REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 29934/12

DATE: 2012-10-12

In the matter between

DAVID LECHIZIO Plaintiff

and

BRIDGETOWN BODY CORPORATE Defendant

JUDGMENT

DODSON AJ:

[1] I give judgment as follows. This is an application for the appointment of an administrator in terms of section 46 of the Sectional Titles Act No. 95 of 1986 ("the Act"). The Bridgetown sectional title scheme is a substantial scheme involving some 524 units.

[2] Unfortunately the scheme has a chequered and litigious history. There have been two prior administration orders granted by this court. A further dispute culminated in a settlement agreement.

[3] I was informed from the bar that the settlement agreement had been made an order of court on 22 November 2011. There was no disagreement between the parties that the settlement agreement regulated matters between them and regulated the basis upon which the affairs of the body corporate were to be conducted.

[4] That settlement agreement which is dated 18 November 2011 reads as follows:

> *"Whereas the parties hereto have settled all disputes between them on the terms and conditions set forth in the settlement agreement and agree that the settlement agreement shall be made an order of this Honourable Court on 22 November 2011, when this matter is called for hearing*.
>
> *Now therefore it is hereby agreed that:*
>
> *1) The applicant will co-opt an additional four trustees onto its board of trustees with immediate effect, which additional trustees shall be*
>
> *a. Lebo Segole.*
>
> *b. Lungo Madlala.*
>
> *c. Pumeze Mqeni.*
>
> *d. Marcel Kalemba.*
>
> *2) No special general meeting of the applicant will be called for the reconstituted board of trustees (the trustees) before the Annual General Meeting of the applicant is held in April 2012 to deal with the composition of the board of trustees.*
>
> *3) The trustees will not entertain or re-visit historic issues such as the dismissal of security guards, Mr Zondo and the like.*

4) Trustee meetings shall not be disjointed with any block of trustees caucusing among themselves or caucusing with any constituency before decisions are made during trustee meetings.

5) The trustees shall make decisions in the best interests of the Sectional Title Scheme and all of its owners, having due regard to their fiduciary responsibilities to all such owners. Decisions will be made by majority vote of trustees and robust but peaceful debate is to be welcomed.

6) Any extra-ordinary meeting of trustees called by any trustee or the chairperson must be called for a date and time that is convenient to all trustees, notwithstanding any urgency involved. All trustees shall at all times be bona fide and act in the utmost good faith in this regard.

7) The agenda for any extra-ordinary trustees' meeting shall be given together with a notice for such meeting to all trustees and such agenda shall not be deviated from at such meeting.

8) Notwithstanding anything to the contrary in the management rules, a quorum for any meeting of trustees shall be seven trustees. If a quorum is not present after two consecutive meetings have been properly called then those trustees present at the third consecutive meeting called shall then constitute a quorum if at least two trustees are present.

9) The terms of this agreement shall not be interpreted as preventing any owners within the Sectional Scheme or who are not party hereto from requesting a Special General Meeting to be held under Management Rule 53.

10) All parties to the pending court proceedings shall pay their own legal costs."

[5] As will appear from the terms of the agreement it provided for the addition of four co-opted trustees to the originally appointed trustees. There was now a quorum requirement of seven trustees and there were specific and particular notice requirements in relation to the calling of meetings of trustees.

[6] The agreement also sought to bring an end to conflict which already existed at that time. Subsequent to the settlement agreement having been concluded the envisaged peaceful resolution has unfortunately not come to fruition. Conflict has persisted and there have since been three resignations among the trustees, including its former chairman. The number of trustees is now down to eight trustees.

[7] The present application is based on the averment that the management of the scheme has essentially become dysfunctional as a result of the actions of a particular grouping amongst the owners who were the respondents in the legal proceedings which resulted in the settlement. They go by the name of “the Bridgetown concerned home owners”.

[8] Mr Voyi, who purported to appear on behalf of the respondent body corporate, raised certain points *in limine*. The first point *in limine* related to the alleged hearsay content of the founding affidavit. This was on account of the fact that the applicant, Mr Lechizio, had not attended any of the meetings that were the subject matter of these proceedings, nor is he a trustee of the body corporate.

