IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case no: 7745/2024

In the matter between:

FAIRVIEW GOLF ESTATE HOME OWNERS' ASSOCIATION	Applicants
and	
WEI-YU FENG	Respondent
Identity number: 891106 5715 088	

JUDGMENT

BORGSTRÖM AJ:

1. The Fairview Golf Estate ("**the Estate**") is located in Gordon's Bay, comprising residential nodes clustered around a 9-hole golf course. The Applicant ("**the HOA**") is a body corporate,[1] with broad responsibilities for the care and control

[1] Before the Estate was established, the development area comprised two larger erven, known as erven 3844 and 3846, Gordon's Bay. At the time that the Estate was created, various town planning approvals were required – in accordance with the (then applicable) Land Use Planning Ordinance 15 of 1985 ("LUPO"). In particular, when the competent authority approved the subdivision of the development area into smaller land units (in terms of section 25(1) of LUPO), it imposed a condition (in terms of section 42 of LUPO) requiring the formation of a "*Home Owner's Association*" (as envisaged in section 29 of

of the Estate, and control over all development in the Estate.[2] In terms of article 15.1 of the HOA's duly approved Constitution ("**the HOA Constitution**"),[3] the "*business and affairs*" of the HOA are managed and controlled by its Board of Trustees ("**the BoT**").[4]

2. The Respondent ("**Mr Feng**") has over several years bought and developed properties in the Estate. As a property owner in the Estate, Mr Feng is (and has at all relevant times been) a member of the HOA – and is bound by the terms of the HOA Constitution.[5]

3. It appears that the relationship between Mr Feng and the BoT has been strained for some time. This has given rise to previous litigation, culminating in the current matter – in which the HOA seeks an order for the provisional sequestration of Mr Feng's estate., in accordance with sections 9(1) and 10 of the Insolvency Act 24 of 1936 ("**the Act**").

4. The relationship between the HOA and Mr Feng is marked by mutual antipathy, serious allegations of dishonesty, and recriminations. None of this is immediately relevant.

5. What is relevant is that at some time in or before 2021, Mr Feng obtained approvals to establish sectional title schemes on two of the erven in the Estate

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LUPO). In accordance with section 29(2)(a) of LUPO, this HOA had to be established as a "*body corporate*". This is reflected in Article 1 of the HOA Constitution.

[2] In terms of section 29(2)(b)(i) of LUPO, the "*object*" of the HOA Constitution had to relate to "*the control over and the maintenance of buildings, services and amenities*" in the Estate. Flowing from this requirement, Article 3 of the HOA Constitution describes the HOA's "*main business*" as the "*promotion, advancement and protection*" of the 9-hole golf course lying at the heart of the Estate, as well as the interests of property owners in the Estate. Clause 4 of the HOA Constitution expands on the HOA's "*main object*", which care and control of defined "*private areas*", and the golf course; as well as control over the "*design and maintenance of buildings and other improvements*" on all erven within the Estate.

[3] Mr Feng's answering papers attached the original iteration of the HOA's Constitution, which was approved by the competent authority in 2000 (as annexure "LF3"). The HOA's replying papers attach the latest iteration of the Constitution, which reflects that it was approved as a Special General Meeting of the HOA on 15 October 2013 (annexure "CJG12"). The amendments do not appear to be relevant to any issue in this matter.

[4] The provisions of the HOA Constitution refer to a "*Trustee Committee*", which is defined (in Article 1 of the HOA Constitution) as the "*Board of Trustees*" of the HOA.

[5] In terms of section 29(2)(b)(ii) and 29(2)(c) of LUPO, the HOA's constitution had to require that all owners of properties in the Estate were members of the HOA – and were "*jointly liable for expenditure incurred in connection with the* [HOA]". This is reflected in Article 6.1 of the HOA Constitution, which states that membership of the HOA is compulsory; and Article 6.6 which states that members may not resign from the HOA. Article 6.4 determines that when erven are sold, the HOA must consent and the Deed of Transfer must impose a condition requiring the buyer to become a member of the HOA.

that he then owned at the time. This frustrated the members of the BoT at the time, who took the view that Mr Feng did not have the right to effectively subdivide the two erven through the creation of sectional title schemes. The HOA thus refused to issue "*levy clearance certificates*" to Mr Feng, which he required in order to transfer the arising sectional units to new owners.

6. Mr Feng thus brought two interlinked applications before this Court, in which he sought to compel the HOA to issue the requisite certificates for the two affected erven ("**the previous applications**").[6] The HOA opposed both applications, which were set down before this Court for hearing on 14 March 2023.

7. However, at some point before the hearing, the substantive relief sought in both of the previous applications became moot. This came about as Mr Feng obtained documents that at least purported to be the requisite clearance certificates; and he was able to transfer the sectional units on the two affected erven to new owners.[7]

8. Only the issue of liability for the costs of both applications remained unresolved. In identical Orders of 14 March 2023, this Court (per Ms Justice Cloete – "**the Orders**"), which:

   8.1. Recorded that the main relief in both of the previous applications had become moot; and

   8.2. Each party would bear its own costs, save that Mr Feng would be liable for identified wasted costs incurred by the HOA (relating to postponements on 30 May 2022 and 27 October 2022; and costs incurred as a result of Mr Feng persisting with the previous applications after 27 October 2023).

9. The wasted costs were duly taxed. On 29 November 2023, this Court's Taxing Master issued an *allocatur* which determined that Mr Feng's liability to the HOA was in the amount of R172 349.36. On 30 November 2023 the HOA's attorneys

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[6] Under case numbers 21084/2021, and 21085/2021.

[7] The HOA suggests that the certificates were fraudulently obtained. Mr Feng disputes this, and states that the members of the BoT resigned *en masse* in this period; and as a result he and other property owners were col-opted as Trustees. At this time the BoT approved that the managing agent could issue the certificates, which was done.

send a demand for payment of this amount by no later than Monday, 4 December 2023.

