THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***3rd August 2022*** Signature: _____

CASE NO: A3086/2021

COURT *A QUO* CASE NO: 9568/2020

In the matter between:

THE BODY CORPORATE OF STAMFORD HALL Appellant

and

MOLAPO, KOTOSOANE SOLOMON First Respondent

MAGISTRATE VIANA, H R Second Respondent

Coram: Adams J *et* Thompson AJ

Heard: 26 July 2022

Delivered: 03 August 2022

Summary: Sectional Titles Schemes Management Act and the Regulations promulgated thereunder – functions and powers of bodies corporate – duties of trustees of bodies corporate – *in casu* body corporate failed *inter alia* to pay rates and taxes and other local municipality charges, to pay any insurance premiums relating to the building and to open and operate an account with a registered bank or any other financial institution.

Appointment of administrators – if serious financial or administrative mismanagement on the part of the body corporate – administrator to be suitably qualified and an independent person.

ORDER

On appeal from: The Johannesburg Magistrates Court (Magistrate H R Viana sitting as Court of first instance):

(1) The appeal against paragraph 1 of the order by the Learned Magistrate dated 11 December 2020, relating to the appointment of an administrator, is dismissed.

(2) The appeal against paragraph 2 of the order by the Learned Magistrate dated 11 December 2020, relating to the identity of the administrator appointed, namely Mr Van Den Bos succeeds, succeeds and his appointment is set aside.

(3) The decision relating to who should be appointed as the administrator of the Appellant is referred back to the court *a quo* with the following directions:

(a) The respondent (the Applicant in the court *a quo*) is granted leave to, within ten days of this order, deliver a supplementary affidavit to duly motivate and prove the suitability of the appointment of Van Den Bos and/or of an alternative administrator.

(b) The appellant (the respondent in the court *a quo*) is granted leave to, within ten days of the delivery of the supplementary affidavit as contemplated in paragraph 3(a) above or within ten days of the lapsing of the period during which the supplementary affidavit is to be delivered, to deliver a supplementary affidavit to deal fully with the contents of the supplementary affidavit contemplated in paragraph 3(a) hereof.

(c) The respondent (the applicant in the court *a quo*) is granted leave to, within ten days of the delivery of the supplementary affidavit as

contemplated in paragraph 3(b) to deliver a supplementary replying affidavit in response thereto.

(d) Either party may, within ten days after the delivery of the supplementary replying affidavit or the expiry of ten days after any affidavit as contemplated in paragraphs 3(a) or 3(b), as the case may be and in default of such affidavit, make application for a date to set the matter down for a hearing pertaining to who is to be appointed as the administrator of the appellant (the respondent in the court *a quo*).

(4) Each party shall bear its or his own costs in respect of the appeal.

JUDGMENT

Thompson AJ (Adams J concurring):

[1] The law is based on certain basic and fundamental principles, which have been etched into stone and has become so trite that there is almost no need to quote the authorities in respect of such trite principles of law. This appeal turns on two of those basic principles. These two principles are also inextricably intertwined.

[2] The first principle on which this appeal turns, is the function of affidavits in motion court proceedings, in which the affidavits delivered constitute both the pleadings, whereby a party's claim or defense is set out to bring it within a legally tenable and sustainable claim or defense, and the evidence in support of the pleaded averments. Otherwise stated, the affidavits must set out the material facts (*facta probanda*) upon which a claim or defense is premised and it must also contain the evidence (*facta probantia*) which proves the material facts relied upon.[1]

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[1] *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) at para [28]

'The fundamental problems facing Transnet are twofold. In motion proceedings the affidavits constitute not only the evidence, but also the pleadings. Transnet's answering affidavit is deficient in both respects.'

[3] The second principle on which this appeal turns is how to evaluate disputes of fact in motion proceedings. Over the years this principle has become known as the *Plascon-Evans* rule.[2] Succinctly stated, where a real and *bona fide* dispute of fact arises from the papers, the applicant will only be entitled to a final order if the facts averred by the applicant, as admitted by the respondent taken together with the facts alleged by the respondent allows for the relief sought by the applicant. Otherwise stated, where a real and *bona fide* dispute of fact arises in motion proceedings, the respondent's version must be accepted and the admitted part of the applicant's version, measured against the respondent's version must allow for the final relief sought by the applicant to be granted. This rule is subject to a principle of logic, if the respondent's version is so far-fetched or clearly untenable or consists of bald or uncreditworthy denials that a court is justified in rejecting it merely on the papers, then the court may do so.[3]

[4] In order for the second principle to arise in motion proceedings, a respondent must first fully comply with its obligations in respect of the first basic principle.

