REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NOS.2907/10
and 9768/10

In the matter between:

HERALD INVESTMENTS SHARE BLOCK (PROPRIETARY) LIMITED	First Applicant
MERVYN THAVENDREN CHETTY	Second Applicant
DENNIS NAIDOO	Third Applicant
BIJAI SINGH	Fourth Applicant
SHAMIN NAIDOO	Fifth Applicant

and

DR UNUS AHMED MEER	First Respondent
ZUBER AHMED MEER	Second Respondent
SELA NAIDOO	Third Respondent
AHMED SAEED ISMAIL KATHRADA	Fourth Respondent
SANDY BERYL VAN NIEKERK	Fifth Respondent
MOHAMED SALIM KHAN	Sixth Respondent
IMRAN JADWAT	Seventh Respondent
KELLY NORTHMORE N.O.	Eighth Respondent
THE BODY CORPORATE OF BELMONT ARCADE NUMBER SS92/1978	Ninth Respondent
F. KHAN	Tenth Respondent

And also in the matter between

UNUS AHMED MEER	Applicant

and

THE BODY CORPORATE OF BELMONT ARCADE	First Respondent
HERALD INVESTMENTS SHARE BLOCK (PROPRIETARY) LIMITED	Second Respondent

JUDGMENT

Del: 14 September 2010

WALLIS J

[1] This is a dispute about who is liable to pay for the cost of refurbishing three lifts in Belmont Arcade, a multipurpose building situated on the Durban beachfront. It consists of three floors of commercial premises, three floors of parking and fifteen floors of residential flats. The building was originally occupied on the basis of a share block scheme and was converted to a sectional title development at the end of 1977. The applicant, Herald Investments Share Block (Pty) Limited, was the developer, and it retained ownership of section 1 which comprises the commercial and parking levels of the building. The 105 flats constitute the remaining sections. Section 1's participation quota represents approximately 52% of the total participation quotas, whilst the flats represent the remaining 48%. Whilst this means that Herald Investments has the major share of the total participation quota the position in regard to voting rights is reversed, with Herald Investments enjoying 95 votes on a poll and the owners of the residential sections one each, giving them a slight majority.

[2] Although ostensibly about the composition of the board of trustees and the need for intervention in the governance of the building the root cause of the two applications before me lies in the disagreement about the cost of refurbishing the lifts in the building. There are four lifts. Access is obtained through a lift lobby in the entrance foyer. One lift is designated as a service lift and is accessible to

everyone in the building. The other three have been programmed so that they serve only the residential portion of the building and the top level of parking, which is where the residents are provided with parking. Not only do these lifts not provide access to the commercial premises and the two lower levels of parking, but access to them is controlled. Glass security walls have been erected that prevent people who do not hold security access discs from entering the lift lobby in front of these lifts. A security guard, stationed at the entrance, controls access to the lifts by *bona fide* visitors. Investigations during the course of the proceedings show that the present security control arrangements were put in place in 2001 when the owners of the residential units agreed to pay the bulk of the cost of installing the glass security walls and security access system. It may be that other less formidable arrangements were in place prior to this and that the lifts were set to serve the residential units from when the building was first occupied but it is not suggested that this affects the issues I have to decide.

[3] In 2005 major maintenance needed to be undertaken to refurbish the lifts at a cost in excess of R1 million. In order to fund these costs the board of trustees of the body corporate raised a special levy on all owners. However, Herald Investments adopted the stance that it was not liable to pay the special levy insofar as it related to the costs of refurbishing the lifts serving the residential portion of the building. Its attitude was and is that the owners of the residential sections have the exclusive use of these lifts and are accordingly liable for the full cost of maintaining them. The owners of the residential sections, or at least those who have expressed views on the matter, dispute this.

[4] Unfortunately, instead of seeking an expeditious resolution of the dispute

matters have been allowed to drag on for nearly five years. Initially the idea was that it would be resolved by arbitration, but that was delayed and shortly after it had been instituted and a statement of claim and a statement of defence filed the nominated arbitrator died. Nothing appears to have been done to revive the arbitration. Instead a number of aggrieved owners of residential sections demanded that a special general meeting of the body corporate be convened for the purpose of considering a resolution for the removal of the existing trustees. Their dissatisfaction undoubtedly related to the fact that the majority of the trustees are nominees of Herald Investments. Such a meeting was held on 22 February 2010 and a resolution for the removal of the trustees was put to the vote. Herald Investments was present at the meeting and in a position to muster sufficient votes to defeat the resolution. It was prevented from doing so because the ninth respondent who chaired the meeting, an attorney acting on behalf of certain residential section owners, held that they were disqualified from doing so under the rules of the body corporate. In the result the resolution was passed and new trustees were appointed.

[5] That precipitated the present proceedings. Herald Investments and the original trustees brought an application aimed at nullifying the proceedings at the meeting. The newly appointed trustees opposed the application and also purported to oppose it on behalf of the body corporate. In their opposing affidavit they alleged that the circumstances in regard to the administration of the development are such that it would be appropriate for the court to appoint an administrator to the body corporate in terms of s 46 of the Sectional Titles Act.[1] When that application first came before court, notwithstanding that the parties wished to argue it on the

1 95 of 1986 ("the Act")

papers, the presiding judge ordered that it be referred for the hearing of oral evidence. In those circumstances the application came before me in the trial court after a further six months had passed In the meantime the respondents in the main application had brought a formal application for the appointment of an administrator. Herald Investments and the original trustees opposed this. Sensibly the two cases were set down for hearing together.

[6] The parties were agreed that the applications could be dealt with on the papers without the need for hearing evidence. In my view that was clearly correct. At the outset of the hearing I raised the fact that a resolution of the disputes formulated on the papers would not resolve the primary issue relating to Herald Investments' obligations in regard to the cost of maintaining the lifts. I suggested that this issue was also one that could be decided on the papers and that its determination was desirable in the interests of all parties. This was accepted and counsel formulated appropriate declaratory orders that they would seek depending upon the decision on their respective contentions. On that basis the case was argued before me.

[7] In the result the following issues fall to be decided:

(a) Is Herald Investments liable to contribute to the costs of maintaining the three lifts serving the residential portion of the building?

(b) Was the special general meeting convened on 22 February 2010 properly convened and if not should the proceedings at the meeting be nullified?

(c) Was it correct for the chair of the special general meeting to disqualify Herald Investments from voting on the resolution to remove trustees and the resolution to appoint new trustees?

