REPUBLIC OF NAMIBIA Not Reportable

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2019/00122

In the matter between:

JOHANNES ADRIAAN COETZEE	**1ST APPLICANT**
ARNO DU PLESSIS	**2ND APPLICANT**
CALLIE HENDRIK ROSSOUW	**3RD APPLICANT**

and

OMEYA GOLF ESTATE HOME OWNERS ASSOCIATION, SEC 21 NON-PROFIT COMPANY	**1ST RESPONDENT**
OMEYA GOLF AND RESIDENTIAL OASIS (PTY) LTD	**2ND RESPONDENT**
ANDRIES JACOBUS VAN DER WALT	**3RD RESPONDENT**
GERHARD JACOBUS DE WET	**4TH RESPONDENT**
MINISTER OF AGRICULTURE, WATER & FORESTRY	**5th RESPONDENT**
ELECTRICTY CONTROL BOARD	**6TH RESPONDENT**
GEORGE RUST TRUST	**7TH RESPONDENT**
W H VAN ZIJL	**8TH RESPONDENT**
W H VAN ZIJL	**9TH RESPONDENT**
RJF BROCKMANN	**10TH RESPONDENT**
G J NEL	**11TH RESPONDENT**
F J VAN DER WALT	**12TH RESPONDENT**
JA COETZEE	**13TH RESPONDENT**
R SCHMIDT	**14TH RESPONDENT**
LOUIS ZAAYMAN	**15TH RESPONDENT**

PA SMIT	**16TH RESPONDENT**
CH CUPIDO	**17TH RESPONDENT**
LH DU PISANI	**18TH RESPONDENT**
E BURGER	**19TH RESPONDENT**
JD VON KUNOW	**20TH RESPONDENT**
C XIAOMING	**21ST RESPONDENT**
WH VAN ZIJL	**22ND RESPONDENT**
D VIVIERS	**23RD RESPONDENT**
RA SANNI	**24TH RESPONDENT**
R MORELLO	**25TH RESPONDENT**
J RIECKERT	**26TH RESPONDENT**
DH SCHOOMBEE	**27TH RESPONDENT**
FJ SWART	**28TH RESPONDENT**
PAUL VAN BILJON FAMILY TRUST	**29TH RESPONDENT**
A SMIT	**30TH RESPONDENT**
JL VAN ZYL	**31ST RESPONDENT**
TR VAN WYK	**32ND RESPONDENT**
LF MEINDERS	**33RD RESPONDENT**
H-J ARNOLD	**34TH RESPONDENT**
EE DU PLESSIS	**35TH RESPONDENT**
JA IPINGE	**36TH RESPONDENT**
MJ COETZEE	**37TH RESPONDENT**
JAE BREDENHANN	**38TH RESPONDENT**
R LIEBENBERG	**39TH RESPONDENT**
LS VAN ZYL	**40TH RESPONDENT**
BONSEC INVESTMENTS 271 CC	**41ST RESPONDENT**
OMEYA ERF 86 (PTY) LTD	**42ND RESPONDENT**
PC OOSTHUIZEN	**43RD RESPONDENT**
AD STUART	**44TH RESPONDENT**
GA ALBERTS	**45TH RESPONDENT**
B VAN SCHALKWYK	**46TH RESPONDENT**
ML LUCAS	**47TH RESPONDENT**
JJ OOSTHUIZEN	**48TH RESPONDENT**
DF VAN DER MERWE	**49TH RESPONDENT**
J VAN DER MERWE	**50TH RESPONDENT**

L MATTHUYSEN	**51ST RESPONDENT**
NEXIS BUILDING CONSTRUCTION (PTY) LTD	**52ND RESPONDENT**
HT POTE	**53RD RESPONDENT**
NL NGHINYENGWASHA	**54TH RESPONDENT**
JH GROBLER	**55TH RESPONDENT**
R SCHNEIDER	**56TH RESPONDENT**
EH BOTHA	**57TH RESPONDENT**
WH FISCHER	**58TH RESPONDENT**
LD BARNARD	**59TH RESPONDENT**
TRUSTEES OF THE BG FAMILY TRUST	**60TH RESPONDENT**
H HERSELMAN	**61ST RESPONDENT**
AG KROHNERT	**62ND RESPONDENT**
DCJ BILLY	**63RD RESPONDENT**
EH BOTHA	**64TH RESPONDENT**
FA BOTHA	**65TH RESPONDENT**
E H BOTHA	**66TH RESPONDENT**
AJNG DE AZEVEDO	**67TH RESPONDENT**
AJNG DE AZEVEDO	**68TH RESPONDENT**
A G BRITZ	**69TH RESPONDENT**
WALTER FAMILY TRUST	**70TH RESPONDENT**
EH BOTHA	**71ST RESPONDENT**
F NELL	**72ND RESPONDENT**
MN GROENEWALD	**73RD RESPONDENT**
A J KOEKEMOER	**74TH RESPONDENT**
M J BURGER	**75TH RESPONDENT**
T REDELINGHUYZ	**76TH RESPONDENT**
JRF QUIPIPA	**77TH RESPONDENT**
A H WILLIAMS	**78TH RESPONDENT**
TEE TO GREEN PROPERTIES CC	**79TH RESPONDENT**
S S CHIVUNO	**81ST RESPONDENT**
S VASSALLO	**82ND RESPONDENT**
W F STEENKAMP	**83RD RESPONDENT**
P KAUTA	**84TH RESPONDENT**
E VAN DER WALT	**85TH RESPONDENT**
VJ LABUSCHAGNE	**86TH RESPONDENT**

RUANDA DE BEER	**87TH RESPONDENT**
R C MOUTON	**88TH RESPONDENT**
M MULETE	**89TH RESPONDENT**
J E BOSCH	**90TH RESPONDENT**
C LEWIS TRUST	**91ST RESPONDENT**
E S VAN DER HEEVER	**92ND RESPONDENT**
B G RENTON	**93RD RESPONDENT**
JOHAN HUMAN	**94TH RESPONDENT**
BF HORN	**95TH RESPONDENT**
BOTHA INVESTMENTS ONE CC	**96TH RESPONDENT**
DRIVING RANGE PROPERTIES 151 CC	**97TH RESPONDENT**
HL STRYDOM	**98TH RESPONDENT**
CLC TCHITENIO	**99TH RESPONDENT**
B KATJAERUA	**100TH RESPONDENT**
D JANSEN	**101ST RESPONDENT**
CF VAN WYK	**102ND RESPONDENT**
DHE HUSSELMANN	**103RD RESPONDENT**
BI NELOYA	**104TH RESPONDENT**
JPM TSITENDE	**105TH RESPONDENT**
PC OOSTHUIZEN	**106TH RESPONDENT**
JA COETZEE	**107TH RESPONDENT**
GK KUHN	**108TH RESPONDENT**
LI DREYER	**109TH RESPONDENT**
JBF QUIPIPA	**110TH RESPONDENT**
E LOFTIE-EATON	**111TH RESPONDENT**
OT AMADHILA	**112TH RESPONDENT**
DD ZEALAND	**113TH RESPONDENT**
DJ GROBBELAAR	**114TH RESPONDENT**
EA NITSCHKE	**115TH RESPONDENT**
PC OOSTHUIZEN	**116TH RESPONDENT**
BONSEC INVESTMENTS 209 CC	**117TH RESPONDENT**
AEA CHRISTOPHER	**118TH RESPONDENT**
N DINATH	**119TH RESPONDENT**
MVH VAN WYK	**120TH RESPONDENT**
D HUSSELMANN	**121ST RESPONDENT**

SEN ASHIPALA	**122ND RESPONDENT**
KW BEZUIDENHOUT	**123RD RESPONDENT**
JS KALIMBA	**124TH RESPONDENT**
NR LIEBENBERG	**125TH RESPONDENT**
FJ VAN DER WALT	**126TH RESPONDENT**
NAA CLOETE	**127TH RESPONDENT**
H HASING-CUSCO	**128TH RESPONDENT**
M YONG MENG	**129TH RESPONDENT**
N ENGELBRECHT	**130TH RESPONDENT**
EL FOURIE	**131ST RESPONDENT**
JP DE VILLIERS	**132ND RESPONDENT**
B FRANKENFELD	**133RD RESPONDENT**
DJ STEYNBERG	**134TH RESPONDENT**
FG HUSSELMANN	**135TH RESPONDENT**
SAG GOLIATH	**136TH RESPONDENT**
D SCHRYWER	**137TH RESPONDENT**
J NAMBAMBI	**138TH RESPONDENT**
GAJ LAMBERTH	**139TH RESPONDENT**
YUCCA INVESTMENTS 80 CC	**140TH RESPONDENT**
AA DA SILVA	**141ST RESPONDENT**
R SCHWARTZ	**142ND RESPONDENT**
EH BOTHA	**143RD RESPONDENT**
JJ THERON	**144TH RESPONDENT**
LR CALLEBERT	**145TH RESPONDENT**
WH KRUGER	**146TH RESPONDENT**
RL MAASDORP	**147TH RESPONDENT**
FS MIBIANA	**148TH RESPONDENT**
T DAVID	**149TH RESPONDENT**
CC KLAASSEN	**150TH RESPONDENT**
L BLAAUW	**151ST RESPONDENT**
HT KAURA	**152ND RESPONDENT**
LCM HUSSELMANN	**153RD RESPONDENT**
H HELM	**154TH RESPONDENT**
GF VAN WYK	**155TH RESPONDENT**
GC VAN WYK	**156TH RESPONDENT**

