

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL, PIETERMARITZBURG**

CASE No.: 9408/2011

In the application of:

ANDRE GRUNDLER N.O.

Applicant

and

BODY CORPORATE OF LOT 2371

FLAMINGO HEIGHTS (SS210/1998)

First Respondent

K.K.GOVENDER (Door No.1)

Second Respondent

N. SAMYASI (Door No.19)

Third Respondent

P. GOVENDER (Door No.11)

Fourth Respondent

P. NAIDOO (Door No.20)

Fifth Respondent

G. RAMRUTHIA (Door No.4)

Sixth Respondent

V. GOVENDER (Door No.6)

Seventh Respondent

S. M. CASSIM (Door No.3)

Eighth Respondent

D. M. NARAINSAMY (Door No.35)

Ninth Respondent

S. CHETTY (Door No.27)

Tenth Respondent

G. SHEIK (Door No.12)

Eleventh Respondent

JUDGMENT

VAN ZÿL, J.:

1. The applicant was appointed as an Administrator in terms of the provisions of section 46 of the Sectional Titles Act 95 of 1986 (the Act) by order of this Court granted under case number 11364/2008 on 22 October 2008. The intended duration of his appointment was for a maximum period of thirty six (36) months. However, the terms of the order provided for the earlier termination of the applicant's office, should the rehabilitation plan contemplated in annexure "A" to the order be substantially implemented before the expiration of the period referred to above. Provision was also made therein for the extension of the applicant's period of appointment, should it not be possible to complete, or substantially complete the rehabilitation plan involved.
2. The subject of the rehabilitation plan was, what was originally the

respondent, but which then became the first respondent, after the second to the eleventh respondents were joined as parties in these proceedings by order of this Court dated 22 November 2011 under case number 9408/2011. It appears that the present proceedings commenced when the applicant applied on 20 October 2011, by way of an urgent application, for the extension of his term of office and a rule nisi returnable on 22 November 2011 and containing interim relief, was granted. On the latter date the individuals, who had travelled to Pietermaritzburg to attend the court proceedings and intended seeking a postponement to enable them to formally oppose the confirmation of the rule, were then by consent joined as parties, the rule was extended until confirmed or discharged and the matter adjourned sine die.

3. Before embarking upon a consideration of the issues presently in dispute, it is necessary to recap the events which eventually gave rise to the present impasse. I do not propose to dwell at any length upon the motivation for the original application giving rise to the appointment of the applicant as Administrator. The first respondent has at all material times been a sectional title development comprising some seventy two (72) units, ownership of which are registered in the names of the various individual owners.
4. The application under case number 11364/2008 (the original application) was launched by the eThekweni Municipality (the

municipality) as applicant and citing the first respondent. The municipality relied for its locus standi to bring the application upon the provisions of s46(1) of the Act, it being the relevant local authority within whose area of jurisdiction the property comprising the business of the first respondent is situated. From the application papers it appears that at the time the municipality had a claim for arrear rates as against the first respondent and was unable to collect. Demands for payment, or even information and documentation in terms of the provisions of the Act, went unheeded and it could not even establish whether the first respondent was controlled by a functional body corporate, as required by the Act. In the result it brought the application for the appointment of an Administrator and the applicant was appointed, as indicated above.

5. It is quite apparent from the application papers before me that, broadly speaking, the relationship between the occupiers of the units in the first respondent and the applicant was unhappy from the outset. The papers are fraught with conflicting views and in the absence of a referral for the hearing of evidence, which is not justified in the present circumstances, I have to make the best of the papers as they are. For present purposes I am prepared to accept that, at the time of the granting of the original order appointing the applicant as administrator, the first respondent had become dysfunctional, that the appointment was justified and that the first respondent was in need of rehabilitation. But that was then and now is now.

6. Since the original appointment of the applicant the municipality, its executive committee having approved a rates rebate policy during June 2010, implemented such policy with effect from November 2010. This resulted in a write-off of the arrear rates which motivated the original application and although detailed particulars of the current rates position is not before the court, it would appear that the municipality now considers the first respondent as sub-economic housing which receives corresponding rates relief from the municipality. It therefore appears unlikely that another debt to the municipality is likely to accumulate in the foreseeable future.
7. What also emerges with some clarity from the papers is that a significant number of the unit owners are in dire financial straights. Many amongst their number are apparently old age pensioners whose sole, or major sources of income are represented by such pensions. The applicant makes the point that an enduring difficulty throughout his administration has been an inability to resolve the issue of long outstanding unpaid levies owed to the first respondent by its unit owners. In paragraph 27 of his founding affidavit he calculates the unpaid levies as at 30 September 2011 in the sum of R485 381-00. He suggests that about one half of the unit owners are either fully paid up or are nominally in arrear, whilst the other half are effectively responsible for the outstanding amount. He expresses the view that the reason for the accumulated debt is their unwillingness or inability

to settle their obligations.

