THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 780/11
Not reportable

In the matter between:

THE WILDS HOME OWNERS ASSOCIATION	**FIRST APPELLANT**
RUDI BOSHOFF	**SECOND APPELLANT**
ADRIANUS LUKAS FAURE	**THIRD APPELLANT**
DEON VAN AARDE	**FOURTH APPELLANT**
HARRIS KAPLAN	**FIFTH APPELLANT**
P J J VAN VUUREN BELEGGINGS (PTY) LTD	**SIXTH APPELLANT**

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**

Neutral citation: *The Wilds Home Owners Association v Van Eeden* (780/11) [2012] ZASCA 113 (13 September 2012).

Coram: Navsa, Cloete, Mhlantla JJA, Southwood and Erasmus AJJA

Heard: **21 August 2012**

Delivered: **13 September 2012**

Summary: **Company law – s 252 of the Companies Act 61 of 1973.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Murphy J sitting as court of first instance):

1. The appeal is allowed to the extent set out in para 2.

2. Paragraphs 1, 2, 3, 5 and 9 of the order of the court a quo are deleted and the following paragraphs are substituted therefor:

'1. The board of directors of the first applicant is directed to instruct the auditors to perform a forensic audit of the financial affairs of the first applicant from its inception, in accordance with the forensic audit scope attached to Annexure "RB21" to the founding affidavit – save that paras 1B to F and H shall be omitted unless the extraordinary general meeting, convened in terms of para 2 or 4 of this order, shall resolve to incorporate any or all of those paragraphs; and to report its findings to the members of the company at an extraordinary general meeting called for this express purpose.

2. The board of directors of 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 following proposed amendments to the articles of association, and any additional amendments to articles 10.4 and 11.1 to allow for the election of new directors:

(a) By the deletion of the following words in article 10.1:

'Until such time that the last erf is sold and transferred, the Developer shall have the right to elect the majority of directors.'

(b) By the substitution in article 10.4 of the phrase 'article 23.1.1' for the phrase 'article 23.1.4'.

(c) By the deletion of the following words in article 10.4:

'. . . and the Developer shall until such time that the last erf on the land is sold and transferred, have the right to elect the majority of directors.'

(d) By the deletion of the following proviso in article 15.3:

'. . . provided that, during the development period the presence of at least 3 (three) nominees of the developer shall be necessary at all meetings of directors in order to form a quorum.'

(e) By the deletion in article 23.2 of the phrase:

'. . . unless specifically permitted otherwise by the chairman . . .'

(f) By the deletion in the definitions section of the developer's rights 'to decide who shall have any right to or interest in any part of the scheme and to determine the nature of such rights.'

3. The Pretoria Society of Advocates is requested 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.

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 as envisaged in para 2 of this order, or in respect of the election of any director, or in respect of any decision to extend the scope of the forensic audit as envisaged in para 1 of this order.

9. The first applicant is interdicted from making payment to the second and third applicants of any fee for services rendered in respect of any litigation between the parties, unless and until such payments are approved by a general meeting.'

3. The second to sixth applicants are ordered to pay the respondents' costs jointly and severally.

JUDGMENT

CLOETE JA (NAVSA, MHLANTLA JJA, SOUTHWOOD AND ERASMUS AJA CONCURRING):

[1] The court a quo (Murphy J in the North Gauteng High Court) granted the respondents relief primarily in terms of the provisions of s 252 of the Companies Act 61 of 1973. It is not necessary (save to the limited extent set out below) to discuss the provisions contained in the section, because this appeal does not turn on a question of law; nor is it necessary to rehearse the prolonged history of the matter, because there is no significant dispute in regard to the findings of fact made by the court a quo in its detailed and motivated 138-page judgment.