(d) Should the court order the appointment of an administrator to the body

corporate in terms of s 46(1) of the Act?

(e) What order should be made in respect of the costs of these proceedings?

I will deal with each of these in turn.

Liability for the cost of maintaining the lifts.

[8] The answer to the question whether Herald Investments is obliged to contribute to the costs of refurbishing the three lifts serving the flats must be found in the provisions of s 37(1)(b) of the Act. The relevant statutory context is that the body corporate is obliged to create a fund for the purpose of paying the administrative expenses and other liabilities of the body corporate.[2] The body corporate is entitled to require the owners of sections, whenever necessary, to make contributions to such fund.[3] In doing so the body corporate determines the amounts to be raised[4] and raises the amount so determined "by levying contributions on the owners in proportion to the quotas of their respective sections".[5] The general principle is therefore that all the costs incurred by the body corporate in respect of the common property, including costs relating to its repair and upkeep, are to be paid by the owners of sections in proportion to their participation quotas. That is the principle that the respondents say is applicable to the costs of maintaining these lifts and they accordingly contend that Herald Investments is liable for some 52% of those maintenance costs.

[9] Herald Investments contends that they are not obliged to contribute to these costs by virtue of the exception to this principle contained in the provisions of the

2 S 37(1)(a).
3 S 37(1)(b).
4 S 37(1)(c).
5 S 37(1)(d).

proviso to s 37(1)(b). That reads as follows:

'Provided that the body corporate shall require the owner or owners of a section or sections entitled to the right to the exclusive use of a part or parts of the common property, whether or not such right is registered or conferred by rules made under the Sectional Titles Act 1971 (Act No.66 of 1971), to make such additional contribution to the fund as is estimated necessary to defray the costs of rates and taxes, insurance and maintenance in respect of any such part or parts, including the provision of electricity and water, unless in terms of the rules the owners concerned are responsible for such costs.'

Herald Investments say that the owners of the residential sections are entitled to the exclusive use of these lifts, albeit that they form part of the common property, and therefore that the body corporate is obliged to recover the costs of maintaining the lifts from the owners of the residential sections and not from it. It does not dispute its obligation to contribute to the costs of maintaining the service lift.

[10] In order to place these rival contentions in context it is necessary to trace some of the history of the legislation governing sectional titles. Prior to 1971 the only way in which to give the occupiers of different portions of a single building rights approximating to ownership over the portions they occupied or used was by way of a share block scheme. Under such a scheme the shares of the company that owned the building were divided into blocks and ownership of each block afforded the owner exclusive rights of use and occupation in respect of a defined portion of the building. The rights of exclusive use and occupation were given in terms of use and occupation agreements concluded between the share block company and each shareholder. When a sale was concluded in respect of a share block the seller would, after obtaining approval from the directors of the company,[6] cede their rights under the agreement of use and occupation to the purchaser. However the

6 Such consent was required as these companies were private companies and their articles of association would provide that a change of shareholder be approved by the directors.

company remained the owner of the whole of the building. There was no basis in law for dividing the ownership of the building among disparate owners. That situation was altered with the enactment of the Sectional Titles Act 66 of 1971.

[11] Belmont Arcade was originally operated as a share block scheme with Herald Investments being the owner of the property. In December 1978 it was registered as a sectional title development under the 1971 Act. Herald Investments was the original developer. The sectional diagrams in respect of Belmont Arcade are in conventional form. They define the 106 sections in the building and identify portions of the property, such as the arcade entrance, the lift lobby, the lifts and stairs and rooms set aside for facilities and the provision of services to the building as a whole, as common property. The lift lobby at the entrance of the building and the lifts themselves, as well as the lift lobby on each floor and the lift motor room on the roof are all part of the common property. Accordingly the obligation to maintain them is one that falls on the body corporate.

[12] The 1971 Act did not make provision for exclusive use areas. However the need for such exclusive use areas soon became apparent in practice and provision for such exclusive use could be made in the management rules of a scheme. The leading authors on the topic say that;

'A popular rule … is the reservation of certain parts of the common property for the exclusive use of certain sectional owners as garden or recreational areas, carports or parking spaces.'[7]

Other devices such as notarial agreements and servitudes were also apparently used[8] and exclusive use rights may also have been conferred under use and occupation agreements.

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7 C G van der Merwe and D W Butler, *Sectional Titles, Shareblocks and Time Sharing* (1985) p 231.
8 C G van der Merwe, *Sectional Titles, Shareblocks and Time Sharing* (looseleaf) para 11.5.1, p11-15 (Issue 12).

[13] I pause at this point to say that the origin of the arrangements in respect of the lifts serving the residential portion of Belmont Arcade was unclear from the original papers. These suggested that they were of long standing dating back to the occupation of the building in the 1970's, when it was operated as a share block scheme. The provision of security by way of such an arrangement would have been an attractive feature enhancing the value of the residential sections even if crime in the 1970's was at a lower level than it is today. However the rules made under the 1971 Act have been placed before me and they do not deal with the arrangement. In those circumstances it was unclear whether the setting aside of these lifts for use only in respect of the residential sections flows from an agreement or is merely a practical arrangement having no contractual underpinnings. If it flows from an agreement, that raises other issues. Is the agreement express or tacit? Is it between the body corporate and the original purchasers of sections and their successors in title, or between those purchasers and Herald Investments as the developer? It was not possible on the factual material originally in the papers to determine these questions. I accordingly gave directions for additional affidavits to be delivered by the parties dealing with these matters. Those affidavits have now been delivered and will be dealt with in due course.

[14] When the 1986 Act replaced the 1971 Act it provided, in s 27 thereof, for rights of exclusive use of parts of a common property. Such rights can be created by the imposition of a condition in the schedule to the sectional plan. Once created the developer is obliged to cede the right to the relevant owner or owners of sections in the scheme by way of the registration of a unilateral notarial deed in their favour. If the developer ceases to be a member of the body corporate then any

exclusive use rights still registered in the name of the developer automatically vest in the body corporate.[9] Apart from that possibility a body corporate is authorised in terms of a unanimous resolution of its members to cause part of the common property to be delineated as being for the exclusive use by the owner or owners of one or more sections.[10] Once created in this fashion the right is transferred to the relevant owner or owners by notarial deed. A right to the exclusive use of a part of the common property established under s 27 is for all purposes deemed to be a right to own immovable property over which a mortgage bond, lease contract or personal servitude of usufruct, *usus* or *habitatio* may be registered.[11]

[15] Together with the enactment of the provisions of s 27 a definition of an exclusive use area was included in s 1 of the 1986 Act reading as follows:

'"e**xclusive use area"** means a part or parts of the common property for the exclusive use by the owner or owners of one or more sections, as contemplated in section 27.'