10. Mr Feng has not at any stage disputed his liability to the HOA for the amount in the *allocatur*. However, he has not made payment as required. As a result, on 6 December 2023, the HOA obtained a warrant of execution against Mr Feng's movable property ("**the warrant**") situated at his property located at 15 St Andrews Drive, Gordon's Bay ("**Mr Feng's residence**"). This residence is also in the Estate.

11. After several attempts, the warrant was personally served on Mr Feng on 1 February 2024 at his residence, by a Deputy Sheriff of this Court for Strand – Mr K Daniels ("**the Deputy Sheriff**"). The return of service ("**the return**") indicates that the Deputy Sheriff explained "*the nature and exigency*" of the process to Mr Feng, and demanded payment. Mr Feng, however, informed the Deputy Sheriff that "*it was impossible to pay the amount claimed or any sum*". The return continues that the Deputy Sheriff thereafter identified and attached items of household furniture, electronic equipment, and appliances – with an estimated value of just R7 500 ("**the attached property**"). The Deputy Sheriff indicated in the return that these items "*were pointed out to me / found by me*".

12. As it happens, the HOA was not even able to obtain the value of the attached property. Mr Feng's mother, Ms Li Chung Feng, submitted a claim that the attached property actually belonged to her.

13. In a letter of 13 February 2024 the HOA's attorneys advised Mr Feng's attorneys that his actions, as represented in the return, amounted to an "*act of insolvency*" as provided for in section 8(b) of the Act – and that the HOA would launch an application for the sequestration of Mr Feng's estate. A duly appointed trustee could then deal with Mr Feng's moveable and immovable property (and could also deal with Ms Feng's claim to the attached property).

14. Mr Feng and his attorneys did not respond.

15. In the current application the HOA asserts that in these circumstances it has fulfilled the requirements in section 10 of the Act, and is entitled to obtain relief for the provisional sequestration of Mr Feng's estate, in that:

15.1. The HOA has a liquidated claim against Mr Feng, which is due and payable – as required in terms of sections 9(1) and 10(a) of the Act.

15.2. Mr Feng's actions, reflected in the return, amount to an "*act of insolvency*" as referred to in section 8(b) and 10(b) of the Act. (I note that in its founding papers, the HOA submitted that – in the alternative – Mr Feng was factually insolvent. The HOA does not, however, persist with this contention).

15.3. There is a clear advantage to creditors, as required in terms of section 10(c) of the Act. This is so in that Mr Feng is the registered owner of three immoveable properties, all of which are unbonded. These include: (a) Mr Feng's residence in the Estate (erf 6221, Gordon's Bay), which he purchased on 14 November 2015 for R260 000; (b) Erf 911, Gordon's Bay (situated at 28 Dennehof Street, Dobson, Gordon's Bay) which he purchased on 31 January 2020 for R535 000; and (c) Erf 5356, Gordon's Bay which he purchased on 13 November 2023 for R780 000. Considering the purchase prices, the HOA submits that the properties would have a likely of more than R1.5 million. Against this, the likely costs of sequestration would be R266 577.13 – leaving at least R1 234 422.876 for distribution to the HOA as a concurrent creditor, which would settle its claim in full. Mr Feng admits that he owns all of these properties, and that they are unencumbered. He states that his residence is in fact worth R2 285 000; erf 911 is valued at R850 000; and erf 5356 is valued at R780 000.

16. In argument, Mr *Heunis*, who appeared on behalf of the HOA, urged me to go further and to exercise the Court's powers to grant a "*just*" order – in accordance with section 9(5) of the Act – and to grant a final order of sequestration.

17. Based on my understanding of Mr Feng's answering papers (deposed to on 23 May 2023), it appears that he opposes the application on four bases:

17.1. **First**, he contends that the HOA is not properly before this Court. In this regard, Mr Feng notes that the HOA's founding affidavit was deposed to by Mr Christopher John Grimsom ("**Mr Grimson**"), in his stated capacity as the chairperson of the HOA's BoT; and relies on a resolution of BoT of 8 May 2023. Mr Feng, however, disputes that Mr Grimson was properly appointed to the BoT. He also disputes that the BoT's resolution of 8 May 2023 indicates that it resolved to bring the current application, or authorised Mr Grimson to depose to affidavits on behalf of the HOA.

17.2. **Second**, he presents a sprawling argument in which he contends that the founding papers in the current application were not properly served on him. and the position of chairperson.

17.3. **Third**, he disputes the HOA's central contention that he committed an act of insolvency as defined in section 8(b) of the Act. In this regard, Mr Feng disputes the factual correctness of the contents of the return of service.

17.4. **Fourth**, he disputes that the HOA establishes any factual insolvency, a debt that is is due and payable, or advantage to creditors.

MR FENG'S INTERLOCUTORY APPLICATION

18. Shortly before filing answering papers in the main application, Mr Feng caused his attorneys to issue a notice in terms of Rule 7(1) ("**the Rule 7(1) notice**"), in which he required the HOA to provide:

18.1. Any resolutions of the BoT authorising the institution of proceedings, and authorising Mr Grimson to depose to affidavits on behalf of the HOA.

18.2. A notice of the HOA's last Annual General Meeting ("**AGM**"), and the minutes of the AGM (at which the current members of the BoT were "*purportedly elected*").

18.3. The minutes of every meeting of the BoT during the preceding 24 months.

18.4. A copy of the BoT's minute book for the preceding 24 months, showing where the current members of the BoT were elected and/or provided authority to bring the current application.

19. In response, the HOA issued a notice in terms of Rule 30 of the Uniform Rules, positing that the Rule 7(1) notice constituted an irregular step in that, *inter alia*:

19.1. Rule 7(1) related to a contestation of the authority of an attorney representing one of the parties, and not to the authority of a deponent; and

19.2. Rule 7(1) did not allow a party to call for specific documents.

20. In the event, on 11 June 2024 Mr Feng brought an interlocutory application, which was set down for hearing at the same date as the main matter. The interlocutory application was purportedly made in terms of Rule 7(1) of this Court's Uniform Rules, and sought orders:

20.1. Directing the HOA to deliver the documents referred to in the Rule 7(1) notice within 10 days; and

20.2. Postponing the main application *sine die*, only to be set down again after the documents had been provided.

21. On 1 July 2024 the HOA simultaneously filed its replying papers in the main application; and its answering papers in the interlocutory application. In both cases, Mr Grimson dealt with the attack on his authority and his status as the HOA's chairperson.

