IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 34482/2018

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

In the matter between:

LEONARD HENRY FRIEDLAND	First Applicant
MEGARAY LIMITED (Registration Number: M2007/023564/06)	Second Applicant
NIGHT VISION OPTICS (PTY) LTD (Registration Number: M2005/029472/07)	Third Applicant
and	
THE BODY CORPORATE OF THE GROVE SECTIONAL TITLE SCHEME	First Respondent
REDBURN INVESTMENTS INCORPORATED (Intervening)	Second Respondent
NUMBER TWO GROVE (PTY) LTD (Intervening)	Third Respondent
EYAL SARIG (Intervening)	Fourth Respondent
MANALIS INTERNATIONAL (PTY) LTD (Intervening)	Fifth Respondent
GERT LOUWRENS STEYN DE WET N.O.(Intervening)	Sixth Respondent
OLCKERS CHOPOLOGE KOIKANYANG N.O. (Intervening)	Seventh Respondent
TANDAVANTU PROPERTIES (PTY) LTD (Intervening)	Eighth Respondent
BANDIT OEM TRADING 102 (PTY) LTD (Intervening)	Nineth Respondent
FAIRBANK PETER BRETHERICK (Intervening)	Tenth Respondent

PALMARINE (PTY) LTD (Intervening)	Eleventh Respondent
BHUTTA MUHAMMAD WASEEM (Intervening)	Twelfth Respondent
RAFIQUE AMMARAH (Intervening)	Thirteenth Respondent
STANLEY WEINSTEIN N.O.	Fourteenth Respondent

Delivered: 1 April 2026 – This judgment is handed down electronically by circulation to the parties' representatives via email and uploading it to CaseLines.

ORDER

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1. The application to introduce new evidence is dismissed.

2. The costs of the application to introduce new evidence shall be paid by Mr Stanley Weinstein personally, on the party and party scale, including costs of counsel at scale B.

3. The counter-application for a review is dismissed.

4. The second to the thirteenth respondents shall pay the costs of the counter-application on the party and party scale, including costs of counsel at scale B.

5. The settlement agreement dated 19 September 2019 between the applicants and the first respondent is made an order of court.

6. The first to thirteenth respondents shall pay the costs of the application to make the settlement agreement an order of court, jointly and severally, with the costs payable by the first respondent on the attorney and client scale and the costs payable by the second to thirteenth respondents on the party and party scale, including costs of counsel at scale B.

JUDGMENT

BESTER AJ:

Introduction

[1] In the heart of Sandton lies The Grove, a sectional title scheme registered under the Sectional Titles Act, 95 of 1986. It consists of eleven residential units and common property. Sadly, the Body Corporate of The Grove, the first respondent, had been unable to comply with its responsibilities for many years. So much so that, upon application by Mr Friedland, who is the first applicant, Mr Stanley Weinstein was appointed as administrator of the first respondent in terms of section 46(1) of the Sectional Titles Act under an order granted by Mathopo J on 15 December 2009.

[2] However, disputes remained rampant, and monies to cover expenses, including litigation expenses for the recovery of levies, continued to fall short. It seems that more than fifteen years of external administration had done little to resolve the strife in this small community.

[3] During 2015 and 2016, the first applicant and two entities controlled by him, the second and third applicants, advanced funds to the Body Corporate to cover expenses, including litigation costs to recover outstanding levies. Mr Friedland is a director of Grove Unit 7 (Pty) Ltd, which is the owner of Unit 7 in the Scheme and, as such, a member of the Body Corporate.

[4] By 2018, the applicants and the Body Corporate could not see eye to eye on the repayment of the advances, leading the applicants to institute summons against the Body Corporate on 19 September 2018. Shortly thereafter, on 26 September 2018, the applicants and the Body Corporate, represented by its Administrator, Mr Weinstein, entered into a written settlement agreement. This application seeks to make that settlement agreement an order of court.

[5] The Body Corporate served a notice of its intention to oppose the application, but never delivered an answering affidavit.

[6] The second to thirteenth respondents, being the owners of the other ten units in the scheme and thus all members of the Body Corporate, obtained leave to intervene pursuant to an order of Cowen AJ dated 20 January 2021. In that order, the intervening owners were granted leave to file an answering affidavit and counterclaim within 15 court days of the order.

[7] The intervening owners indeed brought a counterclaim with their answering affidavit, seeking the review and setting aside of the settlement agreement on the basis that Mr Weinstein lacked authority to conclude it. For purposes of the counter-application, they cited Mr Weinstein as the fourteenth respondent, but did not join him to the proceedings.

[8] Mr Mushet, on behalf of the intervening owners (hereinafter simply referred to as 'the respondents'), initially sought to move a postponement application on the basis that the respondents were under the impression that the administrator intended to intervene in the matter, which did not happen. However, in argument, the postponement was no longer pursued, and the respondents proceeded with the review on the basis that the Body Corporate was the decision-maker whose decision was sought to be reviewed, and that the Administrator was therefore not a necessary party before the court.

