



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)**

Case number: **603/2019**
Date heard: **--/--/----**
Date available: **27/05/2022**

In the matter of:

JASON DAWSON

Applicant

and

SIDNEY ON VAAL CPA

First Respondent

THE CHIEF DIRECTOR

DEPARTMENT OF RURAL DEVELOPMENT

AND LAND REFORM, NORTHERN CAPE

PROVINCE

Second Respondent

Coram: AG van Tonder, AJ

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

VAN TONDER, AJ

[1] The applicant herein applied for leave to appeal to the Full Bench of the Northern Cape High Court, *alternatively* the Supreme Court of Appeal against my judgment delivered on 8 January 2021 in which I made the following order:

2. The application is dismissed.

3. The applicant is ordered to pay the costs of the application, including the costs of the urgent application that were reserved.

[2] The Applicant's application was to obtain an order that the Sidney on Vaal Communal Property Association (the first respondent/CPA) be placed under the administration of the Director-General: Land Affairs, in terms of Section 13(1) of the Communal Property Associations Act 28 of 1996.

[3] The Applicant also requested an order that the Director General: Land Affairs be granted the powers by the court in terms of section 13(2) of the CPA Act, to appoint a receiver to exercise the powers on behalf of the Director General: Land Affairs, and for the receiver

to take over the running of the CPA as set out in the notice of motion.¹

[4] The aforesaid application was preceded by an urgent application which was brought during March 2019, which urgent application was settled on the basis of interim relief pending the finalisation of the main application.

[5] The first respondent opposed the application for leave to appeal.

[6] The facts of the application appear from my judgment and I do not deem it necessary to repeat it.

[7] In the applicant's application for leave to appeal, the grounds of appeal are to the effect that the judgment was based on the following errors:

[7.1] By finding that the maladministration is not a separate ground for placing a Communal Property Association under administration.

¹ Dawson v Sidney on Vaal CPA and another 2021 (6) SA 167 (NCK) also reported as [2021] 2 All SA 429 (NCK)

- [7.2] By concluding that the complaints against the executive committee are not serious enough to warrant placing the CPA under administration.
- [7.3] By finding that the maladministration was facilitated by the applicant.
- [7.4] By finding that it would not be just and equitable to place the CPA under administration.
- [7.5] By finding that the basis of the maladministration took place before the current executive committee took office.
- [7.6] By finding that the complaints raised by the applicant were part and parcel of his duties.
- [7.7] By finding that the criminal investigation identified no wrongdoing.

[8] The crux of the applicant's argument on which he applies for leave to appeal, is that I have erred:

[8.1.] in finding that maladministration is not an independent basis for having the CPA placed under administration, and

[8.2] by finding that it would not in the circumstances of the matter be just and equitable to place the Respondent under administration.

[9] This has from the outset been the basis upon which the applicant had brought the application, as set out in the applicant's founding affidavit as follows:

"The grounds for the Application for the appointment of an Administrator is to stop the continued maladministration of the Association's affairs by the Executive Committee and that it would consequently be just and equitable that the Association be placed under administration."

[10] The applicant argues that the Communal Property Associations, Act 28 of 1996, is an example of socio-economic legislation, wherefore it ought to be dealt with

on the basis (and interpreted to the effect) that maladministration constitutes a separate ground for placing a communal property association under administration.

- [11] The applicant in developing this argument relies on the Social Housing Act, 16 of 2008, in which maladministration is defined as:

*"Non-compliance with the Act or a situation or condition indicating substantial financial, governance or management failure."*²

- [12] The applicant relies on the case of **Social Housing Regulatory Authority v Free State Social Housing Company**, to emphasise that maladministration in itself was found to be the basis for intervention.³

- [13] The aforesaid matter does however not support the contention that maladministration is *per se* a sufficient and independent basis for an entity to be placed under the administration of a regulating authority.

² Section 1 of the Social Housing Act, 16 of 2008.

³ Social Housing Regulatory Authority v Free State Social Housing Company and Others [2019] ZAFSHC 240

[14] Mbhele J, placed the Free State Social Housing Company under administration under circumstances where:

[27] The evidence before me shows that the first respondent is ailing and requires urgent intervention to restore it to normal. It is evident from the report of the provisional liquidator that its liabilities far exceed its assets. The applicant is required by law to intervene in the affairs of the SHIs where it is satisfied on reasonable ground that there is evidence of maladministration.

As well as:

[30] It is clear from the above dictum that courts are less likely to give primacy to form over substance. The issues raised in the current matter are central to the state's obligation to fulfil its constitutional mandate as set out in Section 26 of the Constitution. The evidence shows that the first respondent is factually insolvent. The fact that it was placed under provisional liquidation is an indication that it needs to be rescued. The manner in which the first respondent carried out its business threatens the state's ability to fulfil its constitutional mandate of providing housing to its inhabitants.