N ESTERHUYSE	**157TH RESPONDENT**
A SMIT	**158TH RESPONDENT**
EG SMITH	**159TH RESPONDENT**
J SACARIA	**160TH RESPONDENT**
JM WILLEMSE	**161ST RESPONDENT**
SL BLAAUW	**167TH RESPONDENT**
MA GUBIANI	**168TH RESPONDENT**
AG BRITZ	**169TH RESPONDENT**
PA TSHININGAYAMME	**170TH RESPONDENT**
WKK BAYER	**171ST RESPONDENT**
CC WILLEMSE	**172ND RESPONDENT**
SM TEMBWE	**173RD RESPONDENT**
J ENGELBRECHT	**174TH RESPONDENT**
JD BEUKES	**175TH RESPONDENT**
N DAVID	**176TH RESPONDENT**
A OLIVIER	**177TH RESPONDENT**
MJE ENGELBRECHT	**178TH RESPONDENT**
LM LUMLEY	**179TH RESPONDENT**
EE DU PLESSIS	**180TH RESPONDENT**
IM POWELL	**181ST RESPONDENT**
A MANUEL	**182ND RESPONDENT**
K MATHEWE	**183RD RESPONDENT**
TRUSTEES ERIMAMA TRUST	**184TH RESPONDENT**
JM NEL	**185TH RESPONDENT**
JJ OOSTHUIZEN	**186TH RESPONDENT**
IJB MOUTON	**187TH RESPONDENT**
AR BOCK	**188TH RESPONDENT**
ESTATE LATE GEORGE RUSH	**189TH RESPONDENT**
JE VAN WYK	**190TH RESPONDENT**
JF HUSSELMANN	**191ST RESPONDENT**
H HERSELMAN	**192ND RESPONDENT**
AGW JINKUHN	**193RD RESPONDENT**
AM VAN DER WESTHUIZEN	**194TH RESPONDENT**
VC GRIFFITHS	**195TH RESPONDENT**
SA CAMPBELL	**196TH RESPONDENT**

AD LE ROUX	**197TH RESPONDENT**
A WELGEMOED	**198TH RESPONDENT**
HM DE VILLIERS	**199TH RESPONDENT**
A WEBER	**200TH RESPONDENT**
LE BOTES	**201ST RESPONDENT**
SP ERWEE	**202ND RESPONDENT**
WA VERMEULEN	**203RD RESPONDENT**
KF NESHILD	**204TH RESPONDENT**
JF MARITZ	**205TH RESPONDENT**
KN MWAALA	**206TH RESPONDENT**
DEEZ PROPERTY INVETSMENTS CC	**207TH RESPONDENT**
V PUNZUL	**208TH RESPONDENT**
CM SMIT	**209TH RESPONDENT**
AH STRAUSS-ARCHER	**210TH RESPONDENT**
AA DA SILVA	**211TH RESPONDENT**
KUW KESSEL	**212TH RESPONDENT**
P LANGENHOVEN	**213TH RESPONDENT**
JP KRUGER	**214TH RESPONDENT**
G OLIVOTIO	**215TH RESPONDENT**
W MEYER	**216TH RESPONDENT**
E LE ROUX	**217TH RESPONDENT**
L NONELABULA	**218TH RESPONDENT**
M LOUWRENS	**219TH RESPONDENT**
MAE BUTH	**220TH RESPONDENT**
MH LOUBSER	**221ST RESPONDENT**
JC PRETORIUS	**222ND RESPONDENT**
GW VISSER	**223RD RESPONDENT**
RM LE ROUX	**224TH RESPONDENT**
L KAMWI	**225TH RESPONDENT**
BT VILJOEN	**226TH RESPONDENT**
JM TEICHMANN	**227TH RESPONDENT**
UDK JACOBSEN	**228TH RESPONDENT**
TM ESKANAI	**229TH RESPONDENT**
M VENTER	**230TH RESPONDENT**
E VAN DER WALT	**231ST RESPONDENT**

HC LE ROUX	**232ND RESPONDENT**
PJDW TROMP	**233RD RESPONDENT**
FA BOTHA	**234TH RESPONDENT**
DS LAMBERTH	**235TH RESPONDENT**
GC VAN DYK	**236TH RESPONDENT**
F VAN STRATEN	**237TH RESPONDENT**
R THERON	**239TH RESPONDENT**
E OCALLAGHAN	**240TH RESPONDENT**
GT GRIFFITHS	**241ST RESPONDENT**
A KATHURIA	**242ND RESPONDENT**
CJW VAN HEERDEN	**243RD RESPONDENT**
IE BASSON	**244TH RESPONDENT**
MN NEKWIYU	**245TH RESPONDENT**
CJ VAN TONDER	**246TH RESPONDENT**
II GOLLIATH	**247TH RESPONDENT**
HI MWAFONGWE	**249TH RESPONDENT**
HW KRUGER	**250TH RESPONDENT**
LR BEUKES	**252ND RESPONDENT**
RUDOLF DU PLESSIS	**253RD RESPONDENT**
PR RABE	**254TH RESPONDENT**
L VAN DYK	**255TH RESPONDENT**
CJ CILLIERS	**256TH RESPONDENT**
A SCHOEMAN	**257TH RESPONDENT**
JJ ROBERTS	**258TH RESPONDENT**
FA BOTHA	**259TH RESPONDENT**
W GELDENHUYS	**260TH RESPONDENT**
SH OLIVIER	**261ST RESPONDENT**
WJL BOOYSEN	**264TH RESPONDENT**
TRUSTEES OF OMEYA INVETSMENT TRUST	**265TH RESPONDENT**
TRUSTEES OF THE OMEYA INVESTMENT TRUST	**267TH RESPONDENT**
UAJ SUREN	**268TH RESPONDENT**
EL BARTSCH	**269TH RESPONDENT**
JR HANNIBAL	**270TH RESPONDENT**
WD JANSE VAN RENSBURG	**271ST RESPONDENT**
HJ VAN DER WESTHUIZEN	**272ND RESPONDENT**

BKE REITER	**273RD RESPONDENT**
S NIEBERLE	**274TH RESPONDENT**
DJ MALAN	**275TH RESPONDENT**
GR HOWARD	**276TH RESPONDENT**
EJJ BOONZAAIER	**277TH RESPONDENT**
EG BARTSCH	**278TH RESPONDENT**
JM SIEBERT	**279TH RESPONDENT**
MB NOLTE	**280TH RESPONDENT**
FURNGROVE INVESTMENTS CC	**281ST RESPONDENT**
HL HSIAO	**282ND RESPONDENT**
HG HSIAO	**283RD RESPONDENT**
AP KIIYALA	**284TH RESPONDENT**
AN BENZ	**285TH RESPONDENT**
MG VEIANISA	**286TH RESPONDENT**
LT MARUWASA	**287TH RESPONDENT**
AE VAN DYK	**288TH RESPONDENT**
PE GENIS	**289TH RESPONDENT**
AB VAN DER WESTHUIZEN	**290TH RESPONDENT**
WC SCHALKWYK	**291ST RESPONDENT**
E NAUDE	**292ND RESPONDENT**
D GREEFF	**293RD RESPONDENT**
DS VAN NIEKERK	**294TH RESPONDENT**
PS MULUTI	**295TH RESPONDENT**
J VAN REENEN	**296TH RESPONDENT**
R SINKALA	**297TH RESPONDENT**
ST MUDZANAPABWE	**298TH RESPONDENT**
SH BOTES	**299TH RESPONDENT**
N RABE	**300TH RESPONDENT**
GA VAN GREUNEN	**301ST RESPONDENT**
HA KESSLER	**302ND RESPONDENT**
LB SHITEMBA	**303RD RESPONDENT**
WC GOUWS	**304TH RESPONDENT**
J KITCHING	**305TH RESPONDENT**
S AMIA	**306TH RESPONDENT**
AA THOMPSON	**307TH RESPONDENT**

