IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 53643/09
~~29 May 2011~~
25/05/2011

In the matter between:

THE WILDS HOME OWNERS ASSOCIATION	First Applicant
RUDI BOSHOFF	Second Applicant
ADRIANUS LUKAS FAURE	Third Applicant
DEON VAN AARDE	Fourth Applicant
HARRIS KAPLAN	Fifth Applicant
P.J.J. VAN VUUREN BELEGGINGS (PTY) LTD	Sixth Applicant

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
25/05/2011 DATE SIGNATURE

and

FRANCOIS JOHANNES VAN EEDEN	First Respondent
WERNER HERBST	Second Respondent
HENCO BOTES	Third Respondent
GERHARD SWART	Fourth Respondent
PIERRE ROUX	Fifth Respondent
EVERT BRUWER	Sixth Respondent
ANDRÉ BARNARD	Seventh Respondent
PIET LOUW	Eighth Respondent
HERMAN STASSEN	Ninth Respondent
KOOS PIETERSEN	Tenth Respondent
MIDCITY PROPERTY SERVICES (PTY) LTD	Eleventh Respondent
DIASTOLEUS PROFESSIO INC.	Twelfth Respondent
WOODHILL COLLEGE (PTY) LTD	Thirteenth Respondent
HENDRINA AUDETTE KOEKEMOER	Fourteenth Respondent

WYBRAND ANDREAS LODEWICUS DU TOIT Fifteenth Respondent

JUDGMENT

MURPHY J

1. This matter concerns a long enduring, acrimonious dispute between a significant number of members of the Wilds Home Owners Association, the "HOA" (incorporated under section 21 of the Companies Act 61 of 1973 - "the Act"), and those who control the company.

2. The Wilds is a residential estate in the east of Pretoria in the Township of Pretoriuspark Extensions 13, 14, 15, 17, 18, 19 and 20, Gauteng. The main object of the HOA, according to clause 3 of the Memorandum of Association, is to promote, advance and profit the communal interests of members of the association being persons who are registered owners of an erf and/or sectional title unit in the township. In promoting such communal services the HOA is required to provide and maintain essential and community services, amenities and activities within the township administered by the company.

3. The sixth applicant, PJ van Vuuren Beleggings (Pty) Ltd, is the developer ("the developer") of the Wilds Estate and is defined as such in Article 2 of

the Articles of Association of the HOA. The estate is being developed in phases. Development commenced almost 10 years ago with the first residential transfers occurring in May 2003. As at June 2010, phase 1, which covers approximately 36% of the estate, had been partially developed. The development cost of the first phase was approximately R750 million. The estimated development cost of the second phase will amount to about R1,7 billion. Persons who buy property in the estate automatically become members of the HOA and are accordingly bound by the Articles of Association, as provided in the title conditions of their transfer deeds. The developer is the registered owner of 215 units/erven in phase 1 and the registered owner of all the land in phase 2 consisting of approximately 1700 units yet to be proclaimed. Phase 2 will be developed in accordance with the need for new residential properties in the market.

4. The Articles of Association are structured in a manner ensuring that the developer is able to exercise complete control over the HOA for the foreseeable future, at least until the development is finished. In particular, Article 10.1 of the Articles gives the developer the right to elect the majority of the board of directors, and Article 23.1.4 bestows upon it a veto right in respect of any resolution taken at a general meeting. The developer justifies these clauses on the basis of the extent of the capital it has invested and its entitlement to manage the fruits of that investment.

5. The dispute ranges over a number of issues, relating to questions of governance; financial oversight; the amendment of the Articles in order to

diminish the entrenched position of the developer; the imposition of certain special levies; alleged financial irregularities; the manipulation of members' voting rights; the need for a forensic audit; the costs of establishing the gardens of the estate and the liability therefor; the appointment of the management agent of the company; and the removal of certain directors. As already said, the dispute has been on the go for a number of years and has now reached gargantuan proportions. There have been three applications to court and a stalled arbitration process. The papers filed in the present application contain no less than 10 sets of affidavits in addition to other affidavits from earlier proceedings, together accounting for a record of almost 2500 pages. The heads of argument run to just about 300 pages.

6. The first application was brought by the first respondent in the present proceedings, FJ van Eeden (at various times a director of the HOA), in December 2008, who took up the cudgels on behalf of some of the inhabitants aggrieved by the developer setting off the capital costs of landscaping against levies owed by it to the HOA and the non-disclosure of that in the financial statements. The quarrel about this issue has been the source of all the disagreements that followed. The relief sought in the first application was the setting aside of various decisions taken by the directors and at general meetings during 2007, the removal of the directors appointed by the developer, and an investigation into the HOA's financial statements for 2007 and 2008. The application was settled between the parties and an order was issued by Bertelsmann J on 27

August 2009 staying the proceedings and referring them to arbitration in terms of Article 41 of the Articles.

7. The second application was brought by the HOA, the developer, and the four directors of the HOA elected by the developer. It sought, on an urgent basis, an interdict restraining the respondents from convening and holding an extraordinary general meeting ("EGM") of the HOA on 14 September 2009. The first to tenth respondents are all members of the HOA, while the eleventh is the management agent, the twelfth was the previous auditor and the thirteenth the company at whose premises the meeting was scheduled to be held. The first to seventh respondents ("the respondents") opposed the urgent application but also launched a counter-application relying on section 252 of the Act to claim far-reaching relief including a forensic audit, amendments to the Articles of Association, the declaration of various decisions of the board and general meeting invalid, the convening of a special general meeting for the election of a new board and certain consequential relief. After argument (and negotiations between the parties) on 11 September 2009, Sapire AJ issued an order agreed to by the parties, in which both the urgent and counter applications were postponed and directing that an EGM be held on 28 October 2009. The meeting of 28 October 2009 was duly convened but achieved little towards resolving the disputes. The respondents filed an amended notice of motion on 9 May 2010 supplemented by a supplementary founding affidavit seeking further relief on an urgent basis. The amended counter-application was set down as a special motion

before me on 22 March 2011. The applicants no longer seek an urgent interdict, the need for such relief having been overtaken by events. The respondents filed a second amended notice of motion on 15 February 2011 in which the relief sought has been added to.

8. The respondents are in actual fact the "applicants" in the counter-application. However, like the parties, I will refer to them as the respondents; and to the HOA (the first applicant), the developer (the sixth applicant) and the developer appointed directors, collectively as the applicants.

9. The only question remaining in respect of the urgent application is the issue of costs, which the order of Sapire AJ left over for determination. Hence, it is only the relief in the amended counter-application that must be fully considered and determined. I will give fuller details of the nature of the relief sought later.

The Articles of Association

10. The decision-making structures and processes established by the Articles of Association ("the Articles") of the HOA have been the subject of much contention, and are at the centre of the relief sought by the respondents. It is necessary to examine the most relevant provisions before discussing the history and ambit of the present litigation.

11. The company was incorporated on 14 March 2003. The Articles reflect that the development of the Wilds Estate is a development in progress. Hence, Article 2 defines the "development plan" to mean the provisional lay-out plan relative to the identified property which will eventually fall in the security township to be known as "The Wilds". It furthermore defines "the development period" to be "that period from the establishment of the association until the developer or its successors in title has sold the last erf on the land or has notified the association that it has ceased development". The "development" itself is defined as the residential development on the land and the marketing thereof. The "development scheme" is defined as the scheme for the development of the land which may include any subdivision thereof by the developer in erven, group housing developments, cluster developments and any other scheme of the land or subdivision thereof including development schemes as defined in the Sectional Titles Act.

12. Article 3 governs membership of the HOA. Membership is limited to the developer in its capacity as such, and any person who is, in terms of the Deeds Registries Act, reflected in the records of the deeds office as the registered owner of any erf, unit or an undivided share in any erf or unit in the scheme. An "erf" is defined as any erven on the land upon which may be erected any sectional title unit or group housing unit or dwelling unit capable of registration in the Deeds Registry. A "unit" is defined as any group housing unit, sectional title unit or a dwelling unit for a single family situated on a residential erf which may be registered in the office of the

Registrar of Deeds. Where a unit or erf is jointly owned, all the owners of the unit or erf are deemed to be one member of the association in terms of Article 3.3. Article 4.6 provides that a registered owner of an erf or unit may not resign as a member of the association.

13. Article 4.4, read with the definition of "developer's rights" in Article 2, provides that for the duration of the development period, the developer shall have the right to complete the development scheme and to promote and market it, including the right to construct additional units, buildings and other structures and to determine who shall have any right to or interest in any part of the scheme and to determine the nature of such rights. Moreover, Article 5.1 restricts the right of members to alienate their property by generally requiring the prior written consent of the board to do so and by making it a condition of alienation that the transferee will *ipso facto* become a member of the HOA.

14. Article 6.1 provides for the establishment of a finance committee and/or an executive committee consisting of at least one director and such other persons as the board may determine. Article 6.17 provides that the executive committee and/or finance committee shall act under delegated authority of the directors of the company. The power to levy contributions upon members for the purpose of meeting the expenses of the HOA, including capital expenditure, in pursuance of its main object, and in pursuit of its business, is conferred upon the finance committee by Article 6.2. The remaining sub-articles of Article 6 deal with the mechanics of

determining and levying contributions. Article 6.13 has particular relevance to the present dispute. It provides that unless determined otherwise by the board, no member shall be entitled to any of the privileges of membership unless and until he shall have paid every contribution levied, interest thereon and any other sum which may be due and payable to the HOA from whatever cause arising.

15. Article 6.18 governs the developer's obligation to pay levies to the HOA. It provides that for purposes of determining the amount to be contributed by the developer in respect of levies, the developer shall be deemed to be the owner of a unit or erf for each stand remaining registered in the name of the developer. However, in terms of Article 6.19 the board may enter into an agreement with the developer for the provision of a capital sum and for the transfer of land and/or equipment to the HOA in lieu of levies. Unlike the HOA, therefore, which is exempted from the payment of levies by Article 6.20, the developer has liability for the payment of levies equivalent to that of the other owners.

16. The power to make house rules in regard to members' rights of use and development of their properties, including questions of environmental preservation, keeping of pets, the use of common areas, standards and guidelines for architectural design of buildings, structures etc, the prevention of nuisance and the like, vests in the directors in terms of Article 8.1, but subject to any restriction imposed or direction given at a general meeting.

17. Articles 10-15 govern the appointment, powers and procedures of the board of directors. These articles are purposefully structured in such a way as to entrench the controlling interest of the developer. Article 10.1 provides for a maximum of seven directors, and expressly stipulates that until such time as the last erf is sold and transferred, the developer shall have the right to elect the majority of directors. Article 10.3 secures this right by providing that the board shall during the development period consist of not less than two "nominees" of the developer appointed by it. In terms of Article 10.4, any other directors to be appointed to office shall be elected by the members in general meeting, the developer being entitled in voting on the election of such directors, to exercise its veto power. Article 23.1.4 confers upon the developer a veto right in voting at general meetings with regard to "any matter contained in this document and/or the rules of the association or with regard to any other matter requiring a vote or decision to be taken in respect of any amendment and/ or addition to the rules or to the Memorandum and Articles of Association of the company." That is a very wide veto indeed, allowing, as it does, the developer to veto any decision of the general meeting including the election of a particular director or the amendment of any of the founding documents. The net effect of these provisions is that where the board is to be constituted of seven directors, the developer will always be able to elect four of them and is required to approve of the other three until the end of the development period, being when the last erf is sold and

transferred, which given the size of the development may be at some distant future time.

18. Article 11 deals with the removal and rotation of directors. Article 11.1 provides that each director shall continue to hold office as such from the date of his appointment until the annual general meeting next following his said appointment at which meeting each director will be deemed to have retired from office, and will be eligible for re-election to the board at such meeting. Directors are furthermore deemed to have retired from office, and will be eligible for re-election to the board at such meeting. Any vacancies arising for various reasons shall be filled (until the next AGM) by a person nominated by the remaining board members; except where the vacating director was a nominee of the developer, in which event the vacancy can be filled only by a person nominated by the developer - (Articles 11.2 and 11.3).

19. Article 13 governing the remuneration of directors has assumed some significance. Directors are entitled to be repaid all reasonable and *bona fide* expenses incurred by them respectively in or about the performance of their duties as directors and any director being a professional person shall be entitled to be paid professional fees for professional services rendered. Save for this entitlement, directors shall not be entitled to any other remuneration for the performance of their duties, unless the HOA in general meeting otherwise decides.

20. The proceedings of the meetings of directors are regulated by Article 15. Meetings shall be held as determined by the chairman of the board, but must be at least quarterly (unless unanimously agreed otherwise) and must be convened upon not less than 48 hours written notice. The quorum necessary for the holding of any meetings of the directors shall be four directors present personally; provided that during the development period the presence of at least three nominees of the developer shall be necessary. The attendance of the four developer nominated directors will be sufficient to constitute a quorum.

21. Articles 16-23 govern general meetings of the HOA. An annual general meeting ("AGM") must be held within six months after the end of each financial year, in addition to any other general meetings held during that year. The AGM shall be held at such time as the directors shall decide. All general meetings other than AGM's shall be called extraordinary general meetings ("EGM"'s). Article 16.4 has particular relevance in this case. It provides inter alia for an EGM to be convened by the directors on a requisition by members representing not less than 10% of the voting rights, or in default by the requisitionists themselves as provided by and subject to the provisions of section 181 of the Act.

22. An AGM and a meeting called for the passing of a special resolution, shall be called for by 21 clear days notice in writing, and an EGM, other than one called for the passing of a special resolution, shall be called for by 14 clear days notice in writing. The notice shall specify *inter alia* the general nature of the business of the meeting and in the case of a special resolution, the terms and effects of the resolution and the reasons for it. The membership may waive the notice period by condoning short notice at the meeting - Article 17.1. The quorum of a general meeting during the development period shall be the members representing the votes of the developer and five members from all the other members personally present and entitled to vote.

23. Article 22.1 provides that a member may be represented at a general meeting by a proxy, who need not be a member of the association. The instrument of proxy must be in writing and signed by the member concerned or his duly authorised agent, but need not be in any particular form.

24. At every general meeting every member shall have one vote for each erf or unit registered in his name; while co-owners will jointly have one vote (Articles 23.1.1 and 23.1.2). Any member, including the developer, holding undeveloped land in the township, shall have one vote for each separate piece of land registered in his name - Article 23.1.3. And, as already mentioned, the developer has the veto right bestowed upon it by

Article 23.1.4. Only members in good standing enjoy voting rights. Article 6.13 referred to above is reinforced by Article 23.2 which reads:

> "Save as expressly provided for in these articles and unless expressly permitted otherwise by the chairman, no person other than a member duly registered, and who shall have paid every contribution, 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."

25. Ordinary resolutions shall be carried on a simple majority of all the votes cast thereon. Amendments to the Articles are required in terms of Article 24 to be by special resolution and are explicitly subject to the developer's rights of veto in terms of Article 23.1.4. Special resolutions shall be carried in accordance with the requirements of section 199 of the Act.

26. Article 25.2 gives effect to section 286 of the Act by imposing a duty on the directors to make out the financial statements and to lay them before the AGM. Article 26 gives effect to Chapter X of the Act in respect of auditors.

27. Article 41 deals with disputes arising out of and in connection with the Articles. I shall examine this provision more closely later when dealing with the applicants' special plea of arbitration.

The background to the first application

28. A full set of the papers in the first application has not been filed as part of the record in these proceedings. However, the applicant has annexed its answering affidavit in the first application as Annexure RB43 to its reply in the urgent application, the latter serving simultaneously as its answering affidavit to the counter-application. Annexure RB43 usefully sets out the history and it is possible to extract from it selected common cause or undisputed facts that give insight into the ongoing drama as it unfolded.

29. After incorporation of the HOA on 14 April 2003, the promoters appointed Mr. P. van Vuuren, the managing director of the developer, as the first director of the HOA. Not long afterwards the developer appointed a second director, Mr. Roos. At that stage the developer was the only member of the HOA because none of the stands had been sold or transferred to any purchasers. The first transfer took place in May 2003. In the period between February and October 2004 the developer took initial steps for the establishment of landscaped verges for the first phase of the development.

30. The crux of the complaint made by van Eeden in the first application was that the directors withheld from the auditors information in relation to the cost and accounting for landscaping that resulted in incorrect financial statements for the years 2005-2007. The accounts did not reflect as a debit the cost incurred by the developer for landscaping in the sum of R2 049 795, being gardening costs in respect of the verges alongside Trumpeter's Loop (the main thoroughfare in the estate), which in actual fact belong to the Tshwane Metropolitan Municipality. The accounts also did not include as a credit the levies payable by the developer in the sum of R1 158 841. The landscaping expenses were not approved by the members of the HOA prior to their being incurred though the directors later accepted the invoices but opted deliberately not to disclose the costs in the financial statements. If the expenses were not for the account of the HOA, but were developmental costs for the developer, (as the respondents contend), then there would have been no need to reflect them in the HOA accounts. However, because the developer chose to set off those costs against its levies payable to the HOA, assuming it had the right to do that, it became necessary to account for the transactions accordingly.

31. The developer maintains that since inception there was an agreement and/or understanding between it and the HOA that the establishment of the gardens along Trumpeter's Loop would be set-off against its levy obligations. Work was done on the landscaping and gardens during 2004, 2006 and 2007. The developer paid the costs of the construction and

laying of the landscaped verges and gardens directly to the sub-contractors.

32. At a directors' meeting held on 23 June 2005, one of the directors elected by the members, Mr. Coenie van der Merwe, asked one of the developer nominated directors, Mr. A.L. Fourie (the third applicant) whether the developer was paying levies. The set-off arrangement was mentioned and Fourie agreed to table a report. The developer alleges that a report was indeed tabled at a directors' meeting on 22 September 2005. The minutes of that meeting record that it was decided not to show the income and expenditure in relation to landscaping in the financial statements because this would leave the HOA with a significant deficit.

33. Dissatisfaction regarding the financing of the landscaping was evident at the AGM on 1 November 2005. The matter had been discussed prior to that at a directors' meeting on 24 October 2005. The third applicant, who was then chairperson of the board, raised the issue in his report to the AGM, and informed the AGM of the set-off arrangement. The matter was however not the subject of any resolution.

34. The issue stayed alive during 2006 and 2007 with the gardening costs being discussed at various meetings. The minutes of the directors' meeting of 25 January 2006 contain the following observation in paragraph 14:

> "CR has got quotations for the gardens at Rhine Ridge and the two circles. The developer made it very clear that they were not prepared to incur any costs as far as these gardens were concerned and that it was a cost that would have to be carried by the HOA. This is a contentious issue and will have to be discussed asap."

In a letter dated 26 April 2006 addressed to the directors the developer advised that it was not prepared to carry the capital cost and intended to set the costs off against its levies payable to the HOA.

35. The matter did not appear to get much attention at the AGM of 30 August 2006. It was merely noted in the chairman's report that the landscaping of Trumpeter's Loop had been completed, that there had been a letter on the issue from the developer and that the HOA would maintain the garden. The owners were informed that the gardens were being paid for by the owners. It is recorded that the general feeling of the members was that the developer should take financial responsibility for the landscaping.

