IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 40234/21

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

23/3/2023 .....
DATE Signature

In the matter between:

THE SILVERBIRCH ESTATE HOMEOWNERS' ASSOCIATION (NPC) (Registration number: 2005/003035/08)	FIRST APPLICANT
JOHANNES JOCHIMUS HEYNEKE (Identity number: 760530 5001 08 2)	SECOND APPLICANT
And	
MARY FISHER (Identity number: 580820 0879 08 9)	FIRST RESPONDENT
PUSO FISHER (Identity number: 800404 0225 08 2)	SECOND RESPONDENT
AVRIL COUNTER	THIRD RESPONDENT

(Identity number: 660423 0081 08 8)

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION (CIPC) FOURTH RESPONDENT

KELEBOGILE NTSANE FIFTH RESPONDENT

(Identity number: 760504 5659 08 2)

JUDGEMENT

MOLOTSI AJ

1. The purpose of this application is to obtain an order that the records of the Companies and Intellectual Property Commission ('CIPC'), the fourth respondent, be amended to reflect the correct status of the directors of the Silverbirch Estate Homeowners Association (NPC), the first Applicant, by removing the following names: Mary Fisher, the first respondent; Avril Counter, the third respondent and Kelebogile Ntsane, the fifth respondent.

2. The Applicants further sought an order that the names of the duly elected directors of the first Applicant must be inserted as directors of the first Applicant by the fourth respondent. The duly elected directors are Mr Johannes Jochimus Heyneke, the second Applicant; Mr Robert John Craig and Mr Liren Pillay.

3. The first, second and fifth respondents launched a counterclaim in terms of section 165 of the Companies Act 71 of 2008 and an application in terms of Rule 6(15) of the Uniform Rules of this Court. The first, second and fifth respondents further raised the non- joinder of Mr Robert John Craig and Mr Liren Pillay in these proceedings.

4. The respondents, except the fourth respondent, challenged the jurisdiction of this Court to determine the dispute relating to who are the directors of the first Applicant before the matter is adjudicated by the Community Schemes Ombud Services 'CSOS'.

5. The first Applicant is, Silverbirch Estate Homeowners Association (NPC), which was established to maintain the Silverbirch Estate situated at Erf 633, Lonehill Ext 21.

6. The first respondent, Mary Fisher, is an adult businesswoman residing at Unit 6, Silverbirch Estate. She is a homeowner within the estate.

7. The second respondent is, Puso Fisher, an adult female businesswoman residing at Unit 6 together with the first respondent. The third respondent is, Avril Counter, whose further details are unknown and is not a resident at Silverbirch Estate.

8. The fifth respondent is, Kelebogile Ntsane, an adult male businessman residing at Unit 2 Silverbirch Estate.

9. The Applicants case was that the first, third and fifth respondents fraudulently registered themselves with the fourth respondent as directors of the first Applicant.

10. The original developers of the first Applicant were Mr Jacques Van Zyl and Mr Ryan Hesketh. In 2005 both Mr Van Zyl and Mr Hesketh were registered as the directors of the first Applicant with the fourth respondent. The duo was elected as the first directors of the first Applicant.

11. The first Applicant elects new directors on yearly basis.

12. Due to administrative difficulties the company registration documents of the fourth respondent did not reflect the names of the newly elected directors. Mr Van Zyl and Mr Hesketh remained the registered directors of the first Applicant

with the fourth respondent until 9 September 2020 when they were fraudulently removed as directors by the first respondent.

13. It was only in September 2020 that the names of Mr Hesketh and Mr Van Zyl were removed as directors with the fourth respondent.

14. At the annual general meeting (AGM) which was held on 9 September 2020, the second Applicant, Mr Robert John Craig and Mr Liren Pillay were elected as new directors of the first Applicant. The notice for this AGM was issued on 11 August 2020.

15. The directors that convened the AGM were Ms S Lekena and Mr T Mofo. The first respondent was elected as the director of the first Applicant from 2007 to 2009. Before the AGM of 9 September 2020, the directors of the first Applicant were Sade Lekena and Teboho Mofo.

16. The first respondent refused to pay levies and or other monies due to the first Applicant. On or about 8 September 2020, the first respondent was in arrears of her levies to the value of R153 970. During the AGM, which was held on 9 September 2020, the first respondent arrear levies as per the audited financial statements was an amount of R733 798.26.

