

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 025365/2024

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
04/09/2025	
DATE	SIGNATURE

BRIGHTWARD HOMEOWNERS ASSOCIATION

Applicant

and

VELI KHOSA

First Respondent

LEKULA SYDWELL MOFOKENG

Second Respondent

DUMISANI PASCALL ZUMA

Third Respondent

WANDILE MAZULA

Fourth Respondent

TUMI SMITH

Fifth Respondent

JUDGMENT

BRICKHILL AJ:

Introduction

[1] This matter concerns the Helderwyk Estate in Brakpan ("the Estate") its residents, its developers and the applicant, the Brightward Homeowners

Association (“the Homeowners Association”), which is a non-profit company registered in terms of the Companies Act 71 of 2008 (“Companies Act”). The Homeowners Association is responsible for the governance of the Estate. The Estate has more than 750 homeowners, and has various facilities, including a clubhouse, schools from nursery to high school level, and sports fields and facilities. The respondents are Mr Veli Khosa, Mr Lekula Sydwell Mofokeng, Mr Dumisani Pascall Zuma, Mr Wandile Mazula and Mrs Tumi Smith (“the respondent homeowners”), who are all owners of properties in the Estate and members of the Homeowners Association.

- [2] Mnandi Property Development (Pty) Ltd (“the Developer”) developed the Estate and was conferred with rights in the Memorandum of Incorporation (“MOI”), including special voting rights. The Developer is a company controlled by Mr Shane Brown and his son, Mr Wesley Brown. Mr Wesley Brown is the current chairman of the board of directors and deposed to the affidavits filed on behalf of the Homeowners Association.
- [3] The matter was originally set down on 19 April 2024 on the urgent roll to seek interim relief in ‘Part A’ of the application pending the determination in the ordinary course of ‘Part B’, but the matter was struck from the roll for lack of urgency. The Homeowners Association then set it down again on the ordinary opposed motions roll, seeking some portions of their original ‘Part A’ relief and the whole of the ‘Part B’ relief.
- [4] In the main application, the Homeowners Association seeks an order:
 - a. declaring the disputed meeting to have been a nullity and setting aside the resolutions taken at it;
 - b. declaring that it is lawful and within the discretion of the directors of the Homeowners Association to hold members or directors meetings virtually, unless otherwise directed by a resolution of the Homeowners Association duly taken in accordance with the requirements of the Memorandum of Incorporation (“MOI”);

- c. declaring the online platform known as eAGM to be compliant with the MOI and lawful;
- d. declaring the current levies determined by the directors and communicated to members on 19 May 2023 to be lawfully imposed, binding on and payable by members;
- e. interdicting and restraining the respondents further interference with and/or obstruction of the Homeowners Association and its directors in carrying out their functions and duties accorded to them by the MOI.

[5] The respondents in turn brought a counter-application, in which they seek orders:

- a. declaring that they lawfully objected to the Annual General Meeting (“AGM”) held on 20 February 2024;
- b. declaring that meeting unlawful and setting aside resolutions taken at it;
- c. directing the Homeowners Association to reconvene the postponed AGM in person, alternatively referring all disputes between the parties to CSOS for determination;
- d. declaring the Developer’s veto power to constitute oppressive conduct;
- e. directing the Developer to co-operate and participate in a transitional process of handing over control of the Estate to the homeowners, where such a transitional process is to be conducted by Pam Golding as independent entity with no interest in the matter.

[6] As is apparent from the relief sought in the main application and the counter-application, the matter arises from circumstances in which relations have strained, coming to a head around the AGM convened in early 2024. A brief account of the material facts suffices.

[7] On 2 November 2023, the Homeowners Association gave notice of the AGM to be convened virtually on 15 November 2023. As a quorum was not present, the AGM was adjourned for a week to 22 November 2023. When it convened on that

date, there was a technical problem and communication with some members was lost. The AGM was adjourned again to a later date.