[9] The parties thus proceeded on the basis that the Administrator was not a party before court. Mr Louis Weinstein, an attorney, placed on record that he had a watching brief for the Administrator at the hearing.

[10] Mr Mushet and Mr Morland, appearing for the applicants, agreed that the settlement agreement should be made an order of court, unless the review succeeds.

[11] Sometime after the hearing, whilst judgment was still reserved, attorney Mr Weinstein approached the Court with a request to bring an application to introduce further evidence. I issued directives which allowed papers to be delivered in that application, written submissions to be filed, and an oral hearing to be convened to hear the application.

The issues

[12] The following issues have crystallised in this matter:

a) Should further evidence be admitted, and if so, what effect does this evidence have on the outcomes in the two applications?

b) Are the intervening owners entitled to have the settlement agreement reviewed and set aside?

c) Is the Administrator a necessary party to the review?

d) If the review fails, should the settlement agreement be made an order of court?

e) The issue of costs.

The Review

[13] The respondents did not deliver a notice of motion in respect of their counter-application. They relied on the affidavit of Ms Magill (with some supporting affidavits), which served as an answering affidavit in the application to make the settlement agreement an order of court and a founding affidavit for the counter-application. It incorporated the relief sought at the end of the affidavit. If regard is had to the provisions of Rule 6(7) read with Rule 6(1), this is not the appropriate manner to bring a counter-application.

[14] However, the disputes amongst the parties have dragged on for several years, and the applicants have answered the counter-application without demur and with a clear understanding of the relief sought. As a result, they have not been prejudiced by the respondents' failure to deliver a notice of their counter-application separate from their affidavit. In the circumstances, the respondents' non-compliance with Rule 6 is condoned in the interests of justice.

[15] The premise of the counter-application is straightforward (hereinafter 'the review'). The respondents formulated their challenge to the validity of the settlement agreement as follows:

"27.1. Weinstein had no authority and power to conclude the settlement agreement according to Section 7(1) of the Sectional Titles Schemes Management Act, 2011 ("STSMA") as amended.

27.2. The decision of the Body Corporate is subject to review, both in terms of the Promotion of Administrative Justice Act, 2000, and Common Law."

[16] In the heads of argument, and at the hearing, Mr Mushet advised that, given the decision in *The Legacy Body Corporate*[1], the review is no longer pursued under the Promotion of Administrative Justice Act.

[17] It is settled that a person with sufficient interest in a decision of the body corporate of a sectional title scheme may seek a common law review thereof.[2] Ever since *Feldman*[3] our courts have held that the courts may interfere where a tribunal has disregarded its own rules or the fundamental principles of fairness. It is not necessary to delve into the meaning of what the fundamental principles of natural justice are,[4] because a decision maker exceeding his authority is a long-accepted basis for a court to interfere in the decisions of private bodies.

[18] The order appointing the Administrator provides as follows: -

"1. Stanley Weinstein is hereby appointed in terms of section 46(1) of the Sectional Titles Act 95 of 1986 (*"the Act"*) as the administrator ("the administrator") of the First Respondent.

2. The administrator shall forthwith have all powers and functions of the trustees of the First Respondent as envisaged and furnished in terms of sections 37, 38 and 39 of the Act as read with the First Respondent's management and conduct rules.

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[1] *Trustees for the time being of The Legacy Body Corporate v Bae Estates and Escapes (Pty) and Another* 2022 (1) SA 424 (SCA).
[2] *The Legacy Body Corporate* above at paragraphs 37 and 38.
[3] *Jockey Club of South Africa and Others v Feldman* 1942 AD 340 at 350 to 351; see also *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 646C – 647B.
[4] See for instance *Turner* above at 646D – 647A.

3. The administrator shall every 4 months from date of this order prepare a written report and furnish same to every owner in the First Respondent's scheme setting out the First Respondent's current state of affairs.

4. The administrator or any owner in the First Respondent's scheme may on good cause apply to this court for an order to terminate the administrator's appointment and/or to vary the terms of this order.

5. The remuneration of the administrator shall be:

   5.1. paid by the First Respondent and regarded as an administration expense of the First Respondent in terms of Section 37(1)(a) of the Act;

   5.2. limited to the fees payable to a trustee when administering an insolvent estate of the Insolvency Act 24 of 1936 as amended;

   5.3. the costs of this application shall be paid by the Applicant on an attorney and client scale and shall be regarded as an administration expense of the First Respondent in terms of Section 37(1)(a) of the Act."

[19] The now-repealed Section 46 of the Sectional Titles Act read as follows:

"(1) 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.

(2) *(a)* The Court may in its discretion appoint an administrator for an indefinite or a fixed period on such terms and conditions as to remuneration as it deems fit.

(b) The remuneration and expenses of the administrator shall be administrative expenses within the meaning of section 37 (1) *(a)*.