17. The articles of association of the first Applicant at clause 23.2 provides that:

"Save as expressly provided for in those presents, no person other than a member duly registered and who shall have paid every levy and other sum, if any, which shall be due and payable to the association in respect of or arising out of his membership and who is not under suspension, shall be entitled to be present or to vote on any question, either personally or by proxy, at any general meeting."

18. Furthermore clause 11.3. of the articles of association provides that:

"A *director shall be deemed to have vacated his office as such upon*

11.3. the event of him being a member of the association, him being disentitled to exercise a vote in terms of these Articles."

19. On 8 September 2020 the first respondent caused herself to be registered as a director of the first Applicant with the fourth respondent. The first respondent fraudulently did this. It was done one day before the AGM of 9 September 2020 which elected the new directors of the first Applicant.

20. On 9 September 2020, the records of the fourth respondent reflected that the first respondent and Mr Leon Du Plessis, were the registered directors of the first Applicant.

21. The first respondent sometime in August 2020, approached Mr Van Zyl and Mr Hesketh under the pretence that she was a newly elected director of the first Applicant and claiming that Mr Van Zyl and Mr Hesketh needed to sign documents to update the directors records with the fourth respondent.

22. The first respondent then submitted to the fourth respondent certified copies of her identity document as well as that of Mr Hesketh.

23. Mr Hesketh under oath stated that he submitted a copy of his identity document to the first respondent. He also signed on behalf of Mr Van Zyl after he received COR39, which is the CIPC form which requires the signatures of the directors to be removed and directors to be appointed.

24. Mr Hesketh's identity document was certified by a commissioner of oaths namely Ms. Tania Edwards. Ms. Tania Edwards in the affidavit stated that her stamp was applied to the identity document of Mr Hesketh whereas she never met nor commissioned a copy of his identity document.

25. She stated that the stamp which was applied to the first respondent's identity document was somehow copied, 'photoshoped' or by means of some photocopying method, fraudulently applied to the copy of Mr Hesketh's identity document.

26. Mr Leon du Plessis resigned as a director on 20 October 2020. Mr Mario Van Tonder, who was fraudulently appointed as one of the directors of the first

Applicant on 11 August 2020, stated under oath that he was approached by the first respondent to accept an appointment as a director of the first Applicant.

27. He further stated that the first respondent misled him. Furthermore, in respect of the meeting held on 11 August 2020, he stated that he was not aware of the meeting and never gave the first respondent his proxy for the meeting of 11 August 2020.

28. The first respondent after her fraudulent appointment as a director of the first Applicant took over the control of the first Applicant's Standard Bank account.

29. The first respondent then opened a new bank account for the first Applicant with First National Bank (FNB) and reduced the levies from R1 800 to R750. Any member who did not pay the levies into the new FNB account was blacklisted by the first respondent.

30. Mr. Lerin Pillay and the second Applicant's wife were blacklisted by the first respondent for not paying their levies into the new FNB account.

31. The first, second, third and fifth respondents raised a point in limine that the Applicant's attorney of record had no mandate to represent the first Applicant.

32. Taking into consideration the outcome below and the view that I take about this matter and the conduct of the first respondent, the point in limine is dismissed. The attorney of record was clearly mandated by the directors of the first Applicant elected on 9 September 2020. This point in limine was just a red herring on the part of the first, second, third and fifth respondents.

33. The first, second, third and fifth respondents' case was that the first respondent was appointed as a director of the first Applicant from August 2020. Mr Hesketh and Mr Van Zyl were the only two directors of the first Applicant from 2007 until they resigned as directors in 2020.

34. The meeting which took place on 11 August 2020 was not a general meeting, but it was a directors meeting. The AGM of 2007 did not have a quorum as only

nine (9) members attended the meeting. To reach a quorum, at least twelve members had to attend the AGM.

35. All the general meetings from 2007 to 2020 were not convened by the directors of the first Applicant, no quorum, and no valid proxies. According to the first, second, third and fifth respondents, the general meetings from 2007 to 2020 were therefore invalid.

36. The only proof that a member is the director of the first Applicant is registration as a director with the fourth respondent.