- [8] On 11 February 2024, the first respondent (“Mr Khosa”) addressed a letter to the directors of the Homeowners Association requesting that the adjourned AGM be held in person. Mr Khosa stated that 10% of the members had objected to holding the meeting virtually and that the directors were required, in terms of Article 2.21.1.1 of the MOI, to reschedule the meeting, in person at an address within the magisterial district in which the Estate is situated.
- [9] On 20 February 2024, the Homeowners Association purported to reconvene the AGM on a virtual platform (“the virtual purported AGM”). On the same date, the respondent homeowners convened a meeting also purporting to be the reconvened AGM (“the in-person purported AGM”) at which a number of resolutions were taken, including to remove the auditors, appoint new directors and reverse an earlier decision to set levies. It is the validity of the rival virtual purported AGM and the in-person purported AGM that lies at the heart of this matter.
- [10] The parties have each referred several disputes to the Community Schemes Ombud Service (CSOS). However, none of the pending disputes is material to the issues in the present application.
- [11] The main application and counter-application are, in several respects, mirror images of one another. The parties disagree on the lawfulness of virtual members’ meetings. While the Homeowners Association contends that the reconvened virtual purported AGM held on 20 February 2024 was lawful and its resolutions valid, the respondent homeowners contend that it was unlawful. Similarly, the parties dispute the lawfulness of the in-person purported AGM convened by the respondent homeowners. The respondent homeowners also impugn the Developer’s veto power under the MOI. In light of the two applications, the following issues arise for determination:
 - a. the admissibility of the respondent homeowners’ supplementary affidavit and the Homeowners Association’s Rule 30 application in that regard;

- b. the *in limine* objection of non-joinder raised by the respondent homeowners;
- c. whether it is lawful to hold members' meetings virtually and whether members may object;
- d. the lawfulness of the virtual purported AGM;
- e. the lawfulness of the in-person purported AGM;
- f. the validity of the levies;
- g. the interdictory relief sought by the Homeowners Association against the respondent homeowners; and
- h. the Developer's veto power and the complaint that it constitutes oppressive conduct.

The respondent homeowners' supplementary affidavit

[12] After the delivery of all the initial affidavits in the matter, the respondent homeowners delivered a supplementary affidavit on 19 June 2024. The Homeowners Association opposes its admission and has brought an application in terms of Rule 30 to have the affidavit declared an irregular step.

[13] The initial application was made on an urgent basis involving truncated time periods. The respondent homeowners delivered an initial answering affidavit, which also constituted the founding affidavit in their counter-application, under the truncated time periods occasioned by the framing of the application as urgent. Following the delivery of an answering affidavit in the counter-application, they also delivered a replying affidavit. These latter two affidavits were delivered after the matter was struck from the urgent roll. Subsequently, the respondent homeowners delivered a supplementary affidavit dealing in more detail with Part B of the application and the matters raised in their own counter-application.

[14] The court has a discretion in terms of Rule 6(5)(d) to permit the filing of further affidavits. Given the genesis of this application as an urgent application, it is appropriate to admit the supplementary affidavit in order to ensure that all

relevant facts are before the court. Notwithstanding some delay in its filing, the explanation provided by the respondent homeowners is reasonable.

- [15] I accordingly permit the filing of the supplementary affidavit, and the application to have it declared an irregular step is dismissed. In the circumstances, taking into account the delay in delivering the supplementary affidavit, I exercise my discretion to make no order of costs in relation to the Rule 30 application.

Point in limine: non-joinder of other homeowners

- [16] The respondent homeowners argued that the Homeowners Association ought to have joined all the other homeowners, as the application affects them and because many other residents have shown an interest in the application, including by over a hundred of them signing a petition.
- [17] The Homeowners Association confirmed that the application was provided to all homeowners. It is not necessary in a matter involving a company to join all of its shareholders. The interdictory relief sought in this matter is limited to the respondent homeowners. Any other homeowners who wished to intervene had a reasonable opportunity to do so, but they were not necessary parties. I find that it was not necessary to join all of the over 750 homeowners.

The lawfulness of virtual members' meetings

- [18] The parties disagree on the question whether the Homeowners Association may hold meetings of members, including the AGM, on a virtual platform. This issue has implications for the lawfulness of both the virtual purported AGM and the in-person purported AGM, and it is therefore convenient to address it at the outset.
- [19] The respondent homeowners argued that the MOI does not provide for the power to hold meetings on a virtual platform and that it is therefore impermissible to do so. They note that clause 2.13.2, dealing with notice of a meeting, refers to "the place", which they argue means a physical location only. They further invoke clause 2.21.1 of the MOI, which provides that "[m]embers' meetings shall be held within the magisterial district in which the HOA is situated unless it is determined otherwise by the Directors and notice of the address at which the meeting is to

be held, which address falls outside the magisterial district in which the scheme is situated, is clearly stipulated in the notice calling the meeting”. Again, so the argument goes, the language of the MOI contemplates a physical location within the same magisterial district and at a specified address.

[20] Section 63 of the Companies Act specifically contemplates that meetings of shareholders may be conducted by means of electronic communication, providing as follows:

“(2) Unless prohibited by its Memorandum of Incorporation, a company may provide for-

(a) a shareholders meeting to be conducted entirely by electronic communication; or

(b) one or more shareholders, or proxies for shareholders, to participate by electronic communication in all or part of a shareholders meeting that is being held in person,

as long as the electronic communication employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate reasonably effectively in the meeting.