[2] I accordingly intend dealing directly with the four issues argued on behalf of the appellants. First, the appellants' counsel submitted that either the broad scope of the audit of the financial affairs of the Home Owners Association (HOA), ordered by the court a quo in para 1 of its order, should be limited to the essential dispute between the parties as envisaged in paras 1A and G of the Forensic Audit Scope forming part of annexure RB21 to the founding affidavit and commencing at p 132 of the appeal record; or, preferably, that the scope of the audit should be determined by the extraordinary general meeting of the HOA for which provision is made in para 2 and following of the order of the court a quo. The respondents' counsel sought to defend para 1 of the order of the court a quo in the terms it was made, ie including all of the sub-paragraphs of para 1 of the Forensic Audit Scope. The essential dispute to which I have referred is the set-off of levies owing by the developer (the sixth appellant) to the HOA against landscaping expenses incurred by the developer. In my view, para 1 of the order of the court a quo should be limited as suggested by the appellants' counsel; but the extraordinary general meeting should have the option to extend the scope of the audit. My reasons follow.

[3] An extraordinary general meeting was held following the order made by Sapire AJ on 11 September 2009. Before the meeting the chairman of the HOA sent out an 'e-newsletter' to the members that contained the following paragraph:

'**Forensic Audit**

One of the main points raised that makes everyone's hair stand up is to call for a forensic audit. To speak is cheap. At this stage the estimated costs starts at R180,000.00 for a initial inspection report. If it needs to be further investigated it will amount to more than a R1,000,000.00. The board of directors do not have a problem with a forensic audit and if any member wants to have it done they can pay for it themselves. Why must the HOA pay for something that is costing the members money. To do a forensic report will not resolve the disputes that was raised by Frans [van Eeden, the first respondent] as the Auditors can only audit the books and not give a legal opinion.'

At the meeting, held on 28 October 2009, the following resolution was considered:

'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 recommendation of the Financial Committee.'

A total of 374 members voted in favour of the resolution and the developer used his 215 votes to vote against it. The resolution was accordingly adopted. The directors of the HOA, however, failed to implement the resolution and that was one of the facts which prompted the court a quo to give the order which it did.

[4] It seems to me essential that an audit be conducted as envisaged in paras 1A and G of the Forensic Audit Scope because I cannot conceive how the parties concerned could go forward without this information. It has been the source of all of the problems that have arisen over a number of years between the board of the HOA, the developer and a significant number of members of the HOA. I therefore believe that a limited order by the court under s 252 would have been appropriate.

[5] On the other hand, the remainder of the audit scope is not directly relevant to the essential dispute and appears to be largely of historical significance only, eg:

'B.) Investigate the legality of Board meetings and minutes of the meetings . . .

C.) Investigate the alleged unauthorized actions (outside of their roles and responsibilities) of the four directors appointed by the Developer from date of inception and investigate unauthorized payments made to these Directors of the HOA ie R500 per meeting.

D.) Investigate the procedural irregularities of the XGM held on 8 December 2007 . . .

E.) Confirmation and verification of title deeds of properties that belong to the HOA ie all gatehouses/clubhouses etc.

F.) Investigate the managing agents' (Midcity) performance in managing the accounts of The Wilds HOA in terms of their areas of responsibility . . . .' (I pause to remark that the managing agents have long since been replaced.)

In addition, the costs of the audit will be considerably increased if its scope is extended ─ particularly if it were to include:

'H.) Provide on-going civil and criminal litigation support services in respect of any action instituted by the Directors-in-Exile.'

[6] It is the HOA and therefore, ultimately, the members that will have to pay the costs of the audit. The respondents' counsel has been instructed that his clients are confident of obtaining the 75 per cent majority necessary to amend the articles of the HOA at the extraordinary general meeting. It is therefore likely that there will be more members represented at that meeting than the 374 (excluding the developer) that voted at the extraordinary general meeting held on 28 October 2009. Furthermore, the developer has subsequent to the meeting sold a number of stands, so the interests of members who were not members when the previous general meeting was held could also be represented. The cost estimate by the chairman in his e-newsletter sent almost three years ago will undoubtedly have increased. A more accurate and current estimate of costs could and no doubt will be prepared by the auditors and presented at the meeting.

[7] It is for these reasons that it seems to me essential that at the very least a limited forensic audit take place to facilitate the resolution of the essential dispute between the parties; but desirable that it be left to the general meeting to take an informed decision whether or not to extend the scope of the audit, bearing in mind the cost implications and the current relevance of matters that are not directly relevant to the essential dispute.

