

IN THE KWAZULU NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO. 6047/2010

In the matter between:

**THE BODY CORPORATE OF
PALAZZO DE MARINA**

FIRST APPLICANT

YAGAMBARAM MOONSAMY N.O.

SECOND APPLICANT

and

INTENSE HEAT INVESTMENTS 5 (PTY) LIMITED RESPONDENT

JUDGMENT

MURUGASEN, J.

[1] This an application for the appointment of an administrator to the Body Corporate of a Sectional Title development in terms of S 46 of the Sectional Titles Act No 95 of 1986 (the Act).

[2] The Body Corporate of Palazzo de Marina (the Body Corporate) represented by Yagambaram Moonsamy (Moonsamy), the chairperson of the Body Corporate, as first applicant and the aforesaid Moonsamy in his capacity as the duly authorized trustee of the Yagambaram Moonsamy Family Trust which is the owner of a unit in the Palazzo development as second applicant, launched this application for the appointment of Rajesh Maharaj as administrator of the Body Corporate on the grounds that :

- i) the financial affairs of the Body Corporate were in 'an appalling state' as a result of the failure of the respondent, Intense Heat

Investments 5 (Pty) Ltd, the developer and owner of 32 units in the Palazzo , to effect payment of levies, and

- ii) there was a dispute as to the identity of the duly appointed and authorized trustees of the Body Corporate, which was prejudicing the affairs of the Body Corporate and the Palazzo development.
- [3] The applicants aver that the conduct of the respondent had necessitated the application for the following reasons :
- (i) the failure by the respondent to pay the levies due by it had compromised the maintenance and administration of the Body Corporate and, as at date of the application, the arrear levies due by the respondent was in excess of R130 000;
 - (ii) although the Board of Trustees had on 3 August 2009 resolved that no set off against levies due would take place and that the claims of the respondent would only be considered if properly vouched, the respondent was in default. Subsequently legal action was instituted against the respondent for recovery of the arrear levies, which the respondent defended;
 - iii) the lack of funds resulting from unpaid levies had created financial difficulties and the Body Corporate could not, *inter alia* maintain the lifts and the common property or pay insurance premiums and the managing agent's fees; and
 - iv) no financial statements had been prepared or audited since the date of the establishment of the Body Corporate in contravention of the Act.

- [4] The applicants also dispute the authority of M Esmaljee the representative of the respondent who, with the second applicant and three other members of the body corporate, was appointed as trustee at the inaugural general meeting of the Body Corporate.
- [5] The applicants allege further that after the commencement of the legal action against the respondent, Esmaljee in contravention of the relevant management rules called a Special General meeting of the Body Corporate on 2 April 2010. The second applicant who did not attend the Special General meeting, alleges that various irregularities occurred at the meeting, including the exercise by the respondent of its right to vote at the meeting when it was in arrears with the payment of the levies. He contends that consequently the decisions taken at the meeting were not only invalid but have also exacerbated the problems of the Body Corporate.
- [6] Further, a firm of attorneys, Antony Whatmore and Company, was appointed as the legal representative of the Body Corporate at the meeting, although the same firm also appeared to represent the respondent.
- [7] The appointment of the administrator was consequently also sought to rectify the abuse by the respondent of its majority vote.
- [8] The application is opposed by the respondent which contends that it was not substantially in arrears with payment of its levies as it performed certain cleaning and maintenance services for the Body Corporate and paid expenses on behalf of it, and such amounts lay to be set off against the levies payable by it. The respondent also disputes that it has failed to produce documents in connection with the services and payments or that set off had taken place, averring that the managing agents Ballito Estates

had made legitimate payment for services rendered by the respondent on the premises of the Palazzo development with the knowledge of the second applicant and had refunded the respondent after it had effected payment of its levies. It alleges that after an accounting is conducted, it is possible that the Body Corporate may in fact owe the respondent money.