[9] Taken on its own, the founding affidavit certainly does constitute hearsay evidence. However the replying affidavits filed on behalf of the applicant included an affidavit of one Hendrik Strampe who, it is common cause, is indeed a trustee of the respondent. He says the following at paragraph 1.4 of his affidavit -

> *“I have read the founding affidavit and confirm the correctness*

> *thereof. I have particular knowledge of the allegations therein and confirm it is correct. I have attended the trustee meetings, annual general meetings and special general meetings. I have been present during assaults by owners, I have been intimidated and threatened myself and can collaborate [presumably meaning corroborate] what is stated in the founding papers"*.

[10] Subject to the further objection which was raised by Mr Voyi and which is discussed below, I am satisfied on the basis of section 3(1)(b) of the Law of Evidence Amendment Act No. 45 of 1988, that the hearsay nature of the evidence contained in the founding affidavit was cured by the leading of the evidence of a person who was able to give direct evidence of the facts deposed to.

[11] Mr Voyi objected to the admissibility of Mr Strampe's affidavit on the basis that it was a supplementary affidavit which was unilaterally filed and which raised new matter. I do not consider this objection to be well-founded. Firstly, there was no application to strike out Mr Strampe's affidavit or any part of it out. Secondly, the respondent specifically elected to challenge the evidence on the grounds of hearsay, rather than to apply for leave to file a further affidavit or to seek a postponement in order to do so and must bear the consequences of that election. Thirdly, Mr Strampe's affidavit was filed together with the applicant's replying affidavit and therefore cannot be considered to constitute the unilateral filing of a supplementary affidavit. Fourthly, in the main the affidavit responds to issues raised in the answering affidavit and accordingly represents a legitimate reply to those issues. Fifthly, there is no rule that only those witnesses who deposed to founding and supporting affidavits may depose to and file replying affidavits.

[12] The next point *in limine* raised by Mr Voyi was that it ought to have been anticipated at the outset that there would be disputes of fact and on this basis that application proceedings should not have been launched. However section 46 of the Act expressly provides for application proceedings as the mechanism for seeking the appointment of an administrator. In those circumstances it is always open to a party to bring the proceedings on the basis of an application and indeed that is statutorily required.

[13] The applicant raised a point *in limine* that those purporting to represent the respondent lacked authority to oppose the application. Where an artificial person is a party to proceedings it must be able to show firstly that that party has duly resolved to institute or defend the proceedings and secondly that the attorney representing that party is duly authorised to do so. *Mall Cape (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C).

[14] On 30 August 2012, three days after receiving notice of intention to oppose, the applicant issued a notice in terms of rule 7(1) requiring the filing of a power of attorney. On 11 September 2012 a power of attorney was duly filed. It reads in relevant part as follows:

> *"I Lebo Segole acting herein in my capacity as the chairperson of the trustees of the Body Corporate of Bridgetown and as duly authorised and mandated at the meeting of the trustees held on the 24th August 2012 do hereby appoint Ndumiso Pedro Voyi of Ndumiso Voyi Incorporated, with the power of substitution, to be the Body Corporate of Bridgetown's lawful attorney and agent in its name, place and stead to vehemently resist and oppose the application launched by the Applicant with this Honourable Court under the aforesaid case number"*.

[15] In response to this, the applicant alleged in a supplementary affidavit of attorney Elisha Elizabeth Austin filed before the filing of the answering affidavit, that no quorum could have existed because the applicant's attorneys were in possession of letters from four of the trustees which supported the application for the appointment of an administrator.

[16] In dealing with this aspect in her answering affidavit, Lebo Segole, said the following:

> *102.3) After receipt of the Applicant's application, an urgent meeting was called to take a decision on the position to be adopted by the Respondent concerning the relief applied for.*
>
> *102.4) The alleged four (4) trustees referred to in the supplementary affidavit boycotted the meeting on its first day of sitting. They simply did not turn up.*
>
> *102.5) On the second day, they still did not attend. On the third consecutive meeting called and which was on 24 August 2012 a quorum was present.*
>
> *102.6) On the aforesaid third consecutive meeting a resolution was taken to oppose the present application. Present at such meeting were inter alia myself, Pumeze Nqeni, Lungo Madlala.*
>
> *102.7) The letters by the said trustees are completely irrelevant to the question of a quorum.*
>
> *102.8) These trustees were not even present at the meeting of 24 August 2012. They can accordingly be in no position to state whether or not a quorum was reached at the meeting of 24 August 2012.*

[17] Significantly no documents are put up in support of the averments contained in this portion of the answering affidavit. No notices of the alleged meetings are attached nor are copies of any forms of notice attached to indicate how the successive meetings were called. Given the importance of the matter, this is certainly something which one would have expected, particularly

bearing in mind the reliance sought to be placed on the mechanism in the settlement agreement for a reduced quorum.

