

SUMMARY OF THE JUDGMENT

SCHEME'S TRUSTEES REPLACED: SUBSTANCE OVER FORM

Body Corporate of the Falcons v Rademan and Others (A637/2013, 16173/2012) [2015] ZAGPPHC 459 (14 July 2015)

This is another judgment illustrating the frequency of disputes regarding trustees' management of sectional title schemes. The issue here dealt with the removal of trustees by the body corporate members at a meeting convened for this purpose. The court dismissed arguments by the former trustees that their removals were invalid because the meeting agenda did not specifically notify them that this was on the cards. The substance of the agenda was adequate notification, and compliant with Management Rule 13, that such steps were anticipated.

The Judgment can be viewed [here](#).

FACTS

The Falcons sectional titles development scheme is an upmarket development in Gauteng.

In June 2011, one Van Straaten and four other owners were elected as trustees of the body corporate. When subsequently two of the elected Trustees resigned, they were replaced by the trustees at a trustee meeting held in August 2011 (together herein referred to as the 'former trustees').

There was tension between the former trustees and the majority of the other owners (i.e. members of the body corporate). As a result, in November 2011 some owners (as body corporate members) gave notice that they wanted a special general meeting (SGM) convened. The necessary quorum, prescribed by the rules, filed this request. A petition was also signed by aggrieved owners.

The former trustees responded by indicating that an SGM would be arranged for 30 March 2012, but the aggrieved members did not accept this and convened an SGM for 9 February 2012. A detailed agenda for the meeting was circulated, which included, amongst other things, that: (i) a majority of trustees were not owners; (ii) the trustees disregarded restrictions; (iii) a possible conflict of interest existed between the trustees and a certain managing agent; and (iv) the determination of the number of trustees and election of trustees.

At the SGM of 9 February 2012, many owners were present as well as some of the former trustees, then still in office as trustees, although they refused to answer questions from the floor.

During the course of the meeting, one owner proposed a motion that the agenda be extended to make provision for an item dealing with the removal of the former trustees (then current trustees) and the election of new trustees. The vote was carried with an overwhelming majority of those present. Five new trustees were then elected.

At the meeting, it was argued on behalf of the former trustees that they could not be relieved of their posts because they were not notified, in the formal notification, that an agenda point would be aimed at removing the trustees. A counter argument recorded in the minutes of the SGM was that the intention was clear that the meeting was convened for the purpose of electing new trustees, because of the item on the agenda "determination of the number of trustees and election of the trustees".

On 12 March 2012 the newly elected trustees notified all the owners, as members of the body corporate, that an AGM would take place on 27 March 2012. One of the items on the agenda was the determination of number of trustees and the election of trustees.

At the duly constituted AGM of 27 March 2012, and with the necessary quorum present, the newly elected trustees were again elected as trustees.

Just prior to this AGM, the former trustees launched an application in court to set aside the resolution taken to terminate the appointment of the former trustees as well as the appointment of new trustees. The application was dismissed and the present matter deals with the appeal.

The former trustees based their application on Management Rule 13(e) which provides that a trustee shall cease to hold office if, amongst other things, "by resolution at a general meeting of the body corporate, he is removed from his office, provided that the intention to vote upon the removal from office has been specified in the notice convening the meeting." They allege there was no such notice as the notice they received of the 9 February SGM, including the agenda, did not specifically provide for an item to remove them from office.

HELD:

Management Rule 13

- It was significant that the former trustees launched the application well after the 12

March notification of the 27 March AGM was circulated. At no stage did they challenge the validity of the 27 March AGM, attempt to stop the meeting through legal action or attack the validity of any of the decisions taken at the 27 March AGM, including the appointment of the new trustees.

- However, in as far as the SGM agenda contained items consisting of complaints (that the majority of the trustees were not owners of the units, that the trustees disregard restrictions set out in an annexure, that there was a possible conflict of interest between the trustees and a certain managing/estate agency and also provision for an election of trustees), there was substantial compliance with the requirements of Rule 13(e). In addition, the former trustees were also present at the meeting and also represented by their attorney, one of those attending the SGM.

There was therefore compliance with Rule 13.

Management Rule 11

- Management Rule 11 is generally interpreted to mean, regarding the validity of acts by trustees, that "the rules provide that any act performed by the trustees shall be valid, notwithstanding that it is subsequently discovered that there was some defect in the appointment or continuance in office of any trustee."
- As such, even if the appointment of the new trustees on 9 February was flawed, (on the argument that removal of trustees was not listed in the items of the meeting) the subsequent actions of the new trustees, for example to arrange the 27 March AGM with the subsequent further election of the respondents as trustees, was valid.
- The owners in this case were empowered to call the extraordinary special meeting, to pass a vote of no confidence and to remove the former trustees. They submitted the notice of the SGM to the body corporate and their actions were not unlawful.
- Rule 13(e) also supports this view in that it allows for a trustee to be removed from office before the expiry of his or her term of office by a resolution passed by a simple majority at a special meeting of the body corporate.
- At the 27 March AGM, the new trustees were re-elected as the new trustees for the second time, clearly showing the wishes of the majority of the owners. The former trustees were notified of the AGM of 27 March and that an election of new trustees will take place. They did not take any steps to prevent the AGM and clearly associated themselves with the validity and the result of the election at the AGM.

In all the circumstances, the appeal of the former trustees was dismissed. They were ordered, jointly and severally and in their personal capacities, to pay the costs.

CONTACT US

- CAPE TOWN
Tel: 021 406 9100
- SOMERSET MALL
Tel: 021 850 6400
- TYGER VALLEY
Tel: 021 943 3800
- CENTURION
Tel: 012 001 1546
- CLAREMONT
Tel: 021 673 4700
- STELLENBOSCH
Tel: 021 001 1170
- MENLYN
Tel: 012 348 1682
- BEDFORDVIEW
Tel: 011 453 0577
- FISH HOEK
Tel: 021 784 1580
- TABLE VIEW
Tel: 021 521 4000
- ILLOVO
Tel: 011 219 6200