- [9] The respondent also contends that it is the conduct of the second applicant which led to the dispute in respect of the board of trustees as the applicants failed to comply with the relevant management rules relating to the convening of meetings of the Body Corporate. The respondent also disputes the authorization of the Body Corporate to bring the application, and the appointment of the second applicant as trustee and /or chairperson of the Body Corporate and contended that the various resolutions relied on by the applicants are invalid.
- [10] The respondent further denies that there is any need for the appointment of an administrator as the financial affairs of the Body Corporate were and are not in the state alleged by the applicants. It avers that it was the conduct of the applicants in failing to effect payment for essential services which had resulted in the disconnection of water and electricity to the Palazzo development.
- [11] The respondent alleges further that the special meeting called on 2 April 2010 pursuant to a special resolution of the trustees passed on 17 March 2010 to dispense with the relevant Management rules regulating the convening of meetings was intended specifically for the purposes of the removing as trustee or causing the resignation of the second applicant and trustee A Moodley and validly electing a chairperson and trustees and appointing a new managing agent to replace the illegally appointed Amereda Property Management CC (Amareda).

- [12] Effectively the respondent denies all the allegations of the applicants, in particular that the respondent was responsible for the adverse state of the Body Corporate's financial affairs and contends that their complaints were spurious and unfounded, that the financial woes of the Body Corporate are attributable instead to the deregistration of the managing agent close corporation, Amareda, and its failure to furnish the books of account of the Body Corporate, and that the conduct of the second applicant was contrary to the interests of the Body Corporate.
- [13] The respondent has also submitted that as the trustees elected by the Special General meeting were attending to their obligations, the appointment of an administrator was unnecessary ; alternatively an administrator ought to be appointed to assist the managing agent Maxprop only insofar as necessary and until new trustees are appointed and the outstanding levies collected.
- [14] In terms of an order of court dated 6 August 2010, Rajesh Maharaj (Maharaj) was appointed as interim administrator and directed to investigate and report to the court on the financial affairs of the Body Corporate, the need for the administration of the Body Corporate under Section 46 and if there was such need, the implementation of the Rehabilitation Plan annexed to the application and any proposed amendment thereto, and the anticipated period for the implementation and completion of the rehabilitation of the first applicant.
- [15] Subsequently by way of an application under case number 10454/2010, the Respondent herein sought an order for the removal or replacement of Maharaj on the grounds that he had been appointed as administrator on the basis that he was a suitably qualified and a neutral party to investigate the problems beleaguering the Body Corporate which included the conduct of the managing agent Amareda Property Management CC

(Amareda). It had however subsequently come to light that Maharaj had a business relationship with one R Moodley, the sole member of the Amareda, which had not been disclosed and which the respondent believed would conflict with Maharaj's responsibility as administrator, as part of his duties required him to investigate the conduct of Amareda.

[16] In terms of an order taken by consent Maharaj was removed and replaced with the current interim administrator, Tracy Ludwig (Ludwig) and the costs of the application under Case Number 10454/2010 were reserved for determination with the current application.

[17] Adverting to the allegations of the parties, the versions of the applicants and the respondent are clearly diametrically opposed as each party strenuously rejects the complaints against it or him and seeks instead to lay all blame on the other party.

[18] It is not necessary to traverse the factual background to the application and the affairs of the Body Corporate as the report of Ludwig contains all the pertinent facts. The contents of the report are not in dispute although it has been suggested by the parties that Ludwig's recommendations are either not in accordance with the provisions of the Act or not necessary for the efficient functioning of the Body Corporate as the complaints have been resolved and the managing agents are dealing effectively with their responsibilities.

[19] What emerges clearly from a perusal of the affidavits of the parties, the supporting documentation and the report of Ludwig, is that neither the second applicant nor the respondent, despite their vociferous protestations, have come to court with unsullied hands.

[20] When the application was launched the financial affairs of the Body

Corporate were compromised as it could not meet its financial commitments. The payment of *inter alia* utilities and services, rates, insurance, the maintenance of lifts in the development were not effected timeously and the Body Corporate had fallen into arrears as levies were only paid by the owners who constituted a small percentage of the holders of the units while the developer who held the larger proportion of the units, 32 out of 38, did not meet the levy payments for the units.