(3) The administrator shall, to the exclusion of the body corporate, have the powers and duties of the body corporate or such of those powers and duties as the Court may direct.

(4) The Court may, in its discretion and on the application of any person or body referred to in subsection (1) remove from office or replace the administrator or, on the application of the administrator, replace the administrator.

(5) The Court may, with regard to any application under this section, make such order for the payment of costs as it deems fit."

[20] Section 37 set out the functions of bodies corporate; Section 38 set out their powers; and Section 39 provided that:

"(1) The functions and powers of the body corporate shall, subject to the provisions of this Act, the rules and any restriction imposed or direction given at a general meeting of the owners of sections, be performed and exercised by the trustees of the body corporate holding office in terms of the rules."

[21] The Sectional Title Schemes Management Act 8 of 2011 (the Management Act) commenced on 7 October 2016. Its preamble explains that the purpose of the Act is: -

"To provide for the establishment of bodies corporate to manage and regulate sections and common property its sectional titles schemes and for that purpose to apply rules applicable to such schemes; to establish a sectional titles schemes management advisory council; and to provide for matters connected therewith."

[22] The Management Act repealed the various provisions of the Sectional Titles Act that dealt with the establishment of bodies corporate and other matters now within its purview. The repealed sections included Sections 46, 37, 38 and 39, all of which were replaced by similar provisions in the Management Act.

[23] Of particular relevance is Section 16 of the Management Act, which governs the appointment of administrators (previously dealt with in Section 46 of the Sectional Titles Act). Sub-section (6) provides as follows: -

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

[24] Sub-section (4) provides that: -

> "(4) The administrator must-
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> *(a)* convene and preside at the meetings required in terms of this Act and the scheme's rules; and
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> *(b)* lodge with the ombud-
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> (i) copies of the notices and minutes of meetings; and
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> (ii) written reports on the administration process every three months or at such shorter intervals as the Magistrate's Court may direct."

[25] This provision seems to have been overlooked by the respondents, as will become apparent below.

[26] Section 7 of the Management Act provides as follows in sub-section (1) (sub-sections (2) and (3) have no bearing on the current dispute): -

> "(1) The functions and powers of the body corporate must, subject to the provisions of this Act, the rules and any restriction imposed or direction given at a general meeting of the owners of sections, be performed and exercised by the trustees of the body corporate holding office in terms of the rules."

[27] As can be seen, the wording is identical to the now-repealed Section 39(1) of the Sectional Titles Act, referred to in the order appointing Mr Weinstein as administrator.

[28] I therefore agree with Mr Mushet's submission that the administrator's powers are subject to the restrictive conditions contained in the repealed Section 39(1) of the Sectional Titles Act and Section 7(1) of the Management Act, which replaced it.

[29] A substantial portion of the founding affidavit in the review is devoted to a series of meetings called by the owners of units, or the individuals controlling the property-owning entity, who also reside in those units. This appears to account for six of the eleven units. From these events, the respondents seek to draw the conclusion that the agreement under which the applicants would advance funds to the first respondent was subject to a condition that the advances would be due and payable only upon the sale of unit five (to recover outstanding levies and legal costs).

[30] However, the whole exposition is irrelevant to the issues to be determined. It is not the respondents' case that the repayments were not due when the Administrator signed the settlement agreement. Their ground of review is that he lacked the authority to do so. I therefore do not deal with this aspect further, save to say that the affidavits, in any event, do not evidence that such a condition formed part of the loan agreement.

[31] As already mentioned, on 19 September 2018, the applicants served a summons for repayment of the loans on the Body Corporate, under this case number. Ms Magill, who deposed to the answering affidavit on behalf of the respondents, explained that she assisted the Administrator in reviewing the supporting documents submitted by the first applicant in support of the advances made, spending two weeks in June 2019 working through them. Ms Magill and the Administrator created a draft schedule for itemised costs, with the Administrator sending her a revised schedule sometime later. She informed him that she disagreed with the revised quantum.

[32] The respondents' case for a review centred around a meeting held some weeks before the settlement agreement was concluded. Ms Magill testified that the fourth respondent, Mr Sarig, called a meeting *"to obtain an understanding of outstanding*

general matters", which took place on 1 August 2019 at unit ten. The owners or beneficial owners of five units (2, 3, 7, 8, and 10) were present, and the owner of unit eleven was contacted by telephone during the meeting. Ms Magill states that: -

> "The Respondents present unanimously agreed that the First Applicant must first submit the quantum of the Applicant's claim to all members of The Grove before the Body Corporate finalised any agreement."

[33] The meeting was not called by the Administrator, nor did he preside at the meeting, as required by Section 16(4)(a) of the Management Act– he was apparently not even aware of the meeting. It was not a meeting to which all unit owners were invited. Any decisions taken at this meeting did not bind the Body Corporate or the Administrator. It does not constitute a *"direction given at a general meeting of the owners of sections"*, as provided for in the repealed Section 39(1) of the Sectional Titles Act, and re-enacted in Section 7(1) of the Management Act.