36. The financial statements for the years before 2007 did not include the landscaping costs or the set-off of the developer's levies. The matter came up again at the AGM of 19 June 2007. The minutes of the meeting record that the chairman reported that the financial statements for 2007 had been withdrawn because there was a problem with the developer's levy contribution and that revised statements would be ready in seven days. Later that year, the finance committee recommended that the developer be permitted to offset its levy contributions against payments it

had made in respect of the gardens provided the conditions of township establishment did not require the developer to install the gardens and the final figure was audited and approved by an EGM. The conditions of township establishment do not include any explicit obligation to install the gardens, but the consequence of that, as we shall see, is a matter of some disagreement.

37. The minutes of the directors' meeting of 18 July 2007 reflect that there was once again concern about the non-payment of levies by the developer. A recommendation was made to do a forensic audit "on all levies by either current auditors or appointed auditors". This recommendation has not been acted upon. Various discussions continued through October 2007 to which I will refer later. Eventually, on 12 November 2007, the directors adopted and approved the corrected financial statements which reflected the set-off arrangement. An EGM was held on 8 December 2007 at which it was noted that the audited financial statements had been approved by the directors. The financial statements were put to the vote and approved by the EGM with 169 votes in favour (being the total votes of the developer as member and erf owner) and 81 against.

38. On 21 January 2008 van Eeden circulated a document titled "Directors in Exile forum in the Wilds estate". The document is basically a call to action. Its opening paragraph sets the scene. It reads:

> "At the XGM held on 8 December 2007 nearly all the non-developer members present in person or by proxy voted against the approval of the financial statements and budget. However, the developer used its majority vote present at the meeting by virtue of stands held to approve the financial statements and budget. The approval of the financial statements and budget is an attempt by the developer and its four directors to ratify the unauthorised spending of money by the developer on the establishment of gardens of R2 000 000 and other items without the approval of the HOA in a general meeting."

The document goes on to explain that the intention is to form a "Directors in Exile" forum and "to ensure that we as non-developer members take control of the management of the estate we have to ensure that we can mobilise our majority vote". Annexed to the document is a proxy form. Members were requested to "assign your proxy to the nominated people", being the first, second and sixth respondents. The document stated that the purpose of obtaining the proxies was to obtain a majority vote "to requisition general meetings and vote at general meetings" so that "we can approve our initiatives in general meetings of The Wilds HOA and force the directors of the HOA to execute them".

39. The wrangle over the financial statements, the developer's levies and various proposals by van Eeden (by then an elected director) to amend the Articles continued throughout 2008. At the meeting of the board on 31 October 2008 a decision was taken to withdraw the mandates of all the sub-committees, including the finance committee. Item 12.1 of the minutes records:

> "Not all mandates have been inspected by the directors from the committees; therefore all mandates are withdrawn to allow all sub-committees to give feedback as requested previously from the board of directors. Thereafter mandates will be reviewed and instituted as approved by the board of directors."

It is not recorded whether this decision was unanimous. Both the first and second respondent were in attendance at the meeting. There is no minute recording any objection to the decision by either of them. The upshot of this decision was that because the finance committee was no longer operative, the setting and imposing of levies from then on fell to the board dominated by the developer. This state of affairs endured for about two years.

40. On 13 November 2008 van Eeden caused to be served on the board a requisition for a "special" general meeting in terms of Article 16.4 read with section 181 of the Act. These provisions allow a portion of the membership to request the board to convene a meeting, and, failing it so doing, for the members themselves to convene the meeting. This requisition ("the first requisition") tabled no less than 15 resolutions for consideration by the meeting. These included:

- The removal of the directors appointed by the developer by means of a special resolution in terms of section 220 of the Act on the grounds that they knowingly withheld financial information from the auditors in co-operation with Midcity (the managing agent) that

resulted in incorrect financial statements which they approved knowing they were incorrect.

- The appointment of Price Waterhouse Cooper ("PWC") as the auditors of HOA to re-audit the financial statements of the HOA since inception, and to conduct a forensic audit as recommended by the finance committee.

- The replacement of Midcity as the managing agents by another company, namely Venter and van Wyk CC.

- The limitation of the authority of the board of directors to spend funds on behalf of the HOA to a budget as approved by the general meeting.

- The recovery of the landscaping costs from the developer.

- Recovery of the costs of the re-audit of the financial statements from the directors appointed by the developer, the auditor and Midcity.

- Forcing the developer to deliver in terms of its promises to establish a club house and sporting facilities at the Wilds Estate.

The balance of the proposed resolutions related to the review and termination of contracts which the board had concluded for the provision of various services to the Estate.

41. The requisition was supported by 381 proxy forms and was addressed to the board. In response, the board instructed the managing agent to approach attorneys to obtain legal advice concerning the validity of the proxies and whether the requisition conformed to the provisions of the Act. Midcity informed the directors that its attorneys were of the opinion that the requisition did not comply with the provisions of the Act. This was discussed at the directors' meeting of 8 December 2008. It is recorded in the minutes that Fourie (the third applicant and then chairman) had obtained two legal opinions and both concluded that the requisition to convene an EGM did not conform to the requirements of the Act. Surprisingly, Fourie refused to make the legal opinions available to the member elected directors and declined to disclose their content and the reasons for the conclusion reached. He is however recorded as stating that the proxies were valid for voting at a general meeting but not for convening or requisitioning a meeting. It was further noted in the minutes that Midcity had undertaken a validation process and for reasons not stated had concluded that only 291 of the 381 proxies would be valid for use at a general or extraordinary meeting. At that time there were 546 full title and 322 sectional title members.

42. Although frustrated by the refusal of the board to convene the requested EGM, the requisitionists did not take any steps at that stage to convene the meeting themselves as they were entitled to do in terms of section 181(3) of the Act. It is not clear why this did not happen. It may be that they chose first to await the outcome of the first application which had been filed three days earlier on 5 December 2008. There was also an AGM scheduled for and which took place on 10 December 2008.

43. At the AGM of 10 December 2008 seven directors were elected. The second, third, fourth and fifth applicants were appointed by the developer. The directors elected by the members were the first, second and third respondents. The meeting, by all accounts, was a rowdy affair with much contestation regarding the agenda. The second applicant, apparently claiming the matter was *sub judice*, refused to allow debate about the developer's levies and a vote on the approval of the disputed annual financial statements. There was also evident support for the proposals appointing PWC as auditors and the replacement of the management agent.

The first application

44. The first application was launched by van Eeden alone against the developer and the directors elected by the developer. It was aimed at setting aside the EGM held the previous year, on 8 December 2007, as well as various decisions, including the decision of the board of directors

to "recall" the finance committee's mandate. He sought in addition an order directing the finance committee "to fully investigate and confirm the financials for 2007 and 2008", and an order for the removal of the developer appointed directors.

45. The main issues in the first application were whether the EGM should be set aside as a result of there being short and improper notice; whether the developer was entitled to vote at the EGM (its levies allegedly not having been paid); whether the developer was entitled to set-off the costs for the establishment of the gardens at Trumpeter's Loop against its levy contribution; and whether the financial statements should have included as a debit the costs of the establishment of the gardens and the levies as a credit set-off against such.

46. The first application was set down for hearing before Bertelsmann J on 27 August 2009. The applicants herein (the respondents therein) raised a plea that the disputes in the application were required to be referred to arbitration in terms of Article 41.1 which provides:

> "Any dispute arising out of or in connection with these articles including the cancellation thereof, except where an interdict is sought or urgent relief may be obtained from a court of competent jurisdiction, must be determined in terms of this clause."

47. Bertelsmann J made an order staying the application proceedings, directing the applicant to declare a dispute within 10 days of the order, as envisaged in Article 41.1, and declaring that the process would further be regulated in terms of the procedure set out in Article 41. The questions referred to the arbitrator were: whether or not the decisions of the AGM of 8 December 2007 were valid; whether or not the amended annual financial statements for the year ending 28 February 2007 were validly approved and accepted by the board; whether or not the developer was entitled to set off his levy liabilities against the costs of establishing gardens; whether the developer was or is obligated to obtain the approval of the members in general meeting as envisaged in clause 6.14 of the Articles before embarking on the establishment of such gardens; and whether or not the financial statements for the financial year ending 2005, 2006 and 2007 should have included as a debit the costs of establishing the gardens. The referral has not been withdrawn, nor, as far as I am able to ascertain from the evidence, has any arbitration hearing been convened by the parties or the nominated arbitrator. The unresolved issues forming the subject of the arbitration however remain very much alive and have surfaced again in the subsequent court applications. The parties on the one side have broadened to include the other respondents. Unattended to, the squabbles continue to rankle, contributing to a measure of intractability and a hardening of position on all sides, with unfortunate repercussions for the governance of the company.

The events leading to the urgent application

48. While the first application was pending, and before the decision was taken to refer those disputes to arbitration, van Eeden served a second requisition for a "special" general meeting on 19 May 2009. Again he attached proxies authorising him to call the meeting on behalf of the homeowners. The resolutions tabled include most of the significant resolutions tabled in the first requisition. A "forensic audit scope" intended for application in the event of the meeting resolving to direct PWC to conduct a forensic audit was attached to the requisition. The proposed resolutions 12 and 13 in the second requisition added a different slant. The rationale for these resolutions was that the developer's directors were using their majority on the board "to disrupt and paralyse the functioning of the board". They therefore sought reinstatement of the executive and finance committees to run the estate along with sub-committees dealing with *inter alia* aesthetics and gardens, security and communication. Resolution 13 proposed that the executive committee be authorised to proceed with the process for changing the Articles.

49. On 1 June 2009, the second applicant, in his capacity as chairperson of the board, addressed the following email to van Eeden:

> "With regards to your request for a Special General Meeting the HOA has acquired a legal view and again have (sic) come to the same conclusion that you still do not conform to company law in your request for a special general meeting.

> The HOA will therefore not convene the meeting as requested by you. If you should decide to continue with your request an urgent interdict to stop you will be sought in the High Court of Pretoria for your costs,"

50. A few weeks later, on 24 June 2009, van Eeden served a third requisition (Annexure RB21) in which it is noted that as a director and member he was "duly supported by no less than 99 other members of The Wilds HOA in total representing not less than one-twentieth of all the members having a right to vote at a general meeting". The requisition put forward eleven resolutions, some of which repeated the resolutions of the previous requisitions. Resolution 1 proposed nine amendments to the Articles "in order to ensure proper transparency, accountability and good corporate governance". They are aimed entirely at removing or diluting the entrenched rights of the developer. The most significant include: the deletion of the right of the developer under Article 10.1 to elect the majority of directors until the last erf is sold and transferred; the repeal of the requirement in Article 15.3 that at least three nominees of the developer shall be necessary at all meetings of directors in order to form a quorum; the repeal of the developer's veto right in Article 23.1.4; and the repeal of Article 24 requiring in effect that the developer approve all amendments to the Articles. The requisition repeats the resolutions in the earlier requisitions for the removal of the directors, the appointment of PWC, the performance of a forensic audit, the recovery of the costs of the gardens, the replacement of the management agent and the budgetary limitation.

51. The requisition was made, as it stated, on the basis of proxies furnished by members to van Eeden. Annexure RB22 to the founding affidavit in the urgent proceedings is an example of such a proxy. It is headed: "Proxy Form"; and the relevant member in terms of it appoints van Eeden (or the sixth or second respondent in his stead) "as my/our proxy to requisition general meetings and vote for me/us on my/own behalf at any general meeting" of the HOA.

52. On 5 August 2009, van Eeden and some of the other respondents distributed a notice advising of the convening of an EGM on 14 September 2009 at Woodhill College in Pretoria. The documentation attached to the notice included the requisition, the proposed resolutions, the proposed forensic audit scope and a budget.

53. On 19 August 2009 van Eeden circulated an email to all the homeowners in the estate in which he explained that he was convening the meeting because the directors had failed to arrange the meeting despite the three requisitions. He stated that the proxies had been solicited "to block the developer's elected directors and the developer to abuse (sic) their majority on the board of directors", and that they would vote "yes" on every resolution.

54. In the period between 19 and 30 August 2009 the parties became involved in negotiations with a view to settling their differences. The attorney for

the applicants addressed a letter dated 24 August 2009 to the attorney for the respondents setting out for the first time some clarification of the applicants' position regarding the validity of the requisitions. The principal objection was that a proxy allows a member to appoint another person in his stead to vote in his place at a meeting, but not to requisition a meeting of members. The letter also pointed out that neither the notice nor the requisition specified that the proposed resolution to amend the Articles was required to be a special resolution. The applicants then demanded a written undertaking from the respondents not to continue with the EGM, failing which an urgent application would be launched.

55. In the midst of this, the first application was settled on the terms outlined above and Bertelsmann J issued the relevant order on 28 August 2009. Two days later on 30 August 2009 van Eeden circulated an email advising members that the EGM had not been cancelled and would proceed on 14 September 2009.

56. At a directors' meeting on 31 August 2009, van Eeden raised various objections to the legality of the meeting, but also handed to the chairman a letter dated 29 August 2009 in which he undertook not to convene the EGM of 14 September 2009 if the board supplied him with a valid reason. It is not clear if any reason was furnished. But the applicants have held firm to the position stated in the letter of 24 August 2009. In the founding affidavit they added that the proposed resolutions did not contain a description of the general effect of the resolutions, nor was the requisition

supported by a sum reasonably sufficient to meet the expenses of the HOA in giving effect to the resolutions. It is debatable whether these lapses, if that, rendered the requisition unlawful. The complaint that the notice did not record that any amendments to the Articles would need to be carried by special resolutions is legitimate. The applicants also took the view that the removal of the directors was *lis pendens* or *sub judice* by reason of the order in the first application referring the matter to arbitration. Such objections at first glance, would pertain to the validity or invalidity of any resolutions that might or might not have been adopted by the meeting. On balance though, the objections to the validity of the requisitions at best were formalistic and technical.

The urgent application

57. When the parties were unable to settle their differences, the applicants launched the urgent application on 31 August 2009 for an order interdicting and restraining the respondents from convening and holding the EGM on 14 September 2009.

58. The respondents filed their answer in the urgent application, as well as the counter-application relying mainly upon section 252 of the Act, on 4 September 2009.

59. As I described earlier, the urgent application was enrolled before Sapire AJ on 11 September 2009. He postponed the application and the counter-

application *sine die* and reserved the question of costs in respect of both. He ordered that an EGM should be held on 28 October 2009 and set out a procedure for the convening of the meeting.

60. The urgent application has been overtaken by events, and, as previously explained, the only application now requiring determination is the counter-application.

61. In the answering affidavit in the urgent application, the respondents submitted that the history of the matter shows that the developer "will not hesitate to oppress and subdue any member that disagrees" with it, and that the urgent attempts to interdict the EGM on technical grounds was an indication that something was amiss and that the developer had something to conceal. They argued that the requisition was in compliance with section 181 of the Act in that there is no difference (at least in substance) between giving a proxy to a person to requisition a meeting and signing a specific requisition form. They submitted, in addition, that the general effect of the resolutions was obvious from their terms, as was the requirement that a special resolution would be necessary in terms of section 191 of the Act in respect of some of them.

62. The relief sought in the counter-application has evolved and changed in response to events that occurred after the order in the urgent proceedings was made. In view of that, it is necessary to consider the facts and

allegations in relation to these events before dealing with the relief sought in the counter-application.

The events leading up to the EGM of 28 October 2009

63. At some point before the meeting directed to be convened by Sapire AJ, Mr. J.J. de Koker, of the HOA's erstwhile auditors, Diastoleus Professo Inc., was charged by the Independent Regulatory Board for Auditors ("IRBA") with misconduct. The gravamen of the charge was his having allowed the developer to set-off his liability for levies against the costs of establishing gardens on municipal property without disclosing that in the financial statements. In January 2010 he pleaded guilty to the charges. The relevant charges (Annexure HK26 to the applicants' answering affidavit to the respondents' supplementary affidavit in the counter application) read:

> "4.2 There is a *material* omission in the financial statements with an unqualified audit opinion dated 11 May 2007 insofar as landscaping services due to the Association (HOA) from PJJ van Vuuren Beleggings (Pty) Ltd and levies due by PJJ van Vuuren Beleggings (Pty) Ltd to the Association were not reflected in the audited financial statements
>
> 4.3 The practitioner failed to obtain any audit evidence alternatively failed to obtain sufficient and/or appropriate audit evidence in relation to the landscaping services and outstanding levies."

64. The respondents assert that their lack of confidence in both the auditors and the financial management of the HOA by the board has been vindicated by the finding of the IRBA. They are accordingly anxious about the fact that the management of the company is for all intents and purposes in the exclusive hands of the developer with no finance committee in place to properly oversee the financial affairs of the company; and fear most of all that levies imposed by the developer will be used illegitimately to subsidise further capital expenditure which is rightly for the account of the developer.

65. In accordance with the express terms of the order made by Sapire AJ, the respondents on 14 September 2009 notified the board of directors of all the issues to be included in the agenda of the EGM scheduled for 28 October 2009. The documentation encompassed all the proposed resolutions and amendments that had been tabled in the three requisitions, including additionally a resolution to reinstate the committees that had been suspended and a fuller motivation setting out the object of the resolutions.

66. The HOA in accordance with the court order gave notice of the EGM. The respondents have made something of the fact that the audit scope of the proposed forensic audit was not attached to the documentation. They maintain that the omission forms part of "the concerted effort undertaken" by the developer to ensure that the forensic investigation is stymied. The applicants admit that the audit scope was not attached, but that this was a

mere oversight which was corrected by ensuring that each member was given a copy at the meeting, which allegation I am inclined, and in any event, obliged, to accept.

67. At a board meeting on 23 September 2009, the board approved expenses in the amount of R1 392 098,72 being in respect of legal fees. Two amounts were payable to the attorneys in respect of the urgent application, being R300 722,07 and R872 876,65. Two additional invoices in the amounts of R106 000 and R112 500 were also accepted, being amounts claimed as professional fees by two of the developer's directors in respect of their time and services in defending the application. After the expenses were tabled and approved, the board passed a resolution raising a special levy in the amount of R1500 to be paid by each member of the HOA to meet these expenses. A circular was sent on the same day to all the members informing them of the levy and advising that they were "free to arrange with Midcity to pay the amount over 12 months interest free at R125 per month".

68. The respondents have leveled a number of criticisms at these decisions. Firstly, the approval of the expenditure and payments to the directors was not placed on the agenda prior to the meeting. No copies of the invoices were attached to the agenda, though the minutes state that the accounts were circulated at the meeting.