22. But Mr Feng remained unmoved, and persisted with his demand for the relief in his interlocutory application. At the hearing, the parties agreed that I should first hear arguments regarding the interlocutory application before continuing to the main application. After hearing these arguments, I dismissed the interlocutory application, with costs. As a result, the parties proceeded to arguments regarding the main application.

23. I indicated that the reasons for dismissing the interlocutory application would be provided together with the judgment in the main application, which I do when dealing with the issue of authority.

MR GRIMSON'S POSITION AND AUTHORISATION

24. As noted above, in the founding affidavit presented on behalf of the HOA, Mr Grimson indicated that: he was the chairperson of the BoT, and that he was "*duly authorised to depose to this affidavit on behalf of the HOA as is confirmed by a copy of a resolution marked 'CJG1' dated 8 May 2023 confirming this fact.*"

25. However, Mr Grimson's statements and the resolution of 8 May 2023, did not satisfy Mr Feng; and he notes that he found it "*telling*" that the resolution did not "*confer upon Grimson authority to bring this application*".

26. Mr Feng's approach is somewhat pedantic. It ought to have been obvious that the resolution of 8 May 2023 could only have related to the fact of Mr Grimson's appointment as chairperson of the BoT; and could not relate to any authorisation relating to the current proceedings. After all, the entire basis for the HOA's application is premised on a debt arising from the *allocatur* issued by this Court's Taxing Master on 29 November 2023.

27. The attached resolution is also quite clear in that it records a "*resolution to select Christopher Grimson as Chairperson of the* [BoT] *with immediate effect*". It appears from the face of the resolution that it was approved by three members of the BoT (all of whom counter-sign the resolution); with one member opposing and another two abstaining.

28. In any event, based on his own suspicions, Mr Feng caused his attorneys to issue the Rule 7(1) notice referred to above. As also noted above, the HOA posited that this was an irregular step.

29. In his replying affidavit in the main application (and answering affidavit in the interlocutory application), Mr Grimson refers to and attaches a resolution of the BoT, dated 28 February 2024, in which it "*resolved, ratified and confirmed that*":

29.1. The HOA's attorneys of record were authorised to proceed with an application for the sequestration of Mr Feng's estate; and

29.2. Mr Grimson, in his capacity as the chairperson of the HOA, was "*authorised to sign all relevant documentation and affidavits which may be necessary for the abovementioned application*".

30. The resolution records the names of four members of the HOA, and is counter-signed by each of them (including Mr Grimson).

31. In his replying affidavit, Mr Grimson also confirms that he is authorised to bring the current proceedings on behalf of the HOA. He further named the eight current members of BoT.

32. One would have expected that this resolution, read together with the resolution of 8 May 2023 (appointing Mr Grimson as chairperson of the HOA), should have put an end to Mr Feng's challenges to Mr Grimson's authorisation. But this was not to be. Instead, Mr Feng doubled-down by bringing the interlocutory application, which is quite evidently a tool to extract documentation from the HOA, on the apparently speculative basis that it would or could form the basis for a renewed and strengthened challenge to Mr Grimson's authorisation.

33. Arising from this, it appears to me that two issues arise, being: (a) Whether Rule 7(1) can be employed as a means to extract documentation from the HOA; and (b) whether Mr Feng has established any basis on which this Court might be inclined to 'look behind' the validity of the BoT's resolution of 8 May 2023 (to appoint Mr Grimson as chairperson), or the BoT's resolution of 28 February 2024 (authorising the current application and empowering Mr Grimson to sign all relevant documents and affidavits).

34. I deal with each of these issues below. But, in my view, both of the above issues must fail for the same reason: Mr Feng has failed to raise a direct challenge to any resolutions of the AGM or a meeting or the BoT.

35. In the context of any exercise of public powers the principle is now well-established that decisions stand as valid; and must be acknowledged as fact until

they are set aside. Even in the case of decisions that may appear to have been taken in a manner that is ultra vires cannot simply be disregarded as a nullity.[8]

36. In my view the same principle must apply, for the same reasons, in respect of decisions taken by a juristic body like the HOA – which was established as a condition for the approval of land use planning when the Estate was established; pursuant to statutory requirements.[9]

37. In the current context, this is underscored by the HOA Constitution:

37.1. Clause 16.9 states that "*all competent resolutions recorded in the minutes of any Trustee Committee shall be valid and of full force and effect as therein recorded, with effect from the passing of such Resolutions, and until varied or rescinded , but no Resolution or purported Resolution of the Trustee Committee shall be of any force and effect, or shall be binding on members or on any of the Trustees unless such Resolution is competent within the powers of the Trustee Committee*".

37.2. Clause 16.11 states that "*a Resolution signed by the Trustees shall be valid in all respects as if it had been duly passed as a meeting of the Trustee Committee duly convened.*"

37.3. Clause 16.12 states that "*all acts done by a meeting of the Trustees or a Committee of the Trustees shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such Trustee or person acting as aforesaid or that they or any of them are disqualified, be valid as if every such person had been duly appointed and were qualified to be a Trustee.*"

38. Furthermore, when I asked, I was informed by Mr *Heunis* (for the HOA) that the HOA is a "*community scheme*" registered under the Community Schemes

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[8] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA); MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd 2014 (3) SA 481 (CC) (25 March 2014) at para 100-102; Merafong City Local Municipality v AngloGold Ashanti Limited 2017 (2) SA 211 (CC) at para 34-40; Department of Transport and Others v Tasima (Pty) Limited 2017 (2) SA 622 (CC)

[9] See footnotes 1 and 2 above. The continued operation of the HOA remains compulsory for the Estate, even though LIPO has been repealed. See section 78(1) of the Western Cape Land Use Planning Act3 of 2014.