[18] In reply, these averments are dealt with in the affidavit of Mr Strampe, who describes what took place from his perspective as follows:

> *4.5) …I received an email on 20 August at 11h45am informing other trustees and I that a trustees meeting will be held on 21 August 2011 at 18h30.*
>
> *4.6) My response hereto (which I emailed to Segole) was that I already had another meeting to attend at that time and requested a postponement of this meeting until Wednesday or Thursday. I attach a copy of the email hereto as Annexure HS1.*
>
> *4.7) No communication in this regard was received by myself. Nor was I informed otherwise.*
>
> *4.8) If one has regard to the agenda on the email it is with respect a meaningless statement, no one would have understood what this extremely urgent meeting had regard to.*
>
> *4.9) The next correspondence I received was an email by the same Segole stating on the 23rd, that last night's meeting, which could only have referred to the 22nd, was adjourned till tonight at 19h30pm or the time can be extended.*
>
> *4.10) I wish to place emphasis on the time this email was sent 17h47.*
>
> *4.11) The response sent to me (and all other trustees) by Greg Barends particularly states that the notice is unacceptable and illegal. It further states that this does not give reasonable time for trustees to arrange for a meeting. I attach a copy of the email hereto as Annexure HS2.*
>
> *4.12) I deny that any decision taken by the persons being present Segole, Pumeza Nqeni and Lungo Madlala, could present a quorum having regard to what is stated hereinabove.*
>
> *4.13) …*
>
> *4.14) …*
>
> *4.15) One would have expected clear communication pertaining to*

the meeting, the relevance thereof and the issues to be decided and an attempt to obtain consensus between all relevant parties to convene the meeting, this was not done.

4.16) I would like to reiterate that the only notice and information I received was the two emails referred hereinabove. There was no reply to my request for obvious reasons. I respectfully submit that no decision has been taken and the opposition of this application is done by Segole on a frolic of her own".

[19] If regard is then had to the relevant email correspondence attached to the affidavit, this bears out the assertions made by Mr Strampe. The first email was sent on Monday 20 August 2012 at 11h45. It simply says,

"Good day all. You are all invited to an urgent trustees meeting to be held as follows…"

and below that

"Agenda: notice of intent to serve to the body corporate today

Regards

Lebo Segole".

[20] In response to this, an email is sent by Mr Strampe to Lebo on 20 August at 12h40 and says -

"Lebo

I already have another AGM on the 21st that I need to attend to. Can you please postpone the trustee meeting until Wednesday or Thursday.

Thanks

Hendrik Strampe".

[21] The next email which is then sent is addressed by Lebo Segole to the trustees on 23 August 2012 at 17h47. The subject is *"urgent trustees meeting"*. The email reads:

> *"Hi please note that last nights adjourned meeting has been adjourned to tonight and we can extend waiting time until 19h30 to accommodate everyone as this is a very urgent matter. Regards"*.

[22] It will be observed that the effect of that email was to give approximately an hour and a half notice of the meeting which was due to take place. Appearing immediately above the email is then a reply email sent by another trustee Greg Barends which reads -

> *"This late notice is unacceptable and illegal. This does not give reasonable time for trustees to arrange for a meeting"*.

[23] Those are the communications which were received on the part of Mr Strampe and there is no reference to any notice having been given of a meeting on the 24th when a decision was allegedly taken on the basis of the reduced quorum.

[24] In those circumstances there was, in the purported convening of the meetings, a clear breach of both clauses 6 and 8 of the settlement agreement of 18 November 2011. Clause 6 specifically provides that an extraordinary meeting of trustees called by any trustee or the chairperson must be called for a date and time that is convenient to all trustees, notwithstanding any urgency involved. It also requires that all trustees shall at all times be *bona fide* and act in the utmost good faith in this regard. In clause 8 dealing with the reduced quorum requirement at a third consecutive meeting, there is a specific reference to the requirement that the meetings must be properly called.

[25] Having regard to those clauses of the settlement agreement, I am satisfied that the resolution which was taken on 24 August 2012 was not taken at a meeting which was properly convened and accordingly there is no valid resolution which has been taken to oppose the present proceedings.