[21] As Ludwig reports, the Respondent 'had perpetuated the culture of nonpayment of its levies and had insisted on set off although it had been agreed that it should claim for expenses and no set off should take place.'

[22] That the nonpayment of levies by the respondent and the resultant problems was ongoing is evident from the minutes of the meetings. One such example is evident in the minutes of the meeting of the trustees on 25 May 2009 where it is recorded that the respondent had agreed to pay the outstanding levies but only at the meeting on 1 September 2009 was it confirmed that the payment had been effected, and that the expenses had been refunded to the respondent.

[23] Ludwig also reports that at a meeting called and held on 7 June 2010, the arrear levies as at 30 June 2010 were R238 052; the payment for insurance, lifts etc in the approximate sum of R44 000 was due; the payment of insurance premiums to Santam was in arrears. The contract for the lift was finalised and confirmed on 5 July 2010.

[24] Yet the respondent in its affidavit dated 17 June 2010 denies that it is in arrears with the levy payments, and claims that a reconciliation will place the respondent in credit. Annexure AA22.1 to the respondent's supplementary affidavit, the Revenue Billing statement dated 24 April 2010, indicates that the account was in arrears and payment was effected

on 17 May 2010.

[25] It is common cause that the respondent was liable at the time of the application, to the extent of approximately eighty percent (80%) of the levies. The Body Corporate was forced into financial constraints as a result of the nonpayment of levies. The responsibility therefor must be attributed to the respondent.

[26] Turning to the conduct of the second applicant, the following is noted by Ludwig:

(i) Esmaljee and trustee P Naidoo were not notified of the meeting on 21 January 2010 when legal action against the respondent was considered. It was noted that nonpayment of levies by the respondent, and the 'incorrect offset of expenses' without trustee approval was a problem; the contract for the lifts was not in place and the electricity account was not paid because of the levy arrears.

(ii) Esmaljee was also not given notice of the Emergency General Meeting held on 30 March 2010 or the Emergency Trustee Meeting held on 16 April 2010. It was resolved at the latter meeting that the Body Corporate would apply for the appointment of an administrator and Ravi Moodley (Moodley) who had assumed the role of managing agent, was mandated to meet with the attorneys and provide documentation to them, while Moonsamy was authorized to sign the necessary documentation. No minutes of the meeting are on record.

[27] As pointed out by Ludwig, the failure to give Esmaljee, as trustee, notice of the meeting albeit he was respondent's representative and the

respondent had defaulted with the levy payments, was irregular and given that Rule 54 (1) is peremptory, any decision taken at that meeting, including the decision to apply for the appointment of an administrator, is void *ab initio*.

[28] Significantly there is also no record of a decision to remove Ballito Estates and appoint Amareda as managing agent and the agreement between the Body Corporate and Amareda is not signed and witnessed properly, nor is the juristic status of Amareda apparent ex facie the agreement. It is noteworthy that R Moodley, the active member of Amareda, had over a period of time attended meetings of the trustees and participated therein despite his undetermined capacity and his 'uninvited' status as reflected on the minutes. He therefore appears to have been acting an advisory capacity to Moonsamy even before the improper appointment of Amareda as the managing agent.

[29] Ludwig also found that the authority of Moonsamy to act on behalf the member of the body corporate, the Yagambaram Moonsamy Family Trust, was fatally flawed.

[30] However improper conduct on the part of the respondent is also evident. On 19 March 2010, Esmaljee gave notice to the trustees and Ballito Estate the managing agent who preceded Amareda, of a Special General meeting to be held on 2 April 2010 to discuss the resignation of Moonsamy as chairperson and the illegal appointment of Amerada as managing agent. At the meeting, the respondent as developer was represented by 6 persons among whom the units it held were allocated; but no proxies in respect of this representation were made available to Ludwig. At the meeting, Esmaljee was appointed chairman and four others as trustees of the Body Corporate.