37. Ms Lekena and Mr Mofo were not directors of the first Applicant.

38. The relief sought by the Applicants falls within the jurisdiction of the Community Schemes Ombud Services 'CSOS' and the Applicants have bypassed CSOS dispute resolution mechanism. The director's dispute was never referred to the CSOS. The matter that was referred to the CSOS related to unpaid levies.

39. In respect of section 165 of the Companies Act 71 of 2008, the first, second, and fifth respondents (applicants in the section 165 application) stated that they have locus standi to launch the application as they are registered homeowners. The application is made in good faith. The counter claim involved a case of serious material consequences to the first Applicant.

40. The first Applicant members will suffer serious prejudice if the application is not granted. There is an issue of non- compliance with the payment of levies due to the parallel structures established by the first Applicant's members.

41. Ms Puso Fisher, representing the respondents except the fourth respondent, could not provide the Court with exceptional circumstances which dispensed with the requirements of a demand in terms of section 165(6) of the Companies Act 71 of 2008

42. The only thing that she submitted was that the company is financially constraint. Ms Puso Fisher submitted that if the application in terms of section 165 of the Companies Act 71 of 2008 is granted, no party will suffer prejudice.

43. In respect of the application in terms of Rule 6 (15) of the Uniform Rules of this Court, to strike out a matter that is scandalous, vexatious, or irrelevant, Ms Puso Fisher submitted that the second Applicant's answering affidavit to the section 165 application contains irrelevant and scandalous submissions.

44. She further submitted that reference in the answering affidavit that the first Applicant was hijacked is scandalous. That the answering affidavit consists of legal arguments and merits relating to the main application.

Evaluation

45. The first issue that this Court must determine is the issue of jurisdiction of this Court.

46. The first, second, third and fifth respondents contended that this Court has no jurisdiction as the dispute relating to the directorship of the first Applicant has not yet been referred to and adjudicated by the CSOC.

47. The Applicants stated that CSOC has no power and jurisdiction to deal with the disputes relating to who the directors of the first Applicant are.

48. Section 2 of the Community Schemes Ombud Service Act 9 of 2011 ('Act 9 of 2021') provides that:

"The *purpose of this Act is to provide for-*

[a] the establishment of the Service.
[b] the functions, operations and governance of the Service; and
[c] a dispute resolution mechanism in community schemes.

49. From the purpose of the Act, there is nothing that suggest that CSOC deals with disputes relating to the directors of the first Applicant. Furthermore, in terms of

section 4 of Act 9 of 2011 dealing with the functions of the service, there is nothing that shows that the service can deal with disputes relating to the directors of the first Applicant and as to who the legally elected directors of the first Applicant are.

50. Section 39 of Act 9 of 2011, provides for prayers for relief in respect of financial matters; in respect of behavioural issues; in respect of scheme of governance issues; in respect of meetings; in respect of management services; in respect of works pertaining to private areas and common areas and in respect of general and other issues.

51. Section 39 of Act 9 of 2011 does not lend itself to the conclusion that one of the reliefs that the CSOC can order relates to the disputes as to who is the director of the first Applicant.

52. Consequently, Act 9 of 2011, does not deal with disputes involving who are the lawfully and properly elected directors of the first Applicant. This Court has inherent jurisdiction to deal with this matter and the jurisdictional challenge is dismissed. This Court's jurisdiction is engaged when disputes such as the present one arises.

53. Before deciding whether the first, third and fifth respondents must be removed by the fourth respondent as directors, the issue of the lawfulness or unlawfulness of the election of the directors of the first Applicant must be determined. This is so because only the lawfully elected directors of the first Applicant must be registered as directors with the fourth respondent.

54. Furthermore, unlawfully elected directors of the first Applicant have no business being registered as directors of the first Applicant with the fourth respondent.

55. The second Applicant was properly and lawfully elected as a director of the first Applicant. This is based on the following findings:

55.1. The former directors of the first Applicant namely Ms Sade Lekena and Mr Teboho Mofo convened the AGM which took place on 9 September 2020.

55.2. This followed the AGM which was held on 2 September 2020, and which did not quorate and was subsequently adjourned to 9 September 2020.

55.3. The notice of the 2 September 2020 AGM was issued on 11 August 2020. The agenda for the meeting was attached to the notice of the meeting.

55.4. During the AGM held on 9 September 2020 Messrs Heyneke, Pillay and Craig were elected as directors of the first Applicant.