Ombud Services Act ("**the CSOS Act**"). As such, in terms of section 39(4)(b) and (c) of the CSOS Act, the Community Schemes Ombud Service ("**CSOS**") has jurisdiction to consider matters in which a challenge is made as to whether a meeting of the HOA or the BoT is validly convened; and a challenge that any resolution taken at the AGM or a meeting of the BoT is either invalid or void.

39. Furthermore, in terms of section 41(1) of the CSOS Act, Mr Feng had 60 days after any resolution was taken at a meeting of the HOA or the BoT to challenge that resolution.

40. Mr Feng thus cannot ask this Court to ignore any decisions or resolutions of HOA and its BoT – including the resolutions of 8 May 2023 and 28 February 2024.

(a) The Rule 7(1) notice

41. In my view Rule 7(1) can be appropriately employed to challenge the authority of a deponent claiming to represent a party; and is not merely limited to the authority of the attorneys representing any party.[10]

42. But this does not assist Mr Feng. The only challenges he can raise are to the authority of Mr Grimson, based on allegations that he is not a member of the BoT appointed at the 2022 AGM, and as such cannot claim be chairperson of the BoT; and allegations that the BoT did not authorise the current proceedings, or authorise Mr Grimson to depose to affidavits on behalf of the HOA.

43. These contentions have been fully met by the production of the BoT's resolutions of 8 May 2023 and 28 February 2024. The fact that the BoT's resolution of 28 February 2024 was not attached to the founding papers is not of any particular importance. When Mr Feng (in answer) questions whether the BoT authorised the current proceedings, and whether Mr Grimson is authorised to represent the HOA, the resolution of 28 February 2024 was produced in reply. This is not new material improperly raised in reply, but a valid response to a contention raised in Mr Feng's answering papers.[11]

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[10] *ANC Umvoti Council Caucus and others v Umvoti Municipality* 2010 (3) SA 31 (KZP) at para 22-29.
[11] *Moosa & Cassim NNO v Community Development Board* 1990 (3) SA 175 (A) 180 H-J.

44. For the rest, Mr Feng's Rule 7(1) notice and his interlocutory application have a very different goal: Namely to compel the production of documentary evidence in the hope that these documents will provide a stronger challenge to Mr Grimson's authority and the validity of the resolutions of 8 May 2023 and 28 February 2024. This is not the purpose of Rule 7(1).

45. In my view, Mr Feng had other tools at his disposal which he ought to have used if he wished to challenge the BoT's ability to bring proceedings against him.

45.1. In the **first** place, he could have demanded information from the BoT in terms of his rights under the HOA Constitution; and if refused, he could have brought an application for a mandatory interdict to compel compliance with the terms of the HOA Constitution. But he did not do so, and in any event, the HOA has invited him to access minutes of the meetings of the BoT.

45.2. In the **second** place, he could have exercised his rights under the Promotion of Access to Information Act 2 of 2000. Again, he failed to do so.

45.3. In the **third** place, he could have sought an application under Rule 34(13) of the Uniform Rules, for this Court to direct that the rules of discovery should apply to the current matter. Again, he did not do so.

46. But even so, Mr Feng's problem is not constrained to his procedural mistake in relying on the wrong Rule. As dealt with above, even if he could lay his hands on all of the documents he seeks, this would only assist him if he could then use the information to raise a direct challenge to the BoT's resolutions of 8 March 2023 and/or 28 February 2024 before CSOS, or alternatively, before this Court. I see no reasonable prospect that any such challenge would have any reasonable chance of succeeding.

(b) Mr Grimson's appointment as chairperson

47. Mr Feng points out the following:

47.1. At a contentious AGM held on 13 June 2022, seven property owners were appointed to the BoT. Thereafter, five members of the BoT resigned,

leaving only two BoT members (Mr Robert Young and Mr Paul Govender). Th HOA adds that the five BoT members who resigned did so on the basis that the AGM process was flawed

47.2. In order to ensure the continued operation of the BoT, the managing agent of the Estate arranged for three property owners to be co-opted as members of the BoT, including Mr Feng. These members of the BoT were to remain until a Special General Meeting ("**SGM**") to be held on 20 September 2022. The HOA contends that such co-option was not possible, as the two remaining BoT members could by themselves make a resolution to co-opt new members to join the BoT. It is not clear to me why any of this historical material is relevant.

47.3. Mr Feng notes that "*on or about 20 September 2022 an SGM was supposedly convened in which new Trustees were supposedly appointed.*" Clearly Mr Feng elected not to attend, or to stand for further appointment as a member of the BoT. He refers to a newsletter received at some point after the SGM, but this does not disclose who was appointed to the BoT.

47.4. No further AGM has been held since June 2022, despite the requirement that an AGM be held every year. On this basis Mr Feng suggests that the members of the BoT elected in June 2022 cannot lawfully continue to act. In that capacity, and Mr Grimson cannot present himself as the chairperson of the BoT.

48. Mr Feng's concerns are met by the HOA, which notes the names of seven people who were appointed as BoT members at the SGM (being Lyn Govender; Hendrik Buys; Dudley Paulton; Nabeel Bassadien; Naweed Johnson; Maryna Van Rensburg (who resigned and was replaced by Pieter Theron); and Brian Davids.

49. In addition other property owners in the Estate now serve as members of the BoT – being Mr Grimson (who serves as chairperson, which is confirmed by the resolution of 8 May 2023); Mr Louis Kruger; and Mr Attie Sadie.

50. The appointment of new members to the BoT outside of an AGM is not contentious. Clause 15.3 of the HOA Constitution allows the BoT to co-opt onto

the BoT any member of HOA, or the spouse of a member of the HOA. Such co-opted members enjoy all the rights, and are subject to all of the obligations of a Trustee. This is necessary to ensure that the BoT at all times consists of at least 5 members (as required by clause 12.3 of the HOA Constitution).

51. In my view Mr Feng is correct to flag as a concern that the HOA has not held an AGM since 2022, contrary to the requirements of the HOA Constitution – which envisages that an AGM is held every year. This is clearly undesirable. But he is clearly mistaken when he suggests that, as a result, the people appointed at that 2022 AGM automatically lost their membership of the BoT after a year; or that they could not make decisions to co-opt new members onto the BoT.