[15] The applicant also referred to the case of **Dempa Investments CC v Body Corporate of Los Angeles**, as an example of an administrator being appointed in

terms of the Sectional Titles Schemes Management Act, 8 of 2011.⁴

[16] In the said matter, Gautschi AJ formulated the test as to whether an administrator stands to be appointed in terms of Section 46 of the Sectional Titles Schemes Management Act, 8 of 2011, as follows:

[21] Having regard to the abovementioned authorities and the literature, I intend to apply the following principles :

[21.1] The court has a discretion to appoint an administrator, which must be exercised judicially having regard to the circumstances of the particular case before it.

[21.2] Special circumstances or good cause must be shown.

[21.3] It is not possible to define what would constitute special circumstances or good cause, but as a minimum there should be –

[21.3.1] some neglect, wilfulness or dishonesty on the part of the trustees, or an event beyond their control; and

[21.3.2] a likelihood that the owners of units will suffer substantial prejudice if an administrator is not appointed.

⁴ Dempa Investments CC v Body Corporate of Los Angeles 2010 (2) SA 69 (WLD)

- [21.4] *Acts or omissions which would qualify would include maladministration, breaches of statutory duties, dishonesty, inefficiency and managerial atrophy or deadlock. The list is not exhaustive.*
- [21.5] *The problem must be such that an administrator could be expected to add value where the trustees could not. For instance, mere inexperience on the part of the trustees may not be sufficient, for they could appoint an experienced managing agent. So too it may be insufficient that the body corporate is experiencing serious financial difficulties, for the trustees and managing agent may be as capable an administrator to deal with the problem. If, however, inexperience is coupled with wilfulness, or the financial difficulties have been caused by maladministration, dishonesty or the like, an administrator could be expected to achieve results which the trustees would not.*
- [21.6] *A balance should be struck between, on the one hand, being slow to interfere in the management of the scheme by the body corporate's chosen representatives and, on the other hand, not hesitating to come to the assistance of owners of units who may suffer substantial prejudice by the actions or omissions of trustees.*

[21.7] The applicant bears the onus to persuade the court that this is a suitable case for the exercise of the discretion.⁵

[17] Once again, in the aforesaid judgment maladministration is linked to financial difficulties, as appears from paragraph [21.5] of the judgment.

[18] It should also be kept in mind that the Los Angeles Body Corporate owed almost R1,5 million for arrear rates and taxes the City Council of Johannesburg at the time when the application for an administrator to be appointed, was instituted.

[19] The test enunciated in **Dempa Investments** was also applied in the matter of **David Lechizio v Bridgetown Body Corporate**⁶, where it was found that:

[69] It is clear that taking into account both sides' versions, there is deadlock, there are breaches of statutory duties, there is maladministration, there is neglect, there is financial mismanagement and there is a likelihood of substantial prejudice to owners if an administrator is not appointed. Accordingly the appointment of an

⁵Dempa Investments CC v Body Corporate of Los Angeles 2010 (2) SA 69 (WLD) at 82A - G

⁶David Lechizio v Bridgetown Body Corporate [2012] ZAGPJHC 272

administrator is appropriate even if the answering affidavit is taken into account.

- [20] The Applicant also referred to the matter of **Municipal Employees' Pension Fund v Mongwaketse** as another example of a regulatory body intervening by reason of maladministration, in respect of money managed on behalf of other parties.⁷
- [21] Although reference is made of maladministration as a basis upon which the Pension Funds Adjudicator can rule on a complaint, this matter deals with a determination made in terms of the Pension Funds Act 24 of 1956, and does not deal with the appointment of an administrator.
- [22] As set out in the **Dempa Investments** matter, the applicant bears the onus of persuading the court that this is a suitable case for the exercise of the discretion to appoint an administrator.
- [23] I have held that the applicant has failed to establish that in the circumstances of the matter, it is a suitable

⁷ *Municipal Employees' Pension Fund v Mongwaketse* [2019] ZAGPJHC 162

case for exercising the Court's discretion to appoint an administrator.

[24] The applicant argues that another Court could find that the first respondent should be placed under administration firstly, as a result of maladministration, and secondly on the basis that it would be just and equitable for it to be placed under administration.

[25] I have found that Section 13 of the Communal Property Associations, Act 28 of 1996, does not provide that maladministration is a separate and independent basis for having a CPA placed under administration, but that maladministration is one of the factors to consider in order to decide whether maladministration contributed to or caused a CPA to be unwilling or unable to pay its debts or unable to meet its obligations.

