IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
DATE	SIGNATURE

CASE NO: A637/2013

CASE NO: 16173/2012

DATE: 14/7/2015

IN THE MATTER BETWEEN

THE BODY CORPORATE OF THE FALCONS	APPELLANT
AND	
MARTINUS PETRUS RADEMAN	1ST RESPONDENT
HOFFIE HOFFMEYER	2ND RESPONDENT
JOHANNA MARIA PISTORIUS	3RD RESPONDENT
LENA ERSKINE	4TH RESPONDENT
JACQUES HODSDON	5TH RESPONDENT

JUDGMENT

PRINSLOO, J

[1] This is an appeal against a judgment by this court, dated 5 December 2012, with Molefe, AJ (as she then was) sitting as the court of first instance.

[2] On 12 June 2013, the learned Judge gave leave to appeal to the Full Court of this Division. This is the appeal which came before us.

[3] In the hearing *a quo*, the appellant was the unsuccessful applicant, with the respondents successfully resisting the application.

[4] The learned Judge ordered that the costs of the application for leave to appeal would be costs in the appeal.

[5] Before us, Mr Louw SC appeared for the appellant, and Mr Schabort appeared for the respondents.

Condonation application: the late filing of the appellant's Notice of Appeal

[6] According to the calculations of the appellant's attorney of record, the Notice of Appeal was filed twenty nine days late. It had to be filed within twenty days from 12 June 2013 when leave to appeal was granted.

[7] Already in September 2013, the appellant, having unsuccessfully tried to persuade the respondents' attorney to condone the late filing of the document, filed a substantive application for condonation. The application was supported by an affidavit deposed to by the appellant's attorney of record.

[8] Before us, the application did not receive particular attention, and counsel were allowed to address us on the merits. However, the application was not formally abandoned, so that it remains necessary to pronounce on the fate thereof.

[9] The sole cause of the late filing of the appellant's Notice of Appeal, was a negligent oversight on the part of the appellant's attorney, which oversight he readily admitted when deposing to the supporting affidavit.

In broad summary, the position is as follows: the attorney got married in March 2013, and organised a belated honeymoon with his new bride in Cuba for the period 7 to 21 June 2013. Leave to appeal was therefore granted during the absence of the attorney. He got back to office on 21 June 2013, confronted by an enormous amount of work. In his haste to reduce the backlog of work, he lost sight of the fact that the Notice of Appeal had to be filed within twenty days from 12 June 2013. On 16 August 2013, the file was brought to him for his attention. Quite properly, the attorney admits that he was under the incorrect impression that the order granting leave to appeal was sufficient and that the application would proceed to the appeal stage without a further formal notice. Afterwards he consulted the rule and realised his mistake. In his haste, he, initially, filed an incorrectly worded document with the title "Application for a Trial Date" and not "Notice of Appeal". He corrected the error on 22 August by filing a correctly worded document. He apologised for the oversight, which could not be laid at the door of his client.

[10] As it turned out, there was no real inconvenience on the part of anybody and, certainly, no prejudice in the true sense of the word. The appeal was only heard almost two years after the filing of the Notice of Appeal.

[11] In the notice of motion of the substantive application, costs were also tendered to the respondents on the unopposed scale.

[12] The condonation application was opposed. An opposing affidavit was filed and, for good measure, the respondents also filed a notice in terms of rule 30(2)(b) alleging an irregular proceeding on the part of the appellant for filing the Notice of Appeal out of time (it was due on 10 July 2013), and calling on the appellant to remove the cause of complaint by withdrawing the Notice of Appeal. I will treat the rule 30 notice as part of the condonation application, and the opposition thereto, for purposes of deciding the application and the issue of costs.

[13] Because of the view I take of the matter, I deem it unnecessary to deal with all the arguments raised by the respondents in opposition to the condonation application. It must be recorded, however, that one of the grounds of opposition is that the prospects of success of the appeal is one of the main considerations when the condonation application has to be decided, and if the prospects are considered to be poor, a court should be slow to grant condonation.

