RATIFYING COMMUNITY SCHEME RESOLUTIONS — WHO HAS THE POWER?

The full bench decision (three judges) of the Pietermaritzburg High Court, in the case of *Derby Downs Management Association v Assegaai River Properties (Pty) Ltd and Another* (the *Derby Downs* case),[1] is interesting for a quite a few reasons. One reason is that it appears to be a rare occasion when a CSOS Adjudication Order is not only appealed to one High Court judge, but then the decision of the single judge is appealed to the full bench of that High Court. Another reason that the judgment is interesting is because the adjudicator's decision was overturned by the single judge of the High Court in the first appeal, and then the Adjudication Order was re-established by the full bench (i.e. the adjudicator was correct from the very start, and the single judge's decision was set aside).

Primarily, however, this judgment is interesting because the shareholders (members) of the Homeowners Association ("the HOA") were permitted to ratify, by special resolution, an earlier impugned decision made by the HOA's Board of Directors, some 10 years earlier. That decision was to change the calculation of levies for the HOA.

Although the decision allowing the ratification by special resolution of the members was based on s 20(2) of the Companies Act[2] (because the HOA is a registered non-profit company), it makes one question whether this kind of ratification, or other types of ratification of potentially impugned body corporate or trustee resolutions, is possible in a sectional title environment, or for HOAs which are common law voluntary associations.

Starting with bodies corporate, we know that a body corporate is a creature of statute and so when we embark on an exercise to determine whether a particular act is valid and permitted in terms of the Sectional Titles Schemes Management Act[3] ("the STSMA"), the STSMA Regulations[4] or any rules[5], we have to carefully review and confirm the source of the body corporate's power to perform that act. Section 4(i) of the STSMA provides for a catch-all or broad provision relating to the powers of the body corporate. This provision states that the body corporate may exercise the powers conferred upon it by, or under, the STSMA or the rules, and such powers include the power to do all things reasonably necessary for the enforcement of the rules and for the management and administration of the common property.

A body corporate makes decisions in two traditional ways: (i) through the board of trustees, and (ii) through the members. Members can pass resolutions of the body corporate either at a general meeting or in writing in certain circumstances. Certain decisions are preserved for the members to decide and cannot be decided by trustees.[6] Trustee powers can also be restricted in terms of the rules and in terms of any restriction imposed or direction given at a general meeting of the owners of the sections.[7]

[1] (AR1/2021) [2021] ZAKZPHC 91; 2022 (2) SA 71 (KZP) (12 November 2021).
[2] Act 71 of 2008.
[3] Act 8 of 2011.
[4] 2016.
[5] The Prescribed Management Rules (PMRs) and Prescribed Conduct Rules (PCRs) are found in Annexures 1 and 2 of the STSMA Regulations, respectively.
[6] For example, only the members can pass resolutions, including but not limited to:
- amend, repeal or supplement the management or conduct rules of the body corporate (a unanimous or special resolution, respectively) (ss 10(2)(a) and (b) of the STSMA);
- lease common property for more than 10 years (unanimous resolution) (s 5(1)(a) of the STSMA read with s 17(1) of the Sectional Titles Act 95 of 1986 ("the STA"));
- purchase or otherwise acquire, take transfer of, mortgage, sell, give transfer of or hire or let units (special resolution) (s 4 (b) of the STSMA);
- borrow moneys required by it in the performance of its functions or the exercise of its powers (special resolution) (s 4(e) of the STSMA);
- lease common property for less than 10 years (special resolution) (s 4(h) of the STSMA);
- extend sections (special resolution) (s 5(1)(h) of the STSMA read with s 24(3) of the STA); and
- change the value of each owner's vote, or the liability to make contributions (special resolution) (s 11(2)(a) of the STSMA).

[7] Section 7(1) of the STSMA read with PMR 9(b) of the STSMA Regulations.