CF STOLS	**308TH RESPONDENT**
XL ZHANG	**309TH RESPONDENT**
XL ZHANG	**310TH RESPONDENT**
EJ CHRISTIAAN	**311TH RESPONDENT**
E KOTZE	**313TH RESPONDENT**
R KOPITZARE	**314TH RESPONDENT**
A DU PLESSIS	**315TH RESPONDENT**
EJJ BOONZAAIER	**316TH RESPONDENT**
LC UNDERHILL	**317TH RESPONDENT**
MI JONKER	**318TH RESPONDENT**
TJ MCCONEY	**319TH RESPONDENT**
WJS DU PLESSIS	**320TH RESPONDENT**
KASTEEL INVESTMENTS 3 CC	**321ST RESPONDENT**
ELJO INVESTMENTS CC	**323RD RESPONDENT**
JM PRETORIUS	**324TH RESPONDENT**
OMEYA PRIVATE SCHOOL (PTY) LTD	**325TH RESPONDENT**
C DAVID-HOWOSES	**326TH RESPONDENT**
G BYLEVELD	**327TH RESPONDENT**
F GRAUPE	**328TH RESPONDENT**
N STRYDOM	**329TH RESPONDENT**
K BERNADO	**330TH RESPONDENT**
WP DU TOIT	**331ST RESPONDENT**
B SAVAGE	**332ND RESPONDENT**
H VAN ROOYEN	**333RD RESPONDENT**
I VAN WYK	**334TH RESPONDENT**
R HOFF	**335TH RESPONDENT**
RM KALIPI	**336TH RESPONDENT**
H VAN DER MERWE	**337TH RESPONDENT**
S MORAR	**338TH RESPONDENT**
J VAN ZYL	**339TH RESPONDENT**
GR HOWARD	**340TH RESPONDENT**
CM VAN ZYL	**341ST RESPONDENT**
W VAN ZYL	**342ND RESPONDENT**
L NGHALIPOH	**343RD RESPONDENT**
J HUMAN	**344TH RESPONDENT**

E BURGER	**345TH RESPONDENT**
P LIEBENBERG	**346TH RESPONDENT**
E JACOBS	**347TH RESPONDENT**
MJ VAN HOUT	**348TH RESPONDENT**
P COSTELLO	**349TH RESPONDENT**
R RAIGOPAL	**350TH RESPONDENT**
AC PIENAAR	**351ST RESPONDENT**
PJ SCHOOMBEE	**352ND RESPONDENT**
K CLARK	**353RD RESPONDENT**
ML GELDENHUYS	**354TH RESPONDENT**
M ENGELBRECHT	**355TH RESPONDENT**
EG BARTSCH	**356TH RESPONDENT**
J KNAEBLE-BRINKMAN	**357TH RESPONDENT**
GA NEPENDA	**358TH RESPONDENT**
F JANUARY	**359TH RESPONDENT**
J JANUARY	**360TH RESPONDENT**
E MOUTON	**361ST RESPONDENT**
H MOUTON	**362ND RESPONDENT**
HJ JOODT	**363RD RESPONDENT**
M JOODT	**364TH RESPONDENT**
VR VAN ROOI	**365TH RESPONDENT**
J COHEN	**366TH RESPONDENT**
RL HORN	**367TH RESPONDENT**
E HORN	**368TH RESPONDENT**
DJL DE JONGH	**369TH RESPONDENT**
I KAMONA	**370TH RESPONDENT**
AV ADRIAANSE	**371ST RESPONDENT**
M LIEBENBEREG	**372ND RESPONDENT**
J CLOETE	**373RD RESPONDENT**
M DELPORT	**374TH RESPONDENT**
A DELPORT	**375TH RESPONDENT**
D BOTHA	**376TH RESPONDENT**
T GGITA	**377TH RESPONDENT**
DN BEKKER	**378TH RESPONDENT**
K JACOBS	**379TH RESPONDENT**

C BRIEDE	**380TH RESPONDENT**
T SHANJENGANGE	**381ST RESPONDENT**
H HARMSE	**382ND RESPONDENT**
B EKANDJO	**383RD RESPONDENT**
A LABUSCHAGNE	**384TH RESPONDENT**
P COSTELLO	**385TH RESPONDENT**
M SCIEBLER	**386TH RESPONDENT**
S GARBERS	**387TH RESPONDENT**
G COETZEE	**388TH RESPONDENT**
C SMITH	**389TH RESPONDENT**
J ENGELBRECHT	**390TH RESPONDENT**
J ENGELBRECHT	**391ST RESPONDENT**
W GELDENHUYS	**392ND RESPONDENT**
Y KOTZE	**393RD RESPONDENT**
A VAN DER WALT	**394TH RESPONDENT**
A VAN DER WALT	**395TH RESPONDENT**
G CLOETE	**396TH RESPONDENT**
F VAN STRATEN	**397TH RESPONDENT**
HC OPPERMANN	**398TH RESPONDENT**
C DE KLERK	**399TH RESPONDENT**
J SPANGENBERG	**400TH RESPONDENT**
DJ VAN WYK	**401ST RESPONDENT**
D LAMBRECHTS	**402ND RESPONDENT**
S GARBERS	**403RD RESPONDENT**
HL STRYDOM	**404TH RESPONDENT**
LD BARNARD	**405TH RESPONDENT**
J VAN ZYL	**406TH RESPONDENT**
G MARAIS	**407TH RESPONDENT**
M OPPERMANN	**408TH RESPONDENT**
A OELOFSE	**409TH RESPONDENT**
J MINDERS	**410TH RESPONDENT**
A VERMEULEN	**411TH RESPONDENT**
JBF QUIPIPA	**412TH RESPONDENT**
I AWALA	**413TH RESPONDENT**
J VOLLGRAAFF	**414TH RESPONDENT**

M COOPER	**415TH RESPONDENT**
RC DE BEER	**416TH RESPONDENT**
W VAN VUUREN	**417TH RESPONDENT**
L MINDERS	**418TH RESPONDENT**
J DE GOEDE	**419TH RESPONDENT**
A VAN WYK	**420TH RESPONDENT**
B LENS	**421ST RESPONDENT**
E FOURIE	**422ND RESPONDENT**
K HAMILTON	**423RD RESPONDENT**
A BONTHUYS	**424TH RESPONDENT**
E SCHIMMING-CHASE	**425TH RESPONDENT**
C COETZEE	**426TH RESPONDENT**
J VAN TONDER	**427TH RESPONDENT**
L KOCH	**428TH RESPONDENT**
R PAULTON	**429TH RESPONDENT**
RP BLAAUW	**430TH RESPONDENT**

Neutral citation: *Coetzee v Omeya Golf Estate Home Owners Association, Sec 21 Non-Profit Company* (HC-MD-CIV-MOT-GEN-2019/00122) [2020] NAHCMD 586 (9 December 2020)

Coram: ANGULA DJP
Heard: **21 September 2020**
Delivered: **9 December 2020**

Flynote: Civil Procedure – *Locus standi* – Members of the Company lack *locus standi* to bring an application – Companies Act, 28 of 2004 – Section 260 of the Companies Act – applicants failed to bring themselves within the purview of the provisions of s 260.

Summary: At the core of this opposed application is an Estate Management Agreement concluded between the first respondent and the second respondent. The applicants are not parties to that agreement in terms of the agreement, the second respondent renders municipal-like-services to the home owners on the estate who are members of the first respondent – The agreement imposes certain levies on

homeowners payable to the first respondent which the first respondent in turn pays to the second respondent.

The applicants complain that the homeowners were not consulted when the Estate Management Agreement was negotiated and concluded and do not know how the costs were calculated. In addition, the applicants complain about other matters concerning the running of the affairs of the first respondent including the entrenched controlling power the second respondent exercises over the first respondent.

The respondents raised a number of points *in limine*. These include the applicants' alleged lack of *locus standi* to bring this application; the applicants' failure to join to the proceedings other homeowners in the estate; and the applicants' failure to plead the requirements for a final interdict.

Held; the Executive Management was the body entrusted by the directors of the company with the day to day management of the company, not the members. Courts will not interfere with the internal management of the affairs of a company at the instance of an individual shareholder.