Accordingly when the proviso to s 37(1)(b) was originally enacted the legislation contemplated that exclusive use areas would be created in terms of s 27 of the Act. It also reflected an awareness of the existence of exclusive use rights to areas of common property in existing sectional title developments in terms of rules made under the 1971 Act, because provision was made in s 60(3) for those rights to be transferred to the holders thereof by way of the registration of a notarial deed. In its original form in 1986 that section read as follows:

'Where an owner has in terms of rules made under the Sectional Titles Act, 1971, been granted the right to the exclusive use of a part or parts of common property, the body corporate concerned shall, if so requested after the commencement date by the owner, and if any mortgagee of the owner's section consents in writing thereto, transfer such right to the owner by

9 S 27(1)(c).
10 S 27(2).
11 S 27(6)

the registration of a notarial deed entered into by the parties, in which the body corporate shall represent the owners of all relevant sections as transferor.'

[16] To summarise, the position at the time the 1986 Act was passed was that historically there were people who had acquired rights to the exclusive use of a part or parts of common property in existing sectional title developments by way of rules made under the 1971 Act. In drafting the 1986 Act it was thought desirable to be able to create such rights in a more formal manner by way of registration as real rights. The reason was apparently that a number of abuses had grown up around the retention and exploitation of exclusive use rights by developers.[12] This was the purpose of s 27. In regard to existing rights under scheme rules they could be converted so that they effectively stood on the same footing as rights created under s 27. However no time limit was placed on the right to convert and no provision was made for such rights to lapse so that they continued in force even if not converted. In its original form therefore the 1986 Act expressly contemplated two sources of exclusive use rights, namely s 27 of the Act and rules made under the 1971 Act.

[17] That background is of assistance in construing the proviso to s 37(1)(b) of the Act. The proviso requires the body corporate to recover from owners of a section or sections entitled to the right to the exclusive use of a part or parts of the common property additional contributions in respect of the costs of maintaining that portion of the common property. The key words are those which appear after referring to the right to exclusive use, namely: 'whether or not such right is registered or conferred by rules made under the Sectional Titles Act 1971'. Against the historic background I have sketched and in the light of the relevant provisions

12 C G van der Merwe, *Sectional Titles, Shareblocks and Time Sharing* (looseleaf) para 11.5.1, p11-16 (Issue 12).

of the Act, the natural meaning of these words is that they refer to the two possible alternatives contemplated by the 1986 Act whereby exclusive use rights might exist. In other words the obligation to pay contributions in respect of the area of the common property to which a section owner has a right of exclusive use exists whether that right is a registered right under s 27 or one conferred by rules made under the 1971 Act. As the legislation did not contemplate any other source of rights to make exclusive use of portion of the common property there is no reason why the words should be construed as referring to some other source of such rights. The legislation did not contemplate any other source of such rights. That is not to say that existing exclusive use rights derived from other sources were nullified. It is merely that because the 1986 Act did not recognise them, as a matter of construction the proviso to s 37(1)(b) did not apply to them.

[18] The position becomes clearer if one has regard to the text of s 37(1)(b) in the Afrikaans version of the Act, which was the signed version. In the Afrikaans text the proviso reads as follows:

'Met dien verstande dat die regspersoon van 'n eienaar of eienaars van 'n deel of dele wat op die reg tot die uitsluitlike gebruik van 'n gedeelte of gedeeltes van die gemeenskaplike eiendom geregtig is, ongeag of so 'n reg geregistreer of deur reëls uitgevaardig kragtens die Wet op Deeltitels, 1971 (Wet No. 66 van 1971), verleen is, moet vereis om sodanige addisionele bydrae tot die fonds te maak wat geskat word nodig te wees om die koste te dek van tariewe en belastings, versekering en instandhouding ten opsigte van enige sodanige gedeelte of gedeeltes, met inbegrip van die voorsiening van krag en water, tensy die betrokke eienaars kragtens die reëls verantwoordelik is vir sodanige koste'

The key words are 'ongeag of so 'n reg geregistreer of deur reels uitgevaardig kragtens die wet op Deeltitels, 1971 (Wet Nr 66 van 1971), verleen is …' A more felicitous translation of this into English would be 'irrespective of whether such

right is registered or conferred by rules made in terms of the Sectional Titles Act 1971'. What is clear from the Afrikaans version is that when the proviso to s 37(1)(b) was originally enacted it was only referring to exclusive use rights that arose from registration or rules made under the 1971 Act. It was not referring to rights having some other source.

[19] Unless the meaning of the proviso to s 37(1)(b) has altered since its enactment in 1986 in consequence of other amendments to the Act, that conclusion is fatal to the contentions on behalf of Herald Investments. I turn then to consider the relevant amendments. First amongst these was an amendment to s 60(3) by way of the Sectional Titles Amendment Act 63 of 1991. That amendment inserted the words 'acquired in terms of an agreement or' before the words 'been granted in terms of rules made under the Sectional Titles Act 1971'. The effect is to recognise, as mentioned earlier, the possibility that under the 1971 Act exclusive use rights might have been acquired by way of an agreement rather than under the rules applicable to a sectional title development. Several possibilities present themselves. There could be notarial agreements or an agreement concluded to preserve rights conferred under use and occupation agreements executed when the scheme operated on a share block basis. The latter rights would presumably have been carried over by agreement when the development was sectionalised. Other types of agreement can be imagined.

[20] The effect of the amendment to s 60(3) is that a person who has exclusive use rights flowing from an agreement is entitled to secure them by way of the registration of a notarial deed in which event they become real rights in precisely the same way as rights created under s 27 of the 1986 Act or similar rights

acquired under rules made in terms of the 1971 Act and duly registered. The recognition of rights derived from this source, however, immediately creates a problem in that the proviso to s 37(1)(b) was not amended.[13] Logically one would have expected that it would have been amended so that the critical words would read 'whether or not such right is registered or acquired under any agreement or conferred by rules made under the Sectional Titles Act 1971'. In the absence of such an amendment the anomalous situation appears to arise whereby the holder of exclusive use rights under an agreement is in a more advantageous position, insofar as the costs of maintaining the exclusive use area are concerned, than a person holding similar rights by virtue of a registration under s 27 of the Act or under rules made in terms of the 1971 Act. That is not a tenable position.