(3) If a company provides for participation in a meeting by electronic communication, as contemplated in subsection (2)-

(a) the notice of that meeting must inform shareholders of the availability of that form of participation, and provide any necessary information to enable shareholders or their proxies to access the available medium or means of electronic communication; and

(b) access to the medium or means of electronic communication is at the expense of the shareholder or proxy, except to the extent that the company determines otherwise.”

[21] Accordingly, unless the MOI prohibits it, the Homeowners Association may provide for a shareholders meeting to be conducted entirely by electronic communication. The Companies Act provides that 'electronic communication' has the meaning set out in section 1 of the Electronic Communications and Transactions Act 25 of 2002 (“ECT Act”), which defines the term to mean “a communication by means of data messages”. Section 1 of the

ECT Act in turn defines 'data message' to mean "data generated, sent, received or stored by electronic means", including "voice, where the voice is used in an automated transaction".

[22] I find that section 63(2) of the Companies Act permits the Homeowners Association to hold members' meetings on a virtual platform. While the language of the MOI suggests a physical location, it does not prohibit virtual meetings. Section 63(2) permits them unless expressly prohibited.

[23] The provision permitting shareholders meetings to be held by electronic communication in section 63(2) of the Companies Act is subject to important provisos, namely that the electronic communication employed "ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate reasonably effectively in the meeting" (emphasis added).¹ This principle is reinforced by the definition of the term 'present at a meeting' in terms of section 1 of the Companies Act, which means "to be present in person, or able to participate in the meeting by electronic communication, or to be represented by a proxy who is present in person or able to participate in the meeting by electronic communication" (emphasis added).

[24] There is a further important principle relating to objections to virtual meetings. Clause 2.21.1.1 of the MOI provides that

"If 10 (ten) percent of members to whom the notice convening the meeting is sent, in writing object to the address at which the meeting is to be held at least 7 (seven) days before the meeting, the Directors shall have no alternative but to re-schedule the meeting to take place at an address within the magisterial district in which the scheme is situated."

[25] The Homeowners Association sought to argue that this provision of the MOI is not applicable because it refers to objections to a physical location. However, if the MOI is to be read with section 63(2) of the Companies Act to permit virtual meetings, that interpretive approach must be applied consistently to all the relevant provisions of the MOI. It cannot be that the MOI must be read in a

¹ See the commentary on section 63(2) in J Yeats et al *Blackman II: Commentary on the Companies Act 2008* (Juta, 2018), RS 1, 2020, at pp 1278-9.

technology-accommodating way in relation to the holding of members' meetings, but in a literal way in relation to objections.

[26] I turn now to apply these principles to the two disputed meetings convened, respectively, by the Homeowners Association and the respondent homeowners.

The virtual purported AGM

[27] The virtual purported AGM was validly convened on a virtual platform initially in terms of clause 2.13.1 and 2.13.2 of the MOI. It was lawful to give notice of an AGM to be held virtually and would be lawful to hold the meeting in this way provided that it ensured effective participation of all members.

[28] However, there was a lawful objection to the reconvened AGM being held virtually. More than ten percent of members objected in writing to the meeting being held virtually. In terms of clause 2.21.1.1 of the MOI then required the directors to re-schedule the meeting at "an address within the magisterial district in which the scheme is located". Clause 2.21.1.1 of the MOI provides, as a proviso to the power of directors by notice to set the location of a meeting, as follows:

"If 10 (ten) percent of members to whom the notice convening the meeting is sent in writing object to the address at which the meeting is to be held (sic) least 7 (seven) days before the meeting, the Directors shall have no alternative but to re-schedule the meeting to take place at an address within the magisterial district in which the scheme is situated."

[29] Clause 2.21.1.2 then identifies the magisterial district as Brakpan in Gauteng.

[30] The purpose of this clause is clear. It is to enable members to object to a meeting being held at a location that is remote or difficult to access. Upon objection, it gives the directors "no alternative" but to reschedule at a location within the magisterial district, making it clear that the directors cannot proceed at the location to which objection has been raised. Applied to virtual meetings, the purpose would be similarly to object to a virtual meeting that may not be readily accessible or in which members may not be able to participate effectively.