69. The respondents contend moreover that the payment of fees to the directors would be unlawful because Article 13.2 states that "directors are not entitled to any remuneration for the performance of their duties in terms hereof, unless the association in general meeting otherwise decides". The applicants rely on Article 28 which entitles the directors to be indemnified out the funds of the HOA against any liabilities *bona fide* incurred or in respect of costs, losses and expenses. I doubt this Article covers the fees that the directors claimed. Such probably explains why at a directors' meeting on 22 January 2010 the board, perhaps more sensitive to the possibility of its conduct being perceived as unfair, unjust or inequitable, adopted a resolution in the following terms:

> "During the court case time was spent by Mr. Boshoff and Mr. Fourie on behalf of the HOA with lawyers and counsel (sic). They have issued invoices for the time spent in this regard. It was noted by the Board that the invoices were approved at a previous meeting with the instruction: "Do not pay yet". They do not request payment of the said invoices. The Board discussed the payment. It is resolved that:
>
> (a) The Mr 's (sic) Boshoff and Fourie are requested to supply proof of their auditors of what their time is worth in order to support the invoice as provided;
>
> (b) After receipt of the above the matter shall be reconsidered."

It is not clear whether any further steps have been taken in respect of these payments. The respondents seek an order interdicting such

payments unless approved at a general meeting. Considering the prescriptions of Article 13.2, they are entitled to that relief. The directors seek the payment of fees, not the recovery of expenses or indemnification of any liabilities incurred on behalf of the HOA. They may recover fees only with the blessing of the general meeting, which they do not have.

70. The respondents submit that the raising of the special levy was nothing more than a transparent attempt on the part of the applicants "to have the dice loaded in their favour" at the EGM. They question the motives and timing of the levy, contending that the applicants had in mind the consequence that members who failed to pay timeously would be regarded as not being in good standing and would therefore be disqualified from voting at the EGM in terms of Article 23.2. The applicants deny the charge of attempted manipulation. These questions have assumed importance and I shall examine them more fully later when assessing the fairness of the applicants' overall conduct of the affairs of the company.

71. At the board meeting of 27 October 2009, the day before the EGM, the second applicant resigned as chairman. Van Eeden, who at that stage was vice-chairman assumed that he was entitled to assume the mantle of chairman. The board however elected the fifth applicant, Mr. H. Kaplan as chairman. Van Eeden has relied on Article 12.3 which provides that the vice-chairman shall assume the powers and duties of the chairman in the absence of the chairman or his inability or refusal to act. The resignation

of the chairman meant that there was no chairman rather than an absent chairman. The applicable provision when a chairman vacates office is Article 12.1 which provides that in the event of a vacancy the board "shall immediately appoint one of their members as a replacement". That is exactly what happened at the meeting, and nothing sinister or untoward can be ascribed to the board's refusal to accept the authority of van Eeden to assume the chair. His contention that he automatically became acting chairperson is not correct.

72. The auditors, Diastoleus Professo Inc., tendered their resignation to the board which was accepted at the board meeting of 27 October 2009. They no doubt wished to avoid being the subject of the resolution calling for their removal which was tabled at the EGM scheduled for the next day. By then they would have appreciated that their employee, Mr. de Koker, was guilty of the misconduct to which he pleaded guilty in January 2010.

The Extraordinary General Meeting of 28 October 2009

73. There were ten resolutions tabled and voted on at the EGM. For the most part they repeated those proposed in the third requisition and were concerned with:

- the proposed amendments to the Articles of Association;
- the removal of the auditors;
- the appointment of auditors to perform a forensic investigation;

- the cost of the landscaping;
- the obligation of the developer in respect of the clubhouse and sporting facilities;
- the appointment of new management agent and termination;
- the ongoing financial management of the company;
- the reinstatement of all sub-committees;
- the budget of the financial committee for the current financial year; and
- the removal of the existing directors.

74. With the exception of the removal of the directors, each resolution was carried by a vote of 374 to 215. The 215 votes against represented the votes held by the developer, meaning that every member other than the developer voted in favour of each resolution.

75. The contestation about the contents, merits and implementation of the resolutions forms the basis of the counter-application as amended. I will deal with the issues more fully when considering the merits of the counter-application. It may nonetheless be worthwhile at this juncture to touch briefly on the position taken by the applicants in relation to each agenda point.

76. Regarding the amendment to the Articles, the applicants state correctly that the resolution was not carried with the required majority. Amendments

to the Articles must be passed by 75% of the meeting, and that did not happen. As for the removal of the auditors, they had already resigned and been replaced by PWC. The resolution that the costs of establishing the garden would be the obligation of the developer, the applicants maintain, was the subject of the referral to arbitration and the financial statements had already been corrected to reflect the set-off arrangement; which statements had been approved by the EGM of 8 December 2007, and which meeting also accepted that the conditions of township establishment did not contain a condition requiring the developer to install the gardens. The agenda item regarding the clubhouse and sporting facilities was ruled out of order as a contractual matter between each individual member and the developer and thus it was beyond the authority of the HOA to unilaterally amend the terms of such contracts. The appointment of the management agent, it argued, is in terms of Article 14.1.2 a matter for the board of directors and not the general meeting. Likewise, the resolution to the effect that the board shall manage the financial affairs in accordance with a budget presented and approved at the general meeting, the applicants maintain, is an illegitimate attempt to usurp the authority of the board contrary to the provisions of the Articles and the Act. As for the sub-committees, the applicants have given an undertaking that all the committees will be reinstated, though subsequent events show that may now prove difficult while the developer retains entrenched control. As for the budget approval, that too they insisted is a matter for the board. And, finally, regarding the removal of the directors, the four developer nominated directors resigned as directors before the

meeting and the EGM opted to retain the first, second and third respondents.

The AGM of 2 December 2009

77. In the period immediately after the EGM, the developer did not nominate directors to replace those who had resigned. Both sides appeared to accept that the fifth applicant, Mr. Kaplan, who had been elected chairman at the meeting of 27 October 2009, remained a director. On 5 November 2009 van Eeden wrote to the management agent enquiring whether the developer had appointed replacement directors and urging the board to be convened to implement the resolutions of the EGM. There were various interactions between the two sides in the period between the EGM and the AGM on 2 December 2009, but they were to no avail in resolving any of the disagreements. In this period there was no functional board of directors. The respondents aver that the non-cooperation by the directors of the developer was intended to frustrate the implementation of the resolutions. The tone of the averments in the affidavits dealing with this period gives insight into the escalating acrimony and tension between the two sides.

78. The parties are at odds about whether the 2009 AGM was called on short notice. The decision to convene the AGM was taken on 27 October 2009 by the board. The applicants' version is that the notices were sent on the 4th and 5th of November 2009 and that this was adequate in that 21 clear

days notice as required by the Articles was in fact given. The respondents have put up a case in reply that this could not be so. The issue has acquired significance in relation to whether the meeting was properly convened or whether it was adjourned at the close, with the consequence that the existing directors remained in office.

79. There is a further difference of opinion about whether the minutes correctly record what transpired at the meeting. The minutes, Annexure HK16, are concise, being only one page in length. The first substantive item is item 3, titled: "Consideration of Chairman's Report". There under is recorded the following minute:

> "The chairman started to speak on the matter. The meeting became unruly and the chairman then adjourned the meeting for ten minutes.
>
> Meeting stood adjourned from 19.10 - 19.20
>
> The Chairman proceeded with the meeting and again was interrupted. The chairman warned that if the unruly behaviour continued the chairman will let the meeting stand adjourned to a date to be determined. The meeting was hostile, muted and unplugged the microphone (sic) and threatened to take the chairman out. At this the chairman adjourned the meeting indefinitely because of unruliness."

The minute is dated 3 December 2009 and is signed by the fifth applicant in his capacity as chairman.

80. After the AGM the respondents took the position that as a matter of law all directors ceased to be directors at the commencement of the AGM and no further directors were elected at the meeting. The next day, 3 December 2009, the developer appointed the fourth and fifth applicant, as well as Ms. H. Koekemoer and Mr. W. du Toit as directors. These four persons met on the same day and elected the fifth applicant as chairman and Ms. Koekemoer as vice-chairman.

81. The respondents, in a letter dated 2 February 2010 addressed to the management agent and the company secretary, attach a transcript of the proceedings of the AGM and contest the applicants' account of the events. It is apparent from the transcript that the members did not accept the fifth applicant as either chairman of the meeting or as chairman of the board of directors. Though not entirely obvious from the transcript, it seems that van Eeden assumed the chair of the meeting with the approval of the resident members in attendance. The meeting then took the view that the AGM had been called on short notice. Van Eeden informed the meeting that the AGM could not take place because the requisite percentage to condone late notice, as required by section 186 of the Act, was not in attendance. He next announced that the meeting could not be adjourned and a new AGM had to be called. With that the meeting ended without attending to any business.

82. Article 11.1 provides that each director shall continue to hold office as from the date of his appointment until the AGM next following his

appointment at which he will be deemed to have retired. Article 11.5 provides that the appointment of directors of the HOA shall terminate automatically at each AGM unless re-elected. The respondents submit that because the AGM was called off rather than adjourned, van Eeden and the other member elected directors were the only persons who remained directors beyond 2 December 2009 (the developer appointed directors having resigned), and accordingly that any directors meetings after that which did not include them were irregular.

83. The respondents further contend that even if the AGM was adjourned, there was a duty to re-convene it within 21 days as required by section 192 of the Act. This did not happen.

The events subsequent to the AGM of 2 December 2009

84. On 22 January 2010 a meeting of the board of directors was convened. In attendance were the four directors appointed by the developer, as well as the second and third applicants, who had not been re-appointed, but who were recorded in the minutes as attending as "nominees" of the developer. No member elected directors were in attendance, nor did any receive notice of the meeting. Nothing in the minutes indicates that the directors were of an intention to seek the election or appointment of member elected directors or to give effect to any of the resolutions of the EGM.

85. On 24 March 2010, the respondents' attorney addressed a letter to the attorney of the applicants. The relevant parts of the letter read:

> "1. The above matter refers, and in particular our client places on record its objection to the developer's usurpation of the board of directors of the Wilds Home Owners Association ("the HOA").
>
> 2. We wish to confirm that we have consulted with our clients in this matter, and it has come to our attention that your clients, and in particular the developer, have contrived to remove all the independent directors from the current board, which now comprises only the developer's nominees, some of whom did not (sic) even stay on the estate. As a result, the proper functioning of the board is completely undermined.
>
> .....
>
> 4. Our clients, as the elected representatives of the Wilds HOA, have been informed by this contrived board that they are no longer entitled to attend board meetings of the board of the HOA. As such they have been summarily excluded from the deliberations of the board, without any valid reason.
>
> 5. Our instructions are to place on record that the contrived board is not validly constituted, and as such the developer's conduct has left the HOA dysfunctional and without the competence or ability to take valid decisions. Accordingly, we are in the process of preparing a High Court application which will permanently rectify this impropriety on the part of your clients, and introduce the appropriate management mechanisms that will allow the HOA to operate in a manner which benefits all its members.

....."

86. Neither the applicants, nor their attorneys replied to this letter, beyond the latter informing their counterparts that they would take instructions.

87. On 7 May 2010 the respondents filed an amended notice of motion in the counter-application. I will deal with the relief sought in the various versions of the notice of motion in greater detail in due course. At this stage, it is necessary only to draw attention to the extended ambit of the dispute between the parties introduced by the amendment. The first notice of motion, filed on 4 September 2009 during the urgent proceedings, sought an order appointing PWC to perform a forensic audit; amendment of the Articles in accordance with the resolutions in annexure RB21; an investigation into the clubhouse and sporting facilities issue; a declaratory order that the requisition of the EGM was in compliance with section 181 of the Act, and a further declaration that the procedures for purposes of special resolutions required in terms of section 191 and 220 of the Act had been complied with. The amended notice of motion did not persist with the declarators (the necessity therefor having fallen away). The orders for the forensic audit and the amendments were still sought, as was the investigation into the clubhouse and sporting facilities issue. In addition, orders were sought i) joining Koekemoer and duToit; ii) declaring the EGM of 28 October 2009 to be valid; iii) declaring the first, second and third respondents to be directors of the HOA; iv) declaring the first respondent to be the acting chairperson of the HOA until the board elects a

chairperson; and v) directing the board to implement the resolutions adopted by the EGM within 30 days. In the alternative, an order was sought directing that an interim board of directors be appointed for the HOA, pending finalisation of the main prayers, such board to consist of two directors appointed by the developer and two elected by the members, and an independent lawyer to be appointed as chairman. As a further alternative, an order was sought placing the HOA under judicial management. Finally, with the suspended decision of the board to pay two directors more than R200 000 in fees in mind, an order was sought interdicting and prohibiting the second to fifth applicants from receiving any payments of any nature whatsoever from the HOA in respect of the previous litigation between the parties.

88. The amended notice of motion of 7 May 2010 was supported by a supplementary affidavit outlining the history of the dispute, augmenting the papers by outlining the factual situation between September 2009 and May 2010 and justifying the amendment of the relief sought. The applicants filed an answering affidavit to the supplementary affidavit on 15 June 2010 in which they dealt with the allegations made in the supplementary affidavit and set out their opposition to the relief sought.

89. About six weeks later, on 27 July 2010, the applicants filed a supplementary affidavit, the purpose of which was to properly plead and raise as a preliminary point the alleged failure by the respondents to follow the correct procedure for the resolution of disputes in terms of Article 41 of

the Articles. The Article, as sketched briefly earlier, requires disputes arising out of or in connection with the Articles to be determined by an expert as specified in Article 41.3. Depending on the nature of the dispute, the expert may be either an advocate, accountant, quantity surveyor, architect, engineer or appraiser. The clause is essentially an arbitration clause in that Article 41.8 provides that the decision of the expert will be final and binding.

90. The respondents filed their reply to the answering affidavit and answer to the applicants' supplementary affidavit on 16 August 2010.

91. On 15 February 2011 the respondents filed a second amended notice of motion in which they persist with their prayers related to the forensic audit and investigation, the amendments to the Articles, the implementation of the resolutions of the EGM, the interdicting of payments to the directors and the alternatives of an interim board or judicial management. They no longer seek an order declaring the first, second and third respondents to be directors, or the first respondent to be acting chairperson. It is accordingly not necessary to determine the precise consequence for the directorships of the 2009 AGM being either abandoned or adjourned. However, the respondents seek orders declaring the AGM of 2 December 2009 and the decisions taken at it to be null and void – though it seems no decisions were actually taken. In addition they request an order directing the HOA to convene a "special" general meeting within 60 days of any

court order to address the consequences of any relief that may be granted including but not limited to the election of a new board of directors.

92. On the same day, the respondents filed a further supplementary affidavit dealing briefly with events that took place after 16 August 2010. The applicants filed an answer to that affidavit on 1 March 2011.

93. In the period after August 2010 the applicant circulated a call among members inviting them to file nominations for persons to serve on the sub-committees of the HOA. Only one nomination was received. Furthermore, the board called, convened and held an AGM for the year ending 28 February 2010 on 1 December 2010. The developer appointed the fifth applicant (Kaplan), the fourth applicant (van Aarde) and the fourteenth and fifteenth respondents (Koekemoer and du Toit) as directors. Only 32 owner members signed the attendance register at the AGM. These elected Mr. B. Garlic, Mr. P. van Niekerk and Mr. Gert Le Roux as member elected directors. The respondents suggest that the poor attendance was a result of the ongoing conflict and a loss of confidence by the members in the ongoing management of the company.

The notice of motion and the relief sought in the counter-application

94. As just explained, the notice of motion in the counter-application has undergone metamorphosis twice. A fourth version was handed up during argument, which because of the relief I propose to grant I do not need to

discuss. In the main the relief sought is based on section 252 of the Act which permits the court to grant just and equitable relief if it appears to it that an act or omission of a company is unfairly prejudicial, unjust or inequitable or that the company's affairs are being conducted in a manner unfairly prejudicial, unjust or inequitable to a member or to some part of the members of the company. Besides the relief in terms of section 252 of the Act, the respondents seek the other declaratory orders and mandatory and prohibitory interdicts described above.

95. Prayers 2-9 of the second amended notice of motion read:

> "2. That Price Waterhouse Coopers be appointed to perform a forensic audit on the financials of the first applicant from inception thereof, in accordance with the forensic audit scope attached to annexure "RB21" to the founding affidavit, and to report back to the applicants, the respondents, and the above Honourable Court pertaining to its findings, within a period of six months from this order;
>
> 3. That the auditors Price Waterhouse Coopers be requested to investigate in particular items 6, 7 and 10 of the resolutions referred to in the requisition annexed as annexure "RB21" to the founding affidavit;
>
> 4. That Price Waterhouse Coopers be requested to investigate all facts and circumstances surrounding the promises of the developer relating to the proposed clubhouse and sporting facilities as part of the development of The Wilds Estate, and to report back to the applicants, respondents and this Honourable Court thereon within a period of 6 months of this order;

5. That the articles of association shall be amended in accordance with paragraphs 1.1 to 1.9 of the resolutions stipulated in annexure "RB21" annexed to the founding affidavit of the applicants;

6. An order directing that the first applicant convene a special general meeting within sixty days of this court order to address *inter alia* the consequences of any relief that may be granted by the honourable court including but not limited to the election of a new board of directors;

7. An order declaring that the Annual General Meeting of 2 December 2009 is null and void;

8. An order declaring that all the decisions taken at the above-mentioned annual general meeting are null and void;

9. An order directing the board of directors of the First Applicant to implement the resolutions adopted by the aforesaid Special General Meeting as contained in annexure "A" annexed hereto within 30 days after a new board of directors referred to in paragraph 6 has been appointed."

96. Prayer 10, dealing with an interim board of directors, reads:

"10. Alternatively to prayers 2 to 9 above, an order directing that an interim board of directors be appointed for the First Applicant, pending finalisation of prayers 2-9 above to be enrolled for hearing on the normal opposed roll, pending trial and execution of any orders granted in respect thereof. The interim board of directors is to be constituted as follows:

10.1 Two directors are to be appointed by the Sixth Applicant;

10.2 Two directors are to be appointed by the members in general meeting;

10.3 Mr. Etienne Naude *alternatively* an independent advocate, to be appointed by the chairperson of the Pretoria Society of Advocates, who shall be appointed as chairman of the first applicant and who shall have a casting vote;

10.4 Such directors referred to in paragraphs 11.1 to 11.3 above shall have all the rights and obligations of directors in terms of South African law, and their appointment shall only terminate by order of court, or as set out in paragraph 11.5 below;

10.5 The appointment of the aforesaid directors and independent chairman may only be terminated by a court order, or by agreement between all five directors, who will be entitled to appoint another director in the event of one director resigning, by unanimous consent or a court order."

97. Prayer 11 deals with the further alternative of appointing a judicial manager and placing the HOA under judicial management. Because I do not propose to make any such order there is no need to set it out.

98. Prayer 12 is the prayer seeking an order interdicting and prohibiting the second, third, fourth and fifth applicants from receiving any payment of any nature whatsoever from the HOA in respect of all the previous

litigation between the parties. Prayer 13 seeks an order that the second to sixth applicants (that is all the applicants save the HOA) be ordered to pay the costs of both the urgent application and the counter-application jointly and severally.