[8] The second issue relates to the control the developer has over the HOA that is entrenched in two of the articles of association of the HOA, namely:

'**10. DIRECTORS**

10.1 There shall be a board of directors of the association which shall consist of not less than 2 (two) and not more than 7 (seven) directors. Until such time that the last erf is sold and transferred, the Developer shall have the right to elect the majority of directors.

. . .

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 the voting rights conferred upon it by article 23.1.4. The first directors shall on registration of the association be appointed by the developer and the Developer shall until such time that the last erf on the land is sold and transferred, have the right to elect the majority of directors.'

'23. VOTING

23.1 Subject to clause 23.1.4 below, at every general meeting

23.1.1 every member (including the developer) present in person or by proxy and entitled to vote shall have one vote for each erf or unit registered in his name;

. . .

23.1.4 The Developer shall apart from the voting rights conferred upon it (See Article 23.1.1 hereabove) – until such time that the last erf on the land is sold and transferred, have a veto right 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.'

[9] The court a quo in its order directed:

(a) In paragraph 2, that an extraordinary general meeting be convened for the purpose of considering and voting by special resolution 'upon the proposed amendment 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';

(b) In paragraph 4, that the respondents would be entitled to convene the meeting, should the HOA fail to do so;

(c) In paragraph 5, that article 23.1.4 of the articles would be suspended for the duration of the extraordinary general meeting, and that the developer would 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 HOA or in respect of the election of any director at such extraordinary general meeting; and

(d) In paragraph 6, that any amendments as contemplated in paragraph 2 of the order should 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 the court.

[10] The proposed amendments contained in resolution 1 in annexure RB21 to the founding affidavit, which is at page 124 and following of the appeal record, envisaged in particular the removal of the developer's rights to appoint a majority of directors and to veto directors elected by the members (in terms of article 10) and the removal of the developer's veto (in respect of article 23.1.4).

[11] The appellants' counsel took no issue with the removal of the developer's right to appoint a majority of directors being on the agenda of the general meeting. He also interpreted the veto right contained in article 23.1.4 as applying to decisions made by a general meeting, and not to decisions of the directors. That being so, the agenda for the extraordinary general meeting should refer to the following proposed amendments to the articles of association:

(a) By the deletion of the following words in article 10.1:

'Until such time that the last erf is sold and transferred, the Developer shall have the right to elect the majority of directors.'

(b) By the substitution in article 10.4 of the phrase 'article 23.1.1' for the phrase 'article 23.1.4'.

(c) By the deletion of the following words in article 10.4:

'. . . and the Developer shall until such time that the last erf on the land is sold and transferred, have the right to elect the majority of directors.'

(d) By the deletion of the following proviso in article 15.3:

'. . . provided that, during the development period the presence of at least 3 (three) nominees of the developer shall be necessary at all meetings of directors in order to form a quorum.'

No argument was addressed in regard to proposed resolutions 1.6 and 1.9 and I see no reason why those resolutions should not remain on the agenda.

[12] The appellants' counsel, having taken instructions, gave a formal undertaking in court that at the extraordinary general meeting ordered by the

court a quo the developer would not exercise its veto right in respect of the deletion of its right to appoint a majority of directors. A further undertaking was given in respect of the forensic audit, but I am not certain whether the undertaking covered only a limited forensic audit; or whether it also covered a decision by the meeting to extend the scope of the audit should this court order a limited audit but permit the meeting to extend its scope. I am also not sure whether the undertaking extended to a decision by the meeting to delete the veto right that the developer may have in respect of directors voted in by a general meeting. I shall attempt to eliminate any uncertainty in the order that will be made by this court.

[13] The question that remains under the second issue is whether the general meeting should be entitled to amend the articles of the HOA to remove the developer's veto right in terms of article 23.1.4. I do not consider that this should be allowed, for the reasons which follow.