[14] In Herbstein and Van Winsen, *The Civil Practice of the High Courts of South Africa*, 5th edition, volume 2, the following is said at page 1227:

> "It has already been observed that a failure by a party to comply properly or timeously with the rules governing appeals may in its discretion be condoned by the Court of Appeal. Particular provision on the point is made by statute or rules of court in the case of appeals from the magistrates' courts, appeals to the full court of a provincial division and appeals to the Supreme Court of Appeal, but the court has in any event inherent jurisdiction to grant relief, even in the absence of any such provision.
>
> In *Suidwes-Afrikaanse Munisipale Personeel Vereniging v Minister of Labour* (the reference is 1978 1 SA 1027 (SWA) at 1038B-C) Hart AJP held that the principle has now been firmly established that, in all instances of time limitation, whether statutory or in terms of the rules of court, the Supreme Court had an inherent right to grant condonation when principles of justice and fair play demand it to avoid hardship and when the reasons for non-compliance with time limits have been explained to the satisfaction of the court."

(I do not quote all the references from the footnotes, for the sake of brevity.)

In dealing with the requirement that prospects of success on the merits ought to be shown for purposes of obtaining condonation, the learned authors say the following on page 1233:

> "The court will not, for instance, require an applicant to show a prospect of success on the merits where the failure to comply with the rules is due entirely to circumstances beyond his control, for example the illness of the magistrate."

In my view, the same principle applies in the present matter. Although the learned authors do point out, on page 1233, that courts will be slow to grant condonation where the prospects are considered to be very poor, they also say the following on page 1234:

> "A reasonable prospect of success on appeal is naturally an important consideration relevant to the granting of condonation, but it is not necessarily decisive in every case. Standing alone, it cannot in itself be conclusive."

(Reference to authorities listed in footnotes is again omitted.)

[15] In all these circumstances, and despite my negative view of the merits of the appeal, as will appear later in this judgment, and where we were fully addressed on the merits of the case during the hearing, I have come to the conclusion that this will be an appropriate case for granting the condonation. I am not persuaded that the opposition to the application was unreasonable in this particular case. Consequently, I have come to the conclusion that justice will best be served by ordering the costs, on the opposed scale, flowing from the condonation application, to be costs in the appeal.

[16] What remains, is for me to order, as I do, that the condonation is granted.

<u>The background of the case, and a brief overview of the issues between the parties</u>

[17] The appellant, as cited, purports to be the "Body Corporate" of a so-called "sectional titles development scheme" which was created, and is governed, in terms of the provisions of the Sectional Titles Act no 95 of 1986 ("the Act").

[18] The name of the development scheme, in this case, is "the Falcons".

The Falcons consists of 79 individual sectional title units and the development is situated in Pretoria, relatively close to the Union Buildings. In the founding affidavit, the Falcons is described as "an upmarket" development with the individual sectional title units being "considerably more valuable than the average sectional title unit in South Africa".

[19] In terms of the provisions of section 35 of the Act, a development scheme, such as The Falcons, shall, as from the date of the establishment of the Body Corporate be controlled and managed subject to the provisions of the Act and by means of certain "management rules" and "conduct rules".

In terms of section 36, and with effect from the date on which any person other than the developer becomes an owner of a unit in a scheme, there shall be deemed to be established for that scheme a Body Corporate of which the developer and such person are members, and every person who thereafter becomes an owner of a unit shall be a member of that Body Corporate.

The Body Corporate shall, subject to the provisions of the Act, be responsible for the enforcement of the rules referred to in section 35.

In terms of section 37, the Body Corporate is endowed with certain functions which it shall perform and in terms of section 38, it is endowed with certain powers which it may exercise.

In terms of section 39, the functions and powers of the Body Corporate shall, subject to the provisions of the Act, the rules and any restriction imposed or direction given at a general meeting of the owners of the sections or units, be performed and exercised by the Trustees of the Body Corporate holding office in terms of the rules.

In terms of section 40, each Trustee of a Body Corporate shall stand in a fiduciary relationship to the Body Corporate. This means that a Trustee shall, in relation to the Body Corporate, act honestly and in good faith and avoid any material conflict between his own interests and those of the Body Corporate.

[20] It is against this statutory background, that the following happened:

(i) In June 2011, the deponent to the founding affidavit, Dr Nicholas van Straaten, ("Dr Van Straaten") and four other owners of units at the Falcons were elected as Trustees of the Body Corporate at a duly convened Annual General Meeting of the applicant.