Section 252 of the Act

99. The relief sought in the counter-application asserts the remedy against oppressive or unfairly prejudicial conduct provided in section 252 of the Act. The provisions of the section of relevance in this case read:

> "(1) Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company, may, subject to the provisions of subsection (2), make an application to the court for an order under this section.
>
> (2) ....
>
> (3) If in any such application it appears to the court that the particular act or omission is unfairly prejudicial, unjust or inequitable, or that the company's affairs are being conducted as aforesaid and if the court considers it just and equitable, the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the future conduct of the company's affairs or for the purchase of the shares of any member of the company by other members thereof or by the company and, in the case of a purchase by

the company, for the reduction accordingly of the company's capital, or otherwise.

(4) When an order under this section makes any alteration or addition to the memorandum or articles of a company -

(a) the alteration or addition shall, subject to the provisions of paragraph (b), have effect as if it had been duly made by special resolution of the company; and

(b) the company shall, notwithstanding anything contained in this Act, have no power, some as otherwise provided in the order, to make alteration or addition to its memorandum or articles which is inconsistent with the order, except with the leave of the court.

(5)(a) A copy of any order made under this section which alters or adds to or grants leave to alter or add to the memorandum or articles of the company shall, within one month after the making thereof, be lodged by the company in the form prescribed with the registrar for registration."

100. The section clearly targets two classes of corporate behavior: firstly, acts or omissions by a company that are unfairly prejudicial, unjust or inequitable; and secondly the conduct of the affairs of the company in a manner which is unfairly prejudicial, unjust or inequitable to a member or to some part of the members of the company. While the respondents have pointed to various acts and omissions as being unfairly prejudicial, unjust and inequitable, a reading of their complaints as a whole reveals that they apprehend that the affairs of the company are being conducted

by the developer and its nominated directors in a manner which is unfairly prejudicial, unjust and inequitable to a sizeable part of the membership.

101. If the court is persuaded that there has been what may broadly be referred to as "unfair conduct", and if it considers it just and equitable to do so, it may make such order as it thinks fit. The discretion in relation to the possible relief to remedy the unfair conduct is accordingly a wide one, which must be exercised with a view to bringing to an end the matters complained of. The section is to be interpreted and applied to advance the remedy rather than limit it - *Donaldson Investments (Pty) Ltd v Anglo-Transvaal Collieries* 1980 (4) SA 204 (T) 209.

102. The phrase "the affairs of the company are being conducted" is wide enough to cover conduct by anyone who is taking part in the conduct of the affairs of the company, whether *de facto* or *de jure,* and would in my view include the conduct of the developer in the general meeting and its nominated directors on the board insofar as that conduct relates to the corporate affairs of the HOA - *Re HR Harmer Ltd* [1958] 3 All ER 689 (CA) 698; and *Heckmair v Beton & Sandstein Industrieë (Pty) Ltd* 1980 (2) SA 353 (SWA) 354. A distinction must be kept between acts or conduct of the company on the one hand, and acts or conduct on the part of a shareholder in his private or some other capacity on the other - *Re Unisoft Group Ltd (No 3)* [1994] 1 BCLC 609, 622-623. However, notwithstanding how a shareholder or director may be motivated privately to vote, resolutions of the general meeting and of the board of directors are

decisions of the company and the consequences of them are consequences brought about by the conduct of the company - Blackman *et al*: *Commentary on the Companies Act* 9-12. Section 252 will generally relate to the way that some corporate power is being exercised. In *Re Legal Costs Negotiators Ltd* [1999] 2 BCLC 171 (ChD) 199, it was said:

> "If the company through its directors or in general meeting exercised it powers to conduct the affairs of the company in an unfairly prejudicial manner which failed to give effect to the legitimate expectations of it contributories and the state of affairs could not be cured by the petitioners through the exercise of powers available to them, then a petition ... would lie."

103. It has been held that section 252 applies only in regard to what is taking place or has already taken place, and that therefore relief is not available where an order is sought forbidding threatened conduct, for example perhaps, the threatened exercise of a veto - *Investors Mutual Funds Ltd v Empisal (South Africa) Ltd* 1979 (3) SA 170 (W) 177. Blackman (*op cit* 9-14) submits on the contrary that there would seem to be no reason why the threat to do something cannot itself constitute conduct entitling the member or members to an order, especially when the threat would be unfairly prejudicial, unjust or inequitable if put into effect.

104. The test is essentially one of fairness. In its earlier guise the section targeted "oppressive conduct" which meant conduct which was burdensome, harsh and wrongful. The requirement is now less onerous. What is required is fair play or fair dealing. In *Elder v Elder & Watson*

[1952] SC 49, 55 it was said that the conduct complained of had "to involve a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely". A member usually will be entitled to relief where a dominant group of shareholders use their greater voting power unfairly disabling others from enjoying fair participation in the affairs of the company - *Aspek Pipe Co (Pty) Ltd v Mauerberger* 1968 (1) (SA) 517 (C) 527. The point was made similarly by Slade J in *Re Bovey Hotel Ventures Ltd* (cited in *Re RA Noble (Clothing) Ltd* [1983] BCLC 273) as follows:

> "Without prejudice to the generality of the wording of the section, which may cover many situations, a member of a company will be able to bring himself within the section if he can show that the value of his shareholding has been seriously diminished or at least seriously jeopardized by reason of a course of conduct on the part of those who have had *de facto* control of the company, which has been unfair to the member concerned."

Generally, fairness is a matter of balancing all the interests involved in the light of the history and structures of the company and the conduct complained of viewed as a whole - *Reid v Bagot Wells Pastoral Co (Pty) Ltd* (1993) 12 ACSR 197, 212 SC (SA). In *Re Saul D Harrison and Sons plc* [1995] 1 BCLC 14 (CA) Hoffman LJ explained that the concept of fairness was chosen in order to free the court from technical considerations of legal rights and to confer on the court a wide power to do what appeared just and equitable. This does not mean that the court

can do whatever the individual judge happens to think is fair. Fairness must be applied judicially and rationally.

105. Within the context of company law an important consideration in granting relief against unfair or inequitable conduct always will be that a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality, the terms of which association are contained in the articles of association and sometimes in collateral agreements between shareholders. This feature, said Lord Hoffman in *O'Neill v Phillips* [1999] 2 All ER 961 966-967(HL), "leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted". This means that the enquiry will invariably begin with a consideration of the articles of association and whether the conduct is in keeping with them, holding in mind the principle that by becoming a shareholder in a company a person undertakes by his contract to be bound by decisions taken in accordance with the provisions and prescriptions of the articles. However, the powers of the directors under the articles are invariably fiduciary powers to be exercised for the benefit of the company as a whole and should not be exercised for some illegitimate ulterior or inequitable purpose. Moreover, there will be instances in which equitable considerations will make it unfair for those conducting the affairs of the company to rely upon their strict legal powers - *O'Neill v Phillips* (*supra*

967). Unfairness may consist not only of a breach of articles but also in using the articles unfairly or in a manner contrary to good faith.

106. The proper approach is that enunciated by Lord Wilberforce in *Westbourne Galleries Ltd, Re* [1973] AC 360, 379 where he declared in relation the just and equitable winding-up remedy:

> "The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. The structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound ..... The 'just and equitable' provision does not ... entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations, considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way."

107. The UK Court of Appeal summarised the principles underlying the remedy as follows in *Grace v Biagioli Titanium Electrode Products Ltd, Re* [2000] BCC 85 at para 61:

"(1) The concept of unfairness, although objective in its focus is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under consideration. This will usually take the form of the articles of association and any collateral agreements between shareholders which identify their rights and obligations as members of the company. Both are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable;

(2) It follows that it will not ordinarily be unfair for the affairs of a company to be conducted in accordance with the provisions of its articles or any other relevant and legally enforceable agreement, unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration. Unfairness may, to use Lord Hoffmann's words, 'consist in a breach of the rules, or in using rules in a manner which equity would regard as contrary to good faith': see p.1099A; the conduct need not therefore be unlawful, but it must be inequitable;

(3) Although it is impossible to provide an exhaustive definition of the circumstances in which the application of equitable principles would render it unjust for a party to insist on his strict legal rights, those principles are to be applied according to settled and established equitable rules and not by reference to some indefinite notion of fairness;

(4) .....

(5) A useful test is always to ask whether the exercise of the power or rights in question would involve a breach of an agreement or understanding

between the parties which it would be unfair to allow a member to ignore. Such agreements do not have to be contractually binding in order to found the equity;

(6) It is not enough merely to show that the relationship between the parties has irretrievably broken down. There is no right of unilateral withdrawal for a shareholder when trust and confidence between shareholders no longer exist. It is, however, different if that breakdown in relations then causes the majority to exclude the petitioner from the management of the company or otherwise to cause him prejudice in his capacity as a shareholder."

108. Mr. *Ellis* SC, who appeared on behalf of the applicants, placed much in store on the principle of non-interference in internal management, which he stressed the court should observe when interpreting section 252. The court, he submitted, notwithstanding the far-reaching terms of the remedy, should avoid an unwarranted assumption of the responsibility for the management of the company. The members have contractually undertaken to abide by the articles and structures of the company. Members do not have a remedy in terms of section 252 merely because they have been outvoted or because they are continuously outvoted, no matter how galling or financially disadvantageous - *In re M Dalley & Co* (1968) 1 ACLR 489 (SC:Vic). It is not enough that an entrenched shareholder may cause members discomfort, especially when it acts in terms of its powers and entitlement in terms of the articles. Nor, he submitted further, does section 252 entitle the court to re-write the articles, but only to subject them to be exercised in an equitable manner. I accept

fully that the court should proceed cautiously, but the last proposition is not correct. The express provisions of section 252(4) and 252(5)(a) envision the court issuing an order making an alteration to the articles. And the subsection unambiguously provides that any such order shall have the same effect as if the amendment to the articles had been passed by a special resolution. Moreover, in terms of section 252(4)(b), any amendment effected to the articles by means of a court order in terms of the subsection may only be altered by a further court order. In short, the power of the court to make an order "as it thinks fit" includes the power to intervene in the internal arrangements of a company and to amend the articles when it considers it just and equitable to do so; typically, I would surmise when the articles are structured in a way denying a significant part of the membership fair participation in the affairs of the company. The fact that the courts have to date not resorted to the power to amend the articles does not detract from the authority to do so in terms of the section. In *Bader and Another v Weston and Another* 1967 (1) SA 134 (C), 147F; Corbett J (as he then was) had no doubt that an amendment to the articles with a view to bringing an end to the matters complained of was competent in terms of the provision.

The essence of the respondents' complaint of unfairly prejudicial, unjust or inequitable conduct in the management of the affairs of the company

109. The point of departure, the respondents submit, for the purpose of assessing whether the affairs of the company have been conducted in an

unfair manner, is recognition of the *sui generis* nature of the relationship between the members and the company in the context of a developmental scheme for the establishment of a security residential estate. The members are not typical shareholders who have invested money in a company in exchange for shares and annual dividends to be drawn down from trading profits earned in a commercial enterprise. The company is an association incorporated not for gain in terms of section 21 of the Act, having as its main object the promotion of communal or group interests. The relationship of the members with each other is akin to that of members of a voluntary association established in pursuit of a social or cultural objective. The majority of the members in the HOA are individual home owners in the residential estate; while the developer is a member by virtue of its position as promoter and its continuing ownership of the remaining 215 undeveloped erven in Phase 1 of the estate. The entrenched position of the developer is atypical, though, in my estimation, not illegitimate, at least for the initial phase of the development.

110. The establishment of the security residential estate came about as a consequence of the developer purchasing the land, devising the development plan and the development scheme, and marketing the product resulting in the sale of the erven to the members. The advertising material promised to create amenities and facilities in the estate, including *inter alia* a landscaped central boulevard (Trumpeters Loop) leading to a secure recreation area featuring a swimming pool, tennis courts, squash courts, bowling greens, trim park, walking trails and a clubhouse. In one

promotional document (pg. 358 of the record), the amenities are stated to be "included in the price". It is not denied that in spite of the development having been in progress for about eight years none of the amenities are in place and none of the promised facilities have been brought to fruition. The "landscaped central boulevard", Trumpeter's Loop, was not financed by the developer, but, as explained above, was in effect paid for by the HOA setting off the levies payable by the developer. Whether the funding of the landscaping was authorised by the members is the pivotal controversy which resulted in the present litigation. The respondents, and the members aligned with them, object to subsidising the capital costs of the development out of levies.

111. This quarrel set in motion a series of events which the respondents characterize separately and collectively as unfair, unjust and inequitable management of the affairs of the company justifying the intervention of the court. The alleged unfair conduct includes: the transfer of the liability for the capital cost for the landscaping from the developer to the HOA; the improper accounting for the cost of the landscaping; the refusal of the board of directors to abide the wish of the members for the conduct of a forensic audit; the suspension of the finance committee; the exertions of the board to thwart the convening of the EGM requisitioned by a sizeable group of members; the imposition of a special levy by the board with a view to disenfranchising members at the EGM; the obstructionist approach followed by the developer nominated directors at the EGM; the improper convening and conduct of the 2009 AGM; the attempt to pay the

developer nominated directors a fee for attending to the litigation, payable from the special levy; the threat of the developer to use his veto to prevent any alteration of the Articles; the failure of the developer to stick to his collateral agreements to the members of the HOA; the risk of the HOA being used as a vehicle to bankroll the capital expenditure of the developer in Phase 2 of the development out of members levies; and the general conduct of the affairs of the HOA by the developer nominated directors during 2010-2011. I turn now to deal with each of these issues and the submissions made in relation to them.

112. In reviewing the conduct, the respondents submit that besides keeping in consideration that the company is an association not for gain and without a profit motive, the conduct of the nominated directors should be examined in the context of the estate being a scheme for communal living, where considerations of majority rule, financial transparency, accountability and the receptivity of office bearers is paramount to harmonious living as expressed in the company's main business and object. The respondents profess that it was unlikely that the individual homeowners, when signing on, appreciated the full extent of the developer's entrenched position, which was intended at conception to be temporary, but has endured because of the economic downturn and the inability of the developer to divest itself of its remaining 215 erven.

The liability and accounting for the cost of the landscaped boulevard

113. Although I have traversed some of the evidence and issues related to this dispute, a fuller review is needed to ascertain whether there has been unfairness in the conduct of the affairs of the company.

114. The fact that the advertising material declared the cost of the landscaped boulevard to be included in the price of purchasing an erf in the development, supports the conclusion that it is manifestly a capital development cost for the account of the developer. The applicants say however that subsequent to the distribution of the promotional material an oral agreement between the HOA and the developer was entered into in the early stages of the development which allowed for the costs of the landscaping to be borne by the HOA and set off against the developer's levies. The applicants have tendered little evidence as to the particular terms of the alleged agreement, nor do they disclose the exact date of its conclusion. The only directors of the HOA at the time were Mr. P.J. van Vuuren, the principal, if not sole, shareholder of the developer, and Mr. Roos, a director appointed by the developer. In other words, on the applicants' version the alleged oral agreement was concluded between the developer and the then board of directors of the HOA consisting of the developer and one of his nominated directors. The fact that Mr. P.J. van Vuuren represented the developer and the HOA simultaneously, according to the respondents, constitutes a conflict of interests, which

required the approval of the general meeting. It is furthermore uncertain how many members of the HOA there were at the time. The first general meeting of the HOA took place in November 2004.

115. The applicants point out that nothing in the conditions of establishment imposed any obligation to do the landscaping on the developer. The lack of any such reference in the conditions, to my mind, is at best inconclusive. The key question is whether the HOA assumed the liability. The applicants however insist that the members of the HOA were always aware of the agreement and acquiesced in the decision to have the HOA assume the liability.

116. The respondents deny the existence of the agreement and allege that in any event it would have been in breach of the Articles, and possibly the Act.

117. The cost of the landscaping is set out in an invoice dated 12 October 2007 (some two to three years after most of the work was completed) under the letterhead of the developer (Annexure HK5). The invoice is stated to be in respect of "landscaping of gardens on municipal land on behalf of the Association on the following dates". The dates range from February 2004 to April 2007. The total amount claimed is R2049795,44 and seems to be in respect of various payments made during the period to two service providers, namely "Bokamosa" and "The Nursery". No invoices were submitted to the HOA before October 2007, even though the services

were rendered mainly in 2004 and 2006, and were paid by the developer at the time.

118. The respondents dismiss the applicants' claim that the members acquiesced in the arrangement as an opportunistic distortion which glosses over the enduring discord and dissent as evidenced in the minutes of various meetings between 2004 and 2007; and hence contend that the factual basis of the applicants' justification is blatantly false. The very misrepresentation of the true situation, they say, is itself unfairly prejudicial behavior in the conduct of the company's affairs. In view of that it is important to review the relevant discussions and decisions recorded at each meeting.

119. The subject seems to have arisen for the first time at the directors' meeting of 23 June 2005, to which I have previously referred. On that occasion, it may be recalled, one of the member directors, Mr. van der Merwe, enquired whether the developer was paying its levies. Mr. Faure, a developer nominated director, and the third applicant, is recorded in the minutes as replying that the levies were payable but that the developer was not paying them, because "he deducts the money from the expenses that he is paying at this stage, for example the landscaping". Faure undertook to forward a report "that explains this in detail". It is not noted in the minutes, and hence was probably not pointed out, that this arrangement was in terms of an earlier agreement concluded between the developer and the HOA prior to the election of member directors. The first

time the members elected directors was at the EGM of 9 November 2004. The agreement, if it was indeed entered into, would thus have been concluded on the applicants' version before that date. The landscaping expenses which the developer would have incurred before this time, according to the invoice Annexure HK5, would have been in the order of R600 000.

120. Faure submitted a report at the directors' meeting of 22 September 2005. The relevant minute reads:

> "After the directors discussed this matter it was clear that:
>
> (1) There was (sic) levies that was supposed to be paid by the developer and,
>
> (2) There was an expense incurred by the developer that was supposed to be paid by the HOA.
>
> Therefore it was decided not to show this income and expense on the financial statements because this would leave the HOA with an even bigger deficit.
>
> AF (third applicant) informed the meeting that an explanation of the expenses as well as the levies that was supposed to be paid would be enclosed in the directors' report and that the chairman will explain this to the owners at the Annual General Meeting. See appendix A for the developer levies v cost breakdown that was discussed.
>
> CvdM (van der Merwe) suggests that all future maintenance be done by procedure and that the process must be transparent. The work will go out on a tender and the directors will choose the appropriate quotation."

Appendix A is not annexed to the minutes. The document the applicants allege is Appendix A (Annexure HK7), which is disputed by the respondents, includes no costs breakdown but only a statement of levies. Van der Merwe has filed an affidavit in these proceedings in which he avers that no Appendix A including a cost breakdown was presented at the meeting. It is not essential to resolve the dispute conclusively. Suffice it for present purposes to say that absent a document according with the description of Appendix A in the minutes, the applicants' version that a breakdown of the costs of the landscaping was discussed at the meeting is questionable and less creditworthy.