[34] Ms Magill states that the Administrator had previously agreed to this requirement. She does not explain why it was necessary for the unit owners present at the meeting on 1 August 2019 to revisit the matter. She also does not provide any facts setting out the context and circumstances of when, where, and with whom the Administrator so agreed.

[35] Ms Magill continues: -

> "I told the meeting that Weinstein had assured me that no agreement would be entered into until all owners had sight of the claim, its quantum and were duly satisfied with its legitimacy."

[36] It seems that when Ms Magill stated that the Administrator had previously agreed that the quantum must first be submitted to the owners of sections in the scheme before any agreement is finalised, she was referring to what she calls 'an assurance' from the Administrator to her. Again, no detail is provided, simply Ms Magill's conclusion.

[37] In *President of the Republic of South Africa and Others v M & G Media Ltd*[5] the Supreme Court of Appeal considered the test for personal knowledge in the context of tendering admissible evidence. The Court held that knowledge of an occurrence of an event may come to a person in one of three ways:

a) first: through direct experience, in which event the said person's evidence is admissible to prove the occurrence (issue);

b) second: through the report of another person, in which event a proper basis must be laid for admitting the evidence as hearsay and enabling its weight to be evaluated; or

c) third: through deduction, by way of drawing inferences from other facts, in which event it is not evidential material at all, given that it is for a Court to draw inferences itself, upon the proof of primary facts.

[38] The third category was elucidated upon in *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others*[6] as follows:

> "[28] It is trite law that the affidavits in motion proceedings serve to define not only the issues between the parties, but also to place the essential evidence before the Court for the benefit of not only the Court but also the parties. The affidavits in motion proceedings must contain factual averments that are sufficient to support the cause of action on which the relief that is being sought is based. Facts may be either primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called secondary facts. Secondary facts, in the absence of the primary facts on which they are based, are nothing more than a deponent's own conclusions and

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[5] 2011 (2) SA 1 (SCA) at [37].

[6] 2003 (4) SA 207 (C) at [28]. See also *Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793 C-E and *South African Post Office v De Lacy and Another* 2009 (5) SA 255 (SCA) at [35].

accordingly do not constitute evidential material capable of supporting a cause of action."

[39] An applicant is required to set out the primary facts from which the inferences, the secondary facts, may be obtained.[7] As the Supreme Court of Appeal explained in *Willcox v CIR*[8]:

> "There is nothing artificial or technical about the notion of primary facts. Facts are conveniently called primary when they are used as the basis for inference as to the existence or non-existence of further facts, which may be called, in relation to primary facts, inferred or secondary facts."

[40] Secondary facts in the absence of the primary facts on which they are based are nothing more than the deponent's conclusions, which are the expression of an opinion and do not constitute evidential material capable of supporting a cause of action.[9]

[41] In the result, there is simply no evidence in support of the averment that the Administrator agreed with the owners of the sections not to conclude a settlement agreement before they are all satisfied with the quantum of the applicant's claim.

[42] Moreover, such an undertaking would not meet the requirement of a direction given at a general meeting of the owners of sections in the scheme, as required by the statutory provision. There was no such meeting.

[43] The email from Mr Sarig, sent the following day to those who attended the meeting, does not record any assurance by Ms Magill regarding the Administrator's undertaking. Rather, the contents of the email suggest that it had not been raised. Mr Sarig records: -

> "It was agreed with unit 7 that ALL the owners should have the opportunity to see the claim and to ascertain the legitimacy of the amounts claimed. Unit 7

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[7] *Willcox and Others v Commissioner for Inland Revenue* 1960 (4) SA 599 (A) at 602A; *Radebe* above at 792 I – 793 G/H.
[8] *Willcox* above at 601 J – 602 A.
[9] *Willcox* above; *Radebe* above; *Die Dros* above at [28]. For the correct approach to drawing inference, see *De Lacy* above in [35].

> was adamant that Stanely and Diane would first reconcile the claim and that it would be at the time when Diane came to JHB that the other owners would see the claim."

[44] The first applicant is the Director of the owner of unit seven, as mentioned earlier. 'Stanley' refers to Mr Weinstein, and 'Diane' refers to Ms Magill.

[45] The first applicant, in any event, disputed the recordal in an email sent in response thereto on 4 August 2019. He, amongst other things, stated: -

> "Stanley is the only person empowered to decide and agree for the Body Corporate as to what is the final amount that he accepts for The Grove BC, and if I agree to it, and based on this acceptance by both parties, Stanley and I can then go forward and negotiate the terms and conditions with the aim of crafting an agreement. As there are no negotiations that have taken place up until this day, there is therefore nothing considered, binding, offered or accepted by either Stanley or I."