[26] The second difficulty which I have with the power of attorney which is relied upon is that it purports to confer authority on the attorneys referred to, not only on the basis of the mandate purportedly received at the meeting, but also on the basis that Lebo Segole acts in her capacity as chairperson of the trustees of the body corporate.

[27] The basis upon which she alleges that she is the chairperson of the trustees of the body corporate is set out in her answering affidavit as follows:

> 30 *"Out of the trustees elected in April 2011, three (3) have since resigned and/or relinquished their positions. I attach here two letters of resignation and mark them as annexures D and E. With the co-opted trustees, this resulted in the respondent consisting of eight (8) trustees. One of the trustees that resigned was Johan Buys who was the chairperson. I was Johan Buys's deputy and upon his resignation I took over the position of the chairperson"*.

[28] Hendrik Strampe in his affidavit strongly disputes that the said Mrs Segole was ever appointed either as vice chairperson or as chairperson and refers to the fact that if regard is had to the relevant provisions in the model rules laid down by the Sectional Titles Act, no provision is in fact made for the existence of a position of vice chairperson.

[29] In this regard the model rules read as follows:

Chairman

18. At the commencement of the first meeting of trustees after an annual general meeting, at which trustees have been elected, the trustees shall elect a chairman from among their number who shall hold office as such until the end of the next annual general meeting of the members of the body corporate and who shall have a casting as well as a deliberative vote, save where there are only two trustees.

19. The trustees at a trustees' meeting or the body corporate at a special meeting, in respect of either of which notice of the intended removal from office of the chairperson has been given, may remove the chairperson from his or her office.

20. If any chairman elected in terms of rule 18 vacates his office as chairman or no longer continues in office by virtue of the provisions of rule 19, the trustees shall elect another chairman who shall hold office as such for the remainder of the period of office of the first-mentioned chairman, and who shall have the same rights of voting.

21. If any chairman vacates the chair during the course of a meeting or is not present or is for any other reason unable to preside at any meeting, the trustees present at such meeting shall choose another chairman for such meeting who shall have the same rights of voting as the chairman."

[30] Accordingly it is clear from the model rules that there is indeed no provision for the said Mrs Segole to have been appointed as either vice-chairman or chairman in the manner for which she contends. Nor was any evidence put up of the rules having been amended so as to depart from the model rules. Accordingly it was not possible for her in her capacity as chairperson to have appointed the said attorneys.

[31] The third difficulty with the resolution underlying the power of attorney is the following: prior to the purported resolution advice was received from an attorney who considered himself the duly appointed attorney of the body corporate. That advice took the form of email correspondence dated 23

August 2012 addressed to one of the trustees, Grace Maphanga, and reads as follows:

> *"I confirm Grace having given me a copy of the High Court application that has been brought against the Body Corporate for the appointment of Mr Adrian Sydow to be appointed as administrator of Bridgetown. Grace requested that I peruse such application and advise the trustees accordingly. It is of course prudent for the trustees to obtain legal advice on such an application before allowing same to be granted unopposed if it is to be the case.*
>
> *I understand that all the trustees have seen the application, but in the event that anyone has not had sight of such application, please advise. I understand that a copy of such application has been emailed to all trustees and certain other individuals. I am unaware as to whether the concerned home owners, as some sort of entity on its own is dealing with this matter separately or intends to oppose the application.*
>
> *I cannot see any basis on which to oppose the application and all the allegations made therein by Mr David Lechizio (the applicant), in support of the application appear to be correct. Indeed the applicant has not even made mention of the debacle going on in the CCMA and the deadlock that appears to be present therein"*.

[32] He then refers to the debacle at the CCMA and goes on to say -

> *"I am unaware as to where such matter currently rests, and that will be one of the issues for the administrator to deal with once appointed. The administrator will no doubt appoint a legal representative to deal with the matter. I am of course available to be consulted by the trustees should the trustees wish to obtain any further advice herein, or to give me further instructions as to how this matter should be attended to.*
>
> *I confirm that I am taking no further steps in regard to the application for the appointment of the administrator, which application is set out down to be heard on 28 August 2012. If I am to be instructed otherwise, kindly advise.*
>
> *Regards*
>
> *Kevin Schaafsma"*.