[21] The problem with s 37(1)(b) was compounded by the introduction, in 1997, of s 27A, which empowers a body corporate to confer rights of exclusive use and enjoyment on members of the body corporate by way of rules. This was apparently as a result of representations by SAPOA.[14] A resolution passed by the Registrars of Deeds records that this can only be done by way of a management rule, which requires unanimity among members of the body corporate.[15] What is relevant for present purposes is that once more s 37(1)(b) was not amended.[16]

[22] As matters stand at present therefore the Act recognises four different ways in

13 There is less of a problem flowing from the fact that the definition of 'exclusive use area' was not amended as that definition applies only unless the context otherwise indicates and the context already made that clear in regard to the proviso.
14 South African Property Owners' Association. See van der Merwe, fn 11, *ante.*
15 S 35(2)(a) of the Act. See van der Merwe, *supra*, 11-36 for criticism of the approach by the Registrars.
16 In 2005, and in recognition of the fact that it was misleading, the definition of 'exclusive use area' was amended to remove the reference to s 27. As it now stands it does not identify the source of an exclusive use area and is capable of referring to such an area however created. Professor van der Merwe suggests that the amendment flowed from the introduction of s27A.

which an exclusive use area can exist and an exclusive use right be enforced. Under the Act such rights can now be created only by way of registration under s 27 or a rule under s 27A. However by virtue of the transitional provisions of s 60(3) the Act continues to recognise such rights when created by an agreement in force when the 1971 Act applied or under rules produced in terms of the 1971 Act. There is nothing to suggest that the consequences of enjoying such rights vary depending upon their source save for the advantages expressly conferred by registration. Certainly there is nothing to indicate that its consequences in regard to contributing to the costs of maintaining the exclusive use area should differ from one instance to another. However s 37(1)(b) has not been amended to follow the other amendments bearing upon this issue.

[23] It seems to me overwhelmingly probable that the failure to amend s 37(1)(b) consequent upon the amendments to s 60(3) and the introduction of s 27A was an oversight. It may be that the draftsman read the English text and read the words 'whether or not' as conveying that it does not matter, for the purposes of the proviso, whether the exclusive use area has its origins in registration or rules made under the 1971 Act or some other source. For the reasons I have already given that would not have been a correct reading of the section as originally drafted but the question is whether in the present altered circumstances it must be construed as having that meaning. In my view it must. Any other conclusion would result in the situation where some owners of sections enjoying exclusive use rights are liable to contribute to the cost of maintaining the areas in respect of which they enjoy those rights whilst others are not, depending solely on the source of those rights. That was not what was intended in enacting the proviso to s 37(1)(b). It is plain that the intention was to burden those who enjoyed such rights with the costs of

maintaining the parts of the common property burdened by such rights. That is also an equitable arrangement in distributing the cost of maintaining the property among the owners in a development. Owners are liable to maintain their own sections and where they enjoy exclusive use rights in respect of part of the common property it is appropriate that they should bear the same liability in respect of those areas. It would be quite unfair to expect those who are unable to use part of the common property to pay costs occasioned by their co-owners' enjoyment of that part.

[24] Mr Stewart argued that this result would introduce uncertainty into a regulatory scheme that is designed to avoid such uncertainty. There is a measure of truth to that contention but it should not be taken too far. We are not concerned with an ongoing situation where rights of exclusive use can be created by informal means, but only with those situations where the Act itself recognises that exclusive use areas have been created in the past and gives legislative recognition to those rights. The legislation recognises that under the previous legislative regime exclusive use areas could have been created and acquired by agreement and permits those rights to be converted, by registration, into rights of property under s 27. It is true that proof of the existence of such rights may raise a measure of uncertainty but that is intrinsic in permitting their conversion to registered rights.

[25] More important than any question of uncertainty is that if exclusive use rights arising from agreement are converted by registration there can be no doubt that the owners of the rights would thereafter be liable to pay the costs of maintaining those portions of the common property in respect of which they enjoyed those rights. Why then should they not be liable to do so if they decline to register those rights

or before they have asked for or obtained registration? Indeed if they were not liable that fact would act as a significant disincentive to their applying for registration because they could continue to enjoy the right of exclusive use whilst burdening their neighbours with the bulk of the costs of maintaining the affected areas. Such an impractical construction of the Act should be avoided unless dictated by the clearest possible language.

[26] In my view these problems can be resolved by construing the key words in the proviso as saying that the liability to pay the costs of maintaining an exclusive use area rests on the person vested with the exclusive right to use that area, irrespective of whether the exclusive use right arises in one of the two ways specifically mentioned in the proviso or in another manner recognised by the Act as being an enforceable source of such right. That is a wider interpretation than would have been given to the relevant words in 1986 when the Act came into operation but that wider interpretation is dictated by the statutory extension of the sources from which exclusive use rights may be derived. However unless the owner enjoying the exclusive use of part of the common party has a right to such exclusive use flowing from one of these four possible sources they do not come within the proviso to s 37(1)(b). The reason is that s 37(1)(b) is part of a broader statutory scheme and involves a departure from the fundamental principle embodied in that scheme that owners of sections contribute to the costs of maintaining common property in proportion to their participation quotas. That is a fundamentally important principle because it prevents the body corporate from adjusting that liability to impose it to a greater extent on certain owners to the advantage of others. Thus for example it prevents owners who occupy their own flats from imposing higher levies on those who let out their flats as a source of rental income. Section 37(1)(b) is an exception

to this principle and it is appropriate therefore to ensure that it cannot be used to undermine the general principle. From its inception it was designed to deal with exclusive use rights recognised by the Act itself and no others. Whilst the range of such rights has been expanded by way of the amendments and our understanding of s 37(1)(b) needs to be adjusted accordingly there is no need to go further than the legislature has done to include within it situations that have not been given statutory recognition.

[27] Again I do not wish this to be understood as meaning that the members of a body corporate cannot create rights of exclusive use of common property by means falling outside the provisions of the Act. Clearly they can do so by for example concluding a contract with the unanimous consent of all members for a particular owner or group of owners to have the exclusive use of a portion of common property. For example they could agree that the owners of the flats on the top floor will be entitled to establish and maintain at their own cost a roof garden and recreational area on the roof to which they alone will have access. However the essence of such arrangements must be that the agreement addresses the issue of the costs of maintenance. That is in fact what happened at Belmont Arcade when the glass security partitioning in the foyer was installed. This was proposed by one of the trustees who owned a residential section and according to the minutes of the meeting Herald Investments indicated that ‘if the system is to protect the flats alone then the flat owners must pay for it’. The proposal was unanimously approved and the owners of the residential sections agreed to pay a special levy of R1250 per unit towards the cost. A small excess was paid by the body corporate. Nothing in this judgment should be taken as suggesting that such arrangements are impermissible. It is merely that such arrangements are concluded outside the

framework of the Act and the statutory principles that govern the liability for the costs of maintaining common property and the collection of levies. Accordingly if it is intended that these should be adjusted by agreement then the agreement itself must deal with these matters. Unfortunately it does not appear that this was dealt with when the security partitioning was erected.