52. On the contrary, clause 12.4 of the HOA Constitution affirms that members of the BoT elected at the AGM "*shall remain in office until the following* [AGM]"; and clause 12.5 of the HOA provides the same for co-opted members of the BoT.

53. In these circumstances, there is no obvious basis for Mr Feng to contend that the HOA currently does not have a BoT; or that the existing members of the BoT have lost their powers in any manner to make decisions (in accordance with the HOA Constitution). Mr Feng's remedy is to compel the BoT to call an AGM.

54. Furthermore, there is no obvious basis to doubt the resolutions of 8 May 2023 (appointing Mr Grimson as chairperson); or 28 February 2024 (authorising these proceedings, and Mr Grimson's power to sign any process). The quorum for meetings of the BoT is three persons (clause 16.3 of the HOA Constitution); and decisions are made with the approval of 50% of the members present.

55. Also, clause 31.8 of the HOA empowers the BoT to institute legal proceedings in any Court having jurisdiction.

SERVICE OF THE FOUNDING PAPERS ON MR FENG

56. A return of service included in the Court file indicates that on 18 April 2024 at 9h30, the same Deputy Sheriff (as referred to in paragraph 11 above) personally served the "*the Notice of Motion in this matter*" on Mr Feng at his residence (being the same residence as referred to in paragraph 10 above). The return also

indicates that the Deputy Sheriff handed a copy of the papers to Mr Feng "*after explaining the nature and exigency of the said process*" and records an appearance date of 30 April 2024.

57. On 30 April 2024 this Court (per Ms Justice Ndita) granted an Order, by agreement between the HOA and Mr Feng:

57.1. Postponing the hearing to the semi-urgent roll the Fourth Division of this Court, to be heard on 5 August 2024;

57.2. Setting out a timetable for the filing of answering and replying papers, and directing that heads of argument would be filed in terms of this Court's practice directives; and

57.3. Directing that costs would stand over for later determination.

58. But in his answering papers in the main application Mr Feng argues that the return of 18 April 2024 is untrue. He states that he did not see the Deputy Sheriff on this day, and he found the founding papers in his post box (on 18 April 2024). Mr Feng immediately took the papers to his attorney of record.

59. Mr Feng's attorney then took this up with the Sheriff of this Court for Strand, Mr Deon Burger ("**the Sheriff**"). In response, the Deputy Sheriff provided an affidavit (deposed to on 10 May 2024), in which he stated that he introduced himself to Mr Feng and explained the content of the documents. Mr Feng refused to accept the documents, and indicated that he would take this up with his attorney. When Mr Feng failed to reappear, the Deputy Sherrif placed the documents in Mr Feng's post box.

60. Mr Feng's attorneys reverted on 15 May 2024, indicating that he was not taking issue with the contents of the Deputy Sheriff's affidavit (which he was taking up with Mr Feng), "*but rather how the process was brought to* [Mr Feng'] *attention that remains unanswered.*" It was also pointed out that this did not explain why the version placed in Mr Feng's post box did not contain a manuscript addition in the Notice of Motion, which indicated that the matter would serve before this Court on 30 April 2024. Mr Feng's attorney concluded by asserting that "*it is*

indisputable that the return and events do not align". In this Court Mr Feng states in stronger terms that the Deputy Sheriff's affidavit "*differed materially*" from the content of the return of 18 April 2024.

61. In a further response of 15 May 2024, the Sheriff explained that Mr Feng had refused to open the gate to his property (although he had obtained confirmation from a person who had opened a "*buite hek*", or outer gate, for the Deputy Sheriff). Mr Feng stated that he had his attorney on his telephone, and reported that his attorney had advised him not to accept service. (The Sherrif quite understandably indicates that he trusts that Mr Feng's attorney would not have given such advice).

62. The Sheriff continued that the Deputy Sheriff had spoken to Mr Feng personally, and that the Deputy Sheriff's affidavit indicated that Mr Feng walked away and did not reappear. On the basis that the Deputy Sheriff had spoken to Mr Feng, this was taken as personal service, and the documents were placed in the post box. The Sheriff confirmed that he was satisfied that this constituted personal service – while at the same time acknowledging that the Deputy Sheriff's description in his return could have been more fully expressed. He had taken this up with the Deputy Sheriff.

63. In a final riposte of 15 May 2024, Mr Feng's attorney insisted that his client stuck to his version, and that the return and the deputy Sheriff's affidavit presented contradictory versions. This would be raised before this Court and the Deputy Sheriff could be called to explain himself. It was also contended that the Deputy Sheriff's versions were improbable if regard was had to the layout of the property; the fact that Mr Feng was supposedly travelling to an (unnamed) correspondent attorney at the time (9h30); and that Mr Feng called his attorney at 11h00 when he found the documents in his post box.

64. Ultimately Mr Feng contends that flowing from the above this Court should make a finding that there has been no compliance with Rule 4 of the Uniform Rules, which is "*pre-emptive*", and that the application should be dismissed on this basis alone.

65. I am not inclined to make any finding that the Deputy Sheriff was deliberately untruthful in completing the return of service of 18 April 2024, or in his affidavit of 10 May 2024.

66. In the **first** place, in my view the differences between the Deputy Sheriff's return of service of 18 April 2024, and his affidavit of 10 May 2024, do not indicate any obvious fabrication. I agree with the views expressed by the Sheriff that the return of service could have relayed events more fully, but I do not see the startling contradiction presented by Mr Feng and his attorney. The Deputy Sheriff consistently states that he explained the documents to Mr Feng. Furthermore, it would cause obvious frustration to the work of the office of the Sheriff if personal service could be avoided by a person simply refusing to take the documents into their hands. In my view, the Deputy Sheriff was entitled to view his attempts to hand the documents to Mr Feng as personal service.

67. In the **second** place, Mr Feng must ask this Court to reject both the return and the Deputy Sheriff's affidavit; and to accept his unadorned assertion that he did not see the Deputy Sheriff on 18 April 2024. I am not inclined to do so on behalf of a party in application proceedings, regarding contested factual events presented by a party who is not even a party before the Court.