121. The applicants state in the answering affidavit that Faure reported to the members at the AGM of 1 November 2005 that the developer had set off its levies payable against the expenses incurred for the establishment of the gardens in Trumpeter's Loop and that no objection was raised in response. This in their view amounted to acquiescence and affirmation that "the meeting resolved and confirmed that the HOA will fund the project for the establishment of the gardens in Trumpeter's Loop". The respondents charge that these averments are demonstrably false and aimed at misleading the court. The only reference to the issue in the minutes of the AGM appears under item 3: "Consideration of the Chairman's Report", where it is noted:

> "Garden - entrance of Rhino Ridge: There are plans for the entrance and the directors are requested to get comparative quotes. A tender process will be put into operation. The HOA will fund this project as they have funded the other gardens. The residents were not satisfied with this as it was felt that the developer should take responsibility for the infrastructure and HOA is to maintain it - this will be communicated to the developer."

122. There is nothing at all in the minutes of the AGM indicating that the meeting resolved that the HOA will fund the establishment of the gardens on Trumpeter's Loop. Indeed, to the contrary, the members objected to such and resolved informally that in their view such was a cost for the developer. The members manifestly rejected what the chairman sought to present to them as a *fait accompli*. There is also no minute to the effect that the developer and the HOA had earlier in 2004 concluded an agreement to the effect that the HOA would be liable. There is moreover no evidence that the developer afterward communicated with the members regarding the objection raised at the AGM. It is consequently clear that at least from this point onwards the developer had no right or authority from the general meeting to continue to incur landscaping costs for the account of the HOA. Notwithstanding that, the developer continued to incur costs in the amount of R1,5 million subsequent to the meeting in respect of the landscaping of Trumpeter's Loop. One may assume therefore either that the developer was not updated about the objection raised by the members, or, if informed, chose to ignore it.

123. The matter came up again at the directors' meeting of 25 January 2006 at which quotations for the proposed landscaping were discussed. The deponent to the answering affidavit again misstates what is reflected in the minute by omitting to mention that the issue remained contentious and unresolved. The minute specifically recorded that the developer's refusal to carry the cost was a "contentious issue" that required more discussion. No reference was made to the existence of a contract or arrangement that excused the developer from liability.

124. The applicants then claim that on 8 February 2006 the directors resolved that the developer would finance the gardens out of the levy contributions payable by the developer. Such a course of conduct would have been superfluous had there been a prior agreement. Yet again the deponents' averment is at variance with the minutes of the meeting, which note:

> "The Developer will finance the gardens out of the levy contributions from the developer. WG (a member director) was not happy with this decision as he said the memorandum and Articles of Association says that levies can only be utilised mainly for maintenance. WG feels that this should be taken to the AGM for the owner's approval. WG stated that he was not prepared to sign anything to approve this as he feels that it is in contravention of the Memorandum and Articles of Association. This will be investigated. WG and CR also felt it should be a joint responsibility between the developer and the HOA to develop these gardens, as it is neutral territory it belongs to Tshwane. AF to take up with the developer and give feedback to the HOA."

In view of that, it is false and misleading to state that the directors resolved at this meeting to finance the gardens out of levies. The issue remained contentious and the resolution was to investigate the issue further.

125. The board thereafter invited the intervention of the attorney of the applicants, Mr. Johan Meyer, who addressed the board at its meeting of 29 March 2006 in order to give his interpretation of the Articles regarding the use of levies for capital outlay. The minutes deal with the discussion as follows:

> "Johan Meyer a lawyer was invited to give his interpretation of the Memorandum and Articles of Association regarding the use of the levies for capital outlay. He highlighted that this was a standard clause in security complex contracts. The big dispute is who is responsible for carrying the cost of the garden. The HOA feels if the Developer does not want to contribute to the garden why must they be responsible for the full amount as this is neutral territory that belongs to Tshwane Town Council. The argument was used that the estate was sold through brochures displaying beautiful gardens and double security and this is what residents expect. WG feels that although the HOA paid for the first gate's gardens the residents were not well informed and therefore it went ahead but should they approach the residents now they will not be happy about having to lay out the second garden. WG requested that the developer put in writing on their letterhead that they are not prepared to pay for or contribute any monies toward the second entrance's garden. Johan Meyer stated as the first entrance's garden was paid by the HOA it can be seen as a president (*sic*: "precedent") that was set and the developer is not deviating from his original purpose, he will again be prepared to install the second garden if he can set it off against his levies payable. The developer is (not) using this amount of money for private gain but

rather to enhance the development. WG said that at present the company is insolvent due to not receiving all the levies that it should have and now this is going to be repeated. WG suggested raising this at the AGM for discussion as he feels that the Developer and the HOA must come to some compromise. WG again requested that this issue be referred back to the developer for further consideration. AF said he would discuss this with the developer and get an answer from him in writing."

126. Mr. Meyer, as I have said, was and is the applicants' attorney of record. Prior to his presentation to the board he had consulted with the developer. Once again, therefore, it is noteworthy that he makes no reference to a prior agreement between the developer and the HOA in terms of which the costs would be borne by the HOA to be set-off against the developer's levies. He mentions only the "precedent" created by the manner in which the earlier costs had been dealt with.

127. In response to this interchange the developer addressed its letter of 26 April 2006 to the board regarding the issue, which reads as follows:

"Hiermee verwys ons na die versoek van The Wilds Home Owners Association insake die tuine op die Stadsraad grond.

Graag bevestig ons dat ons is nie bereid om enige bydrae van Kapitale aard teenoor genoemde tuine te maak nie.

Ons gaan die Kapitale fondse voorskiet vir die installering van die tuine in lieu van ons heffingsverpligtinge.

> Ons beskou die saak as afgehandel."

128. The minutes of the directors' meeting of the same day note that "suggestions" were made to refer the matter to the AGM. It is not stated who made the suggestion but most probably it was one of the member elected directors.

129. The matter received attention at the AGM of 30 August 2006. In the minutes under the item: "Consideration of Chairman's Report" it is noted that the landscaping of Trumpeter's Loop had been completed, was put out to tender and the best quote was accepted. It is further noted that a letter had been received from the developer and that "the HOA are to *maintain* the gardens". The letter was not included in the documentation for the meeting and its precise content is not reflected in the minutes. Nor was the issue regarding the capital cost of the gardens alluded to in the chairman's report, but was only clarified in response to questions arising in relation to the report. The recorded minute is somewhat vague and ambiguous, reading:

> "The owners were informed that the gardens were being paid for by the owners. The general feeling was that the developer should take some financial responsibility for these gardens".

What is clear from the minutes is that no resolution was put to or adopted by the AGM ratifying the capital expenditure or authorising the board to

incur expenditure in respect of the gardens up to an amount as determined by the meeting.

130. The respondents attach significance to the failure of the board and the developer to have made proper disclosure of the capital costs and the set-off in the financial statements for the year ending 28 February 2006 and in the estimated income and expenditure for the year 1 March 2006 - 28 February 2007, which were tabled at the meeting. I will deal with the topic of non-disclosure more fully later. The point for present purposes is that the 2006 AGM gave the matter the limited consideration it did without having the benefit of the figures relating to the capital cost and the amount set off against the developer's levies.

131. The applicants are of the opinion that the matter was finally laid to rest at the 2006 AGM. The respondents point to the expressed sentiment of the AGM that the developer had to take some responsibility as a clear indication that the meeting rejected the *fait accompli* with which they had been presented.

132. The quarrel between the parties gained in momentum and acrimony from this point onwards, especially with the realisation among some of the members that neither the costs nor the set-off had been reflected in the financial statements.

133. Not much else came to pass on this score until the next AGM on 19 June 2007. This meeting approved the minutes of the 2006 AGM but made no reference to the issue of the developer taking responsibility for the cost of the garden. In the paragraph 50.23 of the answering affidavit the deponent avers that Faure (the third applicant) explained to the AGM that the financial statements had to be withdrawn because there had been non-disclosure, and indicated to the meeting the expenses which the developer was setting off against its levies, as well as the amount of the levies payable by the developer were. The applicants do not back this assertion with any reference to the full and comprehensive minutes of the meeting. The only relevant minute is item 7 headed: "Consideration of the Audited Annual Financial Statements 1 March 2006 - 28 February 2007" which reads:

> "AF reported that the Financial Statements had been withdrawn. There was a problem with the Developer's levy contribution, although it is transparent it has to be reflected in the set of books. This has been referred to the finance committee. The committee will meet with Midcity, the HOA and the new directors to come to a suitable solution. The revised financial statements will be ready in 7 days."

134. The respondents deny that there was any disclosure of either the costs of the gardens or the amount of the set-off to the 2007 AGM. Their denial gains credence and authenticity from the minutes of the subsequent directors' meeting of 18 July 2007, where it is noted that a complete list of the expenses incurred had not been finalised.

135. The minutes of the directors' meeting of 18 July 2007 expose a measure of dissatisfaction and suspicion about the accounting treatment of the costs of the gardens. It is common cause that prior to this date, for a period of almost four years, there had been no disclosure of the expenses and set-off in the financial statements. The relevant minute reads:

> "All expenses not reflected in the books must be listed and submitted for approval.
>
> A forensic audit must be done on all levies by either current auditors or appointed auditors.
>
> A written document must be done to send to residents to clarify how the correction will be done.
>
> Midcity has compiled a list of the levies payable by the Developer and handed it to the auditor.
>
> .....
>
> All expenses on behalf of the HOA made by the Developer will be listed.
>
> These lists are to be checked by the board and then they can be included in the books."

136. Despite the board suggesting that a forensic audit be done (and this decision being supported in subsequent resolutions of the AGM), to date no forensic audit has been conducted. The applicants' view is that no

resolution was taken by the meeting, and the matter was referred to the finance committee for further consideration.

137. At the directors' meeting of 8 November 2007 a report compiled by Mr. W. Pretorius, being a report of the finance committee regarding levy increases, was submitted. The report analysed the general financial position of the HOA. In paragraph 4 under the heading "Further Recommendations" it made the following proposal:

> "(i) The advance from the Developer to install gardens offset his levy contributions (sic) be accepted provided that:
>
> a. The Developer provides the Conditions of Township establishment to the HOA and the said conditions do not require the Developer to install gardens.
> b. The final figure is audited and approved by the previous board of directors.
> c. The financial statements are approved on (sic) the Extraordinary General Meeting (XGM)."

The minutes of the directors' meeting of 8 November 2007 note that the report will serve to form part of the agenda of the upcoming EGM decided by the meeting to be held on 8 December 2007. The agenda for the meeting was stated to be: 1) Approval of the Financial Statements; and 2) Approval of the proposed budget.

138. The final version of the 2007 financial statements (Annexure HK12) includes a balance sheet reflecting an amount of R1 642 965 as "Trade and other payables" under Current Liabilities. Note 3.1 to the balance sheet discloses the developer as a trade creditor owed an amount of R2 049 795 in respect of landscaping. Levies and contracting fees for 5 years (2003-2007) are set off against this amount leaving a balance of R890 954 owed by the HOA to the developer. The amounts owing as levies and contracting fees are disclosed for each year.

139. At the EGM on 8 December 2007 the amended financial statements were approved by 169 votes in favour and 81 against. The votes in favour were those of the developer. At the meeting van Eeden objected, declaring that the developer was not entitled to vote on account of it not having paid its levies. The applicants maintain they were entitled to vote by reason of the set-off arrangement. Accordingly, as the applicants see it, because of the approval of the financial statements by the EGM there is no longer any issue with regard to the landscaping costs, the developer's levies and their non-disclosure. It sees no difficulty in the fact that for all intents and purposes it was the judge in its own cause. On the other hand, only 81 other members attended the meeting. The exact number of members at this stage of the development is not immediately evident from the papers and it is thus difficult to say categorically whether the members were the victims of their own apathy.

140. As discussed earlier, not long after the correction of the financial statements, the Independent Regulatory Board for Auditors found Mr. T.J. de Koker, the auditor, guilty of making a material omission by not reflecting the landscaping expenses and developer's levies in the financial statements and failing to obtain any audit evidence in relation to those items.

141. What might legitimately be described as a breakdown between those controlling the HOA and a significant number of its members followed on these events, as can be seen in the litigation which ensued.

142. The respondents have urged me to declare finally whether or not the developer has exclusive liability for the costs of the landscaping. I hesitate to do so for two reasons. Firstly, the amended notice of motion seeks no such relief; and secondly there is no need to do so for the purpose of deciding whether the affairs of the company are being or have been conducted in a manner unfairly prejudicial, unjust or inequitable to some of the members.

143. A determination of whether the manner in which the landscaping costs and the set off were dealt with constituted "oppressive" or unfairly prejudicial conduct, involves balancing all the interests concerned in the light of the history and the structure of the company, with reference to the articles of association and, within limits, the other relevant, collateral agreements and arrangements. In the present case, of particular

importance, as I have intimated, is the fact that we here have to do with a majority of the membership being residents in a security estate who have been denied effective voting rights and full democratic participation in the management of the company by reason of the entrenched position of the developer. Added to that, the development is ongoing and the promises made (collateral to the Articles) regarding the proposed facilities of the estate have not been kept, with the developer showing a clear intention to seek to finance those commitments from levies payable by the members.

144. Although the advertising material leaves the impression that the developer will pick up the tab for "the landscaped central boulevard" and the other facilities, there is nothing in principle which prevents the developer and the members from agreeing to transfer that liability to the HOA. The applicants' version that such an agreement was indeed concluded between the developer and the two developer nominated directors at the early stages of the development is improbable. Firstly, there is no record, memorial or minute recording the conclusion of that agreement. Secondly, the alleged existence of such an agreement was raised for the first time late in the day after litigation had commenced. And, thirdly, and most importantly, there were several occasions in the contentious correspondence between the parties where had such an agreement been concluded its existence would have been alluded to and reliance placed upon it; yet this never happened.

145. Even had the agreement existed its genesis and execution probably would have been tainted by illegality, unfairness and a conflict of interests of sufficient order that its conclusion would in and of itself have constituted unfairly prejudicial conduct towards the membership in the management of the company's affairs.

146. In the first instance, any such agreement, or at least the one contended for by the applicants, might have fallen foul of the provisions of section 236 of the Act. The contract supposedly concluded by the developer, P.J.J. van Vuuren Beleggings (Pty) Ltd, with the HOA represented exclusively by P.J.J. van Vuuren and Mr. Roos, was a contract "of significance in relation to a company's business" and thus one within the purview of section 234(2) of the Act. Section 234(1) provides:

> "A director of a company who is in any way, whether directly or indirectly, materially interested in a contract or proposed contract referred to in subsection (2), which has been or is to be entered into by the company or who so becomes interested in any such contract after it has been entered into, shall declare his interest and full particulars thereof as provided in this Act."

That interest has to be disclosed to the members in general meeting. There is no evidence that van Vuuren ever disclosed his interest to the general meeting. It is uncertain though how many members there were at the time the agreement was supposedly concluded, and what would have been needed for a general meeting to be held. Nor, as required by section 239 of the Act, was any resolution in relation to the contract

recorded in any minutes of the board or the general meeting. The purpose of requiring the disclosure is to enable the general meeting to permit the board to enter into the contract and to permit the interested director to be counted in the quorum and to vote on the contract. If the interested director does not disclose his interest and the directors enter into the contract, the contract is voidable at the instance of the company as against the interested director and against a third party (the developer) if the third party had knowledge of the director's breach of duty (Blackman *op cit* 8-327). Moreover, in terms of section 236 the resolution to enter the contract is equally invalid. However, whatever the niceties of statutory compliance, the fact remains that at the AGM of 1 November 2005 the members gave a clear indication that the developer was not entitled to assume that the HOA would accept liability for the landscaping costs after that date.

147. The conclusion of a voidable contract, by means of an invalid resolution, excusing one of the directors (indirectly) from a substantial liability to the company, involving as it does a significant conflict of interests not appropriately disclosed to the general meeting would generally be unfair, in that it would potentially enrich that director unjustly at the expense of the members to whom disclosure was not made. However, the evidence on the papers is insufficient for me to reach any definitive conclusion about whether sufficient disclosure was made as required by the statute prior to the 2005 AGM. At best it can be said that the developer ought fairly to have dealt with the conflict of interests in a more transparent

fashion, and should not have continued to incur additional expenses after the AGM.

148. Besides the inadequate disclosure of the conflict of interests, the alleged oral agreement would have fallen foul of the provisions of the Articles of Association. The agreement and all subsequent resolutions by the board which sought to transfer the capital cost of the landscaping from the developer to the HOA were not in conformity with Article 6.14 which reads:

> "The directors or the finance committee shall not be entitled to undertake on behalf of the association any permanent works of a capital nature exceeding an amount to be determined by the general meeting on an annual basis without the sanction of a resolution of the association in general meeting."

There is no evidence before me of any specific resolution by the general meeting before or after the 2005 AGM authorising the directors to undertake any permanent works of a capital nature (which the landscaping of Trumpeter's Loop was) or a general authority to undertake such works up to a pre-determined budget. At the very best for the applicants, the approval of the amended 2007 financial statements at the EGM of 8 December 2007 could technically constitute implied retrospective ratification. Such would not, at least to my mind, exclude the taint of unfairness entirely. The 2007 EGM was attended by a small percentage of the residents of the estate and the votes in favour were those exclusively vested in the developer. Furthermore, the authorisation of permanent works of a capital nature by way of a general meeting resolution was not

an agenda item in the notice convening the meeting. Had it been, more residents might have shown interest in attending the meeting. In addition, the entrenched position of the developer allowed it to validate its own conflict of interests, perhaps contrary to the spirit of the Act. And, finally, it was never placed on the agenda that the developer required a resolution favouring the set-off arrangement before it would be entitled to vote. Were I to reject the respondents' accusation of unfairness simply on the basis of the approval of the financial statements by the 2007 AGM, I would in effect hold that the exclusive votes of the developer in favour of the financial statements: i) ratified the possibly invalid agreement; ii) authorised the expenditure; iii) approved the set-off; iv) permitted the developer to vote despite non-payment of its levies; and v) was procedural despite the only agenda item being: "approval of the financial statements". Fairness required rather that each of these items should have been specified on the agenda to be voted on by separate resolutions, and that all members received proper notice of them. That did not happen.

149. The applicants justify their conduct with reference to Article 6.19 which provides:

> "The board may enter into an agreement with the developer for the provision of a capital sum and/or the transfer of land and/or equipment to the association in lieu or levies."

I have not been referred to any specific resolution in the minutes of the meetings of the board in terms whereof the developer agreed to provide a capital sum in lieu of levies. But even accepting there was such an agreement, that alone would not have entitled the board to undertake the permanent works of a capital nature, with the capital sum provided, without the approval of the general meeting in terms of Article 6.14. The fact remains, it is undisputed, there was never a resolution adopted by the HOA in general meeting in respect of the establishment of the gardens along Trumpeter's Loop.