Two of the elected Trustees resigned and they were replaced by the Trustees at a Trustee meeting of 3 August 2011. The "replacements" duly co-opted, were Mr Louis Swart ("Mr Swart") and Ms Cari Jordaan ("Ms Jordaan").

The other two duly elected Trustees, who did not resign, were Ms Trix Theron ("Ms Theron") and Mr Pieter Theron ("Mr Theron").

I will refer to these five persons as "the former Trustees" as did the learned Judge *a quo*.

(ii) It is common cause that there was tension between the former Trustees and, what appears to be, the majority of the other owners or members of the Body Corporate. Details appear from the papers about certain complaints which other members had against the former Trustees, and, in particular, Dr Van Straaten. I consider it unnecessary to particularise those complaints.

(iii) On 14 November 2011, some of the owners of units, and members of the Body Corporate, gave notice that they wanted a Special General Meeting ("SGM") convened. It is common cause that the necessary quorum, prescribed by the rules, filed this request. A petition was also signed by aggrieved owners.

The former Trustees responded by indicating that an SGM would be arranged for 30 March 2012. The aggrieved members of the Body Corporate did not accept this offer and convened an SGM for 9 February 2012. They did so with the assistance of a former managing agent (appointed in terms of the rules), Trafalgar Property Managers. The aggrieved members, and their units, were listed in the request to convene the SGM. A detailed agenda for the meeting was circulated. There were fourteen items on the agenda and four of them, which may be of relevance, read as follows:

"7. Majority of Trustees is not owners.

8. Trustees disregard restrictions as per attached [annexure B].

9. Possible conflict of interest between Trustees and Bluestrata Properties.

11. Determination of the number of Trustees and election of Trustees."

(iv) At the SGM of 9 February 2012, forty five owners were present in person or by proxy. The previous managing agent (Trafalgar) was represented and so was the current managing agent at the time (Pro Admin).

Some of the former Trustees, then in office as Trustees, were present but refused to answer questions from the floor.

During the course of the meeting, one Mr Figgins proposed a motion that the agenda be extended to make provision for an item dealing with the removal of the former Trustees (then current Trustees) and the election of new Trustees. The vote was carried with an overwhelming majority of forty three to three.

After a lively debate, the present five respondents were elected as Trustees in the place of the former Trustees, who were duly relieved of their positions. This process was also carried by an overwhelming majority.

I add that, at the meeting and during the debate, it was argued on behalf of the former Trustees that they could not be relieved of their posts because they were not notified, in the formal notification, that an agenda point would be aimed at removing the Trustees. A counter argument recorded in the minutes of the SGM was that the intention was clear that the meeting was convened for the purpose of electing new Trustees, because of the item on the agenda "determination of the number of Trustees and election of the Trustees".

(v) On 12 March 2012 the respondents (then the newly elected Trustees) notified all the owners, as members of the Body Corporate, through the then managing agent, Pro Admin, that an annual general meeting would take place on 27 March 2012 in the Falcons clubhouse. One of the items on the bilingual agenda was -

"11. Trustees

11.1 Determination of number.

11.2 Election of Trustees."

At the duly constituted Annual General Meeting ("AGM") of 27 March 2012, and with the necessary quorum present, the respondents were again elected as Trustees.

(vi) On or about 23 March 2012 the former Trustees launched the application which was dismissed by the learned Judge *a quo* and which forms the subject of this appeal. It is not clear when the application was served on the respondents, because the stamp of the Deputy Sheriff bears the date of 18 April 2012 which would have been after the 27 March AGM. There are no returns of service in the file. The answering affidavit is only dated 23 May 2012.

The relevant prayers in the notice of motion, initially set down for 14 May 2012, but eventually only heard on 12 November 2012, read as follows:

"1. Setting aside a resolution taken by the members of the applicant to terminate the appointment of the persons referred to in paragraphs 5.2.3, 5.2.4, 5.4.1 and 5.4.2 of the founding affidavit as Trustees and to appoint new Trustees at a Special General Meeting on 9 February 2012;

2. That the respondents be interdicted from:

   2.1 representing themselves to be the elected Board of Trustees;

   2.2 interfering illegally and contrary to the provisions of the Sectional Titles Act and the Rules issued thereunder, with the business and management of the applicant in any way or manner."

