IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA 20/1/17.

CASE NO: 444994/2016

1. Reportable: ~~Yes~~/No
2. Of interest to other judges: ~~Yes~~/No
3. Revised: ~~Yes~~/No

20 January 2017

[redacted]

(Signature)

In the matter between:

CORNE VENTER N.O. **First Applicant**

SASJE VENTER N.O. **Second Applicant**

and

SILVER LAKES HOMEOWNERS ASSOCIATION NPC **Respondent**

JUDGMENT

DE VILLIERS, AJ:

Introduction

1 In the end, the applicants sought the following relief:

> "That Rule 11.2 (effective from 27 May 2016) of the Respondent's Rules be declared null and void".

2 The facts were simple:

2.1 The applicants are the trustees of a trust, the Venter Family Trust, and are in that capacity the registered owners of an immovable property in the Silver Lakes residential estate;

2.2 The respondent is a company duly incorporated in accordance with the provisions of section 21 of the **Companies Act** 61 of 1973 ("***the old Companies Act***"), now a non-profit company, as envisaged in the Companies Act 71 of 2008 ("***the new Companies Act***");

2.3 It was common cause that the trustees, acting as trustees of the trust-

2.3.1 Are members of the respondent as a result of the ownership of the property;

2.3.2 Are bound by the respondent's Memorandum of Incorporation ("***the MOI***") and by its rules;

2.4 The respondent's board of directors advised the members of the respondent on 6 May 2016 that they have approved additions to the rules, which would become effective on an interim basis on 27 May 2016;

2.5 The relief sought in this matter pertains to one of these rules, the second one quoted-

> "***11. GENERAL MEETINGS OF MEMBERS***
>
> *11.1 General Meetings of Members will be held in accordance with the provisions of the* ***Companies Act****, 2008, the Memorandum of Incorporation and further subject to the following:*

> *11.2 A Member may be represented by proxy at General Meetings, provided that a person, other than the chairperson of the General Meeting, may not act as proxy for more than 5 (five) Members, unless he holds direct or indirect ownership of these Members' units exceeding 5 (five) units."*

2.6 According to the notice (and the rules), such promulgated rules would only become permanent rules if ratified at a "*Constitutional General Meeting (**CGM**)*";[1] and

2.7 The applicants took issue with the limitation on proxies, engaged the respondent in correspondence, and ultimately this litigation ensued.

3 I do not know all the background facts. I know that:

3.1 The respondent's stated purpose of limiting the number of proxies to five, was to prevent a member from "*controlling*" an Annual General Meeting or a CGM of the respondent;

3.2 The respondent has about one thousand six hundred members;

3.3 It seems that at the previous Annual General Meeting of the respondent, a person held about one hundred and fifty proxies. The respondent describes this as a case of "... *manipulation of the voting process, in that a certain group of members endeavoured to bring about results through the abuse of proxies*". I have not been told the facts for this conclusion by the respondent; and

3.4 No facts have been provided as the reason for the introduction of the five-proxy rule (as opposed to say two or twenty).

4 The fact that I do not know all the background facts is not reflected as a criticism, those are matters known to the drafters and their clients, and there

may be reasons why the background facts were limited. In the end it played no role in my decision.

The legal dispute

5 As reflected earlier, in the end the dispute became a narrow one:

5.1 The applicants' case was that the limitation as set out in Rule 11.2 (quoted above) is "... *in contradiction with the provisions of the Respondent's MOI and more in particular the provisions set out in 5.9.1 thereof ...*".

5.2 That clause, clause 5.9.1, reads-

> "*A member may be represented at a general meeting by a proxy, who need not be a member*";

5.3 The respondent denied that the addition of Rule 11.2 (quoted above) took away, or limited, the right of a member to vote by proxy as set out in 5.9.1 of the MOI;

5.4 The applicants alleged, but did not prove their allegation that-

> "*It is further common cause that all rules implemented must be in accordance with the provisions set out in the respondent's MOI and that any rule that is in conflict or contradictory with the MOI is void ...*";

5.5 This averment was denied in the answer. The averment was not common cause.

6 The parties did not refer to or rely on any section in the new **Companies Act** in the founding or answering affidavits (or in the replying affidavit). I fully subscribe to the summary of the obligations of the parties to plead their cases properly in motion proceedings as set out in **Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others** 1999 (2) SA 279 (T) at 323 under the heading "*The law relating to the content of affidavits generally*". Still, if I had followed that trite approach in this matter, I would not have decided the real issue,

which was to be found in the new **Companies Act**. I dealt with the matter on this basis as the act binds me, despite there being only one reference to the act in the two sets of heads of argument.

The new Companies Act, the MOI and the rules

7 Section 5(1)[2] of the new **Companies Act** requires of me to interpret and apply the act in a manner that gives effect to the purposes set out in section 7 of the act. This aspect was not addressed in any one of the two sets of heads of argument.

