of 2008*, JL Yeats *et al*, Vol. 1, Juta, at 2-1231 [Original Service, 2018] the learned authors state:

'If a company fails to convene a meeting for any reason other than those contemplated in s 61(11) . . . the Act gives a shareholder the power to apply to the court for an order requiring the company to convene a meeting'

[22] It seems therefore that whilst shareholders or members may in terms of section 61(3) request the board to convene a meeting, it is the board that must in fact do so and where the shareholders or members convene the meeting themselves, it is unlawful. Their remedy, where the directors refuse or fail to convene a meeting on request in terms of s61(3) lies in subsection (12) i.e. to approach a court.

[23] It seems to me therefore that the respondents' contention that since section 61(12) is not peremptory they may convene a meeting is misplaced. It follows therefore that the meeting was unlawfully constituted. In this regard it is to be remembered that the Act is a codification of the rights and powers of directors and members and the company itself.

[24] One of the objectives of convening the meeting was to remove the

existing directors. However, s71 provides for removal of directors.

[25] Submissions were also made by the parties on whether there was a proper quorum at the meeting in question. In my view, I need not consider this or any of the other issues raised (save for the provisions of Schedule 1 to the Act, which I deal with below) as the determination that the meeting was unlawfully convened by the respondents is dispositive of the other issues.

[26] Counsel for the respondents referred to s4(2) of Schedule 1 to the Act and clause 3(13) of the AoA and, as I understood the submissions, argued that the AoA are defective in that they do not provide for a distinction of shareholders as voting and non-voting shareholders. The AoA also does not define 'privileges' of shareholders. In my view, the respondents should have raised these issues in a counterclaim for this court to deal with them. They did not. Hence, it is not an issue properly before this court. In any event, whether voters are classified as voting or non-voting is irrelevant. According to the AoA those members who are in arrears with their levies are precluded from voting.

[27] Counsel for the respondents relied on *CDH Invest NV v Petrotank South Africa (Pty) Ltd and another* [2018] 1 All SA 450 (GJ) at paras 79-81 for the contention that the board of directors had a duty to convene a meeting when the notice in terms of s61(3) was served. In my view, the cited case does not advance the respondents' case. As I have already said, the respondents' remedy where the directors failed to convene the meeting was to apply to court in terms of subsection (12). In *CDH Invest* the

majority shareholder had done exactly what the respondents should have done in this matter, i.e. apply to the court to compel the directors to convene a meeting. The reliance on paragraphs 79 to 81 of the judgment for the respondents' stance that they could convene a meeting is in my view misplaced. As I understand the learned Judge (Van der Linde J) he was of the view that intervention by the court is not there for the asking. At para 82 the learned judge goes on to say that the intention of the Legislature must have been to invoke the oversight role of the court. Hence the court would first have to be satisfied whether the calling of a members' meeting was *bona fide*, had a legitimate purpose and in the best interests of the company. The reason for this is that a court generally declines to interfere in the management of a company's affairs. It could not have been intended, reasoned the learned judge, that the court should act as a mere rubberstamp of technical compliance by means of a prior statutory demand. With respect, I cannot fault the reasoning.

[28] There remains the question of costs. The applicant in the notice of motion seeks costs on an attorney and client scale. However, at the hearing counsel for the applicant informed me that the applicant will not pursue punitive costs any longer and will be content with an order that the costs follow the result. Counsel for the respondents submitted that an appropriate order would be that each party bear its own costs. In my view, the relevant sections of the Act were clear - yet the respondents chose to embark on the course of action that they did. Also, an order that each party pays its own costs would have the effect that the remaining respondents would also be footing the bill (through the payment of levies) of the HOA in circumstances where they did not participate in the actions of the 1st to 56th

respondents save for the 79th respondent. The applicant did not seek costs against the 79th respondent.

[29] In the circumstances an order is granted in terms of prayers 2, 3 and 4 of the notice of motion. The 1st to 56th respondents are ordered to pay the costs of the application.



RANCHOD J.

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances

Counsel on behalf of Applicant	: Adv S. J. Labuschagne
Instructed by	: E. Y. STUART INCORPORATED ATTORNEYS 270 MAIN STREET, BROOKLYN PRETORIA
Counsel on behalf of Resps. 1 – 56	: Adv O. Mokgotho
Instructed by	: De Swardt Myambo Attorneys 941 Jan Shoba Street Cnr Jan Shoba & Mackenzie Street, Brooklyn, PRETORIA.
Date Heard	:15 May 2019
Judgment handed down	:20 May 2019.