[46] I therefore conclude that the owners of the eleven units in the scheme did not direct the Administrator to submit the claim quantification to the owners before concluding the settlement agreement with the applicants.

[47] Ms Magill further complains that, as she understands the facts, the first applicant kept *"pressurising"* the Administrator to resolve the quantum of the indebtedness, and that these actions were directed to the Administrator, and not to the sub-committee of four owners, which the respondents say received the blessing of Weinstein to start running the day-to-day affairs of the Scheme.

[48] I point out that there is no suggestion by any party and no evidence to support a conclusion that there was a delegation of powers to these four members. It is therefore not necessary for me to consider whether the Administrator could lawfully delegate his powers under the terms of his appointment.

[49] Irrespective of the status of this sub-committee, the Body Corporate's affairs were still under the control of the Administrator, and the first applicant legitimately engaged with him regarding the repayment of monies owed to the applicants.

[50] The respondents contended that there is a dispute of fact on the papers, which requires the issue of whether the Administrator had the authority to conclude the settlement agreement to be referred to oral evidence. However, on their own version, the respondents have failed to present a *prima facie* case for such an outcome. They must fail on their own version alone. As a result, although there are disputes between the parties regarding the events leading up to the settlement agreement, they need not be resolved to decide the application. There is thus no need to refer any issue to oral evidence under Uniform Rule 6(5)(g).

The application to submit further evidence

[51] As mentioned earlier, whilst judgment was reserved, Mr Louis Weinstein, the attorney, intimated that the Administrator sought an opportunity to bring an application to admit further evidence. He had come on record for the Administrator as well as the Body Corporate. The latter was previously represented by Mr Van Rensburg, who is also the respondents' attorney. It remains unclear on what basis the notice in respect of the Administrator was filed, given that the Administrator and all the other parties accepted at the hearing of the matter that the Administrator was not a party to the proceedings.

[52] I gave directions for the delivery of papers in the application and written submissions in respect thereof.

[53] The application, purported to have been brought by the Administrator, seeks the following relief:

a) that the Body Corporate be granted leave to introduce new evidence, alternatively, further evidence (without identifying what this evidence constitutes);

b) that the applicants and AJ Van Rensburg Inc. pay the costs of the application; and

c) seeking a dismissal of the main application (that is, the application to make the settlement agreement an order of court), on behalf of the first respondent, with the costs to be paid by the applicants and AJ Van Rensburg Incorporated.

[54] This court has a discretion to admit new evidence after the hearing of the matter but before judgment is delivered.[10]

[55] The considerations to be taken into account include the following:[11]

"(i) The reason why the evidence was not lead timeously.

(ii) The degree of materiality of the evidence.

(iii) The possibility that it may have been shaped to relieve the pinch of the shoe.

(iv) The balance of prejudice, i.e. the prejudice to the plaintiff if the application is refused, and the prejudice to the defendant if it is granted. This is a wide field. It may include such factors as the amount or importance of the issue at stake; the fact that a defendant's witnesses may already have dispersed; the question whether the refusal might result in a judgment of absolution, which event whether it might not be as broad as it is long to let the plaintiff lead the evidence rather than to put the parties to the expense of proceedings *de novo*.

(v) The stage which the particular litigation has reached. Where judgment has been reserved after all evidence has been lead on both sides and, just before judgment is delivered, the plaintiff asks for leave to lead further evidence, it may well be that he will have a harder row to hoe, because of factors such as the increased possibility of prejudice to the defendant, a

[10] *Mostert v Cape Town City Council* 2001 (1) SA 105 (SCA) in para 45.
[11] *Mkwanazi v Van der Merwe and Another* 1970 (1) SA 609 (A) at 616G – 617D; *Mostert* above in para 45.

greater need to for finality, and the undesirability of throwing the whole case into the melting pot again, and perhaps also the convenience of the court, which is usually under some pressure in its roster of cases. On the other hand, where a plaintiff closes his case and, before his opponents have taken any steps, asks for leave to add some further evidence, the case is then still *in medias res* as it were.

(vi) The healing balm of an appropriate order as to costs.

(vii) The general need for finality in judicial proceedings. This factor is usually cited against the applicant for leave to lead further evidence. However, depending on the circumstances, finality might be sooner achieved by allowing such evidence and getting on with the case, than by granting absolution and opening the indeterminate way to litigation *de novo* in all its tedious amplitude.

(viii) The appropriateness, or otherwise, in all the circumstances, of visiting the remissness of the attorney upon the head of his client."

[56] The test of materiality would be satisfied where the evidence tendered, if believed, is material and likely to be weighty.[12]

[57] The circumstances within which the application was brought are rather peculiar. The Administrator and all the parties to the proceedings agreed that he was not a party to these proceedings. He had never been joined. Yet he saw fit to bring an application to lead further evidence without, at the same time, applying to be joined as a party to the proceedings. For this reason alone, his application should be considered irregular and be ignored.