Held; the court will not intervene under s 260 at the instance of a member for the conduct by directors' which is alleged to be unfairly prejudicial, unjust or inequitable unless the applicant has first unsuccessfully endeavoured at the general meeting to obtain relief.

Held; the directors of the company are the persons who have the duty and standing to institute legal proceedings on behalf of the company if the company has been wronged. The directors owe a fiduciary duty to the company in their management of the company's affairs and not to the individual members.

Held; further, the applicants failed to provide any reason or facts why they alleged that the agreed fees payable were not financially sustainable by the first respondent. Neither did the applicants specify the 'proper consideration' they took into account to arrive at the conclusion that the fees were not sustainable by the first respondent.

Held; the applicants have failed to make out a case that the respondents conduct complained of was unfairly prejudicial, unjust or inequitable towards the applicants.

Held; the point *in limine* in respect of *locus standi* was upheld.

Held; the applicants to pay costs of the respondents on a punitive scale.

ORDER

1. The application is dismissed.

2. The applicants are to pay the costs of those respondents who opposed the application jointly and severally, the one paying the other to be absolved, on an attorney and client scale, such costs to include the costs of one instructed counsel and one instructing counsel.

3. The matter is finalised and is removed from the roll.

JUDGMENT

ANGULA DJP:

Introduction

[1] The dispute between the parties in this matter concerns the Estate Management Agreement ('the Agreement') concluded between the first respondent and the second respondent and in terms of which the second respondent renders municipal-like-services to the home owners in the estate who are members of the first respondent. The agreement imposes certain levies on the home owners payable to first respondent which the first respondent in turn pays to the second respondent. The applicants complain that as home owners they were not consulted when the

agreement was negotiated and concluded and do not know how the costs were calculated. In addition, the applicants complain about other matters concerning the running of the affairs of the first respondent including the entrenched controlling power the second respondent exercises over the first respondent.

[2] Accordingly, the applicants seek *inter alia* an 'interim interdict' against the first and second respondents from implementing the agreement pending settlement of the dispute about that agreement. Furthermore, the applicants seek an interdict against the first and second respondents from issuing monthly invoices to the home owners and collecting money from home owners in respect of water consumption above 30 cubic litres water as stipulated in the Estate Rules.

[3] The first and second respondents contend that the agreement was lawfully concluded and is valid. They further deny that they are selling water, but that they are rather recovering 'water supply chain costs'. It is necessary to first spell out the parties' relationship to each and amongst each other.

The parties

[4] The first applicant is Mr Johannes Andriaan Coetzee, a businessman residing at a dwelling house situated at Erf No. 57, Omeya Golf Estate.

[5] The second applicant is Mr Arno du Plessis, who resides at a dwelling house situated at Erf No. 381, Omeya Golf Estate. He is a registered owner of 25 per cent of Erf No. 381.

[6] The third applicant is Mr Callie Hendrick Rossouw residing at a dwelling house situated at Erf No. 249, Omeya Golf Estate. He, together with three other family members are members of Deez Property CC, which is the registered owner of Erf No. 249.

[7] The applicants are all home owners of residential properties situated on the Golf Estate situated a few kilometres south of Windhoek. According to the conditions governing the acquisition of properties in the estate, upon acquiring a property in the estate such owner, automatically becomes a member of the first respondent.

[8] The first respondent is the Omeya Golf Estates Home Owners Association ('the Association'). The association is not for gain: it is a so-called 'section 21 company'. Its main objects are amongst others, to manage and promote the communal interest of the home owners and occupiers of properties in the estate. All the owners of immovable properties in the estate are automatically members of the association. The members are loosely referred to as 'home owners'. They will be referred to as such in this judgment.

[9] The second respondent is Omeya Golf Estate and Residential Oasis (Pty) Ltd a company with limited liability registered and incorporated in accordance with the laws of Namibia. It is the developer of the estate. The estate is a proclaimed township consisting of residential units, business units, a retirement village, a golf course and other recreational facilities. The home owners bought their houses from second respondent. It will henceforth be referred to as 'the developer' in this judgment.

[10] The third respondent is Mr Andries Jacobus van der Walt, he is the directing mind of the developer. He is a beneficiary and trustee of the Van der Walt Investment Trust, which is the 100 per cent shareholder in the developer. He is for all practical purposes the 'owner' of the estate.

[11] The fourth respondent is Mr Gerhard de Wet, he is a director of the developer and a member of the association and its chairperson. It would appear that he has in the meantime resigned from the position of a chairperson of the board of directors of the association.

[12] The fifth respondent, is the Minister of Agriculture, Water and Forestry. He and sixth respondent, the Electricity Control Board, have been cited for the interest they might have in the matter. These respondents did not oppose the application. In any event, no relief is sought against them.

[13] The seventh to four hundred and thirtieth respondents are alleged to be home owners in the estate and thus members of the association. These respondents have been cited for the reasons that they have a direct and substantial interest in the

outcome of this application. However their application for joinder was withdrawn by the applicants' legal practitioner at a status hearing on 5 February 2020. According to the applicants' legal practitioner the first applicant decided to withdraw the application against them because he experienced challenges with the service of the application on those respondents. The implication of the withdrawal of the application against those respondents will be dealt with later in this judgment.

[14] A few days before the hearing of the application was due to take place, on 21 September 2020, an application to substitute the first applicant (in his place and stead) was filed by the second and third applicants. The reason for the substitution was that first applicant has, in the meantime, sold his property in the estate. The order whereby the first applicant was substituted second and third applicants was granted on 16 September 2020. The result of the substitution is that henceforth the second and third applicants assumed and succeeded to the rights, title and obligations of the erstwhile first applicant, Mr Coetzee. Henceforth, when reference is made to the applicants in this judgment it means the second and the third applicants.

Relief sought

[15] The following relief are sought:

> '18.2.1 To interdict the First Respondent [the Association] to issue invoices to Applicant[s] as member[s] and other home owners for any water related charges or fee including but not limited to consumption, abstraction, storage, distribution or recycling;
>
> 18.2.2 To interdict First and Second Respondents from collecting money or fees for any water related charges or fees including but not limited to consumption abstraction, storage, distribution or recycling per month;
>
> 18.2.3 To direct First and Second Respondents to pay/transfer money or funds collected or received for water related charges or fees including but not limited to consumption abstraction, storage, distribution or recycling since October 2018 to date or order and to pay such amounts into interest-bearing account with a legal practitioner and not transfer or pay any amount from such account to any third party;

18.2.4 To interdict First and Second Respondents from suspending or limiting privileges or services to homeowners at Omeya Golf Estate, including the right to attend, speak and vote at any general meetings as A member[s] of First Respondent on basis for refusal or failing to pay invoices and amounts related to water related charges or fees including but not limited to consumption, abstraction, storage, distribution or recycling;

18.2.5 To interdict First and Second Respondent from implementing the Estate Management Agreement concluded on 30 May 2018 and to stay the implementation of such agreement;

18.2.6 To direct First Respondent to make payments to Second Respondent for services rendered by Second Respondent on the basis it was made prior to 30 May 2018 on production of invoice containing description of expenses incurred in relation to the undertakings made by Second Respondent as service provider to First Respondent;

18.2.7 To direct that prayer 18.2.5 be an interim interdict pending the finalisation of arbitration or litigation or negotiation in the dispute resolution process in terms of that agreement, provided that such steps to address the dispute pertaining to the Estate Management Agreement be initiated by either the Board of First Respondent or Plaintiff within 60 days of granting of this order;

18.2.8 Costs of suit in favour of the Applicant[s] against First to Fourth Respondents on appropriate scale, or any other party opposing this application, the one paying the other to be absolved; and

18.2.9 Further and/or alternative relief.'

Case for the applicant

[16] As indicated earlier the application was instituted by the first applicant alone. The founding affidavit was thus deposed to by him. When the second and third applicants substituted the first applicant, they confirmed that they have read the founding affidavit and confirmed the contents thereof. In respect of the second applicant, he stated that he supports the application and the reasons for the initiation

of the application. In respect of the third applicant he stated that Deez Property CC the registered owner of the property on the estate, of which he is a member, has *locus standi* and further that it has a direct interest in the application to stay the implementation of the provisions of the Estate Management Agreement.

[17] In the light of those developments set out in the immediate preceding paragraph, I will henceforth refer to the applicant as 'the deponent to the applicants founding affidavit' or simply 'the deponent' unless the context requires otherwise.