[33] This email was then met with certain responses. The response from the purported chairperson, Lebo Segole, read as follows:

> *"Dear Kevin*
>
> *... [she quotes one part of the letter under reply and goes on to say …]*
>
> *Unfortunately Bridgetown does not belong to Grace and she certainly does not make decisions on behalf of everyone. So please continue excluding everyone from your arrangements with her."*

[34] In the second paragraph of her response, she again quotes from the letter from the said attorney and then responds,

> *"Why is it suddenly of your concern that the rest of the trustees have received this because you and your client Grace never even bothered to bring this to the attention of the owners let alone the rest of the trustees and you have furthermore even gone forward making a decision that we need an administrator, could it be that this reaction of yours was triggered by the fact that I made sure that owners know about your precious little secret plan with Grace.*
>
> *Is that the reason why you and her have advised your associates GMA to put password on the computers belonging to the body corporate so that yourself, Grace and your counterparts can restrict transparency in the running of Bridgetown affairs"*.

[35] In the third paragraph she again quotes from the attorney's letter and responds:

> *"Kevin, it is certainly not up to you to make such a decision. Surely you are only in this to milk money out of Bridgetown, would you not perhaps like to know from the people whose money is abused how they feel or are you having too much fun getting rich?"*.

[36] In the fourth paragraph she again quotes from the attorney's letter and responds:

> *"Is this now your official proposal for an official appointment?"*.

[37] In the fifth paragraph she again quotes from his letter and says -

> *"Advice is that you ask Grace"*.

[38] Her letter then proceeds as follows:

> *"Just so that both of you and whoever that is on your kickback's list know I am going to make sure that the owners know about everything that concerns them. I mean even if you bring in your associate as an administrator or put a million passwords to mediums of communication in Bridgetown, YOU ARE NOT GOING TO BULLY ME OUT OF THAT ONE, TRUST ME. Until such time you and Grace start to realise that Bridgetown is not about the two of you I am not interested in your dealings with her and either. Regards Lebo Segole"*.

[39] A similar discourteous letter was addressed to that attorney by the trustee Pumeza Nqeni.

[40] In my view it is implicit in the Sectional Titles Act that trustees are required to act rationally. Apart from the fact that Lebo Segole exposed the body corporate to potential proceedings for defamation in her letter, ignoring the advice that was given in taking the resolution was irrational. Both letters reflect manifest irrationality, apart from a serious lack of courtesy and professionalism. They certainly lend credence to the complaints advanced by the applicant.

[41] Having regard to all of the above circumstances I uphold the point *in limine* taken by the applicant and accordingly hold that –

[41.1] no valid resolution was passed to oppose the proceedings; and

[41.2] no mandate was validly given to Lebo Segole to appoint Ndumiso Voyi of Ndumiso Voyi Incorporated to oppose the proceedings on behalf of the respondent.

[42] The respondent has accordingly not opposed the proceedings and the matter stands to be dealt with on an unopposed basis. The defences advanced in resisting the application stand to be dismissed. Having regard to the papers filed on behalf of the applicant, a *prima facie* case is made out for the appointment of an administrator. The applicant is entitled to the relief it seeks. I will deal with the question of costs below.

[43] Even if a resolution had validly been taken by the respondent to oppose the application I would have come to the same conclusion as that set out above. I wish to give my reasons as briefly as possible as to why I say that. I do so because the matter was fully argued before me yesterday and I also do so in the hope that this will give some greater measure of acceptance of and support for the relief by those who have sought to oppose it. I do so taking into account all of the affidavits that were filed.

[44] The following aspects in my view warrant the appointment of an administrator.

[45] The trustees and the owners are at loggerheads. There is internal strife. On both parties' versions, the original and the co-opted trustees are at loggerheads. The deadlock which exists is apparent from these very proceedings and from the circumstances surrounding them.

[46] The deadlock is also apparent from the lengthy letter which was sent by the former chairperson, Mr Johan Buys, in explaining the circumstances giving rise to his resignation. It certainly gives a full account of the internal strife which characterises the proceedings of this particular body corporate. Although this was put up in reply and there has not been an opportunity to respond to it, the allegations of internal strife and of inappropriate behaviour on behalf of the so called concerned home owners group is corroborated by the two letters to which I have made reference from Miss Segole and Miss Nqeni.

[47] It is also corroborated by the euphemistic statements in the answering affidavits, suggesting that the conduct on the part of the said home owners amounted merely to *"robust action and straightforwardness"*. The existence of the internal strife and the intimidation which has been taking place is also borne out by the fact that three of the original trustees have resigned in the last three months.

[48] The impasse referred to is also apparent from the failure of the settlement agreement concluded on 18 November 2011.