[58] As can be seen from the formulation of the relief, it has the peculiar characteristic that the Administrator purports to bring the application on behalf of the Body Corporate. The principal prayer seeks an order granting the Body Corporate (and not the Administrator) leave to introduce new evidence. In the circumstances, I

[12] *Oosthuizen v Stanley* 1938 AD 322 at 333.

deem it appropriate to treat the application as an application by the Body Corporate to introduce new evidence, and I will consider it in that context.

[59] This, however, creates a further hurdle. As mentioned earlier, although the first respondent delivered a notice of its intention to oppose the application to make the settlement agreement an order of court, it never delivered an answering affidavit. There has been no explanation from any party or person involved in this matter why that is so. What one can glean from the papers is that, instead of delivering the answering affidavit, AJ Van Rensburg Inc, then still acting for the Body Corporate, launched the intervention application on behalf of the respondents. How this came about remains unclear.

[60] In reality, then, the application, although framed as an application to introduce new or further evidence, is in reality an application for the (extremely) late delivery of an answering affidavit. Yet, no such case is made out in the application. For this reason alone, the application must fail. But there are further reasons why the application must fail.

[61] The Administrator's founding affidavit is difficult to follow. Early on in the affidavit, he requests that the contents of an earlier affidavit be *"read as if repeated and contained herein"*. This, he says, refers to an affidavit he affirmed in September 2024, but it was not admitted at the hearing. The document, however, remains a mystery. It does not appear in the record, and at the hearing, Mr Louis Weinstein accepted that he can only hold a watching brief, given that the Administrator was not joined as a party to the proceedings. There was thus never an opportunity for him to move to admit any affidavit. In any event, the Administrator has dealt with the matter no further and thus has not made out a case for the admission of further evidence in the form of that elusive affidavit.

[62] Although not clearly delineated, the new evidence sought to be introduced appears to consist of two parts. The Body Corporate seeks to introduce what the Administrator claims are its conduct rules, and to introduce material in respect of an allegation by the Administrator that he signed the settlement agreement under duress from the first applicant.

[63] I consider the application to admit the conduct rules first. The import of the Administrator's evidence is that he had never been aware that the Body Corporate had conduct rules. This is, to say the least, an astonishing statement. It implies that the Administrator has been administering the Body Corporate for more than 15 years, without ever considering that it might have conduct rules, even though these are required by statute.[13]

[64] The Administrator blames Mr Van Rensburg, whom he contends never told him about the rules. This is an unacceptable proposition. As the Administrator, he should have been aware of the rules and familiarised himself with them. His failure to do so should be of grave concern to the members of the Body Corporate.

[65] The Administrator contends that he only obtained a copy of the conduct rules from the Body Corporate's Managing Agents, Berader Properties, in December 2024. By that time, he explains, Berader Properties had been the Managing Agents for some seven years.

[66] In his founding affidavit, the Administrator does not explain why he belatedly sought a copy of the conduct rules. In his replying affidavit, the Administrator claims that his current attorney was the one who pointed out to him that there was a nondisclosure after he had read the papers. What the nondisclosure was, and how his attorney would have known that from reading the papers, is not explained. If this is a referral to the absence of a reference to the rules, the question must be asked: how did the attorney know the contents of those rules if the Administrator did not?

[67] In his answering affidavit, the first applicant shows that, when he brought his application to appoint Mr Stanley Weinstein as Administrator, a copy of the Management Rules was attached to the papers. This put to bed any notion that the Administrator could not reasonably have been aware of the existence and contents of the rules. Thus, there seems to be confusion about which rules apply, as the administrator and the first applicant refer to different sets.

[13] *Repealed s35 of the Sectional Titles Act; s10 of the Management Act.*

[68] In the circumstances, the following difficulties arise. First, there is uncertainty about which set of rules actually governs the affairs of the Body Corporate. Second, if that is resolved, the relevant rule needs to be interpreted, along with the order appointing the Administrator, to determine whether it affects the Administrator's authority to sign the settlement agreement. This constitutes a whole new case.

[69] If it is kept in mind that the respondent had not, in fact, opposed the matter, and no explanation has been proffered as to why the rules are sought to be introduced at this late stage, it seems that there may be something in the applicants' contention that the evidence is offered to relieve the pinch of the shoe. Furthermore, it is substantially prejudicial to the applicants, who considered their claims settled several years ago, but are now potentially confronted with reopening the whole matter afresh, without any proper explanation as to why this issue is only raised now.

[70] In the circumstances, I do not consider it appropriate to allow this new evidence, which would require the applicants to face a whole new case at this late stage.

[71] I now turn to the second aspect. The affidavit continues with an exposition of a criminal complaint laid by the Administrator against the first applicant for intimidation in 2021. The first applicant, in his answering affidavit, attaches the *nolle prosequi* certificate indicating that the State declined to prosecute. That ought to be the end of the matter. The Administrator suggests that he was forced to sign the agreement under duress. However, he provides no detail. I refer to what I have set out above regarding the need to present the primary facts and not simply present the Court with the witness's own conclusions.