8. In motivating his continued administration and extension of his appointment the applicant expresses the view that the owners of the units, effectively the occupants of the first respondent's development, do not have the resources, experience, ability and tenacity to administer the affairs of the first respondent in a proper manner and he is openly sceptical that they would be able to overcome the enduring problem of chronically unpaid levies. In his view the only solution to the intractable problems besetting the first respondent is to extend the administration of the first respondent so that, when the administration finally terminates the first respondent "*.. should be left with a clean slate before it can revert to owner management under duly appointed trustees.*". (as per para 40 of the applicant's founding affidavit).

9. We know from the original application papers that the municipality at the time claimed arrear rates of some R172 625-16 as at 1 July 2008 to have been owing by the first respondent. From annexure AG.12 in the present application papers it appears that the municipality, as part of its rates rebate policy wrote off outstanding rates of R158 436-52. That no doubt brought about a marked improvement in the financial position of the first respondent.

10. However, in expanding upon the case for continued administration

the applicant points out that there are various other debts still owing by the first respondent. Details of these appear in paragraph 34 of the applicant's founding affidavit. Although it is not my intention to embark upon any detailed analysis of the somewhat lengthy papers before me, it is nevertheless necessary to refer to some of these debts in order to place the position of the parties in perspective.

11.The applicant states that the first respondent is still indebted to attorneys appointed by the applicant in the sum of R7 948-00 in respect of an interdict application he brought against certain owners or occupiers of the units of the first respondent. This application was brought in the Durban High Court and the file has not been available to me. The applicant alleges that he was compelled to bring the application because certain of the owner/occupiers of the complex interfered with service providers appointed by the applicant and who entered the premises of the complex. Whatever the merits of the application, it is a sad reflection upon the state of mistrust which appears to have existed between the unit owners/occupiers and the applicant.

12.During the course of his administration the applicant appointed so-called managing agents to attend to the general administrative, secretarial and accounting duties of the first respondent. Initially Connecta Realty (Connecta) was appointed for the period 12 November 2008 until 31 January 2011 and then Tricor Property Administration

(Tricor) with effect from 1 February 2011. According to the applicant the first respondent still owes Connecta R9 033-00 and Tricor R39 270-84. The applicant also instructed attorneys on behalf of first respondent to collect arrear levies from the first respondent's unit owners. Initially he instructed Shepstone & Wylie from the beginning of 2009. This firm however withdrew its services and the applicant states that because its outstanding fees (in an unspecified sum) could not be settled, they retained the files in terms of their lien. Thereafter the applicant appointed his present attorneys of record Messrs Erasmus van Heerden Attorneys to attend to the collections. The applicant states that the first respondent was indebted to them in this regard in the sum of R63 163-55 as at 30 September 2011 and to himself for fees and disbursements as at 31 August 2011 in the sum of 73 807-22 with the most recent payment to him being on 6 January 2010.

13. Unfortunately the papers do not contain a set of financial statements in format which would permit an accurate understanding of the first respondent's debtors and creditors, its assets and liabilities, both actual and contingent, or its income and expenditures. On the face of it, however, the first respondent's debts referred to above and incurred under the administration of the applicant, total some R193 221-00.

14. Prima facie the first respondent, after more than three years administration, is financially worse off than before the appointment of

the applicant, and that despite the municipality writing off rates of some R158 436-00. I am also concerned about the lack of detail and/or explanation in the papers which would assist in evaluating the benefits of administration to the first respondent. For instance, it is unclear why it was necessary for the applicant to appoint managing agents in the first place, how duties are divided as between the applicant and the managing agent and why it was that the managing agent was replaced.