[49] The next area of concern which in my view warrants the appointment of the administrator is the question of abortive meetings. The applicant complains that the major problem facing the body corporate is that, because the trustees are at loggerheads, they cannot obtain a quorum to obtain any decisions to take forward the management of the complex.

[50] Mr Voyi suggested that the mechanism in the settlement agreement is there to resolve this problem, but the events surrounding the single decision around opposition to these proceedings illustrates that it is not a viable solution.

[51] The detailed account by the applicant of an assault on one of the original trustees and unruly behaviour at a meeting on 16 April 2012 is simply answered by a bare denial and that too lends credence to the assertions in the founding affidavit of internal discord.

[52] It was argued that the appropriate relief in relation to the impasse was not the appointment of the administrator but rather the convening of an annual general meeting. However on both parties' versions, the convening of a general meeting is at this stage virtually impossible. This is demonstrated by the following.

[53] After the appointment of managing agents, there was an attempt to convene a special general meeting on 30 July 2011. The applicant says that after three hours the meeting could not be called to order and had to be called off. The opposing group say that the reason was that the only list brought to the

meeting was a list of those ineligible to vote on account of non-payment of levies. At the meeting, the opposing group demanded a full list of owners to see that there were no non-members in attendance who might rig the vote. On both parties' versions it was not possible to convene a meeting successfully.

[54] A further meeting was scheduled for 10 September 2011. The applicant says that a quorum was present and there was also an attorney in attendance. However the meeting had to be called off because of disruptions and chaos. The opposing group says that there were two attorneys present and that there was insufficient proof of the proxies allegedly held by Mr Johan Buys. On both parties' versions the meeting had to be called off.

[55] A further meeting was scheduled for 1 October 2011. The applicant says it was called off due to concerns over violence and threats. The respondents say it was called off due to the lack of a venue. On both parties' versions, the meeting could not be convened. This apparently was followed by the legal proceedings which culminated in the settlement agreement and, as I have indicated, that too failed.

[56] Accordingly I am not satisfied that merely directing the convening of an annual general meeting provides any solution.

[57] Another area of concern warranting the appointment of an administrator is the financial management of the body corporate. The body corporate has

reserve funds of some R1.2 million. The original trustees say this is needed to provide for undercharging for electricity which has taken place, with the risk the body corporate is going to be hit in the future with a massive and crippling electricity bill when the matter is corrected.

[58] The undercharging arises from a faulty electricity meter and it is common cause that this electricity meter is indeed faulty and has been so for years. The co-opted trustees dispute that there has been any undercharging of electricity, but fail to provide any basis for their denial. Whoever may turn out ultimately to be right or wrong about the undercharging, the fact that it is common cause that the electricity meter is faulty suggests that it is prudent for reserves to be kept for such an eventuality.

[59] On their own version the co-opted trustees are battling for control over these funds held in reserve. The fact that they on their own version wish to take control over these funds and apparently deal with them in a manner other than maintaining a reserve is a matter of serious concern. This lends credence to the charge by the applicant that the co-opted trustees wish to redistribute this reserve.

[60] A further aspect is that arrear levies have increased to a very high amount. The applicant says that in 2005 the arrears stood at R1,105,854.38. At the time of launching the application, the applicant says that the amount was R2,941,747.96. By the time of the filing of the replying affidavit, the amount was R3,286,343.61. The applicant puts up spread-sheets setting out the arrears on an individualised basis.

[61] The spread-sheet suggests that, of the arrears, R1,939,249.63 have been outstanding for longer than 120 days. The opposing group suggests that the concern about the outstanding arrear levies is simply alarmism. They contest the figures put up but fail to put up any alternative version. They simply say that the figures cannot be relied upon because of the faulty electricity meter.

[62] They do not however seem to dispute that there are substantial arrears and simply say that they have “ways and means” of recovering them. No further details of such “ways and means” are given.

[63] The applicant alleges that more than 80 percent of banks refuse to grant bonds on units at Bridgetown due to the financial situation and the deterioration of the building and the complex as a whole. This is met with a bare denial.

[64] The applicant says that the original trustees have obtained three insurance quotes that will reduce the monthly insurance bill by R10 000. This was in November 2011. No decision on these quotes has been taken since that time. The opposing group’s attitude in the answering the affidavit is that there is insurance already in place and nothing needs to be done. This does not amount to responsible financial management.