If an act is performed and such act is not within the body corporate's powers as per the STSMA, STSMA Regulations or the rules, then such an act is *ultra vires* (beyond their available powers) and the act is void.[8] If that act is void then it has no legal force and cannot be enforced by, or against, the body corporate by instituting court proceedings.[9] Some commentators have also provided the opinion that a body corporate cannot even ratify an *ultra vires* act by passing a unanimous resolution.[10]

If the trustees exceed their powers in performing an act, the general meeting of members may be able to ratify that act, provided that such act is within the capacity / power of the body corporate itself.[11] It could be argued that a general meeting of members is not required if the statutory requirements are met to obtain a written special or unanimous resolution (round-robin). The members cannot ratify an impugned act of the trustees, if the body corporate itself has no express or implied power to perform that act.

With regard to the protection of third parties in instances where contracts are entered into by trustees of a body corporate when they do not have the power or authority to do so, the principle of ostensible authority, the defence of *estoppel* and even PMRs 10(1) and (2) of the STSMA Regulations may protect those third parties who may still be able to enforce their contracts entered into by the body corporate. The members may then have recourse against the trustees who acted in breach of their fiduciary relationship to recover any loss suffered as a result thereof by the body corporate.[12] In turn, though, the trustees are indemnified against all costs, losses and expenses arising as a result of any official act that is not in breach of the trustee's fiduciary obligations.[13] Further exploration into these concepts would be useful in a follow-up article.

The STSMA and the STSMA Regulations would appear to be silent on ratification of decisions by the board of trustees, or the membership, which were previously, but potentially wrongfully, made. One place where ratification by the membership is contemplated is PMR 16(2)(d) of the STSMA Regulations, but this relates to the motion at the first general meeting to ratify or not to ratify contracts entered into by the developer on behalf of the body corporate (also referred to as "sweetheart contracts").[14]

There are, however, legislative mechanisms provided for failed proposals for special or unanimous resolutions in sectional title schemes which would involve the Community Scheme Ombud Service ("the CSOS"). This could be categorised under quasi-judicial ratification. Section 6(9) of the STSMA provides that a body corporate or an owner who is unable to obtain a special or unanimous resolution may approach the chief ombud for relief. Similarly, relief is offered in s 39(4)(d) of the Community Schemes Ombud Service Act[15] ("the CSOS Act") which states that, in respect of meetings, the adjudicator could declare that a motion for a resolution considered by a general meeting of the association was not passed because the opposition to the motion was unreasonable under the circumstances, and give effect to the motion as was originally proposed, or a variation of the motion proposed.

Furthermore, in terms of s 54(5) of the CSOS Act, the adjudicator's order may provide that the order they make has the effect of any type of resolution or decision provided for in the scheme governance documentation (the rules of the body corporate). This would appear to cover trustee resolutions too.

Therefore, we have learnt that if an HOA's board of directors passes a resolution which was void at the time it was passed, it can be ratified even a decade later by the members of the HOA in terms of the Companies Act and following the *Derby Downs* case. This leaves open the question of whether resolutions of the executive committee of a common law voluntary homeowners association, governed by a constitution and estate rules, can be ratified by the members of the voluntary association.

In the sectional title environment, there are different factors and provisions which must be taken into account in determining whether a body corporate or trustee resolution can be ratified by the members of the body corporate, if the impugned resolution was originally void, as stated above. In addition to the potential for the members of the body

[8] CG van der Merwe *Sectional Titles, Share Blocks and Time-Sharing* Volume 1 para 14 2 5 1.
[9] van der Merwe *Sectional Titles* para 14 2 5 1.
[10] van der Merwe *Sectional Titles* para 14 2 5 1.
[11] van der Merwe *Sectional Titles* para 14.3 and 14 5 11.
[12] See s 8(3)(a) of the STSMA.
[13] See PMR 8(4) of the STSMA Regulations.
[14] van der Merwe *Sectional Titles* para 3.3.3.
[15] Act 9 of 2011.

corporate to ratify decisions of the board of trustees or of the members, if the body corporate itself has the power to perform the act it seeks to ratify, the current sectional title legislation offers ways in which failed proposed resolutions could be obtained from the CSOS. It is important not to assume that the members of the body corporate have the power to ratify an impugned act of the trustees and it is not safe to assume that a failed proposed resolution cannot be validated or approved by the CSOS.

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