150. Moreover, as the minutes of the various meetings of the board and the general meeting across the five year period reveal, the respondents and their associates never acquiesced in the arrangement. It is important to keep in mind that most of the landscaping costs were incurred after November 2005, by which time the dispute was very much alive. The developer and its directors went ahead in the face of opposition and without proper authority. The board should have placed the issue overtly on the agenda of the AGM for a resolution in terms of Article 6.14 and to have allowed an open, informed debate and a vote. Instead, it chose largely to obfuscate and followed an improper course in the financial disclosure of the costs and levies. Its rationale for not disclosing the amounts in the financial statements, as stated by Faure at the directors' meeting of 22 September 2005, namely "not to show this income and expense on the financial statements because this would leave the HOA with an even bigger deficit" was improper and not in accordance with

generally accepted accounting practice. The non-disclosure was interpreted by the members to be an illegitimate attempt to conceal the fact that the HOA was bearing a development cost which was for the account of the developer.

151. In the final analysis, therefore, the handling of the development landscaping costs by the board, in conjunction with the developer, is inescapably an instance in which the affairs of the company were conducted in a manner unfairly prejudicial to part of the members of the company. All other disagreements between the parties owe their provenance to this primary dispute, resulting conspicuously, as it did, in several members of the company losing confidence in the directors of the company.

The attempts to requisition and convene an Extraordinary General Meeting

152. With that loss of confidence, the activist members aimed their efforts at three targets. They sought first to convene a general meeting in order to alter the structure of the company by amending the Articles of Association to remove the entrenched rights of the developer. They secondly (in view of the uncovering of the irregular accounting) demanded a forensic audit. And thirdly, they hoped to enforce the un-kept promises of the developer to provide the facilities described in the advertising material.

153. The manner in which the applicants responded to the attempts by the members to convene an EGM was less than edifying and was experienced by them as another instance of unfair conduct.

154. Article 16.4 provides:

> "The directors may, whenever they think fit, convene an extraordinary general meeting and an extraordinary general meeting shall also be convened on a requisition made in terms of section 181 of the Act (i.e. members representing not less than 10% of the voting rights may requisition a meeting), or in default may be convened by the requisitionists as provided by and subject to the provisions of that section."

155. Article 17.1 requires 14 or 21 clear days notice of an EGM (depending on the nature of the business of the meeting) specifying the time and place of the meeting, the general nature of the business and in the case of a special resolution, the terms and effect of the resolution and the reasons for it.

156. The relevant parts of section 181 of the Act read:

> "(1) The directors of a company shall, notwithstanding anything in its articles, on the requisition of -
>
> (a) .....
>
> c) in the case of a company not having a share capital, one hundred members of the company or of members representing

> not less than one-twentieth of the total voting rights of all the members having at the said date (date of the lodging of the requisition) a right to vote at general meetings of the company, within 14 days of the lodging of the requisition issue a notice to members convening a general meeting of the company for a date not less than twenty-one and not more than thirty-five days from the date of the notice."

In terms of section 181(3) if the directors do not issue the notice, the requisitionists may themselves convene the meeting on 21 days notice. They are entitled in terms of section 181(5) to recover any reasonable expenses incurred.

157. It will be recalled that the first requisition lodged on 13 November 2008 gave notice of fifteen resolutions aimed at removing the directors, limiting their authority, recovering the costs of establishing the gardens, appointing PWC as auditors and for them to do a forensic audit and replacing the managing agent. The requisition was supported by proxy forms signed by 381 members, being considerably beyond the 5% required by section 181 and the 10% required by the Articles. Faure, the then chairperson, refused to disclose to the member elected directors the reasoning of the legal advice he had obtained that the requisition did not comply with the Act. The members did not at that stage exercise their right to convene the meeting themselves, mainly, it would seem, because they proceeded to launch the first application. The second requisition was lodged with the board on 19 May 2009 while the first application was pending. As

explained earlier, extra resolutions were added. For a second time, the board on unspecified grounds discounted the requisition as irregular and threatened the members with an urgent interdict if they continued to convene the meeting. The third requisition was lodged on 24 June 2009 supported by 99 members. Yet again, without explaining why, the second applicant rejected the requisition and threatened legal action. At this point the members went ahead to convene the meeting and their actions ultimately led to the applicants launching the urgent application.

158. For the first time on 24 August 2009, almost one year after the members lodged the first requisition, the attorney for the applicants outlined the applicants' reasons for challenging the legality of the requisitions. The reasons as set out in the letter are in some respects spurious and in the main are incorrect or invalid. They were as follows:

- A proxy allows a member to appoint another person in his stead to vote in his place at a meeting, but does not allow a member to requisition a meeting of members;

- the requisition was only signed by van Eeden and not by the requisite number of 100 persons and/or members as provided for in the Companies Act;

- the notice of 5 August 2009 conveyed the impression that the HOA had called the meeting and not the requisionists;

- neither the notice nor the requisition specified that the proposed resolution to amend the Articles was required to be a special resolution;

- the requisitionists were usurping and/or encroaching upon the powers of the board of directors; and

- the requisition and documentation were misleading about the cost of a forensic audit (stated to be R200 000).

159. More than 30% of the membership had signed proxies in relation to the first requisition with the intention of requisitioning a meeting. Section 181 is silent on the form which a requisition should take and the signing by members of a proxy for that purpose can be construed as compliance, or at least substantial compliance. On the other hand, it is true that it is obligatory to specify that a special resolution was required to amend the Articles. The other points raised, though, are either wrong or inconsequential. But still, whatever the validity or the invalidity of the points taken by the applicants against the requisition, their conduct was not confidence inspiring and detracted from the possibility of resolving the disputes. Undue insistence on technical legalities, without any obvious benefit from compliance, can in certain circumstances be unfair. There was quite evidently a high level of dissatisfaction and uncertainty among the members of the company as indicated by the number of the proxies

furnished to the directors. There is no getting away from the fact that the respondents, despite at times being inept in their approach, have always been motivated by the collective interests of the residents and the goals of good corporate governance and transparency. The applicants were unreceptive and too litigious in their response. Significant accounting irregularities had been uncovered. The more prudent course would have been to try to allay the fears of the membership by less antagonistic means. The threat of an interdict on the technical grounds relied upon was misplaced, ill-advised and probably needlessly hardened the stance of the members. The issues raised in the requisition were entirely legitimate and deserving of discussion. As a first resort, the board and the developer should have hastened to convene a general meeting and used the power of persuasion, and if need be as a last resort the developer's veto to prevent any valid interests of the developer from being unduly undermined, had it come to that. The precipitate, even impetuous, resort to threats of litigation revealed a disdainful disregard for the apprehension of the membership. This conduct too, therefore, was unfairly prejudicial to the members, compelling them prematurely to costly litigation, and unfairly disabling them from enjoying fair participation in the affairs of the company.

The non-implementation of the resolutions of the EGM by the board of directors

160. Sapire AJ gave no reasons for his order convening the 2009 EGM, which was made with the consent of the parties. None of the assumed technical defects in the requisitions happened to pose an insuperable hurdle, because the meeting was convened without their having been rectified in any noticeable way.

161. The resolutions tabled at the EGM mirrored those contained in the requisitions. Their aims were threefold: to amend the articles to remove the entrenched position of the developer; the replacement of the directors, the auditor and management agent; and to give the general meeting greater control over the financial management and affairs of the company.

162. The first resolution tabled was for the amendment of Articles 10.1; 10;4; 15.3; 23.2; 23.1.4 and 24, all of which in one way or another entrenched the rights of the developer placing it in effective control of both the board and the general meeting. Article 24 is the provision governing the amendment of the Articles. It provides:

> "The company may from time to time by special resolution amend and/or substitute its existing articles of association, subject to the Developer's rights in terms of paragraph 23.1.4."

Accordingly, amendments to the Articles in all instances require a special resolution and the concurrence of the developer. In general terms there must be a quorum of 25% of the total membership attending the meeting and the resolution has to be passed by not less than three-fourths of the number of members entitled to vote who are present in person or by proxy. The resolution to have been carried therefore needed 441 votes out of the total of 589 votes possible at the meeting. All of the residents attending the meeting voted in favour of the amendments, amounting to 374 votes in total. The developer used his 215 votes to vote against the resolution. The 75% threshold was not reached and consequently the developer had no need to resort to the veto in Article 23.1.4.

163. Resolutions 2 and 3 related to the auditor. I shall discuss them when dealing with the need for a forensic audit. Resolution 4 mandated the finance committee to recover the costs to establish the gardens, while Resolution 5 instructed the finance committee to compel delivery in relation to the provision of the clubhouse and facilities in respect of which the developer appears to have reneged. Resolution 6 replaced the management agent. Resolution 7 related to the financial management of the HOA. A further resolution dealt with the removal of the directors; it lost some of its force by virtue of the developer nominated directors having resigned shortly before the meeting.

164. What is clear about Resolution 4 is that this was the first occasion upon which the general meeting was formally and directly called to express

itself on the capital landscaping expenditure. While it is correct that Article 14.1 confers wide financial powers on the board, the managerial prerogative therein is subject to the restriction in Article 14.1.1, namely "save as may be expressly provided herein". As discussed before when examining the subject of the landscaping costs, Article 6.14 requires "the sanction of a resolution of the association in general meeting" for permanent works of a capital nature. The aim and effect of Resolution 4 was to deny the directors that sanction. Absent that sanction they were obliged to collect the levies payable by the developer. It is not denied by the applicants that no steps have been taken to implement the resolution. The board's position is that it has for all intents and purposes collected the levies in that it entered into an agreement with the developer for the provision of a capital sum, which it was entitled to do in terms of Article 6.19, and such agreement was by way of the set-off reflected in the amended 2007 financial statements.

165. Resolution 4 was passed by an appropriate majority. The failure of the directors to implement the resolution is inappropriate. It may yet be shown that the developer has a sound defence to any claim to be instituted; and it may turn out that the general meeting is persuaded at a later stage that it is not prudent to persist in the efforts to recover the levies. It may also be that the board may have to pass another special levy to finance the action for recovery. But it is unfairly prejudicial of the board to simply ignore the resolution of the meeting to bring suit against the developer on the ground that the majority of the board (the developer appointed directors), do not

agree with the resolution. The board was not entitled to incur the expenditure without the authority of the general meeting, and the resolution was an unequivocal refusal to ratify the unauthorised expenditure. The general meeting embraced the view of the respondents, presumably based on legal advice, that any agreement between the HOA and the developer is voidable, and the capital expenditure incurred by the board was not permitted in terms of the Articles.

166. It was mooted in argument on behalf of the respondents that Resolution 4 had the effect of disenfranchising the developer by virtue of the provisions of Article 6.13 which provides that no member shall (unless otherwise determined by the board) be entitled to any of the privileges of membership until levies have been paid. Similarly, Article 23.2 provides that unless specifically permitted otherwise by the chairman no member may vote at the general meeting unless the member's levies have been paid. The point has been seized upon by the respondents, because if correct it would mean that the resolutions amending the Articles would have been properly passed by the mandatory percentage. Article 6.13 must be read as limited by Article 23.2. The privileges referred to in the former do not include the right to vote at a general meeting, by virtue of the latter provision specifically and expressly dealing with it. Accordingly, assuming that the developer was not properly paid up (which it might deny *inter alia* on the grounds of estoppel), it merely needed the specific permission of the chairman to vote, which events at the meeting show it

apparently got, even if only tacitly. For that reason I do not accept the belated submission that the developer was not entitled to vote at the EGM.

167. Resolution 6 proposed that the contract with the managing agent, Midcity, be terminated and that another company be appointed in its stead. The view of the chairman of the meeting was that this was a matter for the exclusive managerial prerogative of the board. Article 14.1.2 provides that the directors shall "at all times have the right to engage on behalf of the association the services of ..... a managing agent ..... on such terms as they shall decide, and this right to engage shall also include the right to dismiss the same". Resolution 6 does not seek to amend the Articles, by transferring the power to appoint and dismiss the managing agent to the general meeting. It merely aimed at allowing the general meeting to exercise the power normally reserved to the board. No attempt has been made by the board to honour and give effect to Resolution 6 that was passed by a vote of 374 to 215.

168. Shortly before the EGM three of the four developer nominated directors strategically resigned. Consequently, at the time the resolution was passed, it was not possible to convene a board meeting with a quorum. In those circumstances, the respondents submit, the general meeting had an inherent residual power to exercise the power to appoint the managing agent. They make the same submission with regard to the appointment of the auditors and the decision to perform a forensic audit, to which I will return later.

169. In *Ben-Tovim v Ben-Tovim and other* 2001 (3) SA 1074 (C) it was held that if for some reason the directors cannot or will not exercise the powers vested in them, the general meeting may do so. HJ Erasmus AJ (as he then was) explained the principle as follows:

> "Are the shareholders in general meeting entitled to step in and resolve a deadlock that has developed between directors by taking resolutions on behalf of the company? The pendulum of the division of powers between the general meeting and the board of directors has through the years swung from the general meeting as the supreme organ to prominence of the articles of association. There are indications, at least in other jurisdictions, that the pendulum is beginning to swing back again ..... Whatever swings of the pendulum and differences of emphasis there might have been, it has been generally accepted that if for some reason the directors cannot or will not exercise powers vested in them, the general meeting may do so. One of the reasons a board of directors cannot exercise powers reserved for it is the development of a state of deadlock among the directors..... In *Barron v Potter* [1914] 1 Ch 895, a case in which no board meetings could be held owing to differences between the directors, the Court found (at 903) that, 'on a principle founded on plain common sense', where directors having certain powers are unable or unwilling to exercise them, 'there must be some power in the company to do itself that which under other circumstances would be otherwise done'. In *Alexander Ward and Co Ltd v Samyang Navigation Co Ltd* [1975] 2 All ER 424 (HL), in which a company had no directors, the Court referred to the 'general meeting which, in the absence of an effective board, has a residual authority to use the company's powers'."

I am likewise satisfied that in the face of an accounting irregularity in the collection and use of the levies (matters falling within the responsibilities of the managing agent), and in circumstances where no board of directors existed, it was within the inherent, residual authority of the general meeting to decide to dismiss the managing agent by means of an ordinary resolution and to appoint another. The enduring refusal by the board to implement that resolution, or its unilateral reversal of it, is another instance of unfairness in the conduct of the affairs of the company.

170. Resolution 7 relating to the financial management of the HOA had three components. The first was the imposing of an overall restriction on the spending authority of the board by limiting it to an approved budget as presented and approved at a general meeting. The second compelled strict financial control by prohibiting expenditure beyond each line item of the budget. And the third required all financial expenses to be approved by at least two homeowner elected directors and the relevant sub-committee chairman. This resolution was also passed by 374 votes to 215.

171. The applicants are of the opinion that the resolution was incompetent because such matters fall within the managerial prerogative of the board. That may be an overstatement. I do not see an insurmountable barrier to such constraints being placed upon the board by the articles of association of a company, and counsel has not referred me to any principle or legal proscription that might present any such impediment. All

the same, in this case, to achieve that objective, an amendment to the Articles is requisite, and to that end a special resolution of the general meeting is needed because none of the powers sought to be reserved to the general meeting by Resolution 7 are so reserved in the Articles as currently formulated. Article 14, governing the functions and powers of the board of directors, vests the prerogative of financial management in the board. Article 14.1.1 is wide in its scope, conferring on the board the power to "manage and control the business and affairs of the association". It stipulates that the directors "shall have full powers in the management and direction of such business and affairs and *save as may be expressly provided herein*, may exercise all such powers of the association, and do all such acts on behalf of the association as may be exercised and done by the association ...." The Articles moreover are structured to permit the budget to be drawn up by the finance committee in terms of Article 6.2, which committee, if and once constituted, acts under the delegated authority of the board in terms of Article 6.17. There is accordingly nothing in the Articles that expressly authorises the general meeting by ordinary resolution to impose the restrictions envisaged in Resolution 7. Likewise, the imposition of a requirement that two homeowner elected directors approve all expenditure in effect amounts to an amendment to Article 15.8 which provides that any resolution of the board shall be carried on a simple majority of all votes cast.

172. In consequence, therefore, I agree with the applicants that Resolution 7 was not competent and does not have to be implemented by the board.

Not because the subject matter is exclusively and permanently reserved to the managerial prerogative of the board, but because the resolution in effect sought to amend the Articles and did not comply with Article 24 read with section 199 of the Act.

173. I do not consider it necessary to canvass the resolutions relating to the removal of the directors and the reinstatement of the finance committee. Suffice it to say the voting in relation to them was predictably the same as in the other resolutions. More important for the purposes of a section 252 determination are the ramifications of the board imposing a special levy just before the EGM and the ongoing resistance of the developer and its nominated directors to the conduct of a forensic audit.

The discouraging and disenfranchising effects of the special levy

174. Prior to the EGM, and subsequent to the order of Sapire AJ, the board met on 23 September 2009 and approved legal expenses of almost R1,4 million in respect of the first application and accepted invoices in an amount of more than R200 000 from two directors in respect of their time spent on the application, which as I outlined earlier should have been put first to the general meeting. The notice convening the meeting included the agenda item "Special Levies". The board then passed a resolution raising a special levy in the amount of R1500 to be paid by each member of the HOA to meet the expenses it had approved.

175. The respondents contend that the raising of the additional levy of R1500 was calculated to discourage member participation in the EGM, and in fact disenfranchised a significant number of members (63), because Article 23.2 grants the right to vote at general meetings only to members who are paid up. They also say that the special levy was unwarranted at the time it was raised because there were sufficient funds on hand to meet the immediate expenses of the HOA, including the legal expenses.

176. Doubt has been expressed also about the legality of the special levy. Article 6.8 provides that "the finance committee may from time to time levy special contributions upon the members". The finance committee had not been in existence since the decision of the board taken on 31 October 2008 to revoke the mandates of all the sub-committees. The respondents hence submit that the decision to impose a special levy was *ultra vires* the powers and competency of the board of directors. The applicants respond by referring to Article 6.16 and 6.17 which read:

> "6.16 The establishment of a Finance Committee shall be in the discretion of the directors of the Association and in the absence of a Finance Committee being established the powers and responsibilities set out above as be vested on (sic) the Finance Committee shall *mutatis mutandis* apply and vest in the Executive Committee.
>
> 6.17 The Executive Committee and/or Finance Committee shall act under the delegated authority of the directors of the company."

The submission of the applicants, with which I agree, is that in the absence of a constituted and operative committee the board is entitled to exercise these powers. Such, it would seem to me, is the necessary implication of Article 6.17 when construed in the context of the Articles read as a whole. Therefore nothing more need be said about this point.

177. There is also a disagreement about a possible delay in sending out the monthly statements including the levy, with the consequence that members had less time to pay and ensure they were in good standing. The applicants deny there was any undue delay, pointing out that the members' directors agreed at the meeting that the levy would be added to the levy statement of October 2009 (as was minuted). And besides, the statements were sent out on 25 September 2009, two days after the board meeting and more than a month before the scheduled EGM. I am prepared to assume the correctness of the applicants' version on this issue, and decline to make a finding that there was deliberate delay. That though does not excuse the confusing implementation of the levy and the repercussions it might have had for voting at the EGM and procedural fairness generally.