[72] No defence has been properly pleaded with reference to the alleged duress; rather, the Administrator simply throws in a few lines with some documents, hoping that the Court will find a defence in it. That is wholly inappropriate. And if the defence had been pleaded properly, it would have been a whole new case at this late stage. The prejudice against the applicants is patent. I refer to what I said above in this regard.

[73] By the time this matter was heard, several years had passed during which the Administrator had not raised these matters. This is not new evidence that came to his knowledge after the hearing.

[74] Overall, the application was ill-considered and should not have been brought. It should be dismissed.

Is the Administrator a necessary party to the proceedings?

[75] The applicants and the intervening owners agreed, correctly, that it is necessary for the decision maker to be before the court in a review under the common law.

[76] The applicants cited the Body Corporate, on whose behalf the Administrator entered into the settlement agreement. In his founding affidavit, the first applicant stated as follows:

> "6. The Respondent is the BODY CORPORATE OF THE GROVE SECTIONAL TITLE SCHEME, represented by Stanely Weinstein N.O., an adult male Chartered Accountant, sued in his capacity as the court appointed Administrator of the Grove Sectional Title Scheme, and who conducts business as a Chartered Accountant at …"

[77] It is evident from their citation that the applicants conflated two persons into one in their application. They did not clearly distinguish between the Body Corporate of the Grove Sectional Title Scheme, on the one hand, and Mr Weinstein in his capacity as court-appointed administrator for the Grove Sectional Title Scheme, on the other.

[78] In their counter-application, the respondents referred to the Body Corporate as the first respondent and cited Mr Weinstein, in his capacity as the scheme's administrator, as the fourteenth respondent.

[79] Mr Weinstein, as the administrator of the scheme, was at all times aware of the application, as the Body Corporate could only have knowledge of it by virtue of Mr Weinstein, as its administrator, having obtained such knowledge.

[80] Thus, the functionary, although not joined, participated and had knowledge of the proceedings, and the decision ultimately resides with the Body Corporate, albeit that its functionary made the decision on its behalf.

[81] Given the conclusion reached in the review, I do not consider it necessary to decide whether the decision maker is properly before the court. I nonetheless consider that it was practically before the court.

Should the settlement agreement be made an order of court?

[82] As stated earlier, the applicants and the respondents were *ad idem* that, should the review fail, the settlement agreement should be made an order of court. However, the Court is not merely a rubber stamp for the parties' actions.

[83] The practice of making settlement agreements an order of court is well established in South Africa.[14] An expedited end to litigation serves the parties' interests and may also serve the interests of the administration of justice.[15] Our courts have approved Huber's statement:[16]

> "A compromise once lawfully struck is very powerfully supported by the law, since nothing is more salutary than the settlement of lawsuits."

[84] The Constitutional Court approved of what was stated in *PL v YL*:[17]

> "[T]he policy underlying the favouring of settlement has as its underlying foundation the benefits it provides to the orderly and effective administration of justice. It not only has the benefit to the litigants of avoiding a costly and acrimonious trial, but it also serves to benefit the judicial administration by reducing overcrowded court rolls, thereby decreasing the burden on the judicial system. By disposing the cases without the need for a trial, the case load is

[14] *Eke v Parsons* 2016 (3) SA 37 (CC) in para [8].
[15] *Eke* above in para [22].
[16] *Eke* above in para [22], approving of Gane's*, Translation of Huber in the Jurisprudence of My Time*, 5th ed., as quoted in *PL v YL* 2013 (6) SA 28 (ECG) in para [34].
[17] *Eke* above in para [23]; *PL* above in paras [36] and [38].

> reduced. This gives the court capacity to conserve its limited judicial resources and allows it to function more smoothly and efficiently.
>
> …
>
> If on is then to proceed from the premise that the wider interests under consideration [are those] of the administration of justice, then the court is required, when exercising its discretion whether to make a settlement agreement an order of the court, to give consideration not only to the need to make orders that are readily enforceable, but also to assess the wider impact which its order may potentially have."

[85] This does not mean that a court will make anything agreed to by the parties an order of court.[18] The order must be one that is competent and proper. This requires the court not to mechanically adopt the terms of the settlement agreement. Three primary considerations arise:[19] The agreement must relate directly or indirectly to an issue or *lis* between the parties; the agreement must not be objectionable, so that its terms are capable of being included in a court order, both from a legal and a practical point of view; and the agreement must hold practical and legitimate advantage. The Court must act in a stewardly manner, ensuring its resources are used efficiently.[20]

[86] Having considered the settlement agreement, there appears to be nothing untoward about its terms, and making it an order is competent and proper. Obviously, dates agreed for the performance of obligations – the payments to be made by the Body Corporate to the applicants – have come and gone over the intervening years. However, that is not a reason not to make the settlement agreement an order of court. It is appropriate that this matter be brought to an end.