[28] I had provisionally reached the conclusion in paragraph [26] when it became apparent that it was necessary to explore the source and origin of the situation where the owners of the residential sections in Belmont Arcade have enjoyed the exclusive use of these three lifts. This was necessary in order to determine whether they enjoy exclusive use rights in terms of an agreement or agreements, possibly having its or their origins in arrangements pre-dating the conversion into a sectional title development, but rendered binding on all relevant parties thereafter. This was not a matter that had been explored in the original papers where only the broadest and most general history of events has been given. I accordingly posed the following question to Herald Investments:

'…does the applicant (Herald) contend that the present situation in regard to the lifts arises from an agreement of the type referred to in section 60(3) of the Sectional Titles Act 1986, that is, an agreement in existence prior to that Act coming into force and concluded between the date of creation of the scheme in December 1978 and 1 June 1988 when the 1986 Act came into operation?'[17]

The answer is that it does not contend for such an agreement. In addition I was furnished with an affidavit giving the background to the installation of the glass security partitioning.

[29] In the light of that response it is possible to answer the first question arising in

17 Against the eventuality that the answer was in the affirmative I gave directions for the delivery of supplementary affidavits.

this case. The rights that the owners of residential sections in Belmont Arcade enjoy to the exclusive use of the three lifts servicing the flats do not arise under either s 27 or s 27 A of the Act. Nor do they arise under rules made in terms of the 1971 Act or under an agreement contemplated by s 60(3) of the 1971 Act and concluded prior to the repeal of that Act and the coming into force of the 1986 Act. Accordingly, whatever rights the owners of the residential sections may have to the exclusive use of the three lifts, a matter on which I express no view, they do not enjoy those rights from a source recognised in the Act. For the reasons I have given a proper construction of the proviso to s 37(1)(b) only entitles the body corporate to recover the costs of maintaining an area of the common property from an owner who enjoys the exclusive use of that area, where the right of exclusive use is derived from one of the sources recognised under the Act. It follows, in the absence of special contractual arrangements falling outside the ambit of the Act, that the costs of maintaining the common areas of the property including the costs of maintaining the three lifts serving the residential portions of the building, must be recovered from all owners, including Herald Investments, in proportion to their participation quotas as provided in s 37(1)(b) of the Act and the costs in relation to the three lifts do not fall to be recovered solely from owners of residential sections in terms of the proviso to that section. An appropriate declaratory order to this effect will be made. Mr Stewart had formulated an order that included orders that outstanding levies and interest on overdue levies be paid. He submitted that this should be followed by a debatement of account in regard to levies and a general meeting of members of the body corporate. In my view none of that relief should be granted. I can see no reason why, once the issue of principle has been determined as it will be by a declaratory order, the parties will not be able with the assistance of the agents to calculate what is owing. Once that has been done there

is nothing to indicate that Herald Investments will not pay what is due. To grant an order sounding in money against them is in my view inappropriate on these papers. I turn then to consider the other issues.

Was the Special General Meeting Properly Convened?

[30] In terms of rule 54 of the rules of the body corporate it is provided that:

'The Trustees may, whenever they think fit, and shall upon a request in writing made by owners entitled to 25 per centum of the total of the quotas of all the sections … convene an extraordinary general meeting. If the Trustees fail to call a meeting so requested within 14 days of the request, the owners concerned shall be entitled themselves to call the meeting …'

Pursuant to this provision a notice was addressed to the trustees on 18 November 2009 requesting that a special general meeting of members be convened. The opening portion of the notice read as follows:

'Kindly take notice that the owners whose names and signatures appear below, who are entitled to at least 25% of the total of the quotas of the sections, hereby request that the trustees convene a special general meeting of the members of the body corporate of Belmont Arcade …'

Appended to the notice were the signatures of the owners of 33 of the residential sections.

[31] It is not disputed that the signatories to the notice do not hold 25% of the total of the participation quotas in the building. That would have entitled the trustees to disregard the notice. However, they did not do so. According to the founding affidavit deposed to by the then chairperson of the body corporate his response was merely to suggest to the agents that the meeting be called in the new year as it was anticipated that a large number of unit owners would be away during the Christmas period. Then, before the trustees could convene the meeting, a notice convening a

meeting on 22 February 2010 was given by the attorneys representing the respondents in these proceedings. The notice provoked a response from the attorneys representing the applicants. However, they did not challenge the validity of the notice convening the meeting on the grounds that it lacked the support of owners holding a sufficient percentage of the participation quotas. The only ground for challenging the validity of the meeting was said to be that the respondents had failed to pursue the proposed arbitration in accordance with their undertaking.

[32] The only portion of the letter dealing with the notice reads as follows:

'The Notice of the Special General Meeting states that the Trustees of the Body Corporate of Belmont Arcade failed to respond to Notice in terms of Management Rule 53 (*sic*). This is incorrect, the Chairman of the Body Corporate of Belmont Arcade, Mr Singh, personally phoned the agent who gave the notice and told the agent that as the proposed meeting was during the Christmas Holiday period many of the members would be away from Durban and that the meeting should be convened for the New Year. This certainly does not amount to a failure to respond to a notice. This smacks of your client's seeking to gain an unfair advantage in the matter.'

The response to this simply said that the trustees had not acted to convene a special general meeting in the new year. In turn the reply recorded that at the special general meeting the share block owners would be entitled to vote and accordingly it was suggested that the meeting had largely become academic. Clearly this view was taken on the basis that Herald Investments and those associated with it would be able to muster sufficient votes on a poll to defeat the resolutions to be proposed at the special general meeting.