There was also a prayer for costs to be paid on the punitive scale by the respondents.

The people listed in the paragraphs mentioned in prayer 1 are four of the former Trustees, Ms Theron, Mr Theron, Mr Swart and Ms Jordaan. Surprisingly, Dr Van Straaten, no doubt the leader of the former Trustees, is not mentioned in prayer 1 of the notice of motion, so that his removal as a Trustee does not appear to be challenged. Nevertheless, I consider this to be an oversight and a point not worth dwelling on.

(vii) Significantly, the former Trustees, who launched this application well after the 12 March notification of the 27 March AGM was circulated, at no stage challenged the validity of the 27 March AGM, neither did they, for example, attempt to stop the meeting through legal action, neither did they at any stage attack the validity of any of the decisions taken at the 27 March AGM, including the appointment of the respondents as Trustees.

(viii) The main thrust of the argument of the former Trustees, in support of their application, is based on the provisions of Management Rule 13(e). The rule reads as follows:

> "13. A Trustee shall cease to hold office as such –
>
> (a) ...
>
> ...
>
> (e) if by resolution at a general meeting of the Body Corporate, he is removed from his office, provided that the intention to vote upon the removal from office has been specified in the notice convening the meeting."

The former Trustees argue that the notice they received of the 9 February SGM, including the agenda, do not specifically provide for an item aimed at removing them from office. I have listed what I consider to be relevant items on that agenda.

My *prima facie* view is that, where the agenda contained items consisting of complaints that the majority of the Trustees is not owners of the units, that the Trustees disregard restrictions set out in an annexure, that there is a possible conflict of interest between the Trustees and Bluestrata Properties and also provision for an election of Trustees, there was substantial compliance with the requirements of rule 13(e). The former Trustees were also present at the meeting and also represented by their attorney, one of those attending the SGM.

Moreover, in their opposing affidavit, the respondents rely on the provisions of Management Rule 11. In the work by Van der Merwe, *Sectional Titles, Shareblocks and time-sharing*, volume 1, the learned author says the following at 14-152:

> "14.5.11 **Validity of acts by Trustees**
>
> The rules provide that any act performed by the Trustees shall be valid, notwithstanding that it is subsequently discovered that there was some defect in the appointment or continuance in office of any Trustee."

In the footnote, the learned author refers to Management Rule 11 and also compares it to rule 9 of schedule 1 of the New South Wales Strata Titles Act 68 of 1973.

The respondents raised this issue in the opposing affidavit but, in reply, Dr Van Straaten did not counter the point.

In view of the aforegoing, it appears that, even if their appointment on 9 February was flawed (which appears not to be the case) the subsequent actions of the respondents, as newly elected Trustees, to, for example, arrange the 27 March AGM, with the subsequent further election of the respondents as Trustees, was valid.

The learned Judge *a quo*, in her judgment, dealt comprehensively with this issue in the following terms:

"[19] It is my view that the owners in this case were empowered to call the extraordinary special meeting, to pass a vote of no confidence and to remove the Trustees. They submitted the notice of the Special General Meeting to the Body Corporate which was signed by the statutory (*sic*, should be statutorily) prescribed number of owners and I find nothing unlawful about their actions. Annexure 8 rule 13(e) also supports my view; in terms of this rule a Trustee may be removed from office before the expiry of his or her term of office by a resolution passed by a simple majority at a special meeting of the Body Corporate.

[20] At a general meeting held on 27 March 2012, the respondents were elected as the new Trustees for the second time, clearly showing the wishes of the majority of the owners. The former Trustees were notified of the annual general meeting of 27 March 2012 and that an election of new Trustees will take place. They did not take any steps to prevent the Annual General Meeting and have clearly associated themselves with the validity and the result of the election at the Annual General Meeting. Furthermore, in terms of Management Rule 11, any act performed by the Trustees shall, notwithstanding that it is

> after the performance of the act discovered that there was some defect in the appointment or continuance in office of any Trustee, be as valid as if such Trustee has been appointed.
>
> [21] The issue of the appointment of the new Trustees at the Annual General Meeting of 27 March 2012 has become purely academic. Even if it was found that the resolution taken at the Special General Meeting of 9 February 2012 was invalid, (which is not the case) it is irrelevant in the face of the Annual General Meeting held on 27 March 2012. The appointment of the new Trustees on 27 March 2012 is therefore valid."