[87] In the circumstances, I am satisfied that the settlement agreement ought to be made an order of court.

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[18] *Eke* above in para [25].
[19] *Eke* above in paras [25] to [26].
[20] *Eke* above in para [34].

Conclusion & costs

[88] In the summary, the application for the admission of further evidence must fail, and so too the review. The application to make the settlement an order of court should succeed.

[89] Clause 6 of the settlement agreement provides that, in the event that any of the plaintiffs find it necessary to take any steps to enforce the provisions of the agreement, the defendant shall pay those costs as between attorney and client. Ultimately, the Body Corporate opposed the matter, albeit in an unusual manner. The applicants are entitled to their costs as agreed.

[90] There is no reason why the costs should not follow the result in the counter-application for a review. The appropriate costs order, in my view, is that the respondents must pay the costs of the review on a party-and-party basis, including counsel's costs at scale B.

[91] In respect of the application for the admission of further evidence, the applicants seek costs *de bonis propriis* against Mr Stanley Weinstein. In the light of his conduct as set out above, such a costs order seems warranted.

[92] In *Pheko II*[21] the Constitutional Court explained the concept of costs *de bonis propriis* in the following terms:

> "Costs *de bonis propriis* are costs which a representative is ordered to pay out of his or her own pocket as a penalty for some improper conduct, for example, if he or she acted negligently or unreasonably. Whether a person acted negligently or unreasonably must be decided in the light of the particular circumstances of each and every case."

[93] In *Pheko II* the Constitutional Court concluded that an attorney should be held liable for the costs because "[w]*hile the evidence may not establish*

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[21] *Pheko II & Others v Ekurhuleni City* 2015 (5) SA 600 (CC) in [51].

wilfulness or mala fides, it does establish a gross disregard for his professional responsibilities".[22]

[94] In *Public Protector v Reserve Bank* [23] the Constitutional Court pointed out that considering whether to award costs *de bonis propriis* and considering a costs order on the attorney and client scale are two separate inquiries:

> "It does not follow that a punitive costs order will always be justified in circumstances where a personal costs order is warranted. An order for personal costs against a person acting in a representative capacity is in itself inherently punitive. The imposition of costs on an attorney and client scale is an additional punitive measure. This could, as pointed out in the first judgment,[24] be viewed as 'double punishment'. While the test for awarding a personal costs order or costs on a punitive scale may overlap, an independent, separate enquiry should be carried out by a court in respect of each order. Both personal and punitive costs are extraordinary in nature and should not be awarded willy-nilly', but rather only in exceptional circumstances."

[95] The Constitutional Court further noted that punitive costs seek to deter reprehensible behaviour by a litigant.[25] A court must consider what is just and equitable in the circumstances of the particular case to secure a just and fair outcome.[26] The Court identified categories where such costs orders have been granted in the past: fraudulent, dishonest or *mala fide* conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court.[27] The Court repeated its previous endorsement[28] of the statement by the Labour Appeal Court *in Plastic Converters Association of South Africa*[29] that:

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[22] *Pheko II* above in [54].
[23] Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC) in [220].
[24] This is a reference to the minority judgment in the matter.
[25] *Public Protector* above in [221].
[26] *Public Protector* above in [222].
[27] *Public Protector* above in [223].
[28] *Limpopo Legal Solutions I v Vembe District Municipality* 2017 (9) BCLR 1216 (CC); [2017] ZACC 14 in [28].
[29] *In Plastic Converters Association of South Africa on behalf of members v National Union of Metal Workers of SA* [2016] 37 ILJ 2815 (LAC) in [46].

> "[t]he scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible conduct. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium."

[96] In my view, Mr Weinstein should not be burdened with a punitive costs order. His conduct, in my view, does not attract double punishment.

[97] In the result, I make the following order:

a) The application to introduce new evidence is dismissed.

b) The costs of the application to introduce new evidence shall be paid by Mr Stanley Weinstein personally, on the party and party scale, including costs of counsel at scale B.

c) The counter-application for a review is dismissed.

d) The second to the thirteenth respondents shall pay the costs of the counter-application on the party and party scale, including costs of counsel at scale B.

e) The settlement agreement dated 19 September 2019 between the applicants and the first respondent is made an order of court.

f) The first to thirteenth respondents shall pay the costs of the application to make the settlement agreement an order of court, jointly and severally, with the costs payable by the first respondent on the attorney and client scale and the costs payable by the second to thirteenth respondents on the party and party scale, including costs of counsel at scale B.

[redacted]

A Bester
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Heard:	5 September 2024
Judgment Date:	1 April 2026
Counsel for the applicants:	L C M Morland, instructed by Warrener de Agrela and Associates Inc.
Counsel for the second to thirteenth respondents:	S Mushet, instructed by AJ Van Rensburg Incorporated.
Counsel for Mr Weinstein:	L Weinstein, attorney