[33] The special general meeting was then convened on 22 February 2010 and with the acquiescence of Herald Investments, who were represented at the meeting, the

attorney for the dissident owners was elected to chair the meeting. Thereafter the resolution to remove the existing trustees was proposed. It was recorded by the agents that Herald Investments had, under protest, paid the amount of the disputed levy. The chair then asked whether interest had been paid on this 'overdue' amount and was told that it had not and that no claim for interest had been made. On the basis of a resolution taken at the Annual General Meeting on 1 December 2008 that 'penalty interest of 2%, compounded on a monthly basis would be charged on all levy accounts in arrears' the chair ruled that Herald Investments was in arrear with its contributions and accordingly disqualified from voting in terms of rule 65. The resolution to remove the existing trustees was thereafter put and passed and new trustees were elected.

[34] In the light of this history it does not seem to me that Herald Investments is entitled to complain that the original notice asking the trustees to convene a special general meeting was defective. The notice was not rejected at the time and the attitude of the trustees was that such a meeting should be held. Although they objected to the fact that the dissident section owners convened the meeting they thereafter attended the meeting and participated in it. Had they been permitted to vote they would undoubtedly have caused the defeat of the resolution to remove the existing trustees. On the face of it Herald Investments and the existing trustees had no objection to the meeting being held, irrespective of the manner in which it had been convened, because they were satisfied that they would be able to control the outcome by the exercise of their votes on a poll. That is the true cause of their complaint not the manner in which the meeting was convened. It seems to me that it is too late for them now to complain after the event about that and seek on those

grounds to set aside the decisions taken at the meeting.[18]

Disqualification of Herald Investments' Vote

[35] Rule 65 of the rules of the body corporate provides that except in cases where a special resolution or a unanimous resolution is required under the Act an owner shall not be entitled to vote at any general meeting if 'any contributions payable by him have not been duly paid'. It was in terms of that rule that the chairperson excluded Herald Investments from voting on the grounds that they had not paid interest on the disputed levies.

[36] Mr Gajoo SC, who appeared for the applicants, submitted that the disqualification of Herald Investments was wrong in law because, whatever the merits of the claim for interest in respect of the disputed levies, the payment of interest was not a contribution for the purposes of the rules. He drew attention to the provisions of rules 30 and 31, which read as follows:

'30. It shall be the duty of the Trustees to levy and collect contributions from the owners in accordance with the provisions and in the proportions set forth in Rule 31.

31(1) The liability of owners to make contributions in terms of sections 30(1) and 35 of the Act shall be as follows:

(a) In respect of premiums on policies of insurance effected by the body corporate in terms of rule 29(1)(a) the owner of each unit shall be liable for:

(i) an amount equal to the replacement value of the unit as specified in the insurance policy multiplied by the relevant insurance premium rates;

(ii) any premiums payable by the body corporate during the course of the year as a result of the replacement value of the Unit being varied in terms of rule 29(1)(d).

18 It matters not whether this is put on the basis of waiver or acquiescence or election. The principle is similar to that which applied in review proceedings before the advent of PAJA. *Lion Match Company Limited v Paper Printing and Wood & Allied Workers Union and others* 2001 (4) SA 149 (SCA) paras [27] – [32]

(b) All expenses other than those referred to in rules 31(1)(a) shall be borne by the owners in proportion to the participation quotas of their respective sections.

(2) At every annual general meeting the Body Corporate shall approve, with or without amendment, the estimate of income and expenditure referred to in rule 36 and shall determine the amount estimated to be required to be levied upon the owners during the ensuing financial year.

(3) Within 14 days after each annual general meeting the Trustees shall determine the amount payable by each owner in terms of rule 31(1) and shall forthwith notify each owner in writing of the amount payable. Such amount shall thereupon become payable in monthly or quarterly instalments as the Trustees may determine, the first such instalment being payable on the 1st day of the month following such notification.'

The only other rule (apart from rule 65) that refers to contributions is rule 45(1), which reads:

'The Owners shall not be entitled to a refund of contributions lawfully levied upon them and duly paid by them.'

[37] The contributions referred to in rules 30, 31 and 45 are the contributions that are levied upon owners of sections in respect of the costs of administration of the body corporate. Under the rules it is contemplated that the body corporate may receive funds from other sources. Thus rule 35(1)(b) requires the body corporate to keep a record of all sums of money received. Rule 36(1) requires it to prepare an itemised estimate of the anticipated income and expense of the body corporate for the ensuing year to be placed before the annual general meeting. Rule 41 refers to the treatment of 'all monies received' by the body corporate, and rule 44 contemplates that there may be receipts by way of interest. There is no rule that deals with interest on overdue levies.

[38] The rules refer to certain provisions of the 1971 Act. Section 30 was the

equivalent of s 37 in the present Act. In s 30(1)(b) it provided that the body corporate was empowered:

'to require the owners, whenever necessary, to make contributions to such fund for the purpose of satisfying any claims against the body corporate.'

In terms of s 30(2) any contribution levied under s 37(1) 'shall be due and payable on the passing of a resolution to that effect by the trustees of the body corporate'. Section 35 also referred to contributions in a context that makes it clear that these are contributions levied under s 37(1)(b). In other words the references to contributions in the 1971 Act were wholly consistent with the references to contributions under the rules of the body corporate of Belmont Arcade. They refer to the amounts levied on owners of sections to meet the expenses of the body corporate. They do not refer to interest on any overdue contributions even though the possibility of non-payment is recognised and dealt with in that Act.

[39] To disqualify the owner of a section from voting at a meeting of the body corporate is a very stringent sanction as it deprives them of a voice in relation to matters that directly affect them arising from their ownership of immovable property. This is recognised in rule 65 itself where it is said that the disqualification does not operate in relation to any resolution that under the Act requires either unanimity or a special resolution. In other words, in relation to the issues of the most profound importance to owners of sections, it is impermissible for their voice to be silenced even if they are in arrears with their contributions. That suggests that the disqualification provision should not be given a construction going beyond its clear language. That speaks only of arrears of contributions, an expression that has a clear meaning in terms of both the Act and the rules, and does not include a failure to pay interest on arrears that have been brought up to date. It

follows in my view that the disqualification on these grounds was not justified and Herald Investments should have been permitted to exercise their voting rights at the special general meeting.

[40] In argument Mr Stewart sought to justify the decision to disqualify Herald Investments from voting on two other and different grounds. In my view it is not open to the respondents to adopt that stance. The minutes reflect that the disqualification was for a very specific reason, namely because no interest had been paid on the special levies for the lifts, and that reason was not justified. If the chair's ruling on the question of non-payment of interest had been different Herald Investments would have been permitted to vote at the meeting and the outcome would have been fundamentally different. To permit that disqualification to stand in order to sustain the result but on wholly different grounds seems strange. However it is unnecessary to decide this finally, as in any event I think that the further grounds advanced are without merit.