[65] The next area of concern is the inability to reach consensus. There are a range of issues on which there are disputes of fact around particular aspects of the management of the body corporate. An example is the issue of

whether the complex should appoint its own security guards directly or employ an outside firm.

[66] It was suggested that these disputes required a referral to oral evidence. On the contrary, in my view they simply serve to illustrate the need for the intervention of an outside neutral administrator.

[67] The test for the granting of an order appointing an administrator is set out in LAWSA, 2nd Edition, Volume 24 at paragraph 460 as follows:

> *"A court will only exercise its jurisdiction to appoint an administrator in exceptional circumstances such as serious financial difficulties encountered by the body corporate and flagrant maladministration through managerial atrophy or deadlock, dishonesty or inefficiency"*.

[68] In *Dempa Investments CC v Body Corporate of Los Angeles* [2008] JOL 21735 (W) at para 21, the court provided the following useful guidelines for the appointment of an administrator:

> (a) The court must exercise its discretion judicially in the light of the circumstances of the case before it.
>
> (b) Special circumstances or a good cause in the form of: (i) neglect, wilfulness or dishonesty on the part of the trustees, or an event beyond their control; and (ii) a likelihood of substantial prejudice to owners if an administrator is not appointed, must be shown.
>
> (c) A non-exhaustive list of qualifying acts or omissions include maladministration, breaches of statutory duties, dishonesty, inefficiency and managerial atrophy or deadlock.
>
> (d) The administrator must be able to add value where the trustees could not. Mere inexperience of the trustees could be solved by the appointment of an experienced managing agent and serious financial difficulties may just as efficiently be ironed out by the trustees and the managing agent. In cases where inexperience is coupled with pig-headedness and financial difficulties have been

caused by maladministration and dishonesty, an administrator could be expected to achieve better results than the body corporate or the trustees.

(e) A balance should be struck between caution to interfere in the management of the scheme by the chosen representatives and swift assistance to owners who may suffer substantial prejudice if an administrator is not appointed swiftly.

(f) The onus rests on the applicant to persuade the court that it is a suitable case for the exercise of its discretion to appoint an administrator.

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

[70] In relation to costs, the applicant asked that an order of costs be made against those trustees who sought to oppose the grant of the relief sought. Mr Voyi argues that these trustees are not before court and he does not represent them and that it would in those circumstances not be fair to make a costs order against them.

[71] The trustees concerned were warned in the original notice of motion that costs would be sought against any party who opposed the proceedings and it was clear from that notice that this was a reference to parties other than the respondent. They were again warned in the replying affidavit that a costs order would be sought against them personally.

[72] Given that the respondent has never properly resolved to oppose the proceedings, it is in effect the three trustees who purported to take the resolution on 24 August 2012 who have done so. There is no reason why the respondent should be saddled with the costs of dealing with the application on an opposed basis. Moreover the conduct of the three trustees concerned has been such as to warrant the grant of a punitive costs order.

[73] Finally in relation to the order, I have also provided in the order (and this departs from the draft order which was handed up by the applicant) for steps to be taken towards conflict resolution between the opposing groupings. Because this was not canvassed with the parties beforehand the applicant or the respondent, properly authorised, or the administrator may approach the court for a variation of that part of the order on the same papers duly supplemented.

[74] An order is made -

1 Appointing ADRIAAN SYDOW (I.D. 721224 505 7082) as Administrator of the BRIDGETOWN SECTIONAL TITLE SCHEME (Scheme Number SS1142/1995, SS1143/1995, SS1144/1005 and SS177/1996, in terms of the provisions of Section 46 of the Sectional Titles Act 96 of 1986 ("the Act");

2 That the term of appointment of the Administrator shall be for a period of 24 (TWENTY FOUR) months from date of appointment, provided

that in the sole discretion of the Administrator and if in his opinion, it would be advisable to have the period shortened or extended, he may apply to this Court, at the expense of the Respondent, for leave to do so and in which event the proposed election for appointment of Trustees referred to hereunder, shall be held earlier or later, as the case may be;

3 That the Administrator shall have, to the exclusion of the members and Trustees of the Respondent, the powers, duties and obligations set forth in Sections 37 to 40 of the Act and the Management Rules published in terms of Section 35(2)(a) thereof;

4 That the Administrator shall, at least 30 (THIRTY) days prior to expiration of his term of appointment, convene a Special General Meeting of all members of the Respondent, for the purpose of electing and appointing Trustees for the Respondent;