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[2] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD) at 634 F

'It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, wherein in proceedings of Notice of Motion disputes of fact have arisen on the affidavits, a final order whether it be an interdict or some other form of relief, may be granted if those facts averred in the Applicant's affidavit which have been admitted by the Respondent, together with the facts alleged by the Respondent, justify such an order. The power of the court to give such final relief on the papers before it, is however, not confined to such a situation. In certain instances the denial by the Respondent of a fact alleged by the Applicant may not be such as to raise a real genuine or bona fide dispute of fact. . . if in such a case the Respondent has not availed himself of his right to apply for the deponents concerned to be called for cross examination under Rule 6(5)(g) of the uniform rules of court and the court is satisfied as to the inherent credibility of the Applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the Applicant is entitled to the relief which he seeks....moreover there may be exceptions to this general rule as, for example, where the allegations or denials of the Respondents are so far-fetched or clearly untenable that the court is justified in rejecting merely on the papers.'

[3] See also *National Director of Public Prosecution v Zuma* 2009 (2) SA 277 (SCA) at para [26]

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.'

[5] In this matter the respondent sought an order in the court *a quo* in terms of Section 16[4] of the Sectional Titles Management Act ('STMA').[5] Relief sought in terms of Section 16 of the STMA, which is the successor to Section 46 of the Sectional Titles Act ('STA'),[6] has been described as the exercising of a '*drastic power*'[7], which exercise of the drastic power constitutes a discretion that must be exercised judicially based on the circumstances before the court in each

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[4] ***16 Appointment of administrators***

(1) A body corporate, a local municipality, a judgment creditor of the body corporate or any owner or other person having a registered real right in or over a unit may apply to a Magistrate's Court for the appointment of a suitably qualified and independent person to serve as the administrator of the body corporate.

(2) (a) If a Magistrate's Court on hearing the application referred to in subsection (1) finds-

(i) evidence of serious financial or administrative mismanagement of the body corporate; and

(ii) that there is a reasonable probability that, if it is placed under administration, the body corporate will be able to meet its obligations and be managed in accordance with the requirements of this Act,

the Magistrate's Court may appoint an administrator for a fixed period and on such terms and conditions as it deems fit.

(b) The remuneration and expenses of the administrator are administrative expenses contemplated in section 3 (1) (a).

(3) An administrator has, to the exclusion of the body corporate, such powers and duties of the body corporate as the Magistrate's Court directs and must exercise these powers to address the body corporate's management problems as soon as reasonably possible.

(4) The administrator must-

(a) convene and preside at the meetings required in terms of this Act and the scheme's rules; and

(b) lodge with the ombud-

(i) copies of the notices and minutes of meetings; and

(ii) written reports on the administration process every three months or at such shorter intervals as the Magistrate's Court may direct.

(5) A Magistrate's Court may, on application by the administrator or any person or body referred to in subsection (1)-

(a) remove the administrator from office;

(b) replace the administrator;

(c) extend the term of the administrator's appointment or amend his or her terms of appointment; and

(d) may make such order for the payment of costs as the Magistrate's Court considers fit.

(6) The provisions of subsection (4) apply, with the necessary changes required by context, to the administrators appointed in terms of section 46 of the Sectional Titles Act.

[5] 8 of 2011

[6] 95 of 1986

[7] *Herald Investments Share Block (Pty) Ltd and others v Meer and others; Meer v Body Corporate of Belmont Arcade and another* [2011] 2 All SA 103 (KZD) at para [46]

particular matter. There is no exhaustive list as to what circumstances would give rise to the need to exercise this drastic power, there must however be special circumstances or good cause shown, which can be constituted either by way of acts or omissions and may range from 'maladministration, a breach of statutory duties, dishonesty, inefficiency, deadlock or atrophy'. The special circumstances required must include, as a minimum, some degree of neglect, willfulness or dishonesty.[8] Where a duly constituted board of trustees is in existence, an order for the appointment of an administrator should not be granted unless it is established that there have been breaches of Sections 3,[9] 4[10] and 8[11] of the STMA and, in addition to the breaches, that substantial prejudice will be suffered by the owners of units if the appointment of an administrator is not granted.[12]

[6] In this matter, the respondent, as an owner of a unit in the scheme administered by the appellant, relied thereon that:

6.1 There is currently no duly constituted board of trustees in existence as no annual general meeting has been held for at least five years prior to when the application was launched during July 2020.

