IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No: 1751/2019

In the matter between:-

SOCIAL HOUSING REGULATORY AUTHORITY	Applicant
and	
FREE STATE SOCIAL HOUSING COMPANY	1st Respondent
NATIONAL HOUSING FINANCE CORPORATION SOC LTD	2nd Respondent
MANGAUNG METROPOLITAN MUNICIPALITY	3rd Respondent
DEPARTMENT OF HUMAN SETTLEMENT, FREE STATE PROVINCIAL GOVERNMENT	4th Respondent

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CORAM: **MBHELE J**

HEARD ON: 12 SEPTEMBER 2019

DELIVERED ON: **17 DECEMBER 2019**

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[1] The applicant approached this court on an urgent basis on 18 April 2019 for an order in the following terms:

1. That these proceedings:

1.1 be heard as a matter of urgency;

1.2 that any failure to adhere to the Rule of the above Honourable Court relating to form, time, periods, service be condoned; and

1.3 that new shortened timeframes be imposed for the filing of all future process and heads of arguments and the setting down for the hearing of this matter on an expedited basis.

2. That the First Respondent be placed under administration of the Applicant in terms of section 12 of the Social Housing Act No. 16 of 2008, with the following powers and duties:

2.1 the Applicant taking immediate control of, and in the place of, the Board of Directors of the First Respondent, manage the business and operations of and concerning the First Respondent, together with all assets and interests relating to the business of the First Respondent;

2.2 the Applicant taking control of the cash, cash investments, shares and other security as well as all other assets owned, held or administered by or on behalf of the First Respondent, acknowledging the rights, claims and securities of the Second Respondent in the process, reference to securities being specifically the securities the latter holds in respect of the First Respondent (‘the Second Respondent’s Securities”);

2.3 the Applicant incurring such reasonable expenses and costs as may be necessary or expedient for the administration and control of the business and operations of the First Respondent and to pay same as and when they fall due from the assets owned, administered or held by or on behalf of the First Respondent;

2.4 the Applicant being permitted to engage such assistance of a legal, accounting, actuarial, administrative or other professional nature, as the Applicant may deem necessary, and to defray reasonable expenses and charges and expenses thus incurred from the assets owned, administered or held by or on behalf of the First Respondent;

2.5 the Applicant will provide to the Second Respondent on a monthly basis commencing on 31 May 2019and for so long as the administration endures, a statement of income and expenditure in respect of the First Respondent and, upon reasonable written request from the Second Respondent and any other creditor of the First Respondent, to provide specified supporting documents in respect thereof;

2.6 the Applicant is authorised to institute or prosecute any legal proceedings on behalf of the First Respondent and to defend any action against the First Respondent;

2.7 the Applicant is authorised to investigate allegations of financial, governance and management failures and to implement appropriate action to address same, and to take action against any person who may be guilty of misconduct or a crime in terms of the Social Housing Act and or any other applicable law;

2.8 the Applicant is authorized and empowered to approach the Master of this Above Honourable Court to request for the convening of an enquiry, the issuing of subpoenas requiring production of documentation including loan applications, suretyships, financial statements, lease agreements and property valuations involving certain corporate entities, trusts, individuals in their capacity as shareholders or directors in the corporate entities and individuals as trustees and individuals as business persons and obtaining of oral evidence in order to comply with the order sought in2.7;

2.9 authorising the Applicant to take such further steps as may be necessary in terms of the Act and or any other applicable law, during the administration of the First Respondent, to achieve the First Respondent's restoration to viability.

3. The Applicant may approach the above Honourable Court on these papers, as may be amplified, for any further powers that may be necessary for this order to be given effect;

4. The Applicant is ordered by no later than 31 July 2019 to report to the above Honourable Court concerning –

4.1 the business and operations of the First Respondent inclusive of information relating to the assets and liabilities and income and expenditure relating to the business of the First Respondent;

4.2 whether the Applicant remains of the view that that the First Respondent can be restored to viability as contemplated in section 12(10) of the SHA and if so, the timeframe within the Applicant believes such restoration can be achieved;

5 In the event that this application is opposed, ordering the party or parties so opposing to pay the costs of this application including those of two counsel;

6 Further and/or alternative relief.

My sister, Naidoo, J postponed the matter to a further date and granted parties leave to file papers within a specified period. The matter came before me, with the parties having fully exchanged affidavits and supplementary reports having been filed. The issues have been fully ventilated by the parties. Third respondent did not oppose the application while 2nd and 4th respondents abide by the decision of this Court.