68. Plainly the HOA cannot assist in presenting additional facts in this regard. If Mr Feng wished this Court to make such a factual finding, he should have called for oral evidence on this issue. This was not done.

69. In the **third** place, I have grave concerns about Mr Feng's scant dealings with his activities on the day in support of his contention that he did not see the Deputy Sheriff on 18 April 2024. In his attorney's letter of 15 May 2024, it is suggested that at 9h30 on 18 April 2024 (i.e. the time that the Deputy Sheriff was present) Mr Feng was away from home, travelling to a correspondent attorney. This is not repeated by Mr Feng under oath. All that he states is that he saw the documents sticking out of his post office when leaving his property at 11h00.

70. In the **fourth** place, even if Mr Feng's version was to be accepted, his argument places form over substance. Mr Feng clearly found the documents on 18 April 2024; understood the contents; and was represented in Court on 30 April 2024

when an Order was made for the further handling of the matter. No issue was raised at that stage. He also had a full opportunity to file answering papers (and an interlocutory application), and does not allege that any shortcomings in the mode of service caused him any prejudice (material or otherwise).

71. In these circumstances it would be unjustifiable to allow Mr Feng to belatedly raise technical shortcomings in service by the Sheriff as a defence to the HOA's application. To the extent that there were any shortcomings in the mode of service and compliance with Rule 4, these are condoned.

ACT OF INSOLVENCY

72. The HOA's application relies on section 8(a) of the Insolvency Act to establish an act of insolvency. This provides as follows:

> " *A debtor commits an act of insolvency* -
>
> ...
>
> *(b) if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment*".

73. The HOA points out that this provision finds easy application. The Order of this Court of 30 April 2023 found that Mr Feng was liable to the HOA for identified wasted costs. These wasted costs have been taxed. Mr Feng has not sought to review the Taxing Master's *allocatur*. Mr Feng failed to make payment, and a warrant of execution was duly issued for the amount in the *allocatur*. The Deputy Sheriff's return indicates that Mr Feng informed the Deputy Sheriff that "*it was impossible to pay the amount claimed or any sum*"; and based on items pointed out and found, the Sheriff was only able to attach immovable property to the value of R7 500. But these attached goods are disputed by Ms Feng.

74. When section 8(b) of the Act is triggered in this manner, the HOA was entitled to bring an application for the sequestration of Mr Feng's estate, without any proof that he is factually insolvent.[12]

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[12] *De Villiers NO v Maureen Properties 1993 (4) SA 670 (T) at 676; and DP Du Plessis Prokureurs v Van Aarde* 1999 (4) SA 1333 (T) at 1335.

75. Against this Mr Feng raises a factual dispute. Once again he contends that the return issued by the Deputy Sheriff is factually wrong. Mr Feng admits that the Deputy Sheriff "*attended upon my residence on the day of 1 February 2024*". He also accepts that the Deputy Sheriff undertook an inspection to establish an inventory of available movable property in Mr Feng's residence; and that the only property identified by the Deputy Sheriff in fact belongs to his mother.

76. Mr Feng also does not dispute that the only property that the Sheriff could identify for attachment at his residence had a value of just R7500; and that there was no other property at the residence that could be attached to settle any part of the debt owed to the HOA.

77. But for the rest Mr Feng contends as follows:

77.1. He invited the Deputy Sheriff in, who sat down and advised Mr Feng that he had to take an inventory of the goods in his house. Mr Feng particularly recalls that the Deputy Sheriff told him that he "*had a nice house*".

77.2. The Deputy Sheriff did not demand payment, and did not ask Mr Feng to identify disposable property belonging to him. Mr Feng contends that the Sheriff took it upon himself to make an inventory of goods, and "*if I said more than 'please and thank you' to the [Deputy Sheriff] that was the extent of our conversation*".

77.3. If the Deputy Sheriff had demanded payment and asked Mr Feng to property, he would have pointed to: (a) his ownership of his residence – which Mr Feng states is unencumbered and has a value of over R2 million; and (b) the other two immovable properties that he owns.

77.4. The return does not state anywhere that the Deputy Sheriff asked Mr Feng "*to point out disposable property which includes immovable property*".

78. Against the backdrop of these factual assertions, Mr *Aarninkhof*, who appeared for Mr Feng, correctly notes that section 8(a) envisages two "*separate acts of insolvency*".[13]

78.1. The **first** is where the debtor is served with a writ by the Sheriff, and fails to satisfy the judgment or to "*indicate disposable property sufficient for that purpose*". Based on his factual contentions, Mr Feng alleges that this did not occur, and that if asked he would have pointed to his immovable properties.

78.2. The **second** is where the debtor is served with a writ by the Sheriff, and the Sheriff is unable to himself find "*sufficient disposable property*" – whether moveable or immovable. Mr Feng contends that this also did not happen as the Sheriff would have to then undertake a diligent search. If this was done, the Sheriff would have identified Mr Feng's immovable properties as being available.

79. Based on the judgment of the full court in *ABSA Bank v Collier*,[14] the HOA clearly cannot rely on the second basis above. Although acting in terms of a writ of execution against movables, the Deputy Sheriff's return cannot be regarded as the basis for a finding that there is an act of insolvency in terms of section 8(b), if the Deputy Sheriff's own efforts to find "*disposable property*" did not consider whether Mr Feng had available immovable property that could be disposed of. This is true *a fortiori* in cases in which Mr Feng's properties are unencumbered; and it would not pose an impossible obstacle to the HOA to obtain a warrant against at least two of Mr Feng's properties (in that they are not used as his primary residence).