6.2 Due to the alleged absence of trustees, the appellant has been and continues to be non-functional and non-compliant with, *inter alia*, sections 3, 4, 5 and 10 of the STMA.

6.3 There is no bank account opened and operated in the name of the appellant as required by Section 3(1)(g) of the STMA and that all payments by members are being made into an account held with First National Bank in the name of Sechaba Building ("Sechaba").

6.4 There are no financial reporting processes in place nor are there annual financial statements or audits conducted.

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[8] *Dempa Investments CC v Body Corporate of Los Angeles* 2010 (2) SA 69 (W) at para [21]

[9] The successor to Section 37 of the STA.

[10] The successor to Section 38 of the STA.

[11] The successor to Section 40 of the STA.

[12] *Bouramis and another v Body Corporate of the Towers and others* 1995 (4) SA 106 (D) at 109G – I

6.5 No annual general meeting has been called or a period in excess of 5 years.

6.6 The collection of levies is being handled by a Ms Mafalo, the owner of unit 31. Ms Mafalo also manages the finances of the appellant and refuses to give other owners access to the financial records of the appellant.

6.7 No repairs or maintenance of the building and common property is being done and the building will deteriorate and will become a slum if an administrator is not appointed.

6.8 Statutory documentation, such as:

6.8.1 proof of the building being insured,

6.8.2 Scheme governance documentation (including rules, regulations, articles, constitution, terms and conditions or other provisions that control the administration or occupation of private areas and common areas);

6.8.3 minutes of meetings; and

6.8.4 annual audited financial accounts are not at hand.

[7] In elucidation of the aforesaid facts relied upon, the respondent alleged that the appellant's financial affairs are in disarray and in the absence of an administrator it will be virtually impossible to manage the appellant in accordance with the STMA. The respondent further alleged that the appellant's management is essentially dysfunctional, and the state of the building is rapidly deteriorating as some owners are withholding levies due to the failure of the appellant to deliver services that it is obligated to deliver its members. In addition to the allegations by the respondent himself, the respondent relies on affidavits by other owners confirming the allegations made by him.

[8] Prior to dealing with the appellant's version, it is necessary to touch upon certain of the duties and obligations of the appellant and its appointed trustees. The appellant must establish and maintain an administrative fund which is reasonably sufficient to cover the estimated annual operating costs to be incurred by the appellant which is to include payment of rates, taxes and charges for the

supply of water and electricity[13] and insurance premiums relating to the building or land.[14] The appellant must open and operate an account with a registered financial institution[15] in the name of the body corporate[16] and it must ensure that the building is insured.[17] It must, not only ensure that the common property is kept in a state of good and serviceable repair,[18] but also control, manage and administer the common property for the benefit of all owners.[19] The appellant is obliged to hold annual general meetings,[20] for which a written notice must be provided,[21] with the notice to be accompanied by, at least, the meeting's agenda and a copy of any document to be discussed at the meeting.[22] The trustees must compile minutes,[23] with the minutes to set out the date, time and place of the meeting, who attended the meeting, the text of all resolutions and the results of the voting on motions.[24]

[9] For reasons that will become apparent hereunder, it bears mentioning that only members of the body corporate is entitled to vote at annual general meetings.[25] A member of a body corporate is the owner of a unit in the body corporate scheme.[26]

[10] Against the backdrop of the preceding statutory and regulatory requirements, the appellant's approach to the application must be measured. The appellant purports to oppose the application on the strength of a written

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[13] Section 3(1)(a)(ii) of the STMA

[14] Section 3(1)(a)(iii) of the STMA

[15] Section 3(1)(g) of the STMA

[16] Management Rule 21(4)(a) as read with Management Rule 17(1) forming part of the Regulations made under the STMA, as published under GN R1231 in GG 40335 of 7 October 2016

[17] Section 3(1)(h) of the STMA

[18] Section 3(1)(l) of the STMA

[19] Section 3(1)(t) of the STMA

[20] Section 6(1) of the STMA

[21] Management Rule 15(1)