- [31] It was also unanimously agreed that Amareda be removed as managing agent and the legal proceedings against the respondent be withdrawn. Despite the clear conflict of interest in the decision to withdraw proceedings against the respondent the representatives of the respondent participated in the decision as it was agreed to do so 'by unanimous vote' but no reason for the decision is recorded. Although Ludwig notes that the institution of the legal action was contrary to the resolution to hand the respondent over 'for collection and recovery through arbitration or liquidation', the minutes are silent as to the reason for the decision. The conduct of the respondent's representative who chaired the meeting was clearly intended to protect the interests of the respondent, as despite the respondent being substantially in arrears with the payment of levies, no decision was taken at the meeting for any alternative recovery of the levies due by it.
- [32] It is therefore apparent that both Esmaljee and Moonsamy whether in their capacities as trustee or chairperson of the Body Corporate acted in contravention of the Management rules and the Act overtly or under the guise of a decision taken or resolution passed by the board of trustees at meetings which were either not quorate or called without due and proper notice, in order to manipulate the conduct and the administration of the Body Corporate to gratify their own interests and objective to assume control of the Body Corporate.
- [33] While there is currently more and better compliance with the Body Corporate's obligations in terms of Section 37 of the Act, of major concern is that the financial statements remain unaudited and the budget unrevised.
- [34] Rule 48 of the management rules requires the managing agent to keep full records of his / her administration. Ludwig was unable to finalise her report

on the financial situation of the Body Corporate as no financial reports were furnished by Amareda, although Ballito Estates had transferred funds and other payments were made to it.

[35] Furthermore as the respondent disputes the figure furnished by Maxprop as owing by it to the Body Corporate, the dispute may only be resolved if the financial records of the successive managing agents and the bank statements are made available. Similarly in respect of the current financial status of the Body Corporate and its creditors, Ludwig was only furnished with the records of Maxprop. As her authority under the interim order did not extend to implementing the rehabilitation plan or reconciling the financial statements of the managing agents, the bank accounts and the claims of the respondent, the financial status of the body corporate remains unascertained and there are still no audited financial statements.

[36] However Ludwig notes that the respondent is no longer persisting with its claim of set off but is now paying what is due timeously. This is clearly a positive consequence of the application and the appointment of an interim administrator, even though the rehabilitation plan has not been implemented.

[37] Nevertheless, the financial affairs of the Body Corporate require urgent resolution. As the powers of the interim administrator were restricted to investigating and reporting to the court, an administrator with the necessary powers and authority may compel the previous managing agents to provide the necessary documentation and financial records to resolve the outstanding dispute with the respondent and ensure that the statements of the Body Corporate are audited in compliance with its obligations in terms of the Act.

[38] Further previous elections of trustees have been flawed and irregular, in

particular in respect of the representation of the owners of the units. Therefore there was, when the interim administrator was appointed, no duly constituted board of trustees. This was in the main, a consequence of the power struggle between the respondent and Moonsamy.

[39] **Appointment of an administrator**

In deciding whether an administrator ought to be appointed, the court must consider whether such appointment is in the best interests of the Body Corporate.

[40] In **Williams v Nathan & Other (2006) JOL 18414 (W) Labe J** held that

“the appointment of an administrator by the court is a drastic step for it to take because it deprives the body corporate wholly or in part of its powers to run its affairs.”

He also quotes with approval from **GC Van Der Merwe & Sonneke: Sectional Titles, Shareblocks and TimeSharing VOI 1 paragraph [14.6] at 14-82** that a court will only exercise its discretion to appoint an administrator in exceptional circumstances and as a “last resort”.

[41] In **Bouramis and Another v Body Corporate of the Towers & Others 1995 (4) SA 106 (D) Booysen J** held at page 109 G-H that :

“....the court should not, where a duly constituted board of trustees is in existence, grant an order for the appointment for the appointment of an administrator unless the applicant establishes on a balance of probabilities, firstly that there have been breaches of duties set out in S39 read with subsec 37, 38 and 40, and, secondly, that it is likely that the owners of the units shall suffer substantial prejudice if an administrator were not to be appointed by the Court. Such breaches could take the form of a failure to perform duties or the improper performance of duties.”