80. But it is different in the first category of cases. If the debtor fails (when asked by the Deputy Sheriff) to point out any movable or immovable property, an act of insolvency arises. This is confirmed in *ABSA Bank Limited v Appelcryn*,[15] in which the the Court noted that the debtor had "*informed the Sherriff that he did not have sufficient movable assets with which to satisfy the judgment debt*", and

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[13] *Rodrew (Pty) Ltd v Rossouw* 1973 (3) 137 (O) at 138B-C
[14] *Absa Bank Limited v Collier* 2015 (4) SA 364 (WCC)
[15] *ABSA Bank Limited v Appelcryn* (2019/38568) [2022] ZAGPJHC 429 (28 June 2022) at para 32

failed to point out his immovable properties. The Court distinguished these facts from those in *ABSA Bank v Collier*. The Court held as follows:

> "*In Collier, the debtor had informed the Sherriff of his immovable property and that its value would extinguish the indebtedness owed to the creditor. There was no suggestion in that case that the property, if sold, would not extinguish the indebtedness owed. In the present case, the respondent failed to inform the Sherriff of the existence and value of his immovable properties or to point out disposable property of sufficient value that could be used to expunge the debt owed by him ...*".

81. In *ABSA Bank v Collier*, the Sheriff's return contained wording very similar to that in the current case - i.e. that it was "*impossible to pay the amount claimed or any sum*". But the debtor alleged, as a fact, that he had informed the Sheriff that he owned immovable property that could be disposed of; and the Sheriff acknowledged that he constrained his own investigation to available movable property.

82. In this Mr Feng does <u>not</u> contend that he informed the Sheriff of the immovable properties in his portfolio. He also does not contend that the Deputy Speaker only spoke to him regarding movable property. Rather, he contends that this Court should make a factual finding that the Deputy Sheriff did not speak to him at all – i.e. the Deputy Sheriff failed to inform Mr Feng of the debt; the Deputy Sheriff failed to determine from Mr Feng whether he had any disposable assets and could settle the debt; the Deputy Sheriff failed to ask Mr Feng to point out any assets; and that Deputy Sheriff simply proceeded to walk around Mr Feng's residence, drawing up an inventory of movable property.

83. I accept that, <u>if</u> Mr Feng's factual allegations are accepted, then the HOA cannot sustain any case that it has proven the existence of an act of insolvency in accordance with the requirements of section 8(a) of the Act (based on the second scenario referred to in paragraph 78.2 above).

84. But, with respect, I find Mr Feng's factual allegations impossible to accept.

85. In analysing the factual dispute raised by Mr Feng, the starting point must be to note section 43(2) of the Superior Courts Act 10 of 2013 – in terms of which the Deputy Sheriff's return is *prima facie* proof of its contents.

86. Mr Feng thus bears an evidential burden to raise a dispute, based on "*the clearest and most satisfactory evidence*"[16]. Mr Feng thus cannot impeach the facts reflected in the Deputy Sheriff's return "*on flimsy grounds or when there exists no reasonable basis on which to do so*".

87. I find that Mr Feng's factual contentions are flimsy. In fact, even if Mr Feng did not bear any evidentiary burden, his factual allegations are – in the language adopted in *Plascon-Evans* – untenable. In *Wightman*[17] the SCA set out the test as follows:

> "*A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the Plascon-Evans] test is satisfied.*"[

88. In this case Mr Feng's factual allegations are contradictory. He starts by portraying an amiable interaction with the Deputy Sheriff on 18 May 2024, with the Deputy Sheriff sitting next to Mr Feng and commenting on the attractiveness of Mr Feng's house. But the, moments later, Mr Feng contends there was almost no communication between him and the Deputy Speaker.

89. Furthermore, Mr Feng is clearly a savvy businessman, who is no push-over. I do not rely on the Sheriff's statements that Mr Feng is strident and known for his feisty actions. Buit it is clear to me that it is almost impossible to lend credence to the idea that Mr Feng would simply sit back, and without more In the circumstance I allow the Deputy Sheriff to wander around his residence without explanation.

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[16] *Absa Bank v Collier* at para 37, and cases cited therein.
[17] *Wightman t/a J W Construction v Headfour (Pty) Ltd* [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) at para 13

90. Finally, it is hard to believe that any Deputy Sheriff would simply wander around a house, without any interaction, drawing up an inventory of goods.

91. In the circumstances, I reject that Mr Feng's factual allegations, and the dispute of fact that he attempts to raise, cannot be accepted. This leaves the content of the Deputy Sheriff's return – which I believe is consistent with an act of insolvency in terns of section 8(b) of the Act.

THE DEBT AND ADVANTAGE TO CREDITORS

92. Mr Feng does not dispute the *allocatur* in the amount of R172 349.36. However, he denies that he is indebted to the HOA.

93. In this regard Mr Feng points to correspondence sent by his attorney in September 2021 to the HOA's then managing agent, JPS Trust ("**JPS**"). In this correspondence, Mr Feng's attorneys asks JPS to provide authority for the basis on which it was withholding Mr Feng's "*building deposits*". This was followed by correspondence in October 2021 in which Mr Feng's attorney sought details of the members of the BoT, which he required in order to launch court proceedings.

94. Mr Feng informs this Court only that he "*always intended to offet any alleged indebtedness which I may owe to the* [HOA] *by the building deposits and interest accrued.*"

95. Mr Feng is clearly wrong when he suggests that his indebtedness to the HOA under the *allocatur* is "*alleged*". This is established by his acceptance that the *allocatur* was issued by this Court's Taxing Master.

96. Moreover, any suggestion that set-off could apply in these circumstances is, with respect, risible. Mr Feng fails to explain anything about the building deposits to which he refers; the amounts involved; or why his claim against the HOA for repayment should be treated as liquidated damages which are due and payable. In fact, Mr Feng's own attorney's letter indicates that the HOA disputed liability to repay the amounts, and accordingly legal proceedings against the HOA were threatened. I am not told whether these threatened proceedings were in fact instituted, or whether such proceedings have been further prosecuted.

97. In addition, in the event that such legal proceedings were not instituted, it is likely that Mr Feng's claim against the HOA would now have prescribed. (This follows in that his attorney's correspondence indicates that Mr Feng was aware of a potential claim in September 2021).