[22] Management Rule 15(3)

[23] Management Rule 9(e) forming part of the Regulations made under the STMA, as published under GN R1231 in GG 40335 of 7 October 2016

[24] Management Rule 27(2)(a)

[25] See generally Management Rule 20

[26] Section 2(1) of the STMA

document which opens with the line ‘we the members … conclude’. According to the document, what was concluded by the members is that the application by the respondent is to be opposed. On a proper interpretation of the document, it purports to be nothing more than a resolution of members authorizing the valid and lawful opposition of the respondent’s application. However, the list of persons who purported to conclude that the respondent’s application must be opposed, includes a vast number of tenants. Tenants clearly do not have voting rights in terms of the STMA as read with Management Rules. To purport to rely on this document, which is clearly advanced to be a resolution of members, demonstrates negligence on the part of the appellant’s purported trustees as to what the STMA and its regulations require.

[11] Even if I am wrong that the aforesaid document is not a resolution of members, but a petition, as advanced in the answering affidavit – which contention I find difficult to accept, having regard to the wording of the document – the appellant still faces a number of difficulties. A purported resolution of trustees, signed by three trustees only is also annexed to the answering affidavit. The difficulty in this regard is that according to the deponent of the answering affidavit, Ms Mafalo, in addition to herself, there are four other trustees. Strangely enough, Ms Mafalo did not sign the trustee resolution. There is no proof that the fifth trustee whose signature does not appear on the purported trustee resolution received notice of the trustee meeting in terms of Management Rule 11(1)(a). I have grave difficulty in finding that there is proper administration by the purported trustees of the appellant in respect of the management of the appellant. The version by the appellant is simply vague.

[12] I continually refer to purported trustees as the respondent alleges there are no elected trustees and that no trustees have been elected for a period of at least five years. In terms of Management Rule 7(4), trustees must be elected at annual general meetings. Management Rule 7(6), in turn, provides that an elected trustee only holds office until the end of the next annual general meeting, although such person may be re-elected as a trustee. The question immediately arises what happens in the event that no annual general meeting is held. As no annual general meeting is held, there is no end of a next annual general meeting,

and the deeming provision of Management Rule 7(6) cannot kick in. The difficulty is that Management Rule 17(1) requires an annual general meeting to be held within four months of the end of each financial year. Does this mean that once the prescribed period envisaged by Management Rule 17(1) lapses that the elected trustees are no longer trustees and the appellant is left rudderless. Although these vexed questions arise, for the reasons to follow they need not be decided in this matter.

[13] Assuming, without finally deciding, that the elected trustees remain in office in the absence of an annual general meeting, the following difficulty arises for the appellant in this matter. No proof has been provided by the appellant that, for the last five years, annual general meetings have been called, agenda's distributed, quorate meetings were held, and resolutions were duly taken and recorded as required by the STMA and the Management Rules. The notices in respect of the calling of the annual general meetings, agendas to such meetings, resolutions adopted, and the minutes of such meetings should be kept by the appellant and should be readily available. This is evidence particularly within the hands of the appellant and should have been disclosed by the appellant to demonstrate the averment by the respondent is incorrect.[27]

[14] A further difficulty arises for the appellant in respect of the annual general meetings. No minutes of any annual general meeting, compliant with Management Rule 27(2)(a) are disclosed. The handwritten purported minutes of an alleged annual general meeting held on 11 January 2020 take the matter no further. Only ten people attended this meeting. This means that out of 63 members, there was only 15,87% representation at the purported annual general meeting. In addition, having regard the earlier document being passed off as a resolution/petition, it is not known whether all of these persons having attended the meeting of 11 January 2020 are members of the appellant. Assuming that they were all members, the meeting of 11 January 2020 was not quorate and could not validly and lawfully adopt resolutions or cause trustees to be elected.[28]

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[27] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at para [13]

[28] See Management Rule 19(2)

It also bears mentioning that the purported minutes of the meeting do not disclose the nomination, seconding and election of trustees.

[15] The handwritten purported minutes of the meeting for 7 November 2018 is even worse for the appellant. Of the thirteen attendees at the meeting, seven were tenants and had no authority to vote at that meeting. This calls into question, once again, whether the alleged annual general meeting of 11 January 2020 was attended by persons other than members. It also calls into question whether only persons who are entitled to vote at meetings in actual fact voted at the meetings or whether persons ineligible to vote, voted at the meetings. Again, the purported minutes do not disclose the nomination, seconding and election of trustees. Similar defects exist in respect of the purported meeting held of 21 March 2020, as recorded in the handwritten purported minutes of this latter meeting.