[26] Even if I were wrong in respect of the aforesaid interpretation, I have not disregarded the maladministration as relied on by the applicant, but have taken cognisance thereof and considered it as a factor to determine whether it would be just and equitable to place the first respondent under administration.

- [27] In respect of the principles regarding whether it would be just and equitable to place the first respondent under administration, I had taken cognisance of the case law and legislation regarding company laws, and applied the principles thereof.
- [28] In the matter of **Erasmus v Pentamed**⁸, Nestadt J (as he then was) gave a detailed analysis of the meaning and ambit of "*just and equitable*" as used in section 344(h) of the Companies Act, 61 of 1973 and its predecessor, and inter alia indicated that "*just and equitable*" does not postulate fact, but only a broad conclusion of law, justice and equity.
- [29] Adjudicating the matter on the papers, I had found that the Applicant has failed to establish that it would be just and equitable for the first respondent to be placed under the administration of the Director General: Land Affairs, as envisaged in section 13(1) of the CPA Act.
- [30] Even if maladministration were an independent ground to have the first respondent placed under

⁸ Erasmus v Pentamed Investments (Pty) Ltd 1982 (1) SA 178 (WLD) at 181E

administration, the applicant would have had to establish maladministration of such a serious nature that a Court would exercise its discretion to place the first respondent under administration.

[31] Even if applying the test as formulated in the matter of **Dempa Investments CC v Body Corporate of Los Angeles**, to the present matter, the applicant has failed to show special circumstances or good cause, and has failed to discharge the onus to persuade the court that this is a suitable case for the exercise of its discretion to appoint an administrator.⁹

[32] In this regard in the case of **Mathebula and Others v The Nwandlamhari Communal Property Association and Others**, Section 13 of the CPA Act was considered, and despite the fact that the complaints made against the executive committee therein, was far more serious than in the present matter the Court did not place the CPA under administration.¹⁰

⁹ Dempa Investments CC v Body Corporate of Los Angeles 2010 (2) SA 69 (WLD)

¹⁰ Mathebula and Others v The Nwandlamhari Communal Property Association and Others (90356/16) [2019] ZAGPPHC 201 (9 May 2019)

- [33] As stated in the **Mathebula** judgment, insofar as there are disputes of fact, the matter stands to be adjudicated on those facts set out by the applicant that are admitted by the respondent, as well as the respondent's factual allegations (unless the respondent's version was rejected on the papers).¹¹
- [34] In considering the facts set out by the applicant and admitted by the first respondent, as well as the first respondent's factual averments, I am satisfied that the applicant has failed to establish that there are sufficient grounds for the Court to exercise its discretion to place the first respondent under the administration of the Director General: Land Affairs, as envisaged in section 13(1) of the CPA Act.
- [35] I am not persuaded that there is a reasonable prospect that another Court may come to a different conclusion, and/or find that it would be just and equitable to place the first respondent under administration.

¹¹ *Mathebula and Others v The Nwandlamhari Communal Property Association and Others* (90356/16) [2019] ZAGPPHC 201 (9 May 2019) at par 82-85

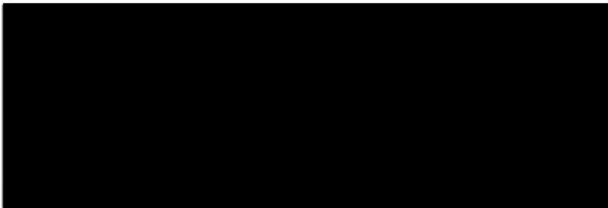
CONCLUSION

- [36] Leave to appeal may only be given if I am of the opinion that the appeal would have a reasonable prospect of success or if there is some other compelling reason why the appeal should be heard.
- [37] I do not agree with the submissions by Mr Raubenheimer that there is a reasonable possibility of another Court coming to a different finding, for the reasons as set out above.
- [38] The next question to be answered is whether there is any other compelling reason why the appeal should be heard. The applicant has not advanced and/or relied on any such ground.
- [39] I am satisfied that the interests of justice do not require a finding that the judgment is to be found appealable in this instance. I am satisfied further that the appeal would neither have a reasonable prospect of success, nor that there is some other compelling reason why the

appeal should be heard. The application for leave to appeal therefore stands to be dismissed.

I therefore make the following order:

- 1 THE APPLICANT'S APPLICATION FOR LEAVE TO APPEAL IS DISMISSED WITH COSTS.**



AG VAN TONDER
ACTING JUDGE

On behalf of the Applicant: Adv. E. Raubenheimer (oio Engelsman Magabane Inc)

On behalf of First Respondent: Adv. P. Mthombeni (oio Mjila & Partners Inc)