[42] Similarly in **Dempa Investments CC v Body Corporate, Los Angeles 2010 (2) 69 (W) Gautschi AJ** at page 82, applied 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.

[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.”

[43] Applying the principles in **Bouramis** and **Dempa** to this case, as there is no duly constituted board of trustees, the financial affairs of the Body Corporate have not been rectified, in particular monies due to the Body Corporate remain unaccounted for and the respondent's dispute in respect of levies due by it remains unresolved, the owners of units are undoubtedly exposed to substantial prejudice.

[44] Further from Ludwig's report it is apparent that the trustees have failed to

perform their duties properly and in the interests of the Body Corporate, but have rather been selfserving and an element of dishonesty pervades the conduct of the second applicant and respondent. This is contrary to Section 40 of the Act, which prescribes that each trustee of a body corporate shall stand in a fiduciary relationship to the body corporate.

[45] The deep animosity between Moonsamy and Esmaljee and the respondent which has divided the members of the Body Corporate also militates against an easy resolution of the problems that continue to beset the Body Corporate. Under these circumstances, it is unlikely that a properly elected board of trustees will be constituted without the intervention and supervision of an administrator.

[46] Thus although Ludwig suggests a mentorship, in effect what is required is a short term administrator who may resolve the outstanding disputes expeditiously.

[47] In deciding whether the applicant has established good reasons that the court should exercise its discretion in favour of appointing an administrator, much depends on whether the conduct of the trustees warrants the appointment. Ironically although the respondent now resists the appointment of an administrator so strenuously, it was the appointment of the interim administrator that led to the substantial improvement in the affairs of the Body Corporate.

[48] Although the Body Corporate is currently being managed effectively and competently by Maxprop, nevertheless the powers of a managing agent do not authorize it to attend to the issues that remain outstanding. Further as the managing agent must act on the instructions of the trustees, the appointment of the trustees must urgently be finalized.

[49] Therefore, although the appointment of an administrator is a drastic step, in respect of this Body Corporate, it is a necessary one, at least until the two major issues are resolved. However the term of the administrator does not need to be indefinite as proposed by the applicants, given the nature of the unresolved issues.

[50] **Costs**

S46 (1) of the act reads as follows :

“ a body corporate, a local authority, a judgment creditor of the body corporate for an amount of not less than R500, or any owner or any person having a registered real right in or over a unit, may apply to the Court for the appointment of an administrator.”

It was accordingly not necessary for two applicants herein, with the concomitant increase in costs. Further given that the election process was flawed, the appointment of the board of trustees was in dispute, and there was no quorum to pass the resolution relied on by Moonsamy to represent the Body Corporate in these proceedings, the application ought not have been launched in the name of the Body Corporate. However the Yagambaram Moonsamy Family Trust as owner of a unit has the necessary locus standi under S46(1) to bring the application; and Moonsamy avers that he is a trustee duly authorized to bring the application on behalf of the trust, although no written authority to that effect has been furnished.

Nevertheless as the affairs of the Body Corporate were prejudiced by the conduct of the respondent, the application for the appointment of an administrator was justified as it was to the benefit of the Body Corporate.

[51] In my view the circumstances herein are appropriate for the court to exercise its judicial discretion in respect of the award of costs. Firstly the application was flawed because of the highhanded conduct of Moonsamy, who was so intent upon having an administrator appointed, that he relied on an invalid resolution to make the Body Corporate party to the

application. Secondly, no costs were sought against the respondent unless the application was opposed by it, which it did despite its blameworthy conduct. In the circumstances the Body Corporate ought not be mulcted in costs as a result of the conduct of an owner and the developer. As already found, both parties have failed to conduct themselves in accordance with their fiduciary obligations to the Body Corporate. An appropriate order for costs will therefore indemnify the Body Corporate but encumber the Second Applicant and Respondent with the costs of the application.