- [31] Such an interpretation also accords with the statutory framework for meetings by way of electronic communication set out in section 63(2) of the Companies Act. Section 63(2) requires such a meeting to enable members to “participate reasonably effectively”, a principle echoed in the definition of ‘present at a meeting’, which entails being “able to participate in the meeting by electronic communication”.
- [32] The evidence established that there were repeated technical difficulties with the virtual platform that the Homeowners Association sought to employ, including on the occasion of the initial AGM. This was the cause of it having to be postponed and rescheduled. The respondent homeowners put up evidence of further internet outages and load-shedding. The Homeowners Association argued that these challenges were being exaggerated, but on its own version admits that there were technical problems, including those that originally led to the AGM being postponed on 15 November 2023.
- [33] The respondent homeowners were therefore entitled to object, both in terms of the MOI and the Companies Act. In future, provided that the virtual platform enables effective participation, it would be lawful under the MOI to convene virtual meetings, although members would retain their right to object. I do not need to decide in what future hypothetical circumstances such an objection may or may not be valid. On the facts, effective participation was not possible virtually due to the repeated technical challenges that were experienced.
- [34] In response to the objection, the Homeowners Association denied that the respondent homeowners were entitled to object and gave notice on 29 January 2024 that the AGM would re-convene on 20 February 2024 on the Zoom electronic platform.
- [35] In the circumstances, I find that the virtual purported AGM was lawfully scheduled to be held virtually and the required notice given, but that the respondent homeowners lawfully objected to the AGM being held on a virtual platform, obliging the directors to convene the meeting at a location within the magisterial district.

[36] The appropriate relief to flow from these findings needs to be considered in light of the disputed in-person purported AGM, the AGM convened separately by the respondent homeowners at the Estate clubhouse.

The in-person purported AGM

[37] The in-person purported AGM was also held on 20 February 2024, convened by the respondent homeowners and not the directors of the Homeowners Association. The Homeowners Association seeks an order declaring the in-person purported AGM unlawful and declaring invalid any resolutions or decisions taken there.

[38] Clause 2.12.2 of the MOI gives the directors the power to convene a general meeting (unless there are insufficient directors capable of acting to form a quorum, which exception does not apply on the facts). Clause 2.12.3 provides that “general meetings shall be held at such time and place as the Directors shall determine”.

[39] Clause 2.12.4 of the MOI provides for the right of members to convene a general meeting:

“A General Meeting of Members shall also be convened on a requisition by Members of the Association representing not less than 1 / 20th of the total voting rights of all the Members of the Company having at the date of the lodgement of the requisition a right to vote at General Meetings of the Company or, in default, may be convened by requisitions as provided by and subject to the provisions of the Company’s Act.”

[40] Section 61(3) of the Companies Act provides, in similar terms, that the board of directors of any other person specified in a company’s memorandum of incorporation or rules must call a shareholders meeting if one or more written demands for a meeting are delivered, where each demand describes the purpose for which the meeting is proposed and, in aggregate, demands for substantially the same purpose are made by the holders of at least 10% of the voting rights.

- [41] The respondent homeowners did secure a requisition of not less than 1/20th of the of the total voting rights to convene the in-person purported AGM, in terms of clause 2.12.4 of the MOI. However, they then purported to give notice of the meeting and convene it themselves, rather than having the directors do so.
- [42] The respondent homeowners argue that there was no self-help because the meeting had originally been called by the directors in terms of clause 2.12.2 of the MOI, after which the respondent homeowners had lawfully objected to the meeting taking place virtually and then proceeded with the meeting originally called by the directors for 20 February 2024. In other words, they argue that the meeting that they convened was the same AGM of which the directors had given notice, but taking place in a different venue pursuant to a lawful objection to the virtual meeting.
- [43] The Homeowners Association argues that, in terms of section 61(12) of the Companies Act, the members' rights are limited to approaching a court to order the directors to call a meeting, and that they may not engage in self-help. The Homeowners Association relied on the unreported judgment in *Heatherview Estate Extension 24 Homeowners Association NPC v Mahlatse Trading Enterprise CC and 101 Others*, where Ranchod J in the Gauteng Division, Pretoria, held that where the directors fail or refuse to convene a meeting on request of the members, the remedy for the members lies in approaching the court in terms of section 61(12) for an order requiring the company to convene the meeting, rather than convening the meeting themselves as members.²
- [44] I agree that the respondent homeowners had the power, which they lawfully exercised, by requisition to demand that a general meeting be re-convened. However, their power does not extend to actually giving notice of the meeting and convening it, as this is a power reserved to the directors and secretary of the Homeowners Association.
- [45] Accordingly, the respondent homeowners acted lawfully and within their powers in requisitioning the convening of the AGM, and the Homeowners Association

² *Heatherview Estate Extension 24 Homeowners Association NPC v Mahlatse Trading Enterprise CC and 101 Others* [2019] ZAGPPHC 180 paras 22-23.

through its directors acted unlawfully in failing to act on that requisition. Indeed, this requisition may have been superfluous as the directors already bore an obligation to reconvene the AGM. It was for the directors to convene the AGM. The respondent homeowners ultimately exceeded their powers in proceeding with the meeting and the resolutions and decisions taken at it are accordingly of no force or effect.