[16] The appellant's allegations relating to the election of trustees are vague. They are also unsubstantiated by evidence it should have in its possession. Therefore, in my view, such allegations are rendered uncreditworthy.

[17] During the course of argument before us, Mr Kubayi, who appeared on behalf of the appellant, submitted that the purported trustees of the appellant are laypersons, from a disadvantaged backgrounds, who have made mistakes due to their ignorance of the law. He further submitted that since the appeal has been noted, they have been following legal advice and guidance, and matters have improved. When Mr Köhn, appearing for the respondent, made submissions in answer, and submitted that since the appeal has been lodged almost two year have passed and it is unknown what the actual status of the appellant is at the present moment.

[18] At this stage it would be appropriate to lament the respondent's conduct in this matter. Once the appeal was noted, the respondent seemingly lost interest in the matter. He did not further instruct his attorneys and, as a result his attorneys did not employ the provisions of Uniform Rule 50(10).[29] The respondent's inaction

[29] 'Notwithstanding the provisions of this rule the judge president may, in consultation with the parties concerned, direct that a contemplated appeal be dealt with as an urgent matter and order that it be disposed of, and the appeal be prosecuted, at such time and in such manner as to him seems meet.'

was to the extent that the heads of argument on his behalf were only delivered at approximately 14:07 on the day immediately preceding the hearing of the matter. This conduct is contrary to Rule 50(9) and Chapter 7.2.2.1 of the Practice Manual of this Division. To make matters worse, no application for condonation by the respondent was delivered in respect of the late delivery of his heads of argument. This conduct should be deprecated and will be reflected in the costs order I intend to propose.

[19] Returning to the submissions relating to the alleged improved, but unknown extent thereof, conduct on the part of the appellant, the appellant did not seek leave to lead further evidence before us relating to this issue. We are thus bound to deal with the matter, within the four corners of the record, as it was before the court *a quo*. There is of course nothing, in light of the order I will propose in due course, preventing the appellant from approaching the court *a quo* in terms of Section 16(5)[30] of the STMA.

[20] The appellant's lack in candor in respect of the its bank account is astounding. According to the respondent, no bank account in the name of the appellant exists, which the Appellant admits. In terms of the explanation provided by the appellant, the bank account used to have the name of the appellant, but the name of the bank account had to be changed after the proposed administrator, Mr van den Bos, had been dismissed on a previous occasion. This name change was, so it is alleged, a necessity to prevent Mr van den Bos from transacting on the account. How a change in the name of a bank account would have prevented control by a third party who had been given authority to transact on that account is unexplained. Then, ambiguously and in conflict with the earlier allegation of a name change to the bank account, reference is made to '*the old*

[30] 'A Magistrate's Court may, on application by the administrator or any person or body referred to in subsection (1)-
(a) remove the administrator from office;
(b) replace the administrator;
(c) extend the term of the administrator's appointment or amend his or her terms of appointment; and
(d) may make such order for the payment of costs as the Magistrate's Court considers fit.'

bank account'. Even more perplexing is the allegation, which allegation is not understood, that payments were '*ambiguously*' being made into this old account.

[21] One would have expected, if there is an iota of credence in the name change allegation, especially if regard is had to the requirement of Management Rule 21(4), that evidence would have been furnished to evidence this name change. No such evidence is proffered. In the absence of such evidence, the version of the appellant is untenable. To make matters worse for the appellant, Mr Kubayi indicated during argument that the name change made sense for the appellant's trustees as laypersons, although it would have no legal effect to prevent an authorized signatory to transact on the account. This, in my view, displays a substantive degree of a lack of knowledge pertaining to the requirements of the STMA, its regulations and financial management generally on the part of the purported trustees of the appellant.

[22] The alleged financial statements alleged to pertain to the appellant refers to Sichaba Building Funds ('Sichaba'). There is nothing to indicate that Sichaba and the appellant is the same entity. There are, however, evidence to be found in the purported financial statements that one is dealing with two different entities as the business of Sichaba is described as 'renting flats', whilst the renting out of flats is not the business of the appellant.