[21] In all the circumstances, and for the reasons mentioned, I find myself in respectful agreement with the reasoning of the learned Judge *a quo*, and I am of the view that the appeal, for this reason alone, ought to fail.

[22] So much for the introduction and the issues between the parties.

<u>Mootness</u>

[23] Section 16 of the Superior Courts Act 10 of 2013 provides for "appeals generally".

Section 16(2)(a)(i) provides "when at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone".

[24] Mr Schabort referred us to *Radio Pretoria v Chairman, Independent Communications Authority of South Africa and Another* 2005 1 SA 47 (SCA) where the court applied the provisions of the similarly worded section 21A(1) of the, now repealed, Supreme Court Act 59 of 1959:

> "(1) When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone."

At 56G-H the learned Judge of Appeal refers to *Premier, Provinsie Mpumalanga, en 'n Ander v Groblersdal se Stadsraad* 1998 2 SA 1136 (SCA) where the learned Judge of Appeal, in that case stated at 1143A-C:

> "Die bedoeling van artikel 21A van die Wet op die Hooggeregshof is klaarblyklik om die drukkende werklas van howe van appèl te verlig. Appèlle behoort slegs vir beregting voorgelê te word as daar 'n werklike, praktiese uitwerking of gevolg van 'n uitspraak van die hof van appèl sal wees ..."

[25] In this case, the 27 March 2012 AGM, where the respondents were, for the second time, elected as Trustees, took place more than three years ago. As I pointed out, the validity of that meeting, and the resolutions there taken, were not challenged in any way by the former Trustees.

[26] On 17 March 2015, the respondents' attorney wrote a lengthy letter to the attorney for the appellant (*de facto*, the attorney representing the former Trustees) suggesting that

the appeal is moot and proposing that the appeal be withdrawn. It is convenient to quote extracts from this letter:

> "4. We in particular wish to draw your attention to section 16(2)(a) of the Superior Courts Act, which provides that where the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.
>
> 5. Since the initial launching of the application in the court *a quo* events have simply superceded the application as you may have been informed by your client.
>
> 6. Various general meetings were since held at which new Trustees were from time to time elected. The election of Trustees as it occurred from time to time were not objected against or sought to be impugned. Both as a matter of fact and law the election of later Trustees were therefore valid. As matters presently stand, none of the respondents are currently Trustee of the Body Corporate and more than 5 general meetings, where Trustees have been elected, took place since February 2012.
>
> 7. In the circumstances, it is pellucid (<u>my note</u>: I did not know what this word meant and looked it up. It means 'clear in style or expression') that even should the appeal succeed it will have no practical effect or result whatsoever."

And:

> "11. It is our instructions to inform you that the issue of mootness will be addressed and dealt with in the heads of argument on behalf of our client. This letter will also be handed to the presiding judges at the

> hearing of the appeal in order to bring to their attention the contents of this letter."

[27] The letter was not met with any favourable response. The former Trustees pressed on regardless.

[28] It is obvious, given the history of this particular case, that the issues, in the spirit of section 16 of Act 10 of 2013, "are of such a nature that the decision sought will have no practical effect or result ..."

The 9 February 2012 SGM took place more than three years ago. A second, unchallenged, decision was taken at the 27 March AGM, appointing the respondents as Trustees. This was followed, over the years, by some five other similar meetings and appointments. The respondents are no longer Trustees. None of the subsequent decisions was challenged. Even if this court were to declare the appointment of the respondents as Trustees at the 9 February 2012 SGM flawed, it would have no practical "effect or result" for present purposes.

In my view, this is clearly a case falling inside the ambit of section 16(2)(a)(i), and, for that reason also, the appeal falls to be dismissed.