[46] The respondent homeowners have, in fact, sought an order in their counter-application to direct the Homeowners Association to reconvene the postponed AGM in person. The court has the power to direct the Homeowners Association to convene the AGM in terms of section 61(12) of the Companies Act.³ That is the appropriate remedy in the circumstances and I am satisfied that the respondent homeowners have made out a case for such an order. I consider that it is appropriate to afford a period of 10 days to publish the notice of the reconvened AGM and to afford a period of 21 calendar days of the meeting from the date of publication of the notice. It is imperative that the AGM be concluded.

The levies

[47] I have found that the resolutions taken at the in-person purported AGM were invalid. Accordingly, the purported resolution to set aside the earlier decision of 19 May 2023 setting the levies was invalid.

³ Section 61(2) provides:

“(12) 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.”

[48] Given the dispute between the parties and the resultant uncertainty regarding the levy obligations of homeowners, it is appropriate to issue an order resolving this question.

[49] The Homeowners Association is entitled to an order in this regard.

The interdictory relief sought against the respondent homeowners

[50] The Homeowners Association also seeks a final interdict against the respondent homeowners interdicting and restraining them “from interfering with and/or obstructing in any manner whatsoever, the Applicant and/or its duly appointed directors in the carrying out of their functions and duties accorded to them in the MOI”.

[51] Mr Porteous for the Homeowners Association accepted that the homeowners are entitled to meet privately and to discuss matters affecting the Homeowners Association, but submitted that this right does not extend to actually convening meetings of the company.

[52] In the analogous context of attempts to interdict members of a traditional community from meeting outside the formal structures of the traditional community, Skweyiya for the majority of the Constitutional Court in *Pilane* recalled the constitutional significance of the right to assemble:

“This Court has on more than one occasion recognised the significance of the rights to freedom of expression, association and assembly in the functioning of a democratic society. It strikes me that the exercise of the right to freedom of expression can be enhanced by group association. Similarly, associative rights can be heightened by the freer transmissibility of a group’s identity and purpose, expressed through its name, emblems and labels. These rights are interconnected and complementary. Political participation, actuated by the lawful exercise of these rights, can and should assist in ensuring accountability in all forms of leadership and in encouraging good governance. The judgment of my Colleagues Mogoeng CJ and Nkabinde J expresses concern that not to allow the first interdict to stand would provide an avenue for the erosion of the rule of law. I do not share these concerns. I see no reason to believe that the lawful exercise of the applicants’ rights would result in chaos and disorder. Rather, there is an inherent value in allowing dissenting voices to be

heard and, in doing so, permitting robust discussion which strengthens our democracy and its institutions.”⁴

[53] Similar principles apply to homeowners in the context of a homeowners association. Their constitutional rights to freedom of expression,⁵ association⁶ and assembly,⁷ as well as their rights to property⁸ and, where actually living on the Estate, housing,⁹ are threatened by an interdict against interfering with or obstructing the homeowners association or its directors. An interdict has a potentially chilling effect against active participation of members in the Homeowners Association, and would only be appropriate when the unlawfulness of their past and threatened conduct has been clearly established. This should not be interpreted as free licence to homeowners to disregard the MOI or act unlawfully, but constitutes an important counter-vailing consideration in the context of the interdict sought.

[54] In the circumstances, I have found that both the Homeowners Association and the respondent homeowners have acted inconsistently with the MOI and the Companies Act. The Homeowners Association was entitled, in principle, to convene a virtual AGM, but only if it met the requirement of effective participation. It did not. The respondent homeowners were also entitled to object and demand an in-person AGM. They were also within their rights to demand that the directors convene a meeting to discuss the issues that they specified; but they were not entitled to convene and hold that meeting themselves.

[55] In the circumstances, a case has not been made out for an interdict against the respondent homeowners in the broad terms sought. In several respects, they acted lawfully, though ultimately going too far in actually holding the in-person purported AGM. What is necessary is clarification of the rights and obligations of

⁴ *Pilane and Another v Pilane and Another* [2013] ZACC 3; 2013 (4) BCLR 431 (CC) para 69.

⁵ Section 16 of the Constitution.

⁶ Section 18 of the Constitution.

⁷ Section 17 of the Constitution.

⁸ Section 25 of the Constitution.

⁹ Section 26 of the Constitution.

all parties, in the hope that all role-players can take a more constructive approach.