8 Not having dealt with section 5 of the new **Companies Act**, the two sets of heads of argument contained no reference to any of the purposes listed in section 7 of the new **Companies Act** that I had to apply in interpreting and applying the act.[3]

9 Section 7(a) of the new **Companies Act** states that one of the purposes of the act is to "*promote compliance with the Bill of Rights as provided for in the **Constitution**, in the application of company law*". I make no finding on its applicability to this set of facts as the case has not been pleaded.

10 The heads of argument delivered on behalf of the applicant did rely on section 58 of the new **Companies Act**. That was the sole reference to the new **Companies Act** in the two sets of heads of argument.

11 Section 58 of the new **Companies Act** applies to this case as a result of the provisions of section 10(3)(a).[4] I quote the first three sub-sections of section 58 (underlining added):

> "***58 Shareholder right to be represented by proxy***
>
> *(1) At any time, a shareholder of a company may appoint any individual, including an individual who is not a shareholder of that company, as a proxy to-*
>
> *(a) participate in, and speak and vote at, a shareholders meeting on behalf of the shareholder; or*
>
> *(b) give or withhold written consent on behalf of the shareholder to a decision contemplated in section 60.*

(2) A proxy appointment-

(a) must be in writing, dated and signed by the shareholder; and

(b) remains valid for-

(i) one year after the date on which it was signed; or

(ii) any longer or shorter period expressly set out in the appointment, unless it is revoked in a manner contemplated in subsection (4) (c), or expires earlier as contemplated in subsection (8) (d).

(3) Except to the extent that the Memorandum of Incorporation of a company provides otherwise-

(a) a shareholder of that company may appoint two or more persons concurrently as proxies, and may appoint more than one proxy to exercise voting rights attached to different securities held by the shareholder;

(b) a proxy may delegate the proxy's authority to act on behalf of the shareholder to another person, subject to any restriction set out in the instrument appointing the proxy; and

(c) a copy of the instrument appointing a proxy must be delivered to the company, or to any other person on behalf of the company, before the proxy exercises any rights of the shareholder at a shareholders meeting."

12 On the face of it, the right of member to appoint a person as his/her proxy is unlimited. He/she may appoint "*any individual*", "*at any time*". It seems to me that the meaning of "*may*" is in the nature of "*being entitled to, or have the right to*". The wording of the act seems to be of wider application than the wording of clause 5.9.1 of the MOI upon which the applicants relied ("*a member may be represented at a general meeting by a proxy, who need not be a member*").

13 Section 15 of the new **Companies Act** contains four important provisions for the purposes of this decision. I refer only to the relevant parts of the four provisions addressing the relationship between the act and the MOI and that rules:

13.1 The first provision is in section 15(1) of the new **Companies Act**.[5] It states that each provision of a company's MOI must be consistent with the act and that it is void to the extent that it

contravenes, or is inconsistent with, the act. This would mean that I have to look to the act to determine the width of application of the right to appoint a proxy and not to the MOI, as argued;

13.2 The second provision is in section 15(2)(d) of the new **Companies Act**.[6] It states that a company's MOI may not include any provision that negates, restricts, limits, qualifies, extends or otherwise alters the substance or effect of an unalterable provision of the act. The parties, not havening addressed the new **Companies Act** in the affidavits or in their heads of argument, also omitted to address the issue of an unalterable provision. To my mind, that was the real legal issue. In the case of an unalterable provision, the intended rule clearly (at least) restricted and limited the right to appoint a proxy. Such a provision would have been void had it been included in the MOI. Until the introduction of the rule limiting the number of proxies, members had the right to pool proxies in favour of one individual. The rule limiting proxies to five took that right away, or restricted it, or limited it, or qualified it, or affects it. Reverting to the real issue, it was held in **Du Plessis v Clearwater Estates NPC and Others** (82306/2014) [2015] ZAGPPHC 1063 (13 November 2015) also reported as NPC 2015 JDR 2477 (GP) by my brother CJ Van Der Westhuizen AJ at Para 27 that section 58(1) is an unalterable provision of the act.[7] I had not been referred to this judgment. It is of direct application to this matter. Clearly, the five-proxy rule, had it been in the MOI, would have restricted or limited the substance of the right to appoint any person as a proxy and would have fallen foul of section 15(2)(d) of the new **Companies Act**;

13.3 The third provision is in section 15(3) of the new **Companies Act**.[8] It states that that, except to the extent that a company's MOI provides otherwise, the board of the company may make, amend or repeal any necessary or incidental rules relating to the governance of the company in respect of matters that are not

addressed in the act or the MOI. The right to appoint any person as a proxy is contained in the act (and the MOI contains provisions with regard to the appointment of proxies); and

13.4 The fourth provision is in section 15(4) of the new **Companies Act**.[9] It states that is that a rule so promulgated must be consistent with the act and the company's MOI, and any such rule that is inconsistent with the act or the MOI is void to the extent of the inconsistency. This reference to being void ends the argument of a rule having only interim application (and/or subject to a resolutive condition).