56. The AGM of 9 September 2020 substantially complied with the first Applicant's memorandum of association. It was accordingly a properly constituted meeting, and the elections of the directors was therefore lawful.

57. The first, third and fifth respondents were not lawfully elected as directors of the first Applicant. This is based on the following findings:

57.1. The meeting of 11 August 2020 which purportedly elected the first respondent as a director was not convened by the former directors of the first Applicant. The meeting of 11 August 2020 was a sham concocted by the first respondent.

57.2. Ms Puso Fisher submitted that the meeting of 11 August 2020 was not a general meeting but a directors meeting. This was clearly an unlawful meeting which was not convened in terms of the memorandum of association of the first Applicant.

57.3. The whole conduct of the first respondent in relation to the meeting of 11 August 2020 and her conduct prior and after this meeting was fraudulent, unlawful and unbecoming of a homeowner.

57.4. The first respondent's conduct was motivated by the fact that she wanted to continue not paying her levies due to the first Applicant and to deliberately create confusion within the members of the first Applicant. Regrettably, she succeeded.

57.5. In a desperate act of unlawfulness, the first respondent deliberately mislead individuals like Mr Hesketh, Mr Van Tonder and Mr Du Plessis that she was elected as a director of the first Respondent whereas she was not and did not qualify to be a director nor vote at any AGM as she had outstanding levies due to the first Applicant.

57.6. She further had Mr Hesketh's identity document certified under fraudulent circumstances in that the Commissioner of oaths did not certify Mr Hesketh's identity document.

57.7. What the first respondent did was to intentionally, deliberately and with mala fide motive create a parallel structure which rivalled the properly elected directors and unlawfully registered herself and others as directors of the first Applicant with the fourth respondent.

57.8. This was done a day before the properly and lawfully elected directors could be elected on 9 September 2020. This was clearly not a coincidence but rather a well- orchestrated plan by the first respondent. The first respondent's conduct was inexcusable.

57.9. This was nothing but an act of self- preservation on the part of the first respondent.

57.10. The first respondent did not have the best interest of the members of the first Applicant. She was just looking after herself and, in the processes, acted unlawfully and with serious consequences to the first Applicant.

57.11. In the process, the first respondent prejudiced the first Applicant as she unlawfully took over the control of the first Applicant's Standard Bank account.

57.12. The fifth respondent was hand-picked by the first respondent to be a director of the first Applicant under the circumstances wherein there was no AGM convened by the directors of the first Applicant to elect him and that he was not qualifying to be a director as he had outstanding levies to the first Applicant.

58. The first, second, third and fifth respondents' arguments that the AGMs of the first Applicant from 2007 to 2020 were invalid, is rather an opportunistic argument and it is clearly unmeritorious. To belatedly complain about the quorum of the past AGMs which the first respondent participated in and did not raise any objection as to the quorum of those AGMs shows the levels of desperation on the part of the first, second, third and fifth respondents.

59. The first, second, third and fifth respondents' arguments that a director of the first Applicant is one which is registered by the fourth respondent has no merits. The directors of the first Applicant can only be legally elected in terms of its memorandum of association.

60. The argument of the first, second, third and fifth respondents that Mr Van Zyl and Mr Hesketh were the only directors of the first Applicant until they resigned in 2020 is rejected. There is no merit in this argument. Legally, the directors of the first Applicant are elected in terms of its memorandum of association.

61. No one can claim to be a director of the first Applicant if not elected in terms of the first Applicant's memorandum of association. The fact that the records of the fourth respondent were not amended to reflect the names of the yearly elected directors of the first Applicant did not mean that the people whose names did not appear in the records of the fourth respondent were not directors of the first Applicant.

62. Registration as a director with the fourth respondent without such a director elected in terms of the memorandum of association, does not

necessarily mean that the registered director is a legally elected director of the first Applicant.

63. Based on the above it is the finding of this Court that the first, third and fifth respondents were unlawfully elected as directors of the first Applicant.

64. It is a further finding of this Court that the second Applicant, Mr Robert John Craig and Mr Liren Pillay, were lawfully elected as directors of the first Applicant on 9 September 2020.

65. Having established that the first, third and fifth respondents were unlawfully elected as directors, it follows therefore that the fourth respondent must remove their names as directors of the first Applicant.