[2] The Applicant is an entity of the National Department of Human Settlements (DHS), established in accordance with the provisions of Section 7 of the Social Housing Act 16 of 2008 (the Act).

[3] The first respondent is a non-profit company registered and incorporated in terms of the company laws of this country. It is classified as a Social Housing Institution (SHI).

[4] The applicant was established in terms of the Act with the mandate to accredit, capacitate, and invest in Social Housing Institutions (SHI) as well as to regulate the Social Housing Sector.

[5] The Social Housing Regulatory Authority (SHRA) was established to advance the DHS's broader mandate of promoting the achievement of a non-racial, integrated society through the development of sustainable human settlements and quality housing.

[6] The first respondent, like other SHIs, was established with a purpose of developing housing rental stock, using the institutional

subsidy administered through SHRA together with loan funding from the National Housing Finance Corporation SOC LTD (NHFC).

[7] A provisional winding up order was granted by this court against the respondent in favour of one of its creditors, CALGRO on 15 November 2018.

[8] The SHRA was granted leave to intervene in the CALGRO application on 21/02/2019. On 15 March the NHFC brought an application where it, *inter alia,* sought leave to intervene in the CALGRO Application, the provisional winding up to the first respondent and the convening of the enquiry into the affairs of the first respondent, as envisaged in section 417 of the 1973 Companies' Act.

[9] The basis for NHFC application was that the first respondent failed to honour monthly instalments for monies advanced to it in terms of two facility agreements entered into in 2011 and 2012. This is common cause.

[10] The NHFC was of the view that the first respondent has plunged into maladministration and its status necessitated a formal inquiry into the affairs of the first respondent as envisaged in the Companies Act.

[11] As Security for the monies owed to it by the first respondent, the NHFC registered first and second covering mortgage bonds over the rights of the First Respondent as lessee of the property under notarial agreement of lease K119/ 2011S and rights over rental income by the first respondent was ceded to NHFC.

[12] The SHRA employed the services of a management consultant firm (Letsema) to undertake an investigation into the first respondent's affairs and to determine whether prospects exist for the turnaround of the first respondent's business.

[13] It is the diagnostic report prepared by Letsema that led the applicant to move this application. Letsema's report painted a picture of an ailing institution with no prospects of turning its fortunes around.

The SHRA settled the liability of the first respondent to CALGRO and CALGRO withdrew its liquidation application as a result.

[14] Central to this application is the alleged maladministration of the affairs of the First Respondent.

The first respondent took issue with the report prepared by Letsema stating that its author is not an auditor as envisaged in section 12 of the Act.

[15] My brother Loubser, J ordered the applicant to appoint an auditor to perform forensic investigation in compliance with section 12 of the Act and further granted the parties leave to supplement their affidavits. Consequently, the applicant appointed Ligwa Advisory Services, a firm of public accountants and auditors to conduct the forensic investigation into the affairs of the first respondent.

[16] **CONTENTIONS BY THE PARTIES**

Ms. Nkosi Thomas, on behalf of the applicant, submits that the applicant has established maladministration as required by Section 12 of the Act. She contended further that the objective evidence in the form of forensic audit report shows that the first respondent is in a state indicating substantial financial governance or management failure. She submitted, further, that if the situation that the first respondent finds itself in is allowed to deteriorate further, it will defeat the purpose for which the first respondent was created. She contended further that maladministration is evident from the fact that the first respondent was placed under provisional liquidation by CALGRO, that its indebtedness to the NHFC in the amount of R31 611 889. 50 resulted in the NHFC commencing liquidation proceedings against it, and further that the report of the provisional liquidator concluded that the first respondent's liabilities exceed its assets by R 38 778 886. 00.

Mr. Mukhari, on behalf of the first respondent, submitted that failure by the applicant to obtain the forensic report as required by the Act is bad in law and fatal to the applicant's case. He submitted further that the report by Ligwa does not present objective facts. He contended that the applicant sought to stranglehold first respondent by withholding the grant to the first respondent. In his view, the applicant cannot benefit from its unlawfulness.

[17] The forensic audit scope of Ligwa was set out as follows:

1. Whether the first respondent used the grant funding from SHRA for its operational expenses in contravention of the agreement with SHRA and the Free State Provincial Givernment;
2. Whether the first respondent failed to pay its service providers in accordance with the relevant and applicable contractual terms;
3. Whether the selection and appointment of Motif to render services relating to accreditation, reporting and assisting the CEO of the first respondent with administrative work was lawful;
4. Whether the failure by the first respondent to repay the loan provided by the National Housing Finance Corporation (NHFC), being the second respondent in this matter was as a result of maladministration;
5. Whether the Board of Directors of the first respondent was supine; and
6. Whether the Board of the first respondent and its management were guilty of non-compliance with internal policies which led to internal control deficiencies.