[14] By purchasing property in the development the members of the HOA became bound by its articles of association. Those articles contain a veto right in respect of resolutions taken at a general meeting. That is the bargain to which the members assented. There is no evidence that the veto right has thus far been used at all, much less in a prejudicial, unjust or inequitable manner (as envisaged in s 252 of the Act and s 163 of the Companies Act 71 of 2008) or in a manner that unfairly disregards the interests of the members (as envisaged in s 163 of the latter Act). If it is, the members would then have to bring themselves within s 163. That is a fight for another day, and hopefully that day will never eventuate. But if the developer's veto right is removed, it has no subsequent redress; and the veto right was obviously inserted for its protection, bearing in mind the enormous capital outlay and its continued exposure in the ongoing development. It must be remembered that only phase 1 of the development has been completed; phase 2 is already contemplated; and the development can consist ultimately not merely of Pretorius Park Extensions 13, 14, 15, 16, 17, 18, 19 and 20 Registration Division JR, Gauteng, but (in terms of the definition of 'Development Plan' in the articles) can include 'any further Extensions that may be added, which

shall eventually fall into the Security Township to be known as “The Wilds”.’ In short, this court simply does not know to what extent the removal of the developer’s veto right might prejudice it; and it cannot be said that it has been exercised in such a way that consideration should be given to its removal under s 252 or s 163 ─ the problem has been with the board of directors, and that problem can be resolved. For both of these reasons I consider that (save in regard to article 10.4) it should not be open to the extraordinary general meeting to amend the articles of the HOA by special resolution so as to remove the developer’s veto permanently.

[15] Counsel for the appellants submitted that para 6 of the order, which imposes a three year prohibition on alteration, addition or amendment to the articles amended at the general meeting, was *per incuriam*, in as much as any amendments at the general meeting will be made by special resolution of the members and not by the court; and it is the court that must make the amendment. I do not read s 252 this narrowly. Sub-section (3) empowers a court to ‘make such order as it thinks fit . . . for regulating the future conduct of the company’s affairs’. Sub-section (4) begins:

‘Where an order under this section makes any alteration or addition to the . . . 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 . . . .’

Sub-section 5*(a)* reads:

‘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 a company shall, within one month after the making thereof, be lodged by the company in the form prescribed with the Registrar for registration.’

It seems to me that where the court empowers a general meeting to amend articles and it does so, the court order ‘grants leave to alter . . . the . . . articles of’ the company as envisaged in sub-section (5)*(a)*; and as the decision of the general meeting is with the authority of the court, the court order indirectly ‘makes any alteration . . . to the . . . articles of a company’ as envisaged in sub-section (4), which itself goes on to provide that:

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

[16] The third issue relates to the interdict which was granted in para 9 of the order of the court a quo, in the following terms:

'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.'

The reference to 'the general meeting' must be read as a reference to any general meeting, and not limited to the general meeting ordered by the court. The submission on behalf of the appellants was that as there was no reasonable apprehension of harm, the interdict should not have been granted. I must disagree. The board of the HOA met on 22 January 2010 and took the following resolution:

'**11. Authorization of invoices for Rudi & Arrie**

During the court case time were spent by Mr Boshoff [the second appellant] and Mr Faure [the third appellant] on behalf of the HOA with the lawyers and council [sc. counsel]. 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 now request payment of the said invoices. The board discusses the payment.

It is resolved that:

a. The Mr.'s Boshoff and Faure are requested to supply proof by their auditors of what their time is worth in order to support the invoice as provided.

b. After receipt of the above the matter should be reconsidered.'

The matter was not resolved and the board could have decided to make the payment on receipt of advice from the auditors ─ which it was not entitled to do because the claim was not for costs, losses or expenses (as envisaged in article 28.2) but, as the court a quo correctly found, remuneration; and article 13.2 requires the approval of a general meeting. Paragraph 9 of the court's order does, however, require amendment: although this was not raised on

appeal, it is too wide and should be altered to refer to the second and third appellants only.

[17] The final issue is costs. So far as the costs in the court a quo are concerned, the appellants' counsel asked that the directors be excluded and that the developer alone be ordered to pay the respondents' costs. But the directors were obstructive and associated themselves with the interests of the developer both before and during the protracted litigation. In addition, specific relief ─ the interdict referred to in the preceding paragraph of this judgment ─ was sought and obtained against two of them. The court a quo exercised a narrow discretion in making the costs order which it did, and as it did not misdirect itself, there is no basis for this court to interfere.