98. Mr Feng also attempts to argue that he cannot be expected to pay any amount to the HOA in circumstances in which the "*existence or otherwise of the* [HOA] *remains in doubt, auditors have raised qualified reports, [and] there exists shorfalls in the accounts where there should be no shorfall*". On this basis he proposes that he "*would be willing to pay this amount into Court, further alternatively pay same into my attorney's trust account until such time as the* [HOA] *is able to present updated and clean financial statements, proof that it is properly constituted, and that the funds are not going to be further misappropriated like the building deposits which I would seek set-off of, alternatively a declaratory order that it is properly constituted.*"

99. This is an empty tender. Mr Feng does not indicate that he has in fact paid any amount into his attorney's trust account.

100. Furthermore, there is no reason why the HOA should be burdened with the duty to meet all of Mr Feng's conditions. Mr Feng's liability to the HOA for the amount in the *allocatur* is uncontested, and payment is due and payable. I do not see any basis on which he can now demand that this Court should give its imprimatur to his unilaterally imposed conditions before he makes payment.

101. Furthermore:

    101.1. Mr Feng's concerns regarding the HOA's audit reports appears to relate link to concerns raised by the auditor at the AGM in June 2022. Mr Feng notes that the HOA's auditor presented a qualified report in June 2022, based on identified irregularities. But the only irregularity to which Mr Feng draws attention is that the HOA had not kept separate interest-bearing accounts to hold building deposits. Mr Feng continues that the auditor reported that such accounts had been opened, but did not hold sufficient funds to cover the building deposits held at 28 February 2021.

101.2. Mr Feng also notes that in July 2022 the HOA's auditor had resigned, based on his finding that a reportable irregularity had taken place, or was taking place in the affairs of the HOA. But this irregularity is not further explained. Mr Feng also does not explain why such irregularity justifies his refusal to pay the amount he owes to the HOA.

101.3. At best it would seem that Mr Feng's concern may arise that the HOA may not have funds to repay his building deposits. But as already, noted, I am not placed in a position to determine anything about such building deposits; or his claim for the repayment of building deposits to him by the HOA.

101.4. I can also not make any finding that the HOA is likely to "*misappropriate*" funds paid to it, in a manner akin to the withholding of his building deposits. As noted, the HOA appears to have disputed liability to repay such amounts to Mr Feng. It may also be that Mr Feng's claims against the HOA have prescribed. In these circumstances, Mr Feng's loose allegation of misappropriation by the HOA is regrettable. In any event, repayment of the amounts that Mr Feng owes to the HOA for wasted costs incurred in dealing with his previous applications would only serve to place the HOA in a better position to fill the amounts it holds for building deposits.

101.5. Mr Feng's contentions that the HOA is not properly constituted is not explained, but would seem to be a repetition of his contention that the last AGM was held in June 2022. But, as dealt with above, the BoT remains in place. Furthermore, the existence of the HOA arises from conditions imposed by the competent authority (under statutory authority) when granting land use planning approvals at the time that the Estate was established.[18] The existence of the HOA is a statutory requirement, and cannot be ignored.

[18] Dealt with in footnotes 1 to 3 above.

102. Finally, the requirements for a finding of an advantage to creditors is set out in *Meier v* Meier,[19] citing *Meskin v Friedman*:[20]

> "*Sections 10 and 12 of the* [Act] *cast upon a petitioning creditor the onus of showing, not merely that the debtor has committed an act of insolvency or is insolvent, but also that there is 'reason to believe' that sequestration will be to the advantage of creditors. Under* s 10, *which sets out the powers of the Court to which the petition for sequestration is first presented, it is only necessary that the Court shall be of the opinion that prima facie there is such 'reason to believe'. Under* s 12, *which deals with the position when the rule nisi comes up for confirmation, the Court may make a final order of sequestration if it 'is satisfied' that there is such reason to believe. The phrase 'reason to believe', used as it is in both these sections, indicates that it is not necessary, either at the first or at the final hearing, for the creditor to induce in the mind of the Court a positive view that sequestration will be to the financial advantage of creditors. At the final hearing, though the Court must be 'satisfied', it is not to be satisfied that sequestration will be to the advantage of creditors, but only that there is reason to believe that it will be so.*"

103. Mr Feng relies on *Gardee*[21] and *Mamacos*[22] to suggest that there is no advantage when a debtor's only creditor seeks the sequestration of the debtor's estate, and when the debtor already has the benefit of a judgment.

104. But in this case, there is no evidence that the HOA is the only creditor. It would be for Mr Feng to provide evidence that the HOA is his only creditor. He does not even make this averment.

105. Furthermore, Mr Feng has frustrated the HOA's ability to make good on the costs award that it was given. Mr Feng is the author of his own misfortune.

RELIEF AND COSTS

106. I do not agree that this is a matter in which it would be appropriate to leap-frog the provisional sequestration of the Mr Feng's estate, and to proceed to a final order.

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[19] *Meier v Meier* (15781/2015) [2021] ZAGPPHC 456 (6 July 2021) at para 40-42.
[20] *Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 558 – 559
[21] *Gardee v Dhannabta Holdings and others* 1978 (1) SA 1066 (N) at 1068-1070
[22] *Mamcos v Davids* 1976 SA 19 (C) at 20C

ORDER

I accordingly make the following order:

1. The estate of the Respondent is placed in provisional sequestration in the hands of the Master of this Court.

2. A rule *nisi* is issued upon the Respondent and all interested persons to appear and show cause, if any, on a date to be determined by the Registrar of this Court, as to why:

   2.1. The estate of the Respondent should not be finally sequestrated in the hands of the Master of this Court; and

   2.2. The costs of this application should not be costs in the final sequestration of the Respondent's estate.

3. The service and publication of this provisional sequestration order and rule *nisi*, granted in terms of paragraphs 1 and 2 above, shall be effected as follows:

   3.1. A copy shall be served on the Respondent by the Sheriff of this Court, or his deputy;

   3.2. A copy shall be served on the Receiver of Revenue by the Sheriff of this Court, or his deputy;

   3.3. A copy shall be served on the Respondent's employees (if any) and any registered trade union(s) that may represent such employees, by the Sheriff of this Court, or his deputy.

D.P BORGSTRÖM

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant:	Adv CJ Heunis Instructed by Heunis Law Group
For the Respondent:	Brett Aarninkhof (Attorney)
Date of hearing:	5 August 2024
Date of judgment:	29 October 2024