[18] The deponent to the applicants' founding affidavit alleges that the first respondent commenced with the issuing of invoices for water consumption during October 2018 which, according to the deponent, was unlawful for the reasons that: his purchase agreement for his residential unit, stipulated that the first 30 cubic litres would be included in the monthly levies charges; that the estate's rules likewise provide that 30 cubic litres of water used would be included in monthly levies charged. According to the deponent, the first and second respondents have not been issued with a water extraction permit by the Ministry of Agriculture, Water and Forestry authorizing them to sell water. He contends further that the charging for water consumption, abstraction recycling, and storage, was not approved in the annual budget for the association, which is a prerequisite before such a charge can be levied.

[19] As a result of the deponent's refusal to pay for water charges, which he considered to be unlawful, he has been barred from attending and voting at any general meeting of the association. He points out that the relevant part of the Articles of Association for the association provides that 'no person other than a member who shall have paid every levy and other sums, if any, which shall be owed and payable to the association' shall attend or vote at any general meeting of the association.

[20] It is the deponent's deposition that due to his objection or refusal to pay for the water consumption invoices, those who manage the affairs of the association have threatened to prohibit him or any other members of the association who refuse to pay the invoice for water consumption, from attending and voting at any general meeting. In this regard, the deponent says that he has been threatened with the suspension of services and benefits to which all home owners are entitled.

[21] The deponent alleges further that the developer did not provide any services since May 2018 and therefore the charges for water and electricity reflected in the invoice are invalid and unlawful because the costs calculation therefor have not been provided to the home owners. The deponent accordingly demands that the Estate Management Agreement be declared null and void and the performance in terms thereof be stayed pending the outcome of either the appointment of new directors or the outcome of arbitration proceedings or negotiations. Furthermore, deponent prays for an order that all payments received by the association and the developer in respect of water consumption from the homeowners be placed in an interest-bearing trust account of a legal practitioner until the dispute is resolved.

[22] The deponent alleges further that the board of directors of the association has become dysfunctional and therefore all decisions of that board are invalid. He thus requests that those decisions be declared null and void.

[23] It is further the deponent's deposition that the resolutions which were adopted at the annual general meeting of the association are invalid. He points out that the representative of the developer and Mr Van der Walt have majority votes at the association's annual general meeting. He asserts that the resolutions are invalid because the calculation of votes exercised on behalf of the developer and Mr Van der Walt were incorrect and amounted to a misrepresentation.

[24] It is the deponent's further deposition that he and the homeowners attempted to gain access to the financial statements of the association, but were prevented from doing so. He alleges that possible financial irregularities were raised with the auditors of the association. According to the deponent, it came to light that the chairperson of the association, Mr De Wet, the fourth respondent, during that time has transferred about N$700 000 from the association's reserved account to the developer's account, without permission from the members of the association. In this connection the deponent points out that the developer pays Mr De Wet's salary.

[25] The deponent further states that as a result of the concern by the home owners about the manner in which the affairs of the association were conducted, the members of the association raised their concerns with the appointed auditors of the

association about the ‘possible irregularities’ at the association. Five weeks thereafter the auditors resigned.

[26] It is further the deponent’s deposition that during November 2018 the developer placed an advertisement in the newspaper to the effect that it has applied to the Electricity Control Board for permission to transfer the association’s electricity licence to the developer. According to the deponent he together with Omeya Concerned Group of Home Owners objected to such transfer for the reason that, that licence is the association’s asset. In this regard, the deponent states that he could not accept or believe that the association’s board of directors could take a decision to alienate the asset of the association in order to benefit the developer and Mr Van der Walt.

Opposition by the first to fourth respondents

[27] The application is opposed by the first to fourth respondents. They will collectively be referred to as ‘the respondents’ in this judgment, unless the context demands reference to one of them, in which event they will be referred to either as ‘the Association’; ‘the Developer’, Mr Van der Walt or Mr De Wet.

[28] The main opposing affidavit on behalf of the respondents has been deposed to by the third respondent, Mr Van der Walt. He states that he is the director of the developer and shareholder of the developer through the Van der Walt Investment Trust. He points out that the developer has to date invested about N$200 million in the development of the estate; and that the developer’s financial interest in the estate amounts to some N$467 million. It is his contention that his control of the developer is of critical importance for the protection and success of the investments made in the estate.

[29] It is his view, that the applicants together with Omeya Concerned Group of Home Owners seek to wrestle control of the development from the developer and thereby placing the investments and financial input made by the developer in the estate in jeopardy by relinquishing control of the development to the applicants and Omeya Concerned Group of Home Owners.

[30] He points out further that the memorandum of the association provides that:

'Each member of the Association acknowledges and agrees that for the duration of the development period (as defined in the Articles of Association) the management and control of the Association shall vest entirely in the hands of Omeya Golf and Residential Oasis (Propriety) Ltd Company number 2005/704 or its nominee or successor in title, or assigns or in the hands of professional managers, operators or subcontractors, as may from time to time be appointed' by the Developer.'

[31] Mr Van der Walt points out that the memorandum provides further that during the development period the A and C members of the association 'shall have no right to appoint trustees to the board of trustee of the association'; and that voting control at meetings of members of the association, will vest with the developer during the development period. He argues that those provisions of the memorandum of association are not untoward or oppressive towards the members of the association.

[32] As regards the invoices issued in respect of water consumption, the deponent points out that those invoices are issued in terms of clause 11 of the Estate Management Agreement, which provides that the association agrees to maintain and uphold the water supply chain for the estate. He points out further that by issuing the invoices, the association is recovering the costs for extraction and maintenance of the water supply chain on the estate. He denies that the Estate Management Agreement is unlawful.

[33] Regarding the applicant's allegation that the agreed fees payable by the association are not financially sustainable for the association, the deponent points out that the applicants failed to disclose that the fees were calculated by Bigen-Kuumba, a firm of engineering consultants, which advises municipalities in Namibia, on the costs of maintenance of services. That firm was jointly appointed by the association and the developer. He points out further that four meetings were held with the director of the association where presentations of the costs calculation were made by an expert from the mentioned engineering consultant firm. The deponent points out further that the deponent to the applicants' founding affidavit failed to disclose that he attended an information meeting held on 8 September 2018, where

an expert from the consultant engineering firm addressed the issue of costs calculation.

[34] As regards the applicants' complaint that the developer is selling water which it is not allowed by law to do, the deponent points out that the Companies Act, 1973, permits an association to pay to a member in respect of services rendered by such member to the association.

[35] Mr Van der Walt further points out that the applicants, and the directors of the association (referred to as 'elected directors'), failed to mention that the conclusion of the Estate Management Agreement was already envisaged in the original and amended 2013 Articles of Association. It is the deponent's further deposition that when the Estate Management Agreement was negotiated, the elected directors of the association represented the association in order to protect and serve the interests of the association. On the other hand, the nominated directors of the developer protect and serve the interests of the developer. He further points out that the Estate Management Agreement was negotiated over a period of three years.

[36] According to the deponent the elected directors, under the leadership of one Mr Alex Klein, consulted an attorney regarding the draft Estate Management Agreement. Thereafter a further work session was held at which the elected directors raised certain concerns which were addressed and resolved. The conclusion of the Estate Management Agreement was unanimously agreed to by the directors at the Association's Board meeting held on 29 May 2018. In this connection, the deponent attached an extract from the minutes of that meeting which records the discussion on the issue of the Estate Management Agreement. It is recorded *inter alia* that it was resolved that Messrs Peter Herle and Gerhard de Wet sign the agreement on behalf of the association.

[37] In response to the applicants allegation that the agreement was negotiated in secrecy and that the members of the association were not informed about it, the deponent points out this is not correct. He points out that the conclusion of the agreement was announced in September 2018 before the AGM was due to be held when an information meeting was held on 4 September 2018 in order to explain the terms of the agreement to the members. He points out that the deponent to the

applicants' founding affidavit attended that meeting. An expert from the engineering consultant firm, one Mr Olivier made a PowerPoint presentation to the members whereby the 'methodology, reasoning and rationale behind the agreement and determination of the costs calculation' were explained to the members. The members present were afforded an opportunity to ask questions for clarification.

[38] Responding to the applicants' allegation relating to the proposed sale and transfer of the association electricity licence to the developer, the deponent confirmed that after the advertisement relating to the sale and transfer of the licence, members of the association filed objections. He points out however that the proposed sale was in accordance with clause 12.4 of the Estate Management Agreement. It is further his deposition that it had been discovered that the issuing of that licence to the association was a mistake because in terms of the law an entity may sell electricity if it is the owner of the infrastructure relating to the electricity supply. In this case, the developer is the owner of the infrastructure and not the association to whom the license had been issued.