[52] **Case Number 10454/2010 :**

This application was necessitated by the failure of Rajesh Maharaj to declare his relationship with Ravi Moodley of Amareda. The minutes of the meetings and Ludwig's report reveal a relationship between Moonsamy and Moodley which existed even before the disputes among the trustees arose and it is highly improbable that Moonsamy was not aware of the relationship between Moodley and Maharaj when the application was launched, as Maharaj was specifically nominated as the administrator.

The appointment of Maharaj was not in the interests of the Body Corporate as, despite the protests to the contrary, it is highly improbable that as administrator he would have been an independent party. In any event it was incumbent upon Moonsamy as the person who motivated the application to satisfy himself not only of Maharaj's credentials but also of his ability to act independently and only in the interests of the Body Corporate and any potential conflict of interest ought to have been disclosed. It has since become apparent that the Body Corporate has suffered financial prejudice through the conduct of Amareda and that the investigation of its financial affairs have been impeded by the failure of Amareda to furnish financial records of the Body Corporate during its management, which has been exacerbated because Amareda is now in deregistration.

Despite the submission that the applicants represented by Moonsamy did not oppose the application for the removal of Maharaj, in my view the Body Corporate was compromised as a result of Moonsamy's disingenuous attempt to appoint an administrator who would be amenable to his suggestions. Consequently the second applicant and not the Body Corporate should bear the costs of the application.

[53] The following Order do issue :

1. **TRACY LUDWIG** is appointed to act as Administrator of the First Applicant in accordance with the provisions of section 46 of the Sectional Titles Act, No. 95 of 1986 ("the Act")
2. The term of Administrator shall be for a period of 6 months from the date of this order.
3. The Administrator shall comply with and implement the Rehabilitation Plan as set out in Annexure "YM 16" to the Founding Affidavit insofar as she deems necessary;
4. The Administrator shall prior to the termination of the order produce to this Honourable Court a Report advising on the completion of the Rehabilitation Plan, as set out in Annexure "YM 16" to the Founding Affidavit ("the Rehabilitation Plan"), or of the reasons why she is unable or deems unnecessary to do so;
5. The Administrator shall perform her functions as provided for in Section 37 of the Act and be empowered with such powers as provided for in terms of Section 38 and 46 of the Act;
6. The Administrator shall, prior to the termination of her appointment,

call a meeting of the members of the First Applicant, on at least twenty one (21) days notice for the purpose of electing and appointing a Board of trustees for the First Applicant and shall, in terms of the Act, call upon such members to nominate Trustees to be appointed to the Board of Trustees of the First Applicant;

7. For the purpose of the meeting referred to in paragraph 5 above the Administrator shall;

- 7.1 act as chairperson; and

- 7.2 determine who is eligible to nominate Trustees and vote in accordance with the provisions of the Act and Rules;

8. The remuneration of the Administrator shall be in accordance with the hourly rate chargeable by an attorney on the High Court Tariff from time to time, plus reasonable travelling costs in the event of her being required to travel outside the greater Durban area, or such other amount as this Honourable Court deems meet. The costs of the administration shall be paid by the First Applicant.

9. Within seven (7) days of the date of this order;

- 9.1 the books, documents, minute books, resolutions, bank statements, deposit books and other property belonging to the First Applicant be handed over to the Administrator;

- 9.2 any and all monies on behalf of the First Applicant be paid or caused to be paid into the Trust Account of the Administrator;

10. The Second Applicant and the Respondent are each ordered to bear its own costs.
11. The Second Applicant and the Respondent are each ordered to pay fifty (50) percent of the taxed costs of the First Applicant.
12. The Second Applicant is ordered to pay the costs of the application under Case Number 10454/2010.

For the Applicant:

Adv M Stewart

Instructed by:

Biccari Bollo Mariano Inc.

For the Respondent:

Adv PC Prior

Instructed by :

Anthony Whatmore & Company

Date of hearing:

27 May 2011-07-28

Delivered:

29 July 2011