66. The other two lawfully elected directors namely Mr Robert John Craig and Mr Liren Pillay are not part of these proceedings. They were not joined as the Applicants. It is unclear why this was not done considering that a relief was sought for their names to be inserted as the duly elected directors of the first Applicant with the fourth respondent.

67. The first, second, third and fifth respondents non- joinder objection in respect of Mr Robert John Craig and Mr Liren Pillay is upheld.

68. Condonation for the late filing of the application in terms of section 165 of the Companies Act 71 of 2008 is granted. Good cause was shown, and interest of justice required condonation to be granted.

69. The application in terms of section 165 of the Companies Act 71 of 2008 is dismissed. The first, second and fifth respondent's application was not made bona fide and accordingly they did not act in good faith. This application had nothing to do with the best interest of the first Applicant but rather to preserve the unlawful conduct of the first and fifth respondents.

70. It was not in the best interest of the first Applicant for the application to be granted especially given the conduct of the first respondent. She acted unlawfully.

71. Furthermore, there is material non- compliance with the provisions of section 165 (2) of the Companies Act 71 of 2008 in that the first, second and fifth respondents never served a demand upon the first Applicant. No exceptional circumstances existed to permit the first, second and fifth respondents to dispense with the demand requirement.

72. The exceptional circumstances submitted by Ms Puso Fisher are rejected. Those submissions do not constitute exceptional circumstances.

73. There is nothing of a material consequence to the first Applicant. What the facts shows is that the conduct of the first respondent of acting unlawfully by registering herself and others as directors of the first Applicant on 8 September 2020, prejudiced the first Applicant.

74. The first, second and fifth respondents failed to discharge the onus placed on them by the provisions of section 165 of the Companies Act 71 of 2008. The first, second, fifth respondents as the applicants in the section 165 application possessed a collateral or ulterior purpose and the application must therefore be dismissed.

75. In *Lazarus Mbethe v United Manganese of Kalahari (Pty) Ltd*[1] , the SCA held that:

"[20] I turn to examine the meaning of the requirement that an applicant must act 'in good faith'. In Swansson supra para 36, the first factor in determining whether the good faith requirement was satisfied was held to be:

'... whether the honestly believes that a good cause of action exists and has a reasonable prospect of success'

In addition, it was also held that, whether:

[1] 2017 ZASCA 67 (30 May 2017 at para 20

'... the applicant honestly holds such a belief would not simply be a matter of bald assertion: the applicant may be disbelieved if no reasonable person in the circumstances could hold that belief'.

In our law it would not be a matter of mere assertion by an applicant that he possesses the requirement of good faith. Although the test for good faith is subjective, relating as it does to the state of mind of an applicant, it is nevertheless subject to an objective control. The state of mind of an applicant has to be determined by drawing inferences from the objective facts, as revealed by evidence."

76. The application in terms of Rule 6(15) is dismissed. There was nothing scandalous, vexatious, or irrelevant in the answering affidavit filed by the second Applicant to the section 165 application by the first, second and fifth respondents. There was nothing defamatory and nothing to harass or annoy the first, second and fifth respondents. The first, second and fifth respondents will not be prejudiced if the application is not granted.

77. The whole conduct of the first respondent was characterised by dishonesty and unlawfulness. She went to great lengths to act unlawfully and act against the best interest of the members of the first Applicant. The Applicants had to approach this Court to get relief.

78. There is no reason why the first respondent should not pay the costs of the Applicants.

79. Accordingly, the following order is made:

79.1. The fourth respondent is ordered to immediately remove the names of the first, third and fifth respondents as directors of the first Applicant from its records.

79.2. The fourth respondent is ordered to immediately insert the name of the second Applicant as a director of the first Applicant in its records.

79.3. The first, second and third respondents' application in terms of section 165 of the Companies Act 71 of 2008 and application in terms of Rule 6(15) of the Uniform Rules is dismissed with costs.

79.4. The first respondent is ordered to pay the costs of the Applicants.

H MOLOTSI
Acting Judge of the High Court, Pretoria

Date of hearing: 3 and 4 November 2022

Date of Judgement: 17 March 2023

Attorney for the Applicants: Maybery Attorneys Inc

Advocate for the Applicants: N. Breytenbach

Attorney for first, second, third and firth respondents: In person

Representative: Ms Puso Fisher – second respondent.