[39] As regards to the reasons for the auditors of the association's resignation, the deponent refers to the letter of resignation by the auditors which states that they formed an opinion that their continued doing audit work for the association could result in a conflict of interest. According to the deponent the same auditors are appointed auditors for the deponent's other entities in which he holds interests. That was the reason for their resignation. New auditors, BDO, have since been appointed as auditors for the association.

[40] In response to the applicants' complaint regarding voting at annual general meetings the deponent refers to clause 9.2 of the Memorandum of Association which stipulates that voting control at all general meetings of members shall, for the development period, vest with the developer. He points out in this connection that the constituent documents stipulate that the developer shall always, during the development period, have one more vote than the combined votes of all the other members thereby placing the *de jure* and *de facto* control of the association in the hands of the developer.

[41] As regards, the applicants' complaint relating to the water invoices, the deponent points out that the invoices are issued in terms of the Estate Management Agreement. He concedes that initially the invoices contained an incorrect description of the service relating to water but that has since been rectified. In this regard, the deponent persists that the association is not selling water but merely recovering costs associated with water supply chain management. In support of his contention he referred to a copy of the Water Extraction Permit issued by the Minister of Agriculture, Water & Forestry, which describes the purpose for which the water may be used namely: 'Landscape, Irrigation and Domestic use'.

[42] As regards, the complaint by the deponent to the applicants' founding affidavit, with respect to him being barred from attending and voting at general meetings of the association due to his refusal to pay for the invoices, Mr. Van der Walt maintains that the invoices in respect of the levies remain of full force and effect until it is declared invalid or unlawful by a court of law.

[43] Regarding the applicants' prayer that the association be directed to pay for actual services rendered, the deponent explains that prior to the conclusion of the Estate Management Agreement all maintenance and services were carried out and paid for by the association. No monies were paid to the developer. He points out that the main reason for the conclusion of the Estate Management Agreement was for the developer to take over the responsibility for maintenance and services being rendered at a fee, because the association was failing in its duties to maintain, replace and repair the infrastructure which failure had an adverse effect on the value of the estate.

[44] In response to the applicants' allegation that the board of the association is dysfunctional, the deponent states that after the association's board meeting on 22 November 2018, elected directors of the association, launched a campaign to take over the control of the estate from the developer. In order to protect the interests of both the association and the developer, the elected directors had to be removed from the board. To that end a general meeting was called. Three of the four elected directors resigned before the resolutions to remove them, were put to the vote. The deponent points out that since the board meeting of 22 November 2018, subsequent

properly constituted board meetings took place on 18 February 2019 and again on 12 March 2019.

[45] As regards, the applicants' concern about the association's financial sustainability and the alleged refusal by the board and management to grant the applicant and other concerned members access to the financials of the association, the deponent points that the financial sustainability would only become an issue if the home owners fail to pay their levies as determined by the Estate Management Agreement. In this connection, the deponent points out that the association was obliged to apply for an overdraft facility due to the fact that the directors and the Chief Executive Officer of the association 'allowed the outstanding levies and penalties to balloon to N$12 million'. Regarding access to financials of the association, the deponent states that the applicants' legal practitioner was granted permission to inspect the financials and an opportunity to meet the board. The first applicant inspected the financials but his legal practitioner did not. Notwithstanding such inspection, the first applicant does not disclose the result of his inspection of the financials.

Points *in limine*

[46] In addition to traversing the merits, the respondents raised a number of points *in limine.* These include the applicants' alleged lack of *locus standi* to bring this application; the applicants' failure to join to the proceedings other homeowners in the estate; and the applicants' failure to plead the requirements for a final interdict which they are seeking.

[47] In their joint status report signed on 5 and 9 March 2020 respectively the parties agreed that the points *in limine* be adjudicated first and depending on the outcome thereof only then the merits should be considered. I will accordingly proceed to consider the point *in limine* relating to the applicants' *locus standi*.

Point in limine – The applicants locus standi considered:

[48] It is common cause that the applicants are a members of the association together with other more than four hundred members. The respondents challenge

the applicants' *locus standi*. Referring to the relief sought against the first and the second respondents jointly, the respondent argues that the applicants are mere members of the association and as such have no *locus standi* to seek relief against the developer. They argue further that the proper applicant should have been the association itself. In addition, the relief sought against both the association and the developer is not supported by what is contained in the founding affidavit.

[49] In an effort to justify his *locus standi*, the first applicant states the following in the founding affidavit:

> 'I respectfully submit that, I, as a single minority member of a section 21 Company, such as the First Respondent, have an interest in first respondent and is [sic] entitled as single member to approach this honourable Court as envisaged in section 260 of the Companies Act.

And further:

> I submit that as member of the first respondent I am entitled to seek relief as remedy in case of oppressive or unreasonable prejudicial conduct by First Respondent as envisaged in section 260 of the Companies Act.'

[50] It is to be recalled that when the second and the third respondents substituted the first applicant they asserted their *locus standi* based on their membership of the association.

[51] It seems to me that given the foregoing allegations, the applicants are basing their *locus standi* on s 260 of the Companies Act, 2014. In the circumstances it is necessary to quote s 260 in order to place the applicants' assertions in context. The relevant subsections, for the purpose of the present matter are ss (1) and (3) which read as follows:

> '(1) Any member of a company who complains that any particular act or omission of a company is unreasonably prejudicial, unjust or inequitable or that the affairs of the company are being conducted in a manner unreasonably prejudicial, unjust or inequitable to him or her or to some part of the members of the

company, may, subject, sub-section (2) make an application for an order under this section.'

(2) . . .

(3) If on any application it appears to the Court that the particular act or omission is unreasonably prejudicial, unjust or inequitable, or that the company's affairs are being conducted in a manner which is unreasonably prejudicial, unjust or inequitable and if the Court considers it just and equitable, the Court may, with a view to bringing to an end the matters complained of, make an appropriate order, whether for regulating the future conduct of the company's affairs or for the purchase of the shares of any members of the company by other members or by the company.'

[52] The onus is on the applicant to persuade the court that the relief sought will remedy the complaint so that the company will function properly in future.[1]

[53] In the present the applicants' complaints do not relate to the purchase of shares but to the manner in which the affairs of the association are being conducted. It has been held that 'a minority shareholder seeking to invoke the provisions of s 252 (Act 61 of 1973 is the counterpart of s 260 of Namibia's Companies Act 28 of 2004) of the Companies Act must establish not only that a particular act or omission of a company results in a state of affairs which is unfairly prejudicial, unjust or inequitable to him, but that the particular act or omission itself was one which was unfair, unjust or inequitable. Similarly, looking at the second part of the section, where the complaint relates to the manner of conduct of the business, it is the manner in which the affairs have been conducted as well as the result of the conduct of the business in that manner which must be shown to be unfairly prejudicial, unjust or inequitable'.[2]

[54] Keeping in mind the legal principles referred to in the preceding paragraph, I proceed to assess whether the applicants have discharged the onus upon them. In other words, have they brought themselves within the purview of the provisions of s 260.

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[1] LAWSA Vol 4, para 282.

[2] *Garden Province Investment and Others v Investment v Aleph (Pty) Ltd and Others* 1979 (2) SA 525, p 531C-D.

[55] Mr Corbett SC for the respondents, points out in his heads of argument that there is no reference whatsoever in the notice of motion that the relief sought is on the basis of s 260. I agree with counsel's observation. There is however no doubt that the applicants cause of action in based on s 260. Just to refresh the reader's memory by paraphrasing about the relief sought: the applicants seek, *inter alia*, a final interdict against the respondents from issuing invoices relating to water usage; a final interdict against the respondents from suspending the applicants' rights or privileges as home owners; a final interdict against the respondents from implementing the Estate Management Agreement; and an interim interdict pending the finalisation (yet to be declared) dispute relating to the Estate Management Agreement pending the finalisation of such dispute. The applicants do not seek to have any conduct by the respondents to be declared unfairly prejudicial, unjust or inequitable. Neither do they seek to interdict the respondent from acting in a certain manner because such actions are unfairly prejudicial or inequitable towards the applicants as stipulated by s 260.

[56] It seems to me that the applicants' main gripe is the fact that the Estate Management Agreement was concluded between the association and the developer without them being involved. In one instance the applicants seek an interim interdict against the association and the developer from implementing the Estate Development Agreement 'pending the finalization of arbitration or litigation or negotiations pending the dispute resolution in terms of that agreement'. His reasons for seeking that order is that negotiations and existence of that agreement were kept in secret and the home owners were not informed thereof.