178. When members initially attended the offices of the HOA during the course of October 2009 to make arrangements regarding the levy, they were presented with Annexure SA18 which allowed for monthly repayments. Paragraph 4 of that document states:

> "The above member has no voting rights at any general meeting of the company until the last payment is made and the levies is (sic) paid in full"

Any member who made an arrangement for deferred monthly payments of the special levy would thus have understood that he was disenfranchised until the full R1500 was paid. Disquiet on the part of some members resulted in pressure being brought to bear on the board, and eventually, just before the EGM convened, the chairman ruled that members who had made an arrangement to pay monthly would be entitled to vote. Considering that this was done at the last minute, the respondents justifiably aver that it is likely that some members were under the misapprehension that they were not entitled to vote. It is not clear how many members stayed away from the EGM, in spite of having made arrangements, on account of their belief that they were disenfranchised on the basis conveyed in paragraph 4 of Annexure SA18. It is conceded that 63 members were disenfranchised because they had not made any arrangement.

179. According to the respondents there was no necessity for the special levy because there were sufficient funds at hand for the HOA to fund the litigation. At the time the levy was approved, the HOA had more than R2 million invested in the bank. Its annual expenses are in the region of R5,6 million. The applicants say it was all the same prudent to raise the special levy. That may or may not be so, but the question I am called to answer is whether the timing of and motivation for the levy was a purposeful

manipulation aimed at discouraging members from attending and voting at the EGM; additionally, or alternatively, whether it impacted unfairly on the rights of members to participate in the management of the company.

180. On 2 October 2009, about the same time members would have received the monthly levy statement reflecting the special levy, the chairman of the board circulated a newsletter to the members in which he *inter alia* warned them that the ongoing dispute was incurring costs and that a further levy of R500 per member might be needed. He shared with them his view that it was likely that the developer might use its veto right to prevent any amendment to the Articles. He cautioned also that the costs of a forensic audit could escalate to more than R1 million.

181. A board meeting was held on 5 October 2009. The meeting was adjourned for 24 hours without any business being concluded as a result of a disagreement about whether van Eeden should be permitted to minute and record the meeting. Only the directors nominated by the developer attended the adjourned meeting the next day, at which they imposed a further special levy of R500 to facilitate the arbitration process which would be added to the levy statement of November 2009, after the scheduled EGM, and would be immediately payable. The levy did not have had any direct ramifications for voting rights at the EGM in October, but conceivably could have had a daunting effect and might have affected the rights of some members at the AGM scheduled for December 2009. The respondents once more submit that the true reason for the levy was

to dissuade members of the HOA from opposing the developer and its nominated directors and aimed at annulling the votes of member by making it more onerous to be in good standing. This levy however (for reasons not clear to me) does not appear to have been collected as yet.

182. I do not consider it necessary to make a determination of whether or not the board acted *mala fides* by initially obliging each member to pay R1500 before being entitled to vote at the EGM. In the atmosphere of increasing acrimony between the members and the board, a more prudent course might have been to delay the imposition of the levy until after the EGM. Be that as it may, regardless of whether the decision was activated by *mala fides* or not, the execution of the decision was undoubtedly tainted by procedural unfairness of an order justifying equitable relief.

183. The main problem with the levy, besides the dubious motive for and the timing of its implementation, was the confusing and contradictory message relayed about the consequences non-payment would have for members' rights to vote at the EGM. Annexure SA 18 which was handed to members when they made arrangements to pay the levy while allowing for payment by instalments specifically stated that the member "has no voting rights at any general meeting of the company until the last payment is made and the levies is (sic) paid in full". Little wonder that the respondents saw the levy as a ruse aimed at disenfranchisement. The situation was not altogether redeemed when the board changed its position, only after pressure had been brought to bear, by allowing

members who had made arrangements to pay in instalments the right to vote at the EGM. This was done at the last minute on the day of the meeting shortly before it commenced. In any event the 63 members who had not made arrangements were still disenfranchised. It is impossible to determine how many members might have stayed away from the EGM as a consequence of being informed by Annexure SA18 that they no longer enjoyed voting rights.

184. Moreover, there is a reasonable likelihood that the rights of the members to and their interests in participation in the governance of the company were impinged on negatively by the chairman's letter of 20 October 2009 threatening a further levy of R500 and insinuating that there was a measure of futility in attending the meeting because the developer would probably resort to its veto right to block the resolutions. In fairness though, while the newsletter may have taken a partisan position, it contained no obvious misrepresentation. The newsletter on its own is insufficient to conclude that it *mala fides* was aimed at advancing the sole interests of the developer in breach of the directors' fiduciary duties. Nor was the admonition it offered totally illegitimate. The concerns mentioned were relevant factors and deserved to be kept in mind. Yet, the circulation of the newsletter within the prevailing discordant atmosphere, taken with the statement in Annexure SA18, most likely would have had a disconcerting and daunting effect. Together the two documents introduced an element of unfairness which almost certainly would have dampened the democratic aspirations of the membership, resulting in fewer members attending the

EGM, thereby unfairly encroaching on the prospects of attaining the margin needed to pass the amendments to the Articles.

185. The special levy was further tainted by unfairness because it included the amount of R200 000 payable to two directors contrary to the provisions of Article 13.2 which provides that the directors shall not be entitled to any remuneration for the performance of their duties unless the association in general meeting otherwise decides. The unconvincing reliance by the applicants on Article 28 allowing for the indemnification of directors against "any liabilities *bona fide* incurred" did not help. They were seeking fees not the repayment of expenses. As a result, the levy was unfairly and improperly inflated. The initial decision of the board, contrary to the Articles, to munificently remunerate the directors out of member levies for their time spent in taking questionable action against the members, cast the directors in a poor light (if not in breach of their fiduciary duties), demonstrating that despite their unwillingness to incur expenditure on a forensic audit they were not above seeking to unjustifiably enrich themselves at the expense of the HOA and the members.

The auditors and the forensic audit

186. The call for a forensic audit was first made after the member elected directors suggested one at the meeting of directors on 18 July 2007. At first glance the minutes create the impression that a resolution was taken mandating a forensic audit. However, the minutes later record that the

matter was referred to the finance committee for further investigation and feedback. That led to the report of the finance committee tabled at the directors' meeting of 8 November 2007 in which a more limited audit was suggested.

187. Resolution 3 at the 2009 EGM mandating the auditors to perform a forensic audit read:

> "The appointment of Price Waterhouse Coopers Incorporated as auditors, and to perform a forensic audit on the financials of The Wilds HOA from inception of The Wilds HOA, as per the recommendation of the Financial Committee."

It will be remembered that the previous auditors had resigned the day before the EGM, presumably to avoid the resolution calling for their dismissal on grounds of the irregular accounting for the landscaping cost and the developer's levies. The agenda was accompanied by a detailed audit scope; directing *inter alia* that the audit must involve the performance of certain procedures to obtain evidence about the amounts and disclosures in the financial statements, including the assessment of the risk of material misstatement in the financial statements, whether due to fraud or error.

188. The appeal for a forensic audit obviously arises from the discovery of the material irregularity which resulted in the disciplining of the auditor by the IRBA and the resignation of the auditors. The understandable anxiety is

that there have been other analogous irregularities at the expense of the HOA and the members.

189. Resolution 3, as with all the other resolutions, was passed at the 2009 EGM by 374 votes to 215. The respondents submit that the EGM, when resolving to conduct a forensic audit, exercised its inherent, residual authority to oversee the conduct of the board of directors. Section 179 of the Act empowers the general meeting to deal with matters as provided for in the articles and the Act, and any matters capable of being dealt with by any general meeting of the company; which, on the authority of the decision in *Ben-Tovim* (*supra*), includes assuming the powers of the directors when they are unable to act. On that basis, the respondents submit, Resolution 3 was properly taken, was competent and should be implemented. The board continues to refuse to implement the resolution.

190. The applicants maintain that the power to appoint forensic auditors is a power vesting in the board and not in the members in general meeting and that the general meeting's usurpation of that function is unlawful.

191. Article 26.1 provides that the accounts of the HOA shall be examined and the correctness of the income and expenditure accounts and balance sheet shall be ascertained by the auditors once at least in every financial year. Article 26.2 provides that the duties of the auditors shall be regulated in accordance with Chapter X of the Act. Section 270(1) of the

Act bestows the power to appoint auditors annually upon the general meeting. It reads:

> "A company shall at every annual general meeting appoint an auditor or auditors to hold office from the conclusion of that meeting until the conclusion of the next annual general meeting of the company."

In terms of section 271(1) of the Act, the directors are only permitted to appoint or re-appoint an auditor where the AGM fails to do so; or where the first auditor (usually appointed by the promoters) is not appointed by lodging a written consent on incorporation (section 269). The power to remove the auditors vests primarily in the general meeting under distinctive prescribed circumstances (sections 277, 278 and 279). The primary duty of the auditor is to report to the "members in such manner and on such matters as are prescribed by this Act and carry out all other duties imposed on him by this Act or any other law" - section 282. The auditor must report on the annual financial statements which the directors are required to lay before the AGM in terms of section 286 of the Act. Meskin, *Henochsberg on the Companies Act*, 535 explains the rationale for an auditors' report as follows:

> "The auditor's report is the medium by which an auditor completes the performance of his duties to whom he is appointed to represent, i.e. the members .....The object of having the auditor report to the members directly, and not to or through the directors ... is to secure to the shareholders independent and reliable

> information respecting the true financial position of the company at the time of the audit."

192. Mr. *Ellis* SC has sought to persuade me that the appointment of an auditor to perform a forensic audit falls outside the competency of members in a general meeting, in particular because Article 14.1.2 confers a general right upon the directors to engage on behalf of the HOA the services of professionals, including accountants and auditors. Thus, although seemingly conceding the power of the general meeting to appoint the auditors to carry out their usual functions, when something extraordinary is called for, he submits, such falls in the exclusive remit of the board. I am unable to agree. The fact that Article 14.1.2 grants the directors a right to engage auditors or other experts to perform specific tasks when needed does not deny the general meeting a right to call for a forensic audit. The primary duty of the auditor is to the general meeting to enable it to exercise supervision and to hold the directors to account. The statutory power of the general meeting to appoint and remove auditors, and the concomitant duty of the auditor to report to the general meeting for the purpose of the members exercising oversight, *ex consequentibus*, and by implication, would permit everything necessary and accessory to achieve that result. To hold otherwise would be to accept that where the auditors report a fraud or irregularity in the financial statements the general meeting will be without power to request further and deeper investigation. Such would imprudently render the oversight power of less consequence and value.

193. For that reason I am satisfied that the general meeting was entitled to adopt the resolution mandating the auditors to conduct a forensic audit in accordance with the proposed audit scope. Even if I am mistaken in this conclusion, at the time the resolution was passed there did not exist a board able to convene a quorum in terms of the Articles and thus the meeting was free to exercise its residual authority to mandate the auditors to conduct a forensic audit. The failure by the board to implement the resolution is another instance of conduct unfairly prejudicial in the management of the company's affairs. The members are entitled to fair participation in the management of the company and that includes the conduct of a forensic audit at their instance when there has been a material audit irregularity, potentially at considerable expense to the company, at the instance of the developer, an entrenched dominant shareholder.

194. Mr. *Ellis* SC depicted the proposed forensic audit as a mere "fishing expedition" that will bring to light nothing at great expense. The only error or irregularity pointed to is the one that has already been unearthed. He downplayed the improper rationale for not disclosing the costs of the landscaping and the set-off in the financial statements, labeling the lapse a mere "mistake". He may well be right on both counts. But if the general meeting has the right to go fishing by way of forensic audit and has taken a lawful and proper decision to do so, it is wrong and unfair of the directors to frustrate the implementation of that decision. The mistake, if that, was at

significant cost to the members and was happened upon after some time in a manner that was hardly confidence inspiring. The members rightfully want to assure themselves that there have been no other mistakes of like order.

195. Added to that, even if the general meeting had no power to mandate the auditors to conduct a forensic audit, it is within the power of this court, having concluded that the affairs of the company are being conducted in an unfairly prejudicial manner, where it considers it just and equitable to do so, to make such an order in terms of section 252 of the Act with a view to bringing the unfairness complained of to an end. Mr. *Ellis* SC has urged me not to do so. The problem, he says, has already been rectified. All the facts have been rehashed and debated *ad nauseam*. A forensic investigation, he submitted, will merely be the opinion of an expert which will most probably result in future litigation and will not bring an end to the matter. The submission, with all due respect, misses the mark. In the first place, relief ordered under section 252 need not bring the matter to an end. It must have as its aim the resolution of the matter. The facts show beyond all doubt that a significant part of the membership is suspicious that the books have been cooked. Considering the serious irregularity, they have reasonable grounds for that suspicion. The fact that the board and developer have been willing to incur litigation expenses running into millions of rand, rather than conduct a less expensive forensic audit has not helped to put that suspicion aside. A forensic audit will either dispel or confirm that suspicion once and for all. Moreover, and importantly, a

substantial number of the members want a forensic audit. The irregularity perpetrated by the developer and the board has resulted in a loss of confidence which hopefully a forensic audit might restore. Consequently, it will be just and equitable to order the auditors to conduct a forensic audit.

The breakdown in the functioning of the company and the relationship between the members and the board after the 2009 EGM

196. The events immediately after the EGM and at the fractious AGM on 2 December 2009 demonstrate that the relationship between the developer nominated directors and the members involved in the litigation had reached a level of hostility making it impossible to conclude the business of the AGM. There was no functional board of directors in the period between the EGM and the AGM.

197. The resolution of the disputes about whether the 2009 AGM was adjourned or called off, and whether the developer was entitled or not to nominate directors on the day after the AGM, and the resultant debate about the existence or lack of a properly mandated board of directors, with the further possible outcome that the 2010 AGM called on 1 December 2010 was also unlawful, would necessitate the determination of a number of factual issues which would prove arduous without oral evidence about what transpired at the 2009 AGM. I accordingly hesitate to try to resolve them. Their ultimate resolution may very well have important legal

consequences. Nevertheless, in view of the orders I propose to make in terms of section 252 of the Act, there is no need to resolve them at this stage. I would therefore postpone *sine die* prayer 7 of the second amended notice of motion seeking a declarator that the 2009 AGM was null and void. The parties may avoid further litigation on this question by punctiliously observing the orders I propose to make.

198. For most of 2010 the four directors nominated by the developer on 3 December 2009, the day after the aborted AGM, continued to manage the affairs of the company, despite the objections of the respondents as expressed in their attorney's letter dated 24 March 2010. The applicants' failure to respond to the letter prompted the respondents to file the amended notice of motion on 7 May 2010 seeking orders declaring three of the respondents to be the directors of the HOA, and van Eeden to be the acting chairperson, or alternatively for an interim board to be constituted allowing for more equal representation and an independent chairperson. The prayers declaring the three respondents to be directors and van Eeden chairperson were not persisted with in the second amended notice of motion. Nevertheless, from this point onwards the relationship between the parties was conducted entirely on a litigious basis.

199. Steps taken by the applicants after August 2010, aimed sensibly at normalising the situation, encountered some resistance. The new directors fruitlessly invited members to join sub-committees and convened an AGM

on 1 December 2010 at which only 32 members (out of a possible 1120) besides the developer attended. It is not possible to account definitely for the poor attendance. It may be that a measure of fatigue has set in, or the members have chosen to await the outcome of this litigation.

200. Additionally, the point needs to be made that the best efforts of the respondents to rally the membership have never yielded more than 374 votes, representing a mere 30% of the present membership. A substantial portion of the membership has shown itself to be apathetic and perhaps even satisfied with the current state of affairs and the entrenched position of the developer. In such circumstances, it would be unfitting for the court to amend the Articles by decree when the bargain struck by the parties obligates a special resolution. Still, to bring the problems in this company to end it will be prudent to establish the conditions for a fair exercise of the democratic will of the company.

The appropriate remedy and the entrenched control and veto power of the developer

201. The unfair conduct of the applicants in thwarting the aspirations of a part of the membership to convene an EGM and the unfair refusal to implement the lawful and legitimate resolutions of the general meeting are the essence of the problem. The suspicions arising from the accounting irregularities have caused and compounded the difficulty. The level of frustration and acrimony has been heightened by the developer being able

to rely upon the entrenched control bestowed upon it by the Articles to frustrate the democratic ambitions of the 30% of the membership who want to participate in and gain greater control of the management of the affairs of the company.

202. The relief sought by the respondents in the counter-application is extensive in its reach, and is frankly out of proportion to what is needed to address the unfairly prejudicial, unjust and inequitable conduct. The court should only do what is just and equitable in order to put right and cure for the future the unfair prejudice which the complaining party has suffered at the hands of those unfairly conducting the affairs of the company - *Re Bird Precision Bellows Ltd* [1986] Ch 658, 669.

203. Besides asking for a forensic audit to investigate possible accounting irregularities, the respondents want the auditors to investigate all the facts and circumstances surrounding the promises of the developer relating to the proposed clubhouse and other facilities. In addition, they want the court to amend the Articles of Association, which the general meeting was not able to do because the requisites for a special resolution were not achieved. They ask for a further EGM and an order directing the board to implement any resolutions it may adopt within 30 days after the appointment of a new board. In the alternative they seek a new governing structure or judicial management.

204. For the reasons already stated, it is appropriate to direct the auditors to conduct a forensic audit into the financial affairs of the company since inception. I am less persuaded though that the scope of the audit should extend to investigating the developer's non-performance of its contractual obligations in relation to the development of the promised facilities. Mr. *Ellis* SC has submitted that the aim of extending the audit to these issues is to collect facts upon which a claim against the developer for the installation of those facilities may be based. The only possible claim which could be envisaged is a claim based on contract between the developer and the individual buyers. It is doubtful whether the HOA would have the standing to institute such a claim. Although there are judicial *dicta* supporting the proposition that the shareholder's remedy against unfair prejudice might be resorted to in order to enforce obligations arising under collateral agreements, those obligations should relate to the way in which a corporate power is being exercised. A distinction must be kept between conduct of the company and the conduct of a shareholder acting in its private capacity, as in this instance, in pursuance of its commercial interests. The performance or non-performance by the developer of promises it may or may not have made when marketing the property for sale to the individual members is not an act or omission of the company nor does such amount to conducting the affairs of the company. Whatever unfairness may attend the developer's behaviour on this score there is no jurisdictional basis for granting any remedy under section 252 of the Act in relation to it. Nor has any contractual cause of action been pleaded in these proceedings.