[23] Even if the purported financial statements were found to be that of the appellant, serious issues of mismanagement arise. The most obvious issue being the admitted arrears to the local authority in respect of utilities charges whilst the directors of the appellant were being paid salaries in the aggregate sum of R228 000 for the 2020 financial year. What makes this even more problematic is that in terms of Management Rule 8(2), trustees who are members of the scheme are not entitled to any reward for their services unless such reward is approved by way of a special resolution of members. In light of the allegations of financial mismanagement of the appellant, one would have expected the appellant to draw the court's attention to the reward paid to directors and demonstrated that the payment was approved by way of a special resolution of members. In addition, if the appellant was acting prudently, it would have explained why trustees are paid

a reward whilst the utilities account with the local authority remains in arrears. The appellant remains vague in pleading the material facts on which it relies and in respect of the evidence to prove such material facts.

[24] The appellant's version in respect of the financial statements is unsubstantiated, bald and uncreditworthy.

[25] The appellant is by its own admission not insured. The attempt by the appellant to shift the blame to the respondent in that he, whilst he was previously a trustee, cancelled the insurance, does not avail the alleged present trustees. They have a statutory duty to ensure that the building is insured, and they have failed to act on this duty.

[26] In my view, serious prejudice to the members of the appellant follows inevitably as a result of the aforesaid failures by the appellant. It is the members of the appellant who will have to foot the bill for damage to the building if damage ensues for some or other reason due to the absence of insurance. It is the members of the appellant who would be left without basic utilities if the utilities services are terminated as a result of non-payment thereof. In addition, the appellant's members will have to foot the bill in order to have utilities supplies restored to the building. No statutory control over the finances of the appellant is possible due to the lack of a bank account in the name of the Appellant. This latter state of affairs engenders opportunity for financial mismanagement of the appellant's funds.

[27] I am accordingly of the view that the court *a quo* cannot be faulted for ordering that an administrator be appointed to the appellant. Mr Kubayi, properly in my view, conceded that on the facts before the court *a quo*, the Learned Magistrate could not be faulted for finding that there is a need for the appointment of an administrator. Accordingly, the appeal on the point whether an administrator should be appointed to the appellant must fail.

[28] I interpose to mention at this juncture that a proper interpretation of s 16(2) of the STMA envisages a two-step process in an application for the appointment of an administrator. The first step is a factual enquiry whether the appointment of an administrator is warranted. Only once that factual enquiry results in a finding

that an administrator is to be appointed, will the enquiry as to the suitability of the proposed administrator commence.

[29] It is in line with this aforesaid approach that the appellant also appeals against the finding that the appointed administrator, Mr Jan van den Bos ('Van Den Bos') is properly and appropriately qualified and experienced to manage the affairs of the appellant. Further issues as to the suitability of Van Den Bos as administrator to the appellant are also raised. Otherwise stated, the mere fact that an administrator is to be appointed does not mean that the person who is proposed to be appointed should be appointed in a mechanical fashion by the court without a proper enquiry as to whether the proposed person is suitably qualified. Moreover, the court is not bound to appoint the person suggested by the person making application for the appointment of an administrator. The court must carefully evaluate the proposed administrator's qualifications, experience, successes and failures and the facts and circumstances that gave rise to such successes and failures in order to determine whether the proposed administrator is suitably qualified. The court may have regard to an alternate person, as suggested by the body corporate. This suggestion can even be made in the alternative to a defence that no administrator is required to be appointed. The court can even, in circumstances where the information before it is insufficient, require further information to be placed before it under oath or, where it is of the view that the proposed person is not suitably qualified, request the parties to propose a different person to be appointed as an administrator.

[30] According to the appellant, it had a prior relationship with Van Den Bos, when the appellant hired him to formalize the its structures, run the administration of the building, collect levies and ensure payment of the utilities account to the local authority. Van Den Bos apparently failed to provide the necessary services and left the appellant with a vast debt, including arrears to the local authority. That Van Den Bos had previously been involved in the management of the appellant is common cause, although the actual effect and consequences of his involvement with the appellant remains in dispute.

[31] The respondent, without any detail, disputed the allegations pertaining to Van Den Bos in his replying affidavit. No details are given in respect of any difficulties Van Den Bos may have experienced in his previous interaction with the appellant and no explanation is proffered why Van Den Bos's previous interaction with the appellant was terminated. In particular, the existence of arrears to the local authority at the time Van Den Bos's previous interaction with the appellant terminated is not even addressed.