15. Likewise it remains unclear why attorneys Shepstone & Wylie withdrew from the collection matters handed over to them, thus necessitating the appointment of Erasmus van Heerden Attorneys. For that matter, the wisdom of embarking upon an expensive legal collection exercise in respect of debtors who are potentially impecunious and may be unable to pay the capital debt, let alone the legal costs incurred, remains unclear. The papers are silent on how successful the debt collections exercise may have been but since both firms of attorneys, the latter in particular, are owed monies it is fair to assume that the exercise was unrewarding.

16. The applicant claims to be litigating for the benefit of those unit owners who are paid up or only nominally in arrears and whose number he estimates at about one half of the units. However, these unit owners are notable in their absence from these proceedings and have refrained from openly lending their support to the applicant for

the extension of his administration.

17. Finally, and not to belabour the point, it is unclear on the applicant's case why, if he has only made limited progress in the rehabilitation of the first respondent during the initial term of his appointment, he is likely to be more successful during the extended term of twenty four (24) months. Prima facie, as indicated above, the financial position of the first respondent has arguably deteriorated during the applicant's initial term of administration and if extended, may deteriorate further.

18. The opposition to the extension of the applicant's appointment has been vigorous and passionate. The second to eleventh respondents purport to represent the owners of the units contained in the first respondent's housing complex generally, but especially those opposed to the applicant's administration. Various allegations are made against the applicant and there are insinuations of dereliction of duty, promotion of self-interest, poor judgement and poor administration laid at his door. These are disputed by the applicant and I refrain from seeking to draw any firm conclusions in this regard from the conflicting averments contained in the papers. It is for that reason that I largely confined myself to the applicant's founding papers in summarising the position above.

19. In essence, however, the second to the eleventh respondents (for convenience here called "the respondents") allege that the unit owners

in the complex have embarked upon a course of self rehabilitation, they have revived their community spirit, they have held formal meetings, elected office bearer/representatives, collected monies, opened a banking account, retained the services of attorneys and feel themselves confident that they would be able, once the authority of the applicant has been removed and they are again masters of their own house, to be able to administer the affairs of the first respondent, both adequately and much more economically than the administrative costs incurred by the applicant. They postulate, should the administration of the applicant not be terminated, that he would effectively become a permanent feature of their existence because the position where the administration of the first respondent could be returned to the unit owners with a “clean slate” (see paragraph 8 above) could never be achieved.

20.The applicant on the other hand is pessimistic regarding the abilities, perseverance, resources and ability of the unit owners to take charge of their own destiny and successfully to administer the affairs of the first respondent. But, as already indicated, it remains unclear what tangible benefits, on balance, the first respondent received or enjoyed as a result of the applicant’s initial term as administrator.

21.Clearly the inter personal relationships between the applicant and the general body of unit owners would appear to be very poor state. It is therefore no wonder that the applicant does not appear to have made

any serious attempt at providing the training regime to the unit owners, as envisaged in paragraph 14 of Annexure “A” to the order of court of 22 October 2008 in case number 11364/2008 when he was initially appointed.

22. There are in addition potentially conflicting interests to be considered.

These arise in particular with regard to the claims of the creditors of the first respondent who became creditors in the course of the applicant’s administration. The applicant suggests that continued administration would mean that these creditors would, in the fullness of time be paid, whilst if his term were not extended such creditors, himself included, may then be compelled again to bring an application for an administrator to be appointed in respect of the first respondent. This view is premised upon the validity of the claims and that the unit owners would be unable to successfully manage the affairs of the first respondent. The respondents on the other hand appear convinced that they would be able to manage the first respondent successfully, are disbelieving regarding the claims and/or quantum of the claims of these creditors and suggest that, in the absence of consensus, the affected creditors should pursue their claims against the first respondent in a court of law where such claims can be properly tested. They appear suspicious that the applicant, if he remains as administrator, would unfairly agree these claims to the prejudice of the first respondent.

23. In the final analysis the question to be answered in these proceedings is whether it has been shown that the interests of the first respondent, and through it the interests of its unit owners generally, would best be served by the extension of the applicant's administration, or by a reversion of control over its affairs to the unit owners of the first respondent.

24. In principle the Act is designed to encourage and promote self governance by unit owners. Section 46 of the Act, however, provides for the situation where, for whatever reasons, the self administration fails. It does so by way of making it possible for members of a select group of interested parties to move the Court for the appointment, replacement or removal of an administrator, where the circumstances justify it. Although the Court is empowered to render the appointment indefinite, this would clearly occur only in the most extreme circumstances. The Court is given a wide discretion by the section but, in my respectful view, where possible, such discretion should be exercised in a manner which would favour self administration, whenever possible.