205. Prayer 5 of the second notice of motion asking the court to amend the Articles in accordance with Resolution 1 at the 2009 EGM, as I have just indicated, is also lacking in proportionality. As I have already pronounced, it is permissible for a court to issue an order under section 252 of the Act to amend articles if it considers it just and equitable to do so. It would be acceptable to do that when the articles are structured in a way denying the members effective participation. However, an order amending the articles should be issued only as a last resort. The articles are the contract bringing about the association and the basis for the members doing future business together. By becoming a shareholder in a company a person agrees to be bound by the decisions taken in accordance with the provisions and prescriptions of the articles. A court accordingly should hesitate to re-write the bargain struck by the members with each other, especially where the impetus to do so is at the instance of a minority of the members (albeit a substantial minority, in this case about 30%) who think the terms of the agreement are unfair or no longer serve their interests. The Act requires that the articles be changed by a special resolution, which means 75% of the votes at a general meeting with a quorum of 25% of total membership. A court ordinarily should pause before overriding those prescriptions, unless there are illegitimate or unfair impediments rendering the achievement of a special resolution impracticable; and even then it should intervene only to the extent necessary to remove the impediment.

206. The developer's control of the company entrenched by the different provisions of the Articles described earlier, and which were the target of Resolution 1 at the 2009 EGM, are a barrier to a more egalitarian structure. The entrenchment of control in the Articles is not without legitimacy and was justifiable in view of the substantial investment and risk undertaken by the developer, who owns more than two hundred erven in the estate and all of the land which will form the subject property of the remaining phases of the development. The developer is a member of the HOA in its capacity as developer but also in its capacity as the registered owner of its erven; thus its 215 votes. In terms of Article 4.4 the developer will cease to be a member of the HOA only at the end of the development period.

207. The entrenched control of the developer, as explained before, is achieved through the right to elect the majority of the directors for the duration of the development period, the quorum requirements for decisions of the board of directors and its veto power in Article 23.1.4 to block any decision of the general meeting, including the election of directors and the amendment of the Articles by special resolution. No person may be elected a director without the approval of the developer. And the corporate structure is cast in stone unless and until the developer agrees otherwise. The intention was to entrench the developer's control for the development period. The entrenched control was thus always intended to be temporary. With the downturn in the market, the development has slowed and the developer's

entrenched control is enduring for a period longer than some members would prefer.

208. The exertions by the respondents and their supporters to amend the Articles to remove the entrenched control of the developer were frustrated not because the developer used its veto right but because they did not get enough votes to carry the resolution. Their lack of success in that regard probably owes something to the confusion the applicants created about the consequences non-payment of the special levy would have for the right of members to vote. The dampening effect was exacerbated by the chairman's letter of 2 October 2009 advising members that the developer was likely to use its veto to prevent the amendments. There is a distinct likelihood that these interventions engendered apathy. It is these acts of unfairness that are deserving of redress.

209. Absent the veto there would be no hurdle in the way of the respondents canvassing the membership and encouraging them to attend a meeting to pass a special resolution. The fact that they have so far only demonstrated support of approximately 30% of the membership, as I have said, could mean either that the membership has become despondent and apathetic or that the majority of the membership are satisfied with the *status quo* and live easily with the developer's entrenched position. Accepting the possibility of the latter, I see no justification for the alternative relief sought in the second amended notice of motion. It would be an over-reach to establish a different governing structure or to impose judicial management

by judicial *fiat*. What is needed is a fair democratic contest over the preferred structure of the company for the future. The unfairness surrounding the accounting irregularities will hopefully be attended to by a forensic audit. And the injustice associated with the convening of the 2009 EGM and the failure to implement its resolutions will be cured best by ordering another EGM for the limited purpose of considering amendments to the Articles, but allowing for that contest to take place on a more level playing field by suspending the developer's veto power for the duration of that meeting and in relation to the resolutions taken at it. In that way there will be meaningful participation by the members.

210. It is correct that the developer has never exercised the veto power. It has however on two occasions threatened to use it. The first was in the letter of the chairman to the members dated 2 October 2009. The second occurrence is recorded in the minutes of the meeting of directors held on 23 April 2010 where Mr. Rudi Boschoff, the representative of the director is minuted as stating:

> "dat die ontwikkelaar van hierdie punt af vorentoe van sy VETO REG volgens die Huiseienaarsvereniging se Artikels van Assosiasie gebruik gaan maak. Alle besluite moet op skrif aan die ontwikkelaar deurgegee word vir sy ondertekening en goedkeuring van implementering."

It seems that Mr. Boschoff was under the mistaken impression that the developer's veto right extended to the decisions of the board as well.

211. The authorities cited earlier support the principle that a threatened use of a veto can constitute conduct entitling members to an order under section 252 of the Act. Apart from that, the continued entrenched existence of the veto has become an unfair obstacle to effective member participation in the affairs of the company. The veto may have had its place in the early phase of the development. Now when there are almost 1200 other members of the company, it is inherently unfair to retain it without the concurrence of the members. The developer now has an equity stake of only 15% in the first phase. There is perhaps no longer justification for it to be privileged with a power to veto every single decision of the general meeting, including any decision to change the governance structures to allow fair participation and fair control over the collection and use of levies. What is at stake in the current state of affairs is a variant of the principle: no taxation without representation. From a practical standpoint too, the continuation of the veto without the endorsement of the increasing membership will spawn further conflict and litigation.

212. While it is within the competence of the court to amend the Articles to delete Article 23.1.4, the better course, in my assessment, is rather to enable the membership to achieve that result after debating the merits of doing so and effecting it by a special resolution without fear of the resolution being rendered nugatory by the exercise of the veto. In other words, the membership should be afforded an opportunity to amend the Articles (including the removal of the veto right) in an EGM for the purpose and duration of which the veto will be suspended.

213. A just and equitable order therefore will be one convening another EGM for the limited purpose of considering amendments to the Articles of Association in accordance with Resolution 1 tabled at the 2009 EGM, including an order suspending Article 23.1.4 for the duration of the meeting and a further order that any such amendments adopted shall not be altered, added to or amended in any way for a period of three years without the leave of the court. To level the playing field further I will order that members who have paid up their levies as contemplated in Article 23.4 will be entitled to vote, but that the special levies imposed by the board at its meeting of September and October 2009 should not be taken into account for determining a member's status as paid-up. Additionally, the developer should be entitled to exercise its votes as developer and as the registered owner of erven, notwithstanding the fact that the dispute regarding the non-payment of its levies as part of the alleged set-off remains unresolved. Because Phase 2 of the development has yet to commence, only the registered owners of erven in Phase 1 and the developer should be entitled to vote. To avoid further tension and strategic positioning, it will be just and equitable for the meeting to be convened by and chaired by an independent professional, who will oversee the election of a new board of directors in terms of the Articles as amended, if amended, and which specifically would require amendment of Articles 10.4 and 11.1 to permit the election of directors at an EGM.

214. My finding that the resolution terminating the contract with the management agent ought properly and fairly to have been implemented would justify an order terminating that contract. More than eighteen months have passed since the resolution was adopted. Prudence dictates that I make no order altering that relationship until another general meeting is held. If a new board of directors is elected, it will be best placed to decide on the way forward.

215. Mr. *Ellis* SC, referred in argument to *Swissborough Diamond Mines v Government of South Africa* 1999 (2) SA 279 (T) at 324C in support of the submission that the proposed relief had not been pleaded with sufficient precision. Affidavits in motion proceedings serve as pleadings defining the issues and there is no call in the affidavits for the veto power to be suspended. The objection is not well founded. The second amended notice of motion (in prayer 6) seeks the convening of an EGM and the election of a new board. And although the notice of motion does not seek an order suspending Article 23.1.4, it does in prayer 5 seek an amendment deleting it entirely. The court has a wide discretion under section 252 of the Act to make any order it thinks fit. Common sense dictates that when the competent relief sought is for a veto power in the Articles to be deleted there can be no objection to the court granting the lesser remedy of a temporary suspension of the exercise of that power.

The special plea of arbitration, lis pendens and the application to set aside the second amended notice of motion as an irregular step

216. I have left these preliminary issues to last because I consider them to be without merit. I am obliged nonetheless to give brief reasons for dismissing them.

217. The special plea of arbitration was not pursued with much eagerness by the applicants. The relevant clause, Article 41.1, provides that any dispute arising out of or in connection with the Articles must be determined in terms of the clause, that is, it must be referred to arbitration. It excludes instances where an interdict or urgent relief is sought. It is debatable whether an application for relief in terms of section 252 of the Act (even if related to issues about the Articles) can be catogorised as a "dispute arising out of or in connection with the Articles". The dispute concerns unfairly prejudicial conduct. But leaving that aside, the special plea falls foul of section 6(1) of the Arbitration Act 42 of 1965. The provision provides that the right to apply for the stay of proceedings commenced by a party to an arbitration agreement must be exercised before that party delivers any pleadings or takes any other steps in the proceedings. Where a defendant/respondent (in this case the applicants as respondents in the counter-application) takes a further step before filing its special plea, it has waived its right to make application for a stay - *Conress (Pty) Ltd v Gallit Construction (Pty) Ltd* 1981 (3) SA 73 (W) at 75H. The plea was raised only in July 2010, after the applicants had filed their answering affidavit to

the counter-application and when the papers were in excess of 1700 pages. In such circumstances, they waived their rights to apply for a stay. In the premises the special plea falls to be dismissed.

218. There has been a muted suggestion, not pursued with any vigour, that the disputes in these proceedings are *lis pendens* by virtue of the referral of the disputes in the first application to arbitration, which has not been finalized. There is no merit in the contention. The issues and decisions at stake differ. The arbitrator is not called on to determine whether the affairs of the company are being conducted unfairly. And in any event the parties are different. Only the first respondent is a party to the arbitration, the other respondents are not.

219. At the commencement of the hearing the applicants sought an order (on notice duly given) that the second amended notice of motion be set aside as an irregular step. I dismissed the application and ordered the costs to be costs in the cause. I indicated that I would provide brief reasons for my order in this judgment.

220. The second amended notice of motion persists with the most significant relief sought in the earlier versions, but in addition it included prayers for the 2009 AGM and its decisions to be declared null and void and a prayer for an order directing the convening of an EGM within 60 days to address the consequences of any court order including the election of a new board of directors. The amendment dropped the prayers for an order declaring

some of the respondents' directors and van Eeden acting chairperson. The decision to do that was prudent. The better course is to provide, as I propose to do, for a new fair election. As already discussed, I consider it neither necessary nor desirable to pronounce upon the validity of the 2009 AGM.

221. The applicants' objection to the delivery of the second amended notice of motion was that it constituted an irregular step in that the amendment was not duly effected as prescribed in Rule 28. The point is well taken. However, I was prepared to condone the irregular step, (if indeed the application was good, which it may not have been because the applicants took a further step by filing an affidavit in response to it on 1 March 2011), principally because the applicants had suffered no prejudice. The amended relief sought is more carefully tailored and less intrusive than that in the earlier versions, and although the order declaring the 2009 AGM might have had significant consequences had I been willing to make it, the applicants had a proper opportunity to canvass the issues in substantial heads of argument filed before the hearing.

Costs

222. The point of departure with regard to costs is that costs should follow the result. Sapire AJ when making the order that an EGM be held on 28 October 2009 reserved the question of costs in respect of both the urgent application and the counter-application.

223. The respondents have been successful in the counter-application and all else being equal are entitled to their costs. The applicants submit that they were substantially successful in the urgent application in that they were able to stop the meeting which was convened for 14 September 2010. I disagree with that interpretation of what was achieved. The prayer in the notice of motion did not seek to postpone the meeting until the technical defects in the requisition were rectified, if indeed there were any. Instead it sought an interdict restraining the convening and holding of the meeting. In that it did not succeed. On the contrary, the court ordered the meeting to proceed at a later date and by implication condoned any defects there might have been in the requisition. Alternatively, the applicants conceded that the requisition was adequate in that they consented to the order directing the meeting to be convened without any reservation. Consequently, the respondents attained substantial success and are entitled to their costs in the urgent application as well.

224. Mr. *du Plessis* SC, who appeared for the respondents, has submitted forcefully that much of the litigation could have been avoided and the papers would have been less prolix had the developer assumed a more understanding and less aggressive posture. As he put it, this is a case about normal working families, who bought property in a residential estate based on a design concept which they were led to believe would include certain joint amenities, the provision of which was expressly stated to be part of the purchase price, and which, almost a decade later, have not

been realised. The funds of the company, to which residents are compelled to belong as members, and to which they must pay levies, have been used by the developer to finance capital outlays and to fund litigation against them. By virtue of the developer's control over the board of directors and its veto power in the general meeting, members have no effective means of participating in the managerial affairs of the company, with the result that their concerns about financing capital development have been swept aside and their attempts to seek redress met with litigation. In such circumstances, Mr. *du Plessis* SC submitted, the company (the first applicant) itself had no interest in the litigation where the real objective, in both the urgent application and the defence of the counter-application, was to preserve and continue the entrenched control of the company by the developer in conditions where it had become unfairly prejudicial, unjust and inequitable to do so. The majority of the members of the company did not resist the requisitioning of the EGM or the resolutions tabled at it. Indeed every participating member except the developer has consistently voted in favour of change. The only opponent to change is the developer, who has consistently acted oppressively and unfairly to thwart an expression of the democratic will. For those reasons, Mr. *du Plessis* SC has urged me to award costs against the developer and his nominated directors (the second to the sixth applicants) but not against the first applicant, the HOA.

225. There is a compelling logic to the submission which finds support in both general principle and authority. Prof Blackman (Blackman *op cit* 9-54-2) in relation to this question observed:

> "It is a general principle of company law that the company's money should not be expended on disputes between shareholders. The general rule is that the company has no business whatever to be involved in such an application, on the principle that the company's moneys should not be expended on disputes between shareholders, and in particular its moneys ought not to be used to defend the majority shareholders in what is essentially a dispute between them and other shareholders. The use of the company's funds by the majority in defending the application is a misuse of the company's funds, confers a distinct financial advantage on majority, and prejudices and discriminates against the applicant; it is both unfair and infringes the basic principle that the powers and funds of a company may be used only for the purposes of the company."

He cited various Australian authorities that support this proposition viz: *Coombs v Dynasty (Pty) Ltd* (1994) 14 ACLR 60, 94 (FedC of A); *Re DG Brims and Sons Pty Ltd* (1995) 16 ACSR 559, 592 SC (Q1a); and *Foxuto Pty Ltd v Bosnjak Holdings Pty Ltd* (No3) (1999) 30 ACSR 20 SC (NSW). There will be exceptions where the company is a necessary party because of its discrete interests. The test whether such participation and expenditure is proper is whether it is necessary or expedient in the interests of the company as a whole; and in considering that test, the starting point is "a sort of rebuttable distaste for such participation and expenditure, initial skepticism as to its necessity or expediency" - *Re a company (No 1126 of 1992)* [1994] 2 BCLC 146, 156. Usually, the

company should be viewed as a nominal party in section 252 disputes without any interest in the matter, the dispute being in substance one between shareholders.

226. I agree with Mr. *du Plessis* SC that the dispute in the present case is in substance one between the developer (as a member by virtue of its entrenched position in the Articles and as the registered owner of erven) and the respondent members representing a substantial minority of the total membership. The other applicants (the developer nominated directors) have aligned themselves with the cause of the developer acting to protect his privileged member status. In *Re Kenyon Swanson Ltd* [1987] BCLC 514 521 (cited in Blackman *op cit* 9-56 footnote 2) it was held that directors should not resist an application against the person they prefer to be in control of the company and able to appoint and remove its directors. They are not entitled at the expense of the company to take part in a dispute to prevent diminution of that control. Such expenditure by the directors, the court described as a malfeasance.

227. The costs order sought by the respondents in paragraph 13 of the second amended notice of motion is accordingly the appropriate order to make. Considering the complexity of the evidence and issues, as well as the importance of the matter to all concerned in the life of the company, the use of two counsel and senior counsel was justified.

The Order

228. The following orders are issued:

1. The auditors of the company are directed to perform a forensic audit on the financials of the first applicant from its inception in accordance with the forensic audit scope attached to Annexure "RB21" to the founding affidavit and to report its findings to the members of the company at the extraordinary general meeting convened in terms of paragraph 2 of this order, or at any subsequent general meeting as determined by the members.

2. The first applicant is ordered to convene an extraordinary general meeting within 60 days of this order for the purpose of considering and voting by special resolution upon the proposed amendments to the Articles of Association contained in Resolution 1 in Annexure "RB21" to the founding affidavit, and any additional amendments to Articles 10.4 and 11.1 to allow for the election of new directors.

3. The Pretoria Society of Advocates is directed to appoint an independent advocate to serve as chairperson at the extraordinary general meeting, who will be permitted to charge the first applicant a reasonable fee for his or her services.

4. Should the first applicant fail to take steps to convene the extraordinary meeting within 21 days of this order, the respondents, in accordance with any direction given by the chairperson appointed in terms of paragraph 3 of this order, may convene the meeting and may recover any reasonable expenses incurred to that end from the first applicant.

5. Article 23.1.4 of the Articles of Association of the first applicant is hereby suspended for the duration of the extraordinary general meeting convened in terms of either paragraph 2 or 4 of this order, and the sixth applicant shall not enjoy a veto right with regard to any decision taken in respect of any amendment and/or addition to or deletion from the Articles of Association of the first applicant or in respect of the election of any director at such extraordinary general meeting.

6. Any amendments as contemplated in paragraph 2 read with paragraph 5 of this order shall not be altered, added to or amended in any way whatsoever for a period of three years from the date of the extraordinary general meeting without the leave of this court.

7. The members of the first applicant, in the event of the Articles of Association having been duly amended to allow for the election of directors at an extraordinary general meeting, shall elect new

directors of the company in accordance with the amended Articles at the extraordinary general meeting.

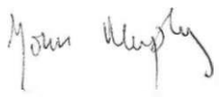
8. It is ordered for the purposes of the voting contemplated in paragraphs 2 and 7 of this order that only the registered owners of erven in Phase 1 of the development and the sixth applicant shall be permitted to vote. Such members shall not be entitled to vote unless they are paid-up as contemplated in Article 23.2 of the Articles of Association; except that for the purpose of determining if a member is paid up the special levies imposed by the directors at the board meetings on 23 September 2009 and 5 October 2009 shall not be taken into consideration. The sixth applicant shall be permitted to vote irrespective of it not being fully paid up. The chairperson of the meeting may at his sole discretion permit any other member who is not paid-up to vote.

9. The first applicant is interdicted from making any payment to any current or former director of the first applicant of any fee for services rendered in respect of any litigation between the parties, unless and until such payments are approved by the general meeting.

10. Prayer 7 of the second amended notice of motion is postponed *sine die*.

138

11. The second to sixth applicants are ordered to pay the respondents' costs in the application and counter application (including the costs reserved by Sapire AJ on 11 September 2009), such costs to include the costs occasioned by the employment of two counsel and senior counsel.



JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard: 22-25 March 2011
For the Applicant: Adv R. du Plessis SC and Adv S. Davies, Pretoria
Instructed By: Geldenhuys & Meyer c/o Rorich Wolmarans & Luderitz Inc.
For the Respondent: Adv P. Ellis SC and Adv L. Meintjies, Pretoria
Instructed By: Henderson, Kuiper Isaacson & Rooseboom