[32] Van Den Bos's CV attached to the founding papers contains terse and bald statements. It avers that he has a highest qualification of B Com (Law), but there is no indication as to when or with which higher education facility this degree was obtained. It further avers that he managed a managing agent company Sectional Trust (Pty) Ltd between 1992 and 2006 during which he managed sectional title complexes. No details as to the success of his ventures as managing agent is disclosed. He then retired from the company to concentrate his efforts on rehabilitation of inner-city sectional title blocks. No details as to his success in respect of this venture is disclosed. It is averred that he is a registered estate agent, yet no proof of this or a valid fidelity fund certificate from the Estate Agency Affairs Board is provided. Mr Köhn accepted, during argument, that the CV of Van Den Bos contained terse statements, none of which are elucidated upon for the court to independently assess whether Van Den Bos is, in fact, suitably qualified to be appointed as an administrator to the Appellant.

[33] It also so happens that Van Den Bos is no stranger to litigation. We were referred to two unreported judgments by the Honourable Judge Mia pertaining to Van Den Bos.[31] Mia J expressed concerns as to the manner in which Van Den Bos addressed persons from previously disadvantages communities as 'pigs' and found his explanation as to the use of the word 'pigs' is 'indicative of [Van Den Bos's] administrative ability and his recognition of human rights. There is no excuse for such manner of address toward any person'.

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[31] *Letsoalo and others v Van Den Bos NO* (Gauteng Division, Johannesburg case number 30656/2020 per Mia J) (23 December 2020) and the judgment on leave to appeal by Van Den Bos N.O. (30 March 2022)

[34] Suitably qualified, in my view, encompasses an ability to treat persons, due to the injustices of the past, wholly ignorant of the strict requirements of the STMA and its regulations, with decency and respect. In an unreported judgment by the Honourable Acting Judge Engelbrecht[32] concerns were expressed in the course of the judgment relating to Van Den Bos being the director of PAL Property Management which is deregistered and was seemingly in financial distress. Engelbrecht AJ found that such conduct by Van Den Bos as a director is directly relevant to his suitability to be appointed as a managing agent.[33] What is disconcerting is that this apparent blemish upon Van Den Bos's potential capability to act as administrator is not disclosed by either the respondent or Van Den Bos in this matter. This is an inexcusable failure on the part of the respondent, in so far as he may have had knowledge thereof. This failure is even more disconcerting on the part of Van Den Bos himself who provided confirmatory affidavits in this matter. A person who is to be appointed in a fiduciary position has a duty to the court to disclose, or cause to be disclosed, all material facts which will impact on a court's decision whether such person is a proper and fit person to be appointed as an administrator. I can also but only query why the attorneys who act for the respondent, who has knowledge of the aforesaid blemish on Van Den Bos's record as they act in various matters pertaining directly or indirectly to Van Den Bos, did not disclose this material fact to the court *a quo*. This failure by the respondent's attorneys is not only disconcerting, it is deplorable.

[35] In conclusion, Engelbrecht AJ had the following to say regarding the responses of Van Den Bos in respect of the serious allegations against him:

'This Court would have expected him to provide details of his qualifications and experience to convince the Court that the allegations made against him are not spurious. He did not do so, and therefore the allegation that he is not qualified and accordingly ought to be removed is unchallenged.'

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[32] *Dibakoane N.O. v Van den Bos and Others; Van den Bos and others v Gugulethu and Others* (2021/2054; 2020/28772) [2021] ZAGPJHC 652 (17 August 2021)

[33] Par [78]

[36] I align myself, *mutatis mutandis*, with these remarks by Engelbrecht AJ in respect of the challenges in this matter against Van Den Bos. Mr Köhn, rightly so in my view, conceded that it would be appropriate for us to align ourselves with this *dictum* by Engelbrecht AJ.

[37] Unfortunately, in the court *a quo*, the suitability of Van Den Bos was not fully and properly canvassed by the parties. We, as a court of appeal, cannot close our eyes to the various concerns that have been raised against Van Den Bos in the aforesaid judgments, especially since the appellant have, *albeit* inadequately, raised concerns about the suitability of Van Den Bos. The appointment of an administrator, which includes the person to be appointed as administrator, constitutes the exercise of a discretion that must be exercised judicially. A judicial exercise of the discretion can only properly occur if all material facts are placed before the court for consideration. We would improperly venture into dangerous territory if we were to make findings against Van Den Bos and his suitability to be appointed as administrator on the terse facts before us. A proper exercise of the judicial discretion relating to who should be appointed is required.