[29] I add that, in supplementary heads of argument, Mr Louw submitted that the issues in this appeal cannot be said to involve "an academical question or a matter providing legal advice" by the court to the parties. He argued that the Management Rules, the interpretation thereof and the application thereof to the practicalities of the

management of the Falcons are all at issue. He referred to a passage from *MEC for Education, Kwa-Zulu Natal and Others v Pillay* 2008 1 SA 474 (CC) at 486B-E where the learned Chief Justice said the following:

> "[32] With regard to mootness, this court has held that 'a case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law' (<u>my note</u>: the learned Chief Justice refers to *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at 18H-19B and authorities there quoted). Sunali is no longer at DGHS and the isue is therefore moot. This court has however held that it may be in the interests of justice to hear a matter even if it is moot if 'any order which [it] may make will have some practical effect either on the parties or on others'. The following factors have been held to be potentially relevant
>
> - the nature and extent of the practical effect that any possible order might have;
> - the importance of the issue;
> - the complexity of the issue;
> - the fullness or otherwise of the argument advanced; and
> - resolving disputes between different courts."
>
> (References in footnotes omitted.)

In my view, none of these examples of whether a case may be heard even when it is moot, is applicable to the present case. The reasons I have mentioned. In any event, the test for mootness in the Supreme Court of Appeal (the case under consideration does not have a constitutional flavour, in my view) is different from what it may be in the Constitutional Court such as *Pillay*, referred to by Mr Louw: in *Absa Bank Ltd v P J J Van Rensburg and Another* (228/13) [2014] ZASCA 34 (28 March 2014) the Supreme Court of Appeal also had occasion to apply section 21A of the Supreme Court Act 59 of 1959 ("Act 59 of 1959"). In paragraph [7] the following is said:

> "According to section 21A(1), if the issues in an appeal 'are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone'. These provisions set a direct and positive test: whether the judgment or order will have a practical effect or result and not whether it might be of importance in a hypothetical future case (<u>my note</u>: here the learned Judge of Appeal refers to the case of *Groblersdalse Stadsraad*). As a result, this court will not 'make determinations on issues that are otherwise moot merely because the parties believe that, although the decision or order will have no practical result between them, a practical result could be achieved in other respects'."

(References to footnotes omitted.)

In *Absa Bank*, notably paragraphs [8] to [12], the learned Judge of Appeal considered matters where, despite mootness, it was decided to hear the appeal in any event. The example mentioned in paragraph [10] is the well-known case of *Sebola v Standard Bank* 2012 5 SA 142 (CC) where the court held, at 150D-F, that the case was moot, but said the following:

> "Yet mootness is not an absolute bar to deciding an issue. That is axiomatic: the question is whether the interest of justice require that it be decided

(my note: the learned Judge refers to another Constitutional Court case, that of *Van Wyk v Unitas Hospital and Another* 2008 2 SA 472 (CC) at paragraph [29]). One consideration is whether the court's order will have any practical effect on either the parties or others."

In *Absa Bank*, paragraph [10] footnote 14, the learned Judge of Appeal points out that the "provisions of the Act, (a reference to Act 59 of 1959) including section 21A, did not apply to the Constitutional Court which uses a different yardstick, the interests of justice test, in deciding whether to hear an appeal whose issues have gone dead".

On this authority, Mr Louw's argument cannot avoid an adverse finding against the appellant on the ground of mootness. In any event, I have expressed the view that the examples mentioned in *Pillay*, quoted above, do not apply to the present case.

I add, as a matter of interest, that counsel for the appellant in *Radio Pretoria* attempted a similar approach, without success. See the judgment at 55B-D where counsel attempted to persuade the court that a decision on the interpretation of a certain Act and on the correctness of ICASA's refusal in respect of the employment practice "would be useful as a guide for the court reviewing ICASA's decision in respect of the four year licence application and to other broadcasters who might experience similar problems".

[30] For all these reasons, I have come to the conclusion, and I find, that the appeal also falls to be dismissed on the ground of mootness: on the basis of the facts of this case and the principles I have attempted to summarise, I agree with the submissions by counsel for the respondents that the granting of the relief sought in prayer 1 of the

notice of motion cannot invalidate any of the subsequent elections of Trustees and will be of no consequence. It has become academic. Likewise, the relief sought in prayer 2 of the notice of motion will have no practical effect or result in circumstances where not one of the respondents is still a Trustee against whom the interdict sought can be granted. The situation does not represent an existing or live controversy, which should exist if the court is to avoid giving advisory opinions on abstract propositions of law – *National Coalition for Gay and Lesbian Equality, supra*.