[18] Ligwa found that there was evidence of maladministration and lack of oversight by the Board at the first respondent and based its findings on the following:

1. That the first respondent Failed to pay its service providers resulting in litigation proceedings by Likakapa and CALGRO.

2. Failure to make payment to NHFC resulting in an amount of R32,9 million owing to NHFC.
3. Approval by CEO of his incentive amounting to R34 321.76 during December 2017 without the approval of the Board.
4. Appointment of Motif without following a tender process;
5. Payments to Motif amounting to a total of R2 884 762, 28 during the period 17 February 2015 to 7 November 2017 which were not supported by any written contract , appointment letter and/ or deliverables;
6. Failure to make payments to VBV for services rendered resulting in the amount of R713 316 , 39 owing to VBV;
7. Failure by the Board of the first respondent to hold the minimum number of meetings as prescribed by the Board Charter;
8. Failure by the Board to commence business rescue proceedings as soon as the first respondent was financially distressed as prescribed in its Board Charter;
9. Failure by the Board to ensure that the First respondent has an effective and independent audit committee as the Board Charter prescribes.

[19] The First Respondent disputes that the appointment of Motif was in contravention with its own procurement policies. It submits that the policy does provide for deviation from the tender process in situation where early delivery is of critical importance and where the invitation of tenders is impossible or impracticable.

[20] The relevant clause of the procurement policy provides as follows:

A tender or quotation for products and services other than the lowest quotation shall not be accepted, unless there is a written report from the Corporate Services Manager or CEO, stating all the reasons for such a recommendation.

The following will be issued and circulated to managers by the Corporate Services Manager:

- Internal procurement directives.
- Prescripts on tender procedures.
- Evaluation and awarding of tenders.

Supplies and / or services may be procured without inviting comparative tenders in cases where early delivery is of critical importance and where the invitation of tenders in terms of the prescribed manner is either impossible or impracticable. In such cases, the reasons for the urgency and the losses or consequences that will follow if timeous action is not taken must be certified in writing by the Corporate Services Manager for approval by the Board.

In the case of a limited number of suppliers, the requirements to advertise shall fall away. The identified potential suppliers shall directly be provided with tender invitations. The requirements from such suppliers shall be advertised annually in order to explore the market for new products and to ensure that all suppliers are indeed known and on record. This will be possible with the approval of the Board.

Period contracts, defined as contracts entered into for the supply of repetitive goods, the rendering of services or the disposal of movable property over a specified period of time, may be arranged by the Corporate Services Manager, with approval from the Board.'

[21] It is the first respondent's case that the services of Mr. Naidoo, the director of Motif were of a specialised nature and that his previous history with the first respondent justified his appointment without following tender processes.

[22] The policy requires that reasons for urgency be certified in writing by the Corporate services Manager for approval of the Board.

There is no indication that such reasons were advanced as no document exists in support thereof. There is no document showing why and how Motif was appointed. It is apparent from the above that the first respondent's procurement policy was not followed in the appointment of Motif.

[23] The first respondent assails the forensic report further and alleges that the investigator ignored the information that the first respondent entered into payment arrangements with its creditors. The document termed 'payment arrangement' with VBV which is attached to the first respondent's supplementary answering affidavit is undated and unsigned. It is not clear from the document when was the payment arrangement entered into and with whom.

[24] The first respondent attached the minutes of the Board meeting dated 05 October 2017 to its supplementary affidavit to counter the finding by Ligwa that the CEO's incentive bonus was paid without the approval of the Board. The minutes of the meeting of the 05th October 2017 were not part of the minutes reviewed by Ligwa. This meeting seems to have been held just six days after the meeting of 29 September 2017 which according to Ligwa was the last meeting for the year 2017. The next meeting was held in February 2018.

[25] The report by Ligwa shows that there were only 8 meetings held by the Board of the first respondent in a period of 4 years between

2015 and 2018. This was not disputed by the first respondent. If there was a meeting held on of 05 October 2017 the number would have risen to 9. The minutes of 05 October were not brought to the attention of the investigators. It is clear that this set of minutes was prepared to counter the finding that the payment of incentives was not approved by the Board.

The argument by Mr. Mukhari that Ligwa's report was tailored to suit the outcome desired by the applicant is without basis. The available evidence does not support this assertion.