[38] I am therefore of the view that a proper case has been not made out by the Respondent in the court *a quo* (or before us) for the appointment of Van Den Bos as administrator. The difficulty that then arises is that there is no alternative suggestion before this Court and the STMA does not seem to allow for the court to make an order that the Estate Agency Affairs Board may select an appropriate person consequent upon an order of court that an administrator is to be appointed. Mr Köhn indicated during argument that he can propose two different persons. The difficulty with this approach is that the appellant would require time to consider the suitability of the persons nominated. This would, in any event, require further affidavits to be filed and would essentially lead to this court of appeal sitting as a court of first instance in respect of the identity of the person to be appointed as administrator. In my view the appointment of Van Den Bos must be set aside, and the matter remitted back to the court *a quo* for a proper consideration in respect of the administrator to be appointed.

[39] To summarize the effect of this judgment, the appellant failed to abide by its duties as a respondent in the court *a quo*. It failed to plead its case properly and, even more fatally, it failed to present evidence in respect of the averments that it did make. In so far there was an attempt at disclosing evidence, the evidence was so defective that it rendered the appellant's version vague, bald, uncreditworthy and untenable. The court *a quo* cannot be faulted for granting an order for the appointment of an administrator. The appointment of the administrator itself, however, is problematic. Serious allegations are made against Van Den Bos, which casts a shadow upon whether he is suitably qualified to be appointed as the administrator. Although the evidence presented by the appellant in this regard was paltry, the fact that the respondent and/or Van Den Bos did not head-on challenge the serious allegations against Van Den Bos essentially leaves the appellant's version regarding the suitability of Van Den Bos unchallenged.

[40] As for the costs of this appeal, each party is partially successful in the appeal. And I deem it proper, in the exercise of my discretion, that each party should pay their own costs in respect of the appeal.

Order

[41] In the result, I propose the following order: -

(1) The appeal against paragraph 1 of the order by the Learned Magistrate dated 11 December 2020, relating to the appointment of an administrator, is dismissed.

(2) The appeal against paragraph 2 of the order by the Learned Magistrate dated 11 December 2020, relating to the identity of the administrator appointed, namely Mr Van Den Bos succeeds, succeeds and his appointment is set aside.

(3) The decision relating to who should be appointed as the administrator of the Appellant is referred back to the court *a quo* with the following directions:

(a) The respondent (the Applicant in the court *a quo*) is granted leave to, within ten days of this order, deliver a supplementary affidavit to duly

motivate and prove the suitability of the appointment of Van Den Bos and/or of an alternative administrator.

(b) The appellant (the respondent in the court *a quo*) is granted leave to, within ten days of the delivery of the supplementary affidavit as contemplated in paragraph 3(a) above or within ten days of the lapsing of the period during which the supplementary affidavit is to be delivered, to deliver a supplementary affidavit to deal fully with the contents of the supplementary affidavit contemplated in paragraph 3(a) hereof.

(c) The respondent (the applicant in the court *a quo*) is granted leave to, within ten days of the delivery of the supplementary affidavit as contemplated in paragraph 3(b) to deliver a supplementary replying affidavit in response thereto.

(d) Either party may, within ten days after the delivery of the supplementary replying affidavit or the expiry of ten days after any affidavit as contemplated in paragraphs 3(a) or 3(b), as the case may be and in default of such affidavit, make application for a date to set the matter down for a hearing pertaining to who is to be appointed as the administrator of the appellant (the respondent in the court *a quo*).

(4) Each party shall bear its or his own costs in respect of the appeal.

C E THOMPSON
Judge of the High Court
Gauteng Local Division, Johannesburg

I agree and it is so ordered,

L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	22nd July 2022.
JUDGMENT DATE:	3rd August 2022.
FOR THE APPELLANT:	Attorney Noveni E Kubayi
INSTRUCTED BY:	Noveni Eddy Kubayi Incorporated, Alberton
FOR THE FIRST RESPONDENT:	Adv Michael Kohn
INSTRUCTED BY:	A M Ellis Attorneys, Highlands North, Johannesburg