[41] The decision by Herald Investments to pay the disputed supplementary levy was taken in order to avoid them being disqualified from voting at the special general meeting. The managing agents for the development were asked to calculate the amount outstanding and were then instructed to pay that amount to the body corporate of Belmont Arcade. They did so and then furnished a schedule to Herald Investments reflecting that nothing was owed by way of levies to the body corporate. At the meeting itself Mr Clark, the representative of the agent, confirmed that all levies, including the special levy arising from the refurbishment of the lifts had been paid in full and that its account reflected a nil balance. None of this is in dispute.

[42] The first respondent, Dr Meer, who deposed to the main opposing affidavit, says that since the meeting he has had discussions with Mr Clark and another employee of the agent, and they have told him that the payment of the disputed special levy was effected by debiting the account of Herald Investments in the trust account of the agents and crediting the account of Belmont Arcade. They were able to adopt this means of effecting payment because the agents are also the agents for Herald Investments in relation to the administration of the share block company and the commercial section of Belmont Arcade. However there was at the time an insufficient amount standing to the credit of Herald Investments in the accounts of the agents so that the effect of the transfer was to leave their account with the agents in a debit position. This was remedied two days after the meeting by the transfer to the agents of an amount standing to the credit of a savings account held by Herald Investments.

[43] In a replying affidavit Herald Investments disputes the correctness of this and contends that the agents held a sufficient credit at the time to discharge the entire balance of the special levy. However it is unnecessary to resolve this dispute. The fact of the matter is that the credit to the account of Belmont Arcade was made and once made could only be reversed with the consent and authority of Belmont Arcade.[19] It is no concern of the body corporate whether this lead to a deficit in Herald Investments' account with the agent any more than it would have been any concern of theirs that the transfer had resulted in Herald Investments exceeding its overdraft limit with its bank. The only legitimate concern of the body corporate

19 c/f *Nedbank Ltd v Pestana* 2009 (2) SA 189 (SCA) paras [8] and [9]. The agents here do not appear to stand on any different footing from the bank in that case. They could only reverse the transfer if they had lawful reason to do so and none existed.

was whether the levy shortfall had been made up and the answer to that as Mr Clark made clear at the meeting was that it had.

[44] The other additional point is of even less worth. It is said that in calculating what amount was owing by Herald Investments Clark had taken certain opening balances reflected in the accounts but had not found the records of payments supporting those opening balances. That does not however mean that any levies were outstanding. It merely means that the records in the possession of the agents, who had only taken over as agents about a year before, did not contain substantiation of the correctness of the opening balances. There could be a multitude of reasons for this but that does not suffice to show as a fact that these amounts had not been paid. What is of significance in this regard is that the payments would have been made over a period of time long preceding the commencement of the new agency during which period the body corporate had held annual general meetings at which audited annual financial statements had been tabled and approved. Minutes of these meetings for the 2006, 2007 and 2008 years form part of the papers and they reflect that in each year audited accounts were tabled and approved without comment as was in each year a report from the chair of the body corporate. Bearing in mind the heat that the issue of the special levy has generated over a number of years it seems to me inconceivable that it would not have been raised and debated had Herald Investments not even paid its share of the costs in relation to the service lift.

[45] It follows that on the papers before me the respondents have not shown that Herald Investments was in arrear with any amount in respect of contributions when the meeting was held on 22 February 2010 and it should not have been precluded

from voting at that meeting. It follows, and Mr Stewart accepted this, that the resolutions taken at that meeting fall to be set aside and the applicant trustees restored to the offices from which they were wrongly removed. That would become academic however if the court appoints an administrator and it is to that question that I now turn.

Appointment of an administrator

[46] In terms of s 46(2) of the Act a court may in its discretion appoint an administrator to a sectional title development. The section gives no indication of when and in what circumstances this power should be exercised. It is however a drastic power in that it removes control of the affairs of the body corporate from those in whom it should be vested, namely the trustees elected by the members of the body corporate. In my view therefore it would normally only be exercised when those persons are not in a position properly to perform the functions assigned to them under the Act or when the body corporate has not elected trustees or where for some other reason the affairs of the body corporate are not being or not capable of being administered in the fashion that the Act contemplates. There may be situations in which the manner in which it is being administered is causing prejudice where the power should be exercised. But it must be borne in mind that the purpose of appointing an administrator is remedial the idea being that the conduct of the affairs of the body corporate should after administration be restored to the members of the body corporate. To try and go beyond that to describe the circumstances in which the power should be exercised would be unwise as it may

be seen as narrowing the scope of a broad discretion. The enquiry will inevitably turn on whether the affairs of the body corporate need to be taken out of the hands of the trustees and members of the body corporate in order that the problems giving rise to the application can be addressed and resolved by outside intervention.

[47] The respondents make the broad allegation that there has been 'gross mismanagement and financial irregularity' in support of the application for the appointment of an administrator. These are said to be that the body corporate's affairs have been run as the 'personal fiefdom' of Herald Investments and that there are conflicts of interest between the former trustees' obligations as trustees and their personal interests as shareholders in and directors of Herald Investments. This is said to have given them both direct and indirect financial benefits. It is also suggested that such an appointment might help to avoid allegations that any faction is acting in a 'partisan and biased fashion towards the other'.

[48] Whilst these broad allegations of malfeasance are made few if any facts have been put up to support them. It is indisputable that the auditors appointed by the members audited the annual financial statements of the body corporate for 2006, 2007 and 2008 and these were approved without dissent at annual general meetings of members. The approval and adoption of the 2007 and 2008 reports was proposed by Dr Meer, who is the first respondent and the deponent on behalf of the respondents to their opposing affidavit and the affidavit in support of the application for appointment of an administrator. At each such meeting a proposed budget for the forthcoming year was considered and approved by the members. It is difficult in those circumstances to accept that there is long standing financial

maladministration. Other than the fact that Herald Investments has refused to pay the supplementary levy and that no steps have been taken to recover it from them no other example of alleged maladministration is given. The problem seems to be a lack of acceptance that this stance is indicative of a bona fide dispute over its liability for this levy.