14 By now, it must be clear that I am of the view that the five-proxy rule is inconsistent with the new **Companies Act** and therefore void.

15 I was invited by both counsel to make a finding of cost of senior counsel. I have not been referred to any authority on this point.

16 My instincts were that that such a class of costs order does not exist. I can see no reason why the status of senior counsel, appearing on his (in this case) own, should warrant a higher fee. Rule 69(5) makes it clear that it is the taxing master who must determine what a reasonable fee should be. It does not refer to any role to be played by the presiding judge or his/her right to usurp the function of the taxing master. The approach that the taxing master has to follow has been set out in **Hennie De Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another** 2010 (5) SA 124 (CC) at Para 8 and for example in **City of Cape Town v Arun Property Development (Pty) Ltd and Another** 2009 (5) SA 227 (C) at Para 17, 24, 25 and 30.

17 However, upon conducting superficial research, my view of the law seems not to carry universal support. In several cases reported on SAFLII, such orders have been granted. My brother Murphy stated the following in

Tobias v Road Accident Fund (4934/2009) [2010] ZAGPPHC 537 (15 April 2010) at Para 29:

> "Mr Thabede argued that it is not competent for the court to make an order that costs should include the costs of senior counsel. In this regard he referred to rule 69(1) which confers authority on the court to depart from the general rule that only the fees of one counsel will be allowed. Because the rule is silent in relation to the employment of a senior counsel who appears without a junior, the matter, Mr Thabede, submitted is rightly within the jurisdiction of the taxing master in terms of rule 69(5), which provides that fees will be in accordance with the tariff where applicable or in such amount he considers reasonable. Mr Thabede therefore has a point. However, in determining a reasonable fee the taxing master is required to take account of the category to which the counsel belongs (senior or junior); the time spent and the general standard of fees charged - **Sebenza Kahle Trade CC v Emalahleni Local Municipal Council** [2003] 2 All SA 340 (T). Accordingly, it has become acceptable practice for courts to pronounce in their costs orders, having regard to the nature of the matter, its implications and complexity, that the costs of senior counsel are justified."

18 My stint as an acting judge has come to an end. I do not want to make a definitive ruling about the practice without full argument on the powers of a judge in making the order as requested. Even if my instincts are wrong, I still would have had a discretion to refuse the request. I do. The taxing master can determine the reasonable fees of counsel.

Consequently, I make the following order:

1 Rule 11.2 (effective from 27 May 2016) of the Respondent's Rules declared void;

2 The respondent is ordered to pay the costs of the application.

[redacted]

DP de Villiers
Acting Judge of the High Court
Gauteng Division

Heard on: **24 November 2016**

On behalf of the Applicant:	**FW Botes SC**
Instructed by:	**Hotane Snyman & Taljaard Inc**
On behalf of the Respondent:	**AF Arnoldi SC**
Instructed by:	**Christo Bekker Inc**
Judgment handed down:	**20 January 2017**

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[1] MOI clause 7.2;

[2] *"5(1) This Act must be interpreted and applied in a manner that gives effect to the purposes set out in section 7"*;

[3] See section 7(i). I have to (mutatis mutandis) *"balance the rights and obligations of shareholders and directors within companies"*;

[4] *"10(3) Sections 58 to 65, read with the changes required by the context-*

(a) apply to a non-profit company only if the company has voting members; and ..."

[5] *"(1) Each provision of a company's Memorandum of Incorporation-*

(a) must be consistent with this Act; and

(b) is void to the extent that it contravenes, or is inconsistent with, this Act, subject to section 6 (15)."

[6] *"(2) The Memorandum of Incorporation of any company may-*

(a) include any provision-

(i) dealing with a matter that this Act does not address;

(ii) altering the effect of any alterable provision of this Act; or

(iii) imposing on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement, than would otherwise apply to the company in terms of an unalterable provision of this Act;

(b) ...

(d) not include any provision that negates, restricts, limits, qualifies, extends or otherwise alters the substance or effect of an unalterable provision of this Act, except to the extent contemplated in paragraph (a) (iii)."

[7] The case dealt with the question if the MOI could limit the right to be presented by proxy to proxies delivered by a stipulated period before the meeting concerned. See Para 12, 22, 27, and 28;

[8] *"(3) Except to the extent that a company's Memorandum of Incorporation provides otherwise, the board of the company may make, amend or repeal any necessary or incidental rules relating to the governance of the company in respect of matters that are not addressed in this Act or the Memorandum of Incorporation, by-*

(a) ..."

[9] *"(4) A rule contemplated in subsection (3)-*

(a) must be consistent with this Act and the company's Memorandum of Incorporation, and any such rule that is inconsistent with this Act or the company's Memorandum of Incorporation is void to the extent of the inconsistency;

(b) takes effect on a date that is the later of- ..."