The Developer's veto power

[56] The respondent homeowners invoke section 163 of the Companies Act and ask the court to declare “the developer’s veto power to constitute an oppressive conduct”.

[57] Clause 2.17.1.2 of the MOI provides that:

“The Developer shall, during the development period have an equal number of votes as there are the total number of Members votes in the Company in addition to the votes conferred upon the Developer in terms of this Article.”

[58] Clause 2.3.15 of the MOI provides that:

“Notwithstanding anything to the contrary in this Memorandum, the Developer shall not pay any levy contribution in respect of any of the freehold residential erven of which it is the registered owner until the end of the development period.”

[59] The effect of clause 2.17.1.2 of the MOI is to confer on the Developer an entrenched majority vote and to render the homeowners a perpetual minority. This, of course, is the arrangement that the homeowners concluded and to which they committed themselves under the MOI. As Sutherland J explained in *Bushwillow Park Home Owners v Fernandes & Another*, the individual members derive their rights and obligations from contract and the authority of the company itself is defined by its instruments.¹⁰ The Developer enjoys these weighted voting rights, which amount in practice to a veto, until the completion of the development phase, and also has the right to appoint three of five directors of the company.

¹⁰ *Bushwillow Park Home Owners v Fernandes & Another* [2015] ZAGPJHC 250 para 6, cited with approval in *Mount Edgecombe Country Club Estate3 Management Association II (RF) NPC v Singh and Others* 2019 (4) SA 471 (SCA) paras 23-24.

[60] The respondent homeowners argue that the veto power contained in clause 2.17.1.2 constitutes oppressive conduct contrary to section 163 of the Companies Act. Section 163(1) provides:

“163 Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company

(1) A shareholder or a director of a company may apply to a court for relief if—

(a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;

(b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or

(c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.”

[61] Section 163(2) then provides that a court considering an application under this provision “may make any interim or final order it deems fit, including various specified orders.¹¹

¹¹ Section 163(2) refers to the following:

“(a) an order restraining the conduct complained of;

(b) an order appointing a liquidator, if the company appears to be insolvent;

(c) an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6, if the court is satisfied that the circumstances set out in section 131(4)(a) apply;

(d) an order to regulate the company’s affairs by directing the company to amend its Memorandum of Incorporation or to create or amend a unanimous shareholder agreement;

(e) an order directing an issue or exchange of shares;

(f) an order—

[62] 'Oppression' in this context connotes lack of probity or good faith and fair dealing in the affairs of a company to the prejudice of some portion of its members.¹² It is not the motive for the conduct complained of that the court must consider but rather the conduct itself and its effects on the other members of the company.¹³ Where the directors of a company exercise their powers under its memorandum of incorporation and do so in accordance with the standard of conduct required by section 76, a shareholder prejudiced by their decision cannot complain that they were unfairly prejudiced under section 163 save in exceptional circumstances.¹⁴ Section 76(3) requires directors to act in good faith and for a proper purpose; in the best interests of the company; and with the requisite degree of care, skill and diligence.

[63] As formulated in the respondent homeowners' notice of counter-application, they seek an order declaring the Developer's veto power itself – rather than its

(i) appointing directors in place of or in addition to all or any of the directors then in office; or

(ii) declaring any person delinquent or under probation, as contemplated in section 162;

(g) an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions;

(h) an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement;

(i) an order requiring the company, within a time specified by the court, to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine;

(j) an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;

(k) an order directing rectification of the registers or other records of a company; or

(l) an order for the trial of any issue as determined by the court."

¹² *Grancy Property Ltd v Manala* 2015 (3) SA 313 (SCA) para 23, referring to *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324. See generally J Yeats et al *Blackman II: Commentary on the Companies Act 2008* (Juta, 2018), RS 1, 2020, at pp 7-18 to 7-20.

¹³ *Grancy Property Ltd* (id) at para 27.

¹⁴ *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* 2014 (5) SA 179 (WCC) paras 52, 59 and 65.

exercise in relation to one or more specific decisions – to be oppressive conduct. In effect, they ask the court to declare that veto power inconsistent with section 163 for all purposes.