[49] As regards the allegation that the body corporate has been run as a private fiefdom it is not disputed that its affairs have always been in the hands of managing agents. It is true that there is a complaint that these agents also act as agents for Herald Investments but that has always been the case and there has not hitherto been any recorded objection to that situation, which holds obvious advantages in terms of efficient administration. To give but one example many of the owners of residential sections also own share blocks in Herald Investments that confer the right to use parking bays on the top level of parking. With only one agent dealing with the entire building this facilitates payment of levies that need to be divided between the Belmont Arcade and Herald Investments and, one suspects, means that Belmont Arcade enjoys greater security in regard to the receipt of levies from these individuals as there does not have to be a process of payment from Herald Investments to Belmont Arcade. With one agent it is easier to deal with staff who service all parts of the building and employ contractors when necessary.

[50] There is nothing to suggest that either the previous or the present agents have been anything but diligent in the performance of their duties. It is said that a great quantity of documents have been provided to the attorney acting for the respondents but it is unclear why this was thought necessary. Although the attorneys have been in possession of those documents since at least March 2010

the affidavits in the application for the appointment of an administrator delivered in August 2010 do not say that anything untoward has been discovered in them. No affidavit has been presented from Mr Clark, who attends to the building's administration on behalf of the agents, that any difficulty is being experienced in regard to its day-to-day affairs.

[51] In addition it is apparent that at each annual general meeting trustees have been appointed of whom the majority have been owners of residential sections. It is only relatively recently with the resignation of two such trustees that there has been a majority of trustees appointed by Herald Investments. There are no complaints on record before me of these trustees experiencing difficulties in fulfilling their role as trustees as a result of interference or overbearing conduct on the part of Herald Investments. If its situation was as dire as is suggested by the allegations made in support of this relief one would have expected that chapter and verse would have been placed before me by way of affidavits demonstrating such unacceptable conduct. None has been forthcoming.

[52] In the formal application for appointment of an administrator delivered in August it is said that the heart of the dispute is the fact that Herald Investments holds a 52% participation quota and that it uses this to suppress the minority owners. It is suggested that the appointment of an administrator will provide an opportunity to alleviate the effect and impact of this by way of an amendment to the management rules of the body corporate that will overcome the veto power of Herald Investments. I doubt whether this is a permissible reason for the appointment of an administrator. What is being suggested is that by this means the administrator can alter the rules and the voting rights of the section owners and tilt

them in favour of the owners of residential sections. That fundamentally changes the entire basis upon which the scheme was established in the first instance and would operate to deprive Herald Investments of its influence in the affairs of the development whilst leaving its financial obligations, based on its participation quota, untouched. As I say I doubt whether that is something that an administrator may do but in any event it is not in my view justified in the present case.

[53] For those reasons the application for the appointment of an administrator must fail. I will deal with the costs of that application in the next section of the judgment.

Costs

[54] The proper order of costs is complicated by the fact that the two sides of the litigation have each enjoyed some success. On the matters that precipitated the application Herald Investments has succeeded. The attempt to circumvent this by way of the application for the appointment of an administrator has failed. However on the issue that has been the true *casus belli* between the two sides Herald Investments has been unsuccessful. In those circumstances it seems to me that a fair order would be one in terms of which each party to the litigation bears his, her or its own costs thereof, save that Dr Meer will be liable for the separate costs of the application he brought for the appointment of an administrator. However it is necessary to deal separately with the situation of the body corporate, which was joined as a respondent in the main application and which purported to defend the proceedings represented by the trustees newly appointed at the meeting on 22 February 2010.

[55] As I have held that those trustees were not properly appointed it is questionable whether they were entitled to burden the body corporate with a liability in respect of costs that would have to be borne as to 52% thereof by Herald Investments. Mr Stewart submitted that even if I held that the trustees had not been properly appointed their actions are valid by virtue of rule 11, which provides that:

'Any act performed by the Trustees shall, notwithstanding that it is after the performance of the act discovered that there was some defect in the appointment or continuance in office of any Trustee be as valid as if such Trustee had been duly appointed or duly continued in office.'

This rule is the equivalent of s 214 of the Companies Act 61 of 1973, as amended, which is couched in similar terms. It has been held in regard to predecessors to that section couched in the same terms that the protection provided by the section is only applicable to acts completed before the irregularity is discovered and challenged.[20] That seems to me equally correct in regard to rule 11. Here the whole purpose of the litigation was to remedy the unlawful removal of the old trustees and their replacement by the new trustees. The irregularity had not only been discovered but was the whole subject of the litigation. In those circumstances it was not open to the new trustees to defend the proceedings in the name of the body corporate and the correct position is that the body corporate has played no role in these proceedings. That has its consequence that no order for costs should be made against it. It also follows, although no order was sought or needs to be granted in that regard, that the costs incurred by the other respondents in defending the application and by Dr Meer in the application for the appointment of an administrator are not to be charged to or recovered from the body corporate.

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20 *Dowjee and Co Ltd v Waja* 1929 TPD 66 at 79; *Trek Tyres Ltd v Beukes* 1957 (3) SA 306 (W) at 310 F-G.

Order

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[56] In the result I make the following orders:

In Case No 2907/2010:

1. It is declared that the costs incurred by the body corporate of Belmont Arcade in connection with the refurbishment of the three lifts serving the residential portions of the building known as Belmont Arcade are recoverable from all owners of sections in Belmont Arcade in proportion to their participation quotas and are not recoverable exclusively from owners of residential sections in terms of the proviso to s 37(1)(b) of the Sectional Titles Act 95 of 1986.

2. The decision by the Eighth Respondent, at the special general meeting of members of the body corporate of Belmont Arcade on 22 February 2010, to disqualify Herald Investments (Pty) Ltd in terms of rule 65(1) from exercising its vote as a member of the body corporate is set aside.

3. T

The resolution passed at the special general meeting of members of the body corporate of Belmont Arcade on 22 February 2010 to remove the Second, Third, Fourth and Fifth Applicants as trustees of the body corporate of Belmont Arcade is set aside.

43. The resolution passed at the special general meeting of members of the body corporate of Belmont Arcade on 22 February 2010 to appoint the First to Seventh Respondents as trustees of the body corporate of Belmont Arcade is set aside.

54. Each party shall pay his, her or its own costs of the application.

In Case No 9768/2010:

The application is dismissed with costs.

DATE OF HEARING	**26 AUGUST 2010**
DATE OF JUDGMENT	**14 SEPTEMBER 2010.**
APPLICANTS' COUNSEL	**MR V I GAJOO SC**
APPLICANTS' ATTORNEYS	**BICARRI BOLLO MARIANO INC**
RESPONDENTS' COUNSEL	**MR M E STEWART**
RESPONDENTS' ATTORNEYS	**BERKOWITZ COHEN WARTSKI**