[26] **Legal Principles applicable**

Section 12 of the Social Housing Act provides as follows:

12 Powers of intervention of Regulatory Authority
(1) If the Regulatory Authority is satisfied on reasonable grounds that there has been maladministration by a social housing institution, the Regulatory Authority must
(a) prepare a report to that effect;
(b) provide the social housing institution with a written notice of the Regulatory Authority's intention to intervene, and must specify in that notice what remedial action must be taken by the social housing institution;
(c) instruct the social housing institution to take the remedial action specified in the notice, and may request the institution to obtain specified support in order to rectify such maladministration.

(2) The Regulatory Authority may make available funds through the social housing investment plan to assist in meeting the costs of any such support.

(3) Should the social housing institution continue to resist the intervention of the Regulatory Authority or if there is no improvement in performance in respect of the matters which necessitated the intervention, the Regulatory Authority may authorise a forensic investigation into the institution's affairs and appoint a public accountant and auditor registered in terms of the Public Accountants' and Auditors' Act, 1991 (Act 80 of 1991), to undertake such investigation.

(4) The Regulatory Authority may, after consultation with the providers of any debt finance to the institution and upon notice to affected

parties, including the providers of finance to the institution
(a) apply to the High Court for the suspension of the chairperson, members of the board, manager or executive or senior staff of the institution for the period of the investigation; and
(b) appoint suitably qualified persons to manage the institution's affairs in their place pending the findings of the forensic audit report.

(5) The forensic audit report must make a finding on whether the social housing institution has been managed in a manner which constitutes maladministration.

(6) If the forensic audit report does not make a finding of maladministration, the suspended persons are automatically reinstated as from the date of such report and the Regulatory Authority must review its previous instructions to the institution.

(7) If the forensic audit finds maladministration, the Regulatory Authority must request the members of the social housing institution to replace any suspended person or person associated with the maladministration with a person acceptable to or recommended by the Regulatory Authority.

(8) If the Regulatory Authority, based on the forensic audit report, does not believe that the institution is sustainable in its current form, or if the social housing institution refuses to take the steps required under subsection (8), the Regulatory Authority may, after consultation with the providers of debt finance to the institution and upon notice to affected parties, including the providers of finance to the institution, apply to the High Court for an order placing the institution under the administration of the Regulatory Authority.

(9) If the High Court grants an order placing the institution under the administration of the Regulatory Authority, the Regulatory Authority
(a) must manage the institution effectively and efficiently;
(b) may remove the accreditation of the social housing institution;
(c) may transfer the housing stock or rights of the social housing institution to another social housing institution prepared to accept such transfer on such terms and conditions as may be agreed at the time; or
(d) where appropriate, institute legal proceedings for the winding up of the institution.

(10) Where the Regulatory Authority succeeds in restoring the viability of the institution or any part thereof, it may apply to High Court for
(a) the administration order to be lifted; and
(b) for an order authorising the Regulatory Authority to appoint suitable persons as directors and office bearers of the institution.

(11) A social housing institution or any person directly affected by a decision of the Regulatory Authority, may exercise

(a) any rights to internal review to the Regulatory Authority in accordance with the prescribed procedures;
(b) any other rights according to law.

(12) Where the Regulatory Authority succeeds in restoring the viability of the institution or any part thereof, it may apply to High Court for
(a) the administration order to be lifted; and
(b) for an order authorising the Regulatory Authority to appoint suitable persons as directors and office bearers of the institution.

(13) A social housing institution or any person directly affected by a decision of the Regulatory Authority, may exercise
(a) any rights to internal review to the Regulatory Authority in accordance with the prescribed procedures;
(b) any other rights according to law.

(14) A social housing institution for purposes of any inspection under this Act must, subject to the provisions of any applicable law and subject to such limitations as may be prescribed by the Minister, allow the Regulatory Authority
(a) access to its premises or any property developed, constructed or managed by it;
(b) access to its records and documentation; and
(c) the seizure and photocopying of such records and documentation as may be required for investigation.

[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.

[28] The argument by the first respondent that the application must be dismissed for failure to secure a forensic audit report prior to its institution seeks to elevate form over substance. The order of 10 May 2019 by Loubser, J had an effect of condoning the applicant's failure to file the forensic audit before instituting this application. Loubser, J further granted parties leave to supplement their papers to respond to the findings of the forensic report. Even though

there was no forensic report the Letsema report gave the applicant the basis upon which it had to intervene in the affairs of the first respondent. The findings by Letsema were confirmed by the forensic audit report.