Do the former Trustees have the necessary *locus standi* to pursue this appeal, and do they have the necessary authority from the appellant, as cited, to do so?

[31] In my view, there is much to be said for Mr Schabort's argument that the former Trustees, not having been in the proverbial saddle as Trustees for more than three years, do not have the authority from the Body Corporate to pursue the appeal.

[32] Indeed, when the respondents were elected, for the second time, as Trustees, on 27 March 2012, and when they, by then, were made aware of the application, they resolved, at a meeting of Trustees, on 3 May 2012, to withdraw the application.

Subsequently, on about 8 May 2012, the respondents called upon the "applicant" to submit a power of attorney, in terms of Uniform Rule 7(1), "to embark on this action on behalf of the applicant".

In reply to the Rule 7(1) notice, the former Trustees supplied a resolution entitled "round-robin resolution of the Trustees of the Falcons Body Corporate". This resolution, purportedly taken on 27 February 2012, although the date above the signatures of the five former Trustees is left blank, stipulates that Dr Van Straaten "in his capacity as chairperson of the Board of Trustees of the Falcons Body Corporate" is authorised to approach this court to rescind the vote of no confidence passed at the 9 February 2012 SGM and to interdict the "unlawfully elected" respondents from conducting themselves as duly elected Trustees. The five former Trustees, Mr and Ms Theron, Ms Jordaan, Mr Swart and Dr Van Straaten, are mentioned by name in the resolution as the signatories. They also signed the document.

[33] It is perhaps arguable that the five former Trustees, as aggrieved persons, had the *locus standi* to approach the court to set aside their removal and to bring about their reinstatement. They could do so on the strength of their interpretation of the binding effect of Management Rule 13(e).

[34] The issue of *locus standi* was not mentioned in the judgment of the learned Judge *a quo*, neither was the appellant, as cited, non-suited by the learned Judge.

[35] However, the learned Judge found, correctly in my view, that the true litigants were the former Trustees and not the Body Corporate. She said so in the following terms:

> "[22] Regarding the issue of punitive costs, it would be unfair to grant a costs order against the applicant ('the Body Corporate') in the circumstances as the applicant is in reality the former Trustees."

The learned Judge then went on, correctly in my view, to order the former Trustees to pay the costs of the abortive application.

[36] It appears that the former Trustees held the view at the time when launching the application, that they were still the Trustees, with the necessary *locus standi* to proceed in the name of the Body Corporate. Their resolution also predates the AGM of 27 March.

However, in my view, after the 27 March meeting and the (second) election of the respondents as Trustees, the former Trustees ought to have joined themselves as co-applicants in their personal capacities. Their failure to do so, amounts to an abuse of the rules. I also see no basis for holding that the respondents were obliged to join the former Trustees as co-applicants.

[37] In view of the aforegoing, it is obvious that the true litigants or applicants (later appellants) are the former Trustees. Their authority to proceed in the name of and on behalf of the Body Corporate has long since fallen away.

[38] In the result, and whilst I make no formal pronouncement on the *locus standi* of the former Trustees to proceed with this litigation in their personal capacities, as they have in fact been doing, I find that they are clearly the parties to be ordered to pay the costs of the appeal in their personal capacities. To this extent, I also find myself in respectful agreement with the costs order made by the learned Judge *a quo*.

<u>The order</u>

[39] I make the following order:

1. The appeal is dismissed.

2. The former Trustees, jointly and severally, and in their personal capacities, are ordered to pay the costs.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

A637-2013

I agree

M F LEGODI
JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree

M W MSIMEKI
JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 15 APRIL 2015
FOR THE APPELLANT: A J LOUW SC
INSTRUCTED BY: E Y STUART INC ATTORNEYS
FOR THE RESPONDENTS: J W SCHABORT
INSTRUCTED BY: JARVIS JACOBS RAUBENHEIMER INC