[57] According to the respondents, the agreement was negotiated over a period of three years. Before it was signed, a presentation was made to the members by the experts on costs calculations. The first applicant attended that meeting. The agreement was thereafter unanimously approved by the directors of the association including the elected directors who represent the interest of the members of the association on the board.

[58] Without necessarily applying the *Plascon-Evans* rule, I found the applicant's complaint that 'the negotiations and existence of this agreement was kept in secret

and the members of the association (home owners) were not informed thereof' rather startling. I know of no company where members or shareholders participate in the negotiations of agreements between the company and third parties. To my knowledge, negotiations and conclusions of agreements between a company and third parties are ordinarily conducted by management and not even by directors and let alone members of a company.

[59] The executive management is the body of people entrusted by the directors with the day to day management of the company, not the members. It has been held that courts will not interfere with the internal management of the affairs of a company at the instance of an individual shareholder[3]. The learned author of Henochberg on Companies Act[4] opines that the court will not intervene under s 260 at the instance of a member for the directors' conduct which is unfairly prejudicial, unjust or inequitable unless he has first unsuccessfully endeavored at the general meeting to obtain relief.

[60] I fully endorse the above view by the learned author. It is not the applicants' case that they endeavored to obtain relief at the general meeting which failed. In any event, the respondents' conduct regarding the negotiation and adoption of the Estate Management Agreement as explained by the respondent, in my judgment, do not constitute acts which are unfairly prejudicial, unjust or inequitable.

[61] For those reasons, the applicants' complaint in this regard is rejected as baseless and lacking both in substance and in law.

[62] The applicants' further complaint is embodied in para 22.2 of the founding affidavit where he says the following: 'On proper consideration of the fees First Respondent agreed to pay towards Second Respondent, it was clear, I submit, that it is not financially sustainable to First Respondent and secondly benefitted Second and Third Respondents and consequently this conclusion of agreement prejudiced me as a member of the association significantly'.

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[3] *Porteus v Kelly and Others* 1975 (1) SA 219 (W), p 221C.
[4] Fourth Edition, Vol. I, p 399.

[63] The deponent to the applicants' founding affidavit does not give any detail why the applicants claim that the agreed fees payable are not financially sustainable by the association. Neither does he specify the 'proper consideration' they took into account to arrive at the conclusion that the fees are not sustainable by the association. On the applicants version they do not know how the fees were calculated because they and other members were not provided with cost calculations. On the respondents' version which, on the application of the *Plascon-Evans* rule should prevail, the applicants were provided with briefing and a presentation regarding the costs calculation; they had an opportunity to consult their lawyer regarding the agreement; and thereafter the resolution for the conclusion of the agreement was unanimously adopted by the directors of the developer and the directors of the association. Accordingly, the applicants' complaint in this regard is equally rejected as lacking in substance.

[64] As regards, the complaint that the fees will benefit the developer and Mr Van der Walt, I agree with the respondents' response to the effect that the applicant cannot expect those respondents to render services free of charge or without any compensation. The applicants failed to set out facts detailing in what manner 'the conclusion of the agreement prejudice[d]' them as a members of the association. For instance the applicants do not allege that the fees are disproportionate to the services rendered or that the services rendered are of inferior quality and therefore do not justifying the fees charged. In my judgment, the applicants have failed with this allegation to make out a case that the respondents conduct complained of is unfairly prejudicial, unjust or inequitable so as to afford them standing within the meaning of s 260.

[65] At para 35 of the founding affidavit, the deponent states '[T]he decision by the Board of the First Respondent and the Board of the Second Respondent on 30 May 2018 was an act by the First Respondent which act is unreasonably prejudicial, unjust and inequitable to me as a member of First respondent and consequently the affairs of the First Respondent were conducted in a similar prejudicial manner. I request the court to grant the staying order to bring to an end the prejudicial consequences'.

[66] For avoidance of doubt, the decision referred to is the decision or the resolution by the directors of the association to conclude the Estate Management Agreement with the developer. I endeavored to summarise the historic background which culminated it the conclusion of the Estate Management Agreement when I summarized the respondents' case. Significantly, the respondents' version on this point has not been denied by the applicants in their replying affidavit.

[67] Again, it is to be noted that the applicants are merely reciting the wording of s 260(1) without providing facts why they allege that the decision to conclude the Estate Management Agreement is 'unfairly prejudicial, unjust or inequitable'.

[68] In this connection the court in *Garden Province Investment* (*supra)* held that a minority shareholder seeking to invoke s 260(1) must establish that the particular act or omission itself was one which was unfair, unjust or inequitable. I cannot understand how a 'decision' unanimously adopted by a board of directors without more can be said to be unfairly prejudicial unjust or inequitable. No facts have been pleaded to support the bold conclusion made by the applicants. It would have been a different consideration, if the applicants complaint was that as a result of that decision the costs for services escalate and the attack was directed at escalation. In my judgment, in view of the fact that the decision was taken unanimously, s 260(1) is not applicable. The section would only have been applicable if the directors who hold the majority votes on the board had exercised such power or control capriciously or maliciously with intention to oppress or victimise the minority votes.

[69] It has furthermore been held (*Garden supra*) that where the complaint relates to the manner of conduct of the business, then it is the manner in which the affairs have been conducted as well as the result of the conduct of the business which must be shown to be 'unfairly prejudicial, unjust or inequitable'. The applicant simply states 'consequently the affairs of the First Respondent were conducted in a similar prejudicial manner'. Again the applicants failed to plead facts to support the bold conclusion that the affairs of the association are conducted in a manner which caused prejudice to them. This fall far below the requirement for discharging the onus that rests on the applicants.

[70] The applicants are complaining about various matters with which they are not happy with. It ranges from the conclusion of the Estate Management Agreement, to invoices for services rendered; the transfer of the electricity licence from the association to the developer; the numbers of votes recorded at a general meeting and how they were tallied or calculated; and the alleged dysfunctionality of the board of the association. In this connection it has been held that loss of confidence in the manner in which the company affairs are conducted or resentment at being out-voted or mere dissatisfaction with or disapproval of the conduct of the company's affairs, whether on grounds relating to policy or efficiency, however well-founded, will not of themselves constitute prejudice, injustice or inequity within the meaning of s 260(1)[5]. It follows thus the applicants complaints in respect of those matters do not give them a standing to bring this application.

[71] Having regard to the applicants' various complaints, I am of the considered view that those complaints do not constitute prejudice, injustice or inequity within the meaning of s 260(1). I gain the impression from the range of complaints by the applicants that they are simply busybodies.

[72] I turn to the applicants' prayer that this court should grant a stay of the implementation of the Estate Management Agreement 'in order to bring to an end the prejudicial consequences'. According to this relief the dispute is to be declared by the directors of the association. I should mention that I fail to imagine how the directors who do not have an issue with the implementation of the agreement can declare a dispute based on that agreement. In any event, it has been held in this connection that 'an applicant must not only establish that the conduct is unjustly prejudicial, unjust or inequitable, but also that it is just and equitable that the court should come to his relief'[6]. In the present matter the applicants failed to plead facts why it would be just and equitable to suspend the operation of the Estate Management Agreement which has been in operation for over a year. They further failed to state how the suspension of the agreement would affect the other members' rights. They further failed to suggest who should render the services to the members during the suspension period of the agreement. To my mind even if the applicants had established *locus standi* it would not have been just and equitable to suspend

[5] *Garden Province* (supra) at 535.
[6] *Donaldson Investments (Pty) Ltd and Others v Anglo-Transvaal Collieries Ltd: SA Mutual Life Assurance Society and Another* 1979 (3) SA 713, p 719.

the operation of the agreement because such suspension would cause hardship towards the home owners in that they would be deprived of essential services.

[73] It is not every decision of the majority which can be challenged in terms of s 260(1). In order to succeed, the applicant is required to establish that the act or omission complaint of reveals lack of probity or departs from the standard of fair dealing. In this regard the court in *Donaldson Investment (supra)* put it this way at page 722:

> 'In my view, the applicants must establish a lack of probity or fair dealing, or a visible departure from the standards of fair dealing, or a violation of the conditions of fair play on which every shareholder is entitled to rely. Couched in another form, I agree that the applicants must establish that the majority shareholders are using their greater voting power in a manner which does not enable the minority to enjoy a fair participation in the affairs of a company. The emphasis is upon the unfairness of the conduct complained of. It must be conduct which departs from the accepted standards of fair play, or which amounts to an unfair discrimination against the minority.'

[74] In my judgment, the applicant has failed to establish that the majority shareholders are using their majority power in an unfair manner or that their dealing is a departure from the standard of fair dealing. To the contrary, the answering affidavit has demonstrated that the majority have been acting in fair manner and according to accepted standards toward the minority shareholders.