[64] In *The Wilds Home Owners Association and Others v Van Eeden and Others*,¹⁵ the SCA considered a similar question whether a developer's veto right may be inconsistent with section 163 of the Companies Act. Cloete JA for a unanimous court addressed the issue as follows:

“[14] By purchasing property in the development the members of the HOA became bound by its articles of association. Those articles contain a veto right in respect of resolutions taken at a general meeting. That is the bargain to which the members assented. There is no evidence that the veto right has thus far been used at all, much less in a prejudicial, unjust or inequitable manner (as envisaged in s 252 of the Act and s 163 of the Companies Act 71 of 2008) or in a manner that unfairly disregards the interests of the members (as envisaged in s 163 of the latter Act). If it is, the members would then have to bring themselves within s 163. That is a fight for another day, and hopefully that day will never eventuate. But if the developer's veto right is removed, it has no subsequent redress; and the veto right was obviously inserted for its protection, bearing in mind the enormous capital outlay and its continued exposure in the ongoing development. It must be remembered that only phase 1 of the development has been completed; phase 2 is already contemplated; and the development can consist ultimately not merely of Pretorius Park Extensions 13, 14, 15, 16, 17, 18, 19 and 20 Registration Division JR, Gauteng, but (in terms of the definition of ‘Development Plan’ in the articles) can include ‘any further Extensions that may be added, which shall eventually fall into the Security Township to be known as “The Wilds”.’ In short, this court simply does not know to what extent the removal of the developer's veto right might prejudice it; and it cannot be said that it has been exercised in such a way that consideration should be given to its removal under s 252 or s 163 — the problem has been with the board of directors, and that problem can be resolved. For both of these reasons I consider that (save in regard to article 10.4) it should not be open to the extraordinary general meeting to amend the articles of the HOA by special resolution so as to remove the developer's veto permanently.”

¹⁵ *The Wilds Home Owners Association and Others v Van Eeden and Others* [2012] ZASCA 113.

[65] In the present matter, there are factual indications that the Developer's veto power has been used in ways prejudicial to the interests, and certainly the preferences, of members. In *The Wilds Homeowners Association*, the power had not yet been so employed. Here, it appears to be used routinely by the Developer, and was used to block amendments to the MOI that would remove the veto power at the AGM held on 5 September 2021. The implications of removing the veto power entirely would nevertheless be significant and would require full ventilation and careful consideration, taking into account the consequences of doing so for both the Developer and the members.

[66] The Homeowners Association raised a non-joinder objection in relation to this issue. They argue that the Developer has a direct and substantial interest in relation to the relief sought declaring the special voting rights to be oppressive conduct.

[67] In *Louw and Others v Nel*, the Supreme Court of Appeal considered an appeal in a matter where the applicant sought relief from oppressive conduct under section 252 of the Companies Act 61 of 1973, the predecessor provision to section 163 of the current Act.¹⁶ One aspect of the appeal concerned the attempt to secure an order against other corporate entities that were not parties to the proceedings on the basis, in substance, one going concern and consolidated as such. In a unanimous judgment, the Supreme Court of Appeal held that this was not competent.¹⁷ The court also held that, while a court has wide discretion to grant relief under the provision, it is essential that the applicant should formulate the relief that is sought.¹⁸

[68] The respondent homeowners in turn argue that the court should disregard the separate legal personality of the Homeowners Association and the Developer

¹⁶ *Louw and Others v Nel* 2011 (2) SA 172 (SCA).

¹⁷ *Id* at para 33.

¹⁸ *Id* at para 32.

because the Developer controls the Homeowners Association and the same two natural persons, Mr Wesley Brown and Mr Shane Brown, control both entities.

[69] In essence, the respondent homeowners invite the court to 'lift the veil' by taking into account who the company's shareholders and directors are.¹⁹ The difficulty is that the order sought would effectively terminate the Developer's veto power, in circumstances where the Developer has not been joined and its rights under the MOI would be adversely affected. There is also no explanation for the failure of the respondent homeowners to join the Developer, which might easily have been done in the counter-application, especially since the respondents supplemented their initial answering papers and the matter was proceeding on the ordinary civil roll and not the urgent roll.

[70] The Developer is a separate legal entity, with its own directors, shareholders and interests. The fact that through the veto power it exercises control over the Homeowners Association does not detract from its separate legal personality and the fact that the order sought would significantly impact the Developer's rights and obligations under the MOI, in its absence.

[71] It may be that the particular exercise of the veto power in certain specific instances, having regard to the effect of such exercise of the power, constitutes oppressive conduct. For instance, it may be oppressive conduct to impose virtual meetings in circumstances where, on the facts, effective participation of members is not possible. That, however, is not the relief sought by the respondent homeowners and that particular issue has in any event been resolved without the need to have regard to section 163. As with the decision in *The Wilds Homeowners Association*, it is possible to resolve the specific current dispute of the parties without removing the veto power of the Developer. It may also be that the use of the veto power to entrench itself could amount to oppressive conduct.

¹⁹ There is a distinction between 'piercing' the corporate veil, which involves a court treating the liabilities of a company as those of its shareholders or directors, and 'lifting' or 'looking behind' the veil, which involves having regard to who the shareholders and directors are. See Cassim et al *Contemporary Company Law* (Juta, 2021) at 60.