5 That the Administrator shall, for purposes of the meeting referred to in the aforesaid paragraph, in his sole discretion, determine who is eligible to nominate Trustees and to vote for their appointment;

6 That, for the performance of his duties, the remuneration of the Administrator shall be:

6.1 Remunerated at the rate of R500,00 (FIVE HUNDRED RAND) per hour plus VAT (if applicable), provided that his fees shall

not exceed R5,000.00 (FIVE THOUSAND RAND) plus VAT (if applicable), in any one month;

6.2 Reimbursed in respect of all necessary expenses incurred (stationery, telephonic disbursements, etc.);

6.3 Reimbursed in respect of travelling expenses at R2,50 (TWO RAND FIFTY CENTS) per kilometre.

7 That the Respondent, through its trustees, shall within 7 (SEVEN) days from date of this Order, deliver or cause to be delivered to the Administrator:

7.1 All documents relating to the administration, management and control of Respondent, including documents and correspondence pertaining to:

7.1.1 insurance affairs;

7.1.2 creditors of Respondent;

7.1.3 members of Respondent;

7.1.4 legal proceedings instituted by or against Respondent;

7.1.5 any Management Agreement entered into in terms of the provisions of Management Rule 46;

7.1.6 all Service Agreements;

7.1.7 all Employment Contracts with employees of the Body Corporate, including all the original UIF blue cards of the employees of Respondent, as well as all source documents and correspondence relating to UIF for the employees of Respondent;

7.1.8 copies of levy clearance certificates issued and details of all transfer of Units in progress at Respondent, in Respondent's possession;

7.1.9 all Minutes, Minuted Books, Resolutions, Management Rules and Conduct Rules of Respondent and in Respondent's possession;

7.1.10 all financial and accounting records, including books, documents, copies of all bank statements, deposit books and deposit slips, members ledger accounts, cash books, copies of tax returns and tax assessments and any other documents pertaining to Respondent's financial affairs and/or administration in Respondent's possession or under its control;

7.1.11 all cheque books, documents and statements pertaining to any cheque accounts, savings account and/or investment account, including any petty cash on hand;

7.2 That the Respondent shall, within 30 (THIRTY) days from date on which this Order is granted, render to the Administrator a full account of the monies received and disbursed for and on behalf of Respondent, together with supporting vouchers.

8 SPECIFIC RESTRICTIONS/DIRECTIONS

8.1 That the Administrator shall, at his election and upon delivery to him of the documents referred to in paragraph 7 and after accounting to him, have either an investigative, or a forensic audit executed pertaining to the correctness of the members' ledger accounts and the financial records of Respondent, as maintained by Respondent or its Managing Agent.

8.2 That the Administrator shall in his sole discretion determine a procedure to verify members' ledger accounts and/or adjudicate any disputes concerning outstanding arrears by members of Respondent and failing any resolution or settlement with regard to such dispute or verification, shall immediately proceed with legal action for the recovery of all arrear amounts;

8.3 The Administrator shall not be entitled to incur any expenses relating to luxurious or non-luxurious improvements (other than necessary and required maintenance) to the buildings of Respondent, without having received the approval of the

members of Respondent, in accordance with the provisions of the Regulations, alternatively, without the approval of this Honourable Court;

8.4 That, to the extent that the resources of the respondent permit, the Administrator shall engage the services of a reputable conflict resolution organisation to implement measures aimed at resolving the on-going conflicts which beset the administration of the affairs of the Respondent, provided that either party may on 24 hours notice to the other set the matter down on the same papers for the sole purpose of seeking the variation of this paragraph 8.4.

9 That the costs of this Application shall be paid by –

9.1 the Respondent on an attorney and client basis to the extent that the costs would in any event have been incurred if the application had been moved on an unopposed basis;

9.2 Lebo Segole, Lunga Madlala and Pumeza Mqeni on an attorney and client basis in respect of the balance of the costs incurred by the applicant as a result of their opposition to the relief sought, jointly and severally, the one paying, the other to be absolved.

10 That the Administrator gives notice of this Order to each owner of Respondent at the owner's chosen domicilium citandi et executandi as reflected in the records of the Body Corporate, by prepaid post, within 14 (FOURTEEN) days from date of this Order and to cause delivery by hand of a copy thereof at each Unit in Respondent's Scheme.

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AC DODSON AJ