25. Weighing all the relevant and material considerations and the entreaties advanced on behalf of both the applicant as well as the respondents, I am not persuaded that the interests of the unit owners of the first respondent's complex, nor its creditors, present, contingent and future, would necessarily best be served by the extension of the

appointment of the applicant as administrator.

26. It may be that the unit owners are not successful and that in due course the administration of the first respondent fails again and that another order placing it under administration is called for. But to say that the unit owners can only be restored with control over their own destiny once there is a guarantee of success goes too far in my view. The same consideration applies to the approach by the applicant that control over the first respondent can only be returned to the unit owners when there is a “clean slate”. In other words all levies are fully paid up. If there is a not insignificant prospect of the unit owners succeeding in running their own affairs and absent weighty considerations to the contrary then, in my view, the court should, in keeping with the tenor of the Act favour the principle of self determination.

27. In the view I take of the present matter the onus rests upon the applicant, as the proponent for the extension of his administration, to demonstrate that such an extension would be justified and more likely to be generally beneficial to all concerned. I am not satisfied that the applicant has discharged this onus. It follows that the application must fail and the rule be discharged.

28. There remains the issue of costs. In principle, costs should normally follow the result. Here the applicant *prima facie* brought and pursued

the application, in the face of furious opposition from at least a significant and vocal group of unit owners in the first respondent opposed to his further involvement, to advance his own personal financial interests. Such interests related both to recovery of outstanding fees to which he lays claim, as well as further fees to be earned during the course of his extended administration.

29. But the situation is by no means so simple when it comes to the formulation and effects of a costs order adverse to the applicant. The applicant acts *nomine officio* and an adverse costs order would rebound on the respondents because the costs awarded against the applicant would be payable out of the assets of and by the first respondent. Since the interests in the first respondent are ultimately held by the unit owners, including the respondents, a costs order against the applicant would in practice become a costs order against the respondents and the other unit owners. Much the same situation would prevail if I were to make no order as to costs because the applicant would still be entitled to recover his own costs from the first respondent.

30. The only way in which to ensure that the applicant is not unfairly benefitted by an adverse costs order would be to direct that the applicant's costs are to be personal to him and not recoverable as an administration expense from the first respondent. That, of course, would leave the respondents high and dry. But then counsel for the

respondents, in his heads of argument, seeks discharge of the rule and dismissal of the application, but is silent on the issue of costs.

31. In the result I make an order, as follows:-

- a. The application is dismissed and the rule nisi, as granted on 20 October 2011 and indefinitely extended on 22 November 2011, is discharged.
- b. The applicant in his personal capacity shall bear his own costs of the application and shall not be entitled to indemnification for such costs by, or be entitled to recover such costs, or any portion thereof, from the first respondent.
- c. Save for the order as to costs contained in paragraph (b) hereof, there shall be no order as to costs.
- d. By reason of the fact that the costs orders contained in paragraphs (b) and/or (c) hereof were not considered during the course of the argument of the opposed matter, should any one of the parties feel aggrieved by the terms of such costs orders, such party shall be entitled to call for reconsideration of these costs orders; and
 - i. to that end shall be entitled within TEN(10) days

from date of delivery of this judgment to deliver notice in writing to the court and to all the other interested parties specifying the cause of complaint and the grounds therefore, together with such written argument as such objecting party may wish to submit in support of the objection.

- ii. Any party receiving such objection and wishing to oppose or participate may do so by way of written argument delivered within SEVEN(7) days from date of receipt of the objection.
- iii. The Court shall consider the objection(s) and may call for oral argument, or consider the objection(s) in the light of the documentation submitted and may either recall the earlier costs order and make a costs order afresh, or it may reaffirm the order as herein contained.

VAN ZÿL, J.

APPEARANCES:

For the Applicant : Adv P. Jorgensen

Instructed by Erasmus van
Heerden Attorneys, Durban c/o
Browne, Brodie & Fourie,
Pietermaritzburg.

For the Respondent : Adv A. R. Brink,
Instructed by Premrajh &
Associates, Pietermaritzburg.

Judgment reserved on : 7 August 2012

Judgment delivered on : 22 August 2012