[72] It is possible that the respondent homeowners could in future make out a case, having properly joined the Developer, to declare the veto power as a whole or its use in specific ways to be oppressive conduct and to seek appropriate relief, such as the amendment of the MOI. I express no final view on that issue, given the failure to join the Developer.

[73] In the circumstances, the relief sought in the counter-application to declare the Developer's veto power under the MOI oppressive conduct, for all purposes, cannot be determined in the absence of the Developer as a party. This part of the counter-application must be refused.

Conclusion and costs

[74] Ultimately, each of the parties has enjoyed some success in relation to the relief sought. The Homeowners Association has succeeded in relation to the declaratory relief permitting virtual members' meetings, but subject to the important proviso requiring effective participation under the Companies Act and subject to the right of members to object to virtual meetings under the MOI. The order will also confirm that the eAGM platform is one permissible option. The Homeowners Association has also succeeded in establishing that the in-person purported AGM held at the Estate Clubhouse on 20 February 2024 was ultimately unlawful, although the directors were under an obligation to convene it in response to the members' requisition. As a result, they also succeeded in establishing that the previously determined levies remain valid.

[75] The respondent homeowners, though unsuccessful in their position that virtual meetings are entirely impermissible, established the important proviso and qualification to the power to call virtual meetings. They also established that their objection to the virtual purported AGM was lawful and effective, rendering the meeting unlawful and resolutions taken at it invalid. They also succeed in securing an order requiring the Homeowners Association to reconvene the AGM and to do so in person, in light of the valid objection and the fact that effective participation was not secured previously.

[76] Despite plausible concerns regarding the Developer's veto power and how it has been deployed by the Developer, I have determined that the failure to join the

Developer precludes a determination that this power constitutes oppressive conduct under the Companies Act.

[77] It is to be hoped that the reconvened AGM will provide an opportunity for the parties to find each other, in the best interests of all homeowners, the Developer and the Homeowners Association itself.

[78] In light of the substantial, and comparable, success achieved (and failure experienced) by both sets of parties, I determine that it is just to make no order as to costs.

Order

[79] The following order is granted:

1. The supplementary affidavit delivered by the Respondents on 19 June 2024 is admitted, and the Applicant's application in terms of Rule 30 to have that affidavit declared an irregular step is accordingly dismissed.
2. It is declared that it is lawful for the Applicant to hold meetings of members by way of electronic communication on a virtual platform, including using the online voting platform eAGM, provided that:
 - 1.1 the electronic communication employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate reasonably effectively in the meeting; and
 - 1.2 subject to the right of members to object to the meeting taking place virtually in terms of clause 2.21.1.1 of the Applicant's Memorandum of Incorporation.
3. It is declared that the members of the Applicant lawfully objected to the Annual General Meeting ("AGM") taking place on a virtual platform on 20 February 2024.
4. It is declared that the meeting purporting to be the AGM of the Applicant held on a virtual platform on 20 February 2024 was unlawful in light of

the objection by members and because the electronic communication employed would not enable all members to participate reasonably effectively in the meeting.

5. All resolutions and decisions purportedly taken at the meeting referred to in paragraph 4 of the order are set aside.
6. It is declared that the meeting purporting to be the AGM of the Applicant held at the clubhouse of the Helderwyk Estate on 20 February 2024 was not duly convened in terms of the Applicant's Memorandum of Incorporation and was thus unlawful.
7. All resolutions and decisions purportedly taken at the meeting referred to in paragraph 6 of the order are set aside.
8. The current levies determined by the Applicant's directors and communicated to the members of the Applicant on 19 May 2023 are declared to have been lawfully imposed and are binding upon the members of the Applicant and payable by its members.
9. The Applicant is directed to reconvene, in person at a location in the magisterial district of Brakpan, the AGM of the Applicant to address all agenda items set out in the Applicant's original notice of meeting dated 29 January 2024, notice of such AGM to be given within 10 days of the date of this order and to give not less than 21 calendar days' notice of the date of the AGM.
10. There is no order as to costs.

■■■■■

Type text here

J BRICKHILL
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 4 September 2025.

DATE OF HEARING: 2 June 2025

JUDGMENT SUBMITTED FOR DELIVERY: 4 September 2025

APPEARANCES:

For the Applicant: Adv GF Porteous and Adv N Tarmahomed,
instructed by Tonkin Clacey Inc.

For the Respondent: Adv P Mokoena SC, Adv S Msimanga and Adv N Kgaka,
instructed by Msikinya Attorneys & Associates.