[75] I have earlier in this judgment dealt with the power of the directors' vis-à-vis the power of the shareholders to conclude agreements with third parties on behalf of the company. It is common cause that the impugned decision by the board of directors of the association to conclude the Estate Management Agreement with the developer was unanimously taken by the directors. In my judgment the applicant, as a member of the association, has no authority to question the operation of the agreement lawfully entered into by the directors of the association acting in what they considered to be for the benefit and best interests of the association.

[76] In my view, it is highly inconceivable that the entire agreement is unfairly prejudicial unjust or inequitable to the applicant. There must be clauses in the

agreement which do not offend the requirements of s 260(1). At the bare minimum the applicants ought to have identified clauses which they complain are oppressive. Common knowledge tells us that an agreement will have clauses that are neutral in the sense that they favour neither party, such as for instance clauses like 'non-variation'; 'the *domicilium* of the parties'; 'amendment or waiver'; and 'the duty to act in good faith'. I have perused the agreement it has such neutral clauses. In my judgment the applicants' prayer relating to the suspension of the entire agreement is overbroad and lack specificity or particularity and for that reason it stands to be rejected.

[77] It is common ground that the members of the association are over four hundred in number. It would appear that out of over 400 hundred home owners the applicants are the only ones who have issues with the Estate Management Agreement. I say this for the reason that none of the homeowners intervened to join them in these proceedings. The applicants on the other hand also failed to join other home owners which could have been fatal to this application in the event the applicants were to succeed to establish that they have the standing.

[78] It is the directors of the association who have the duty and standing to take action on behalf of the association if the association has been wronged. The directors owe their duty to the association in their management of the association's affairs and not to the individual members. I agree with Mr Corbett's submission in this regard that should the applicants be unhappy with the management of the affairs of the association, they should persuade other members of the association to vote the current directors out of office in order to improve the internal management of the association. After all, on the applicants' own version they are member of the Omeya Concerned Group of Home Owners through which they could exert pressure on those who are in charge of the affairs of the association.

[79] According to the first applicant, when he acquired his property on the estate in 2016, he was aware of the clause in the deed of sale which provided that on becoming the registered owner of his property situated on the estate, he would become a member of the association and would be bound by its Memorandum and Articles of Association as long as he remains a registered property owner.

[80] Quite apart from binding himself to the provisions of the Memorandum and Article of Association, it is a well-established principle of our company law that on becoming a member of a company, a member agrees to be ruled by majority over those matters subject to majority rule by the company's constitution. In this connection the often-quoted passage from the *Sammel and Others* v *President Brand Gold Mining Co Ltd*[7] is appropriate. The South African Appellate Court stated the principle as follows:

> 'By becoming a shareholder in a company a person undertakes by his contract to be bound by the decisions of the prescribed majority of shareholders, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights as a shareholder. That principle of the supremacy of the majority is essential to the proper functioning of companies.'

[81] In the present matter when the applicants became members of the association, they must have been aware or at best ought reasonably to have known about the provisions of the clauses 9.1 and 9.2 of the Memorandum of Association which vest the management and control of the association in the hands of the developer for the duration of the development of the estate. They also agreed that as 'class A members' they would have no right to appoint directors to the board of the association except in the manner provided and further that they would have no voting control at the meetings of the association and that such voting control shall vest in the developer.

[82] Mr Corbett referred the court to the well-known rule in *Foss v Harbottle*[8] which boils down to this: the company must itself act against the wrongdoers though in certain circumstances a member may assert the company's rights through a derivative action. In the present matter, it is not the applicants' case that they brought the instant application through a derivative action. Nothing more needs be said about that aspect.

[83] It is to be noted that four of the seven relief sought are jointly against the association and the developer. In this connection Mr Corbett correctly points out such orders would be incompetent. This is because the applicants are not members

[7] *Sammel and Others v President Brand Gold Mining Co. Ltd*, 1969 (3) 629 (A), p 678H.
[8] (1843) 2 Hare 461; 67 ER 189.

of the developer. They have no reciprocal rights or obligations vis-à-vis the developer. There are no contractual rights between the applicants and the developer. It is for the association to enforce its rights against the developer. As pointed out elsewhere in this judgment, the applicants, as members of the association, have no rights to enforce the rights of or on behalf of the association: they have no locus standi. Only the association can do so or a member through a derivative action.

[84] From all that has been stated and considered herein before, I have arrived at the conclusion that the applicants have failed to establish that they have the requisite *locus standi* to claim any relief against the developer. Equally the applicants have failed to establish that they have the requisite *locus standi* to bring these proceedings against the association pursuant to the provisions of s 260(1) of the Companies Act, 2004.

[85] In view of the conclusion, I have reached with regard to the applicants' lack of *locus standi* it became unnecessary to consider the remainder of the points *in limine*.

Costs

[86] Mr Corbett for respondents argued for a punitive order of costs on attorney-and-client-scale against the applicant. Counsel submits in his heads of argument that the applicants have failed to comply with both substantive as well as procedural law in bringing this application.

[87] I agree with counsel's submission in this respect. It is particularly concerning that the applicant having acknowledged upfront that the other home owners have a direct and substantial interest in the outcome of this application by citing the seventh to four hundred and thirtieth (430) members as respondents, however the applicants thereafter failed to cause those respondents to be served with the application and later simply withdrew the application against them.

[88] In the case management report dated 13 August 2019, the first applicant at that time indicated that he would file an interlocutory application seeking the court's direction in respect of service of the application on the rest of the respondents. No

application of that nature was ever filed. Thereafter the first applicant in the joint status report dated 24 October 2019, indicated that he would file proof of service on the remainder of the respondents on 29 November 2019. After a long period had passed only the returns of service in respect of the first to sixth respondents were filed on 3 February 2020. Simultaneously the applicant filed a 'notice of withdrawal of action' against the seventh to four hundred and thirtieth respondents because no services were effected on them.

[89] I should mention in this connection that Mr Hohne, who held a watching-brief in respect of some 150 respondents filed an affidavit in which he informed the court that that those respondents did not intend to oppose the application.

[90] It goes without saying that the matter was postponed on various occasions awaiting service of the application on the rest of the respondents. An impression was created to the court that service of the papers on the remainder of the respondents was being attended to. In this regard, I should point out that, except for the returns of service on the first to sixth respondents, not a single return of non-service was filed to indicate that at least attempts were made to serve the papers on some of the respondents but that such attempted had been unsuccessful.

[91] No doubt the respondents who are currently before court incurred costs for those appearances while waiting for the returns of service. It reasonable to say that they prepared their defence in expectation that the other seventh to four hundred and thirtieth respondents would eventually be served and joined as parties to the present proceedings.

[92] In response to the question by the court why the application against other respondents was withdrawn, Mr De Beer for the applicants responded that the applicants encountered challenges in causing the papers to be served on those respondents. He did not elaborate on what kind of challenges were encountered. He went on to say that in any event the association to which those respondents are members have been served.

[93] In my view, the response is unsatisfactory. The applicants knew from the beginning that those respondents have to be joined as persons with a direct and

substantial interest in the outcome of the application that is why they were cited as parties to the proceedings. The relief sought, if granted would have serious consequences for those home owners in their personal capacities, hence the need to have them joined.

[94] As regards the answer that the association to whom the respondents are members have been joined, it is trite law that the association is a separate person from its members. The members have separate rights from the association.

[95] In addition, the manner in which the applicants' case has been pleaded leaves much to be desired. The relief sought were confusingly couched to the extent that both the court and counsel for the respondents did not know whether interim or final orders were sought. Counsel for the applicants sought to amend from the bar the final relief sought to interim orders which was justifiably opposed by the counsel for the respondents and which the court declined to grant. Furthermore, the requirements for interim orders and final orders were confusingly pleaded.

[96] For those reasons, I am of the view that a punitive order of costs would be an appropriate sanction in the circumstances as a sign of the court's disapproval of applicants' unstructured approach to this matter.

[97] In the result, I make the following order:

1. The application is dismissed.

2. The applicants are to pay the costs of those respondents who opposed the application, on an attorney and client scale, such costs to include the costs of one instructed counsel and one instructing counsel.

3. The matter is finalized and is removed from the roll.

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H Angula

Deputy-Judge President

APPEARANCES:

APPLICANTS:	P J DE BEER Of De Beer Law Chambers, Windhoek
FIRST, SECOND, THIRD and FOURTH RESPONDENTS:	A W CORBETT SC Instructed by Francois Erasmus & Partners, Windhoek