[29] In **Dengetenge Holdings PTY (Ltd) v Southern Sphere Mining & Development Co Ltd and Others 2014 (5) SA 138 at 135-136** the following was said:

> "It is apparent from the special circumstances of this case, set out fully in the main judgment, that if Southern Sphere had applied for exemption, in all probability the high court would have granted it. In these circumstances to remit the matter to the high court for an application for an exemption to be made would be tantamount to placing form above substance. This is so because Dengetenge has conceded on the merits that the rights were granted to it unlawfully and in contravention of an interdict. Therefore, on the present facts, a remittal to the high court would serve no purpose other than granting an exemption which is already justified on record. Accordingly, I hold that a remittal solely for that purpose is neither justified nor warranted. Ordering a remittal here would constitute a waste of time and resources. Scarce judicial resources must not be spent on mere formalities which are not dispositive of a real dispute in particular litigation."

[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.

[31] I am not of the view that the people who are currently at the helm of the first respondent have the capacity to take the respondent out of the mess it finds itself in. The first respondent failed to meet the requirements for its accreditation. It is unfathomable how the Board could have approved incentive bonus for a CEO who is steering a sinking ship. It is not clear what was the Board rewarding when he got his incentive bonus. This is a clear indication that the Board is not in touch with the affairs of the organisation it is overseeing. I am satisfied that the applicant has established maladministration in the first respondent and that the first respondent must be placed under administration.

[32] Consequently, the following order is made:

ORDER:

The First Respondent is placed under administration of the Applicant in terms of section 12 of the Social Housing Act No. 16 of 2008, with the following powers and duties:

2.1 The Applicant shall take immediate control of the First Respondent; manage its business and operations together with all assets and interests relating to the business of the First Respondent;

2.2 The Applicant shall take control of the cash, cash investments, shares and other security as well as all other assets owned, held or administered by or on behalf of the First Respondent, acknowledging the rights, claims and securities of the Second Respondent in the process, reference to securities being specifically the securities the latter holds in respect of the First Respondent (‘the Second Respondent’s Securities”);

2.3 The Applicant to incur such reasonable expenses and costs as may be necessary or expedient for the administration and control of the business and operations of the First Respondent and to pay same as and when they fall due from the assets owned, administered or held by or on behalf of the First Respondent;

2.4 The Applicant is permitted to engage such assistance of a legal, accounting, actuarial, administrative or other professional nature, as the Applicant may deem necessary, and to defray reasonable expenses and charges and expenses thus incurred from the assets owned, administered or held by or on behalf of the First Respondent;

2.5 The Applicant will provide to the Second Respondent on a monthly basis commencing on 31 January 2020 and for so long as the administration endures, a statement of income and expenditure in respect of the First Respondent and, upon reasonable written request from the Second Respondent and any other creditor of the First Respondent, to provide specified supporting documents in respect thereof;

2.6 The Applicant is authorised to institute or prosecute any legal proceedings on behalf of the First Respondent and to defend any action against the First Respondent;

2.7 The Applicant is authorised to investigate allegations of financial, governance and management failures and to implement appropriate action to address same, and to take action against any person who may be guilty of misconduct or a crime in terms of the Social Housing Act and or any other applicable law;

2.8 The Applicant is authorized and empowered to approach the Master of this Court to request for the convening of an enquiry, the issuing of subpoenas requiring production of documentation including loan applications, suretyships, financial statements, lease agreements and property valuations involving certain corporate entities, trusts, individuals in their capacity as shareholders or directors in the corporate entities and individuals as trustees and individuals as business persons and obtaining of oral evidence in order to comply with the order in 2.7;

2.9 The Applicant is authorized to take such further steps as may be necessary in terms of the Act and or any other applicable law, during the administration of the First Respondent, to achieve the First Respondent's restoration to viability.

4. The Applicant may approach this Court on these papers, as may be amplified, for any further powers that may be necessary for this order to be given effect to;

5. Costs shall be costs in the administration.

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NM MBHELE, J

On behalf of the Applicant:	Adv L.J Nkosi-Thomas
Instructed by:	Matsepes Inc BLOEMFONTEIN
On behalf of the 1st Respondent:	Adv Mkhari SC
Instructed by:	Moroka Attorneys BLOEMFONTEIN

On behalf of the 2nd Respondent:	Adv J Vermas
Instructed by:	Honey Attorneys BLOEMFONTEIN
On behalf of the 4th Respondent:	Adv Jonas
Instructed by:	State Attorney BLOEMFONTEIN