[18] So far as the costs of appeal are concerned, the appellants have achieved a measure of success. They have rescued the developer's veto over decisions at a general meeting. They have also had the ambit of the forensic audit severally curtailed. But the respondents have retained the right to have the developer's control over the board considered at a general meeting ─ and this was primarily responsible for the litigation in this and previous matters ─ and the developer will be precluded from exercising its veto to prevent this. They have also successfully resisted the challenge to the three-year period imposed by the court a quo preventing further amendments should the general meeting decide to remove the developer's powers of appointment of directors and the developer's rights to veto directors elected by the members. In addition, the respondents have obtained the right for the members in general meeting to widen the scope of the forensic audit, so the appellants' partial success in this regard may be reversed in whole or in part. Furthermore, the interdict in respect of two of the directors has remained in place. The directors again made common cause with the developer on appeal, so I see no reason for differentiating between them and the developer. For all of these reasons I do not consider that such success as the second to sixth appellants achieved on appeal can be regarded as substantial success.

[19] Before making the appropriate order, I should mention that I intend amending para 3 of the order of the court a quo to substitute the word 'requested' for the word 'directed' as the Pretoria Society of Advocates is neither a party to this litigation nor part of the administration of the courts; and while I have no doubt that it will co-operate, it is not amenable to an order directing it to do anything.

[20] The following order is made:

1. The appeal is allowed to the extent set out in para 2.

2. Paragraphs 1, 2, 3, 5 and 9 of the order of the court a quo are deleted and the following paragraphs are substituted therefor:

'1. The board of directors of the first applicant is directed to instruct the auditors to perform a forensic audit of the financial affairs of the first applicant from its inception, in accordance with the forensic audit scope attached to Annexure "RB21" to the founding affidavit ─ save that paras 1B to F and H shall be omitted unless the extraordinary general meeting, convened in terms of para 2 or 4 of this order, shall resolve to incorporate any or all of those paragraphs; and to report its findings to the members of the company at an extraordinary general meeting called for this express purpose.

2. The board of directors of 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 following proposed amendments to the articles of association, and any additional amendments to articles 10.4 and 11.1 to allow for the election of new directors:

(a) By the deletion of the following words in article 10.1:

'Until such time that the last erf is sold and transferred, the Developer shall have the right to elect the majority of directors.'

(b) By the substitution in article 10.4 of the phrase 'article 23.1.1' for the phrase 'article 23.1.4'.

(c) By the deletion of the following words in article 10.4:

'. . . and the Developer shall until such time that the last erf on the land is sold and transferred, have the right to elect the majority of directors.'

(d) By the deletion of the following proviso in article 15.3:

'. . . provided that, during the development period the presence of at least 3 (three) nominees of the developer shall be necessary at all meetings of directors in order to form a quorum.'

(e) By the deletion in article 23.2 of the phrase:

'. . . unless specifically permitted otherwise by the chairman . . .'

(f) By the deletion in the definitions section of the developer's rights 'to decide who shall have any right to or interest in any part of the scheme and to determine the nature of such rights'.

3. The Pretoria Society of Advocates is requested 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.

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 as envisaged in para 2 of this order, or in respect of the election of any director, or in respect of any decision to extend the scope of the forensic audit as envisaged in para 1 of this order.

9. The first applicant is interdicted from making payment to the second and third applicants of any fee for services rendered in respect of any litigation between the parties, unless and until such payments are approved by a general meeting.'

3. The second to sixth applicants are ordered to pay the respondents' costs jointly and severally.

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T D CLOETE

JUDGE OF APPEAL

APPEARANCES:

For Appellant:	N G D Maritz SC Instructed by: Geldenhuys & Meyer c/o Rorich Wolmarans & Luderitz, Pretoria Symington & De Kok, Bloemfontein
For 1st to 9th Respondent:	R du Plessis SC Instructed by: Burt Meaden Attorneys c/o Romanos Attorneys, Pretoria Honey Attorneys, Bloemfontein