

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 26865/2019

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO


Judge Dippenaar

In the matter between:

TUHF PROPERTIES (PTY) LTD

APPLICANT

AND

THE ARGYLE COURT HOUSING ASSOCIATION

FIRST RESPONDENT

BONELAKHE MTHANDENI NDLOVU

SECOND RESPONDENT

FRANS MASIMATLA NONG

THIRD RESPONDENT

TINNY XHAKASA

FOURTH RESPONDENT

HILLTON NDLOVU

FIFTH RESPONDENT

SIBUSISO TWALA

SIXTH RESPONDENT

PASTER DINGULWASI NKOSI

SEVENTH RESPONDENT

VALENTIA MATSHOBA

EIGHTH RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 01st of February 2023.

DIPPENAAR J:

[1] The applicant seeks an order for the discharge of Mr Cyprian Mondli Pehlukwayo, a court appointed administrator of the first respondent ("ACHA"), an incorporated association not for gain registered under s 21 of the 1973 Companies Act of which the second to eighth respondents are directors.

[2] The applicant further seeks an order for the final winding up of ACHA on the basis that it is unable to pay its debts and that it would be just and equitable for it to be wound up as contemplated in sections 344(f) and (h), 345(c), 346 and 347 of the Companies Act¹.

¹ 61 of 1973, read with Item 9 Schedule 5 of the 2008 Companies Act

[3] ACHA's main business is to provide low cost housing to accommodate previously disadvantaged tenants. Argyle Court is a 7 story block of flats comprising of some 72 units.

[4] Pursuant to proceedings under case number 16798/2016 between the applicant and ACHA in which *inter alia* transfer of Argyle Court to ACHA was sought, Victor J, granted orders on 31 May 2017 and 31 July 2017 respectively. In terms of those orders, Mr Pehlukwayo ("the administrator") was ultimately appointed as administrator of ACHA in terms of the latter order.

[5] ACHA has been under the administrator's control since August 2017. The duties and obligations of the administrator are particularised in paragraph 5 of the 31 May 2017 order, confirmed in the order of 31 July 2017. One of his obligations was to defend any legal action which may during his tenure be instituted against ACHA. The administrator was also obliged to account to the tenants of ACHA and the applicant on his actions and findings on a monthly basis including financial statements and management accounts and to submit comprehensive monthly progress responds including property management and management accounts to both ACHA and the applicant.

[6] ACHA did not oppose the present application. The administrator provided a confirmatory affidavit to the applicant's founding papers confirming its version and supporting his discharge as administrator and the final winding up of ACHA. Attached to the founding papers is a progress report by the administrator dated March 2018. The report is only nine pages long and contains scant information. It also only covers the period August 2017 to March 2018, although the present proceedings were only instituted during July 2019.

[7] The second to eighth respondents, members and directors of ACHA, obtained leave to intervene and oppose the application. They accuse the administrator of not complying with his duties and dispute the grounds advanced for the winding up of ACHA.

Their case is centrally based on their rights under s26 of the Constitution² and the argument that 'normal' commercial processes may not be abused to exploit and exacerbate the economic and social weaknesses and marginality of the poor, especially when doing so has a negative impact on state efforts to alleviate homelessness³.

[8] It does not appear from the papers that the administrator has provided any comprehensive report pertaining to the affairs of ACHA or its financial position after March 2018. Although the second to eighth respondents did not oppose the discharge of the administrator, they accuse the administrator of not complying with his duties and of a failure to apprise the members of ACHA of its financial position. On the papers, it cannot be determined whether there is any merit to this complaint as the administrator has chosen to remain silent after the delivery of the applicant's founding papers.

[9] Considering the arguments advanced at the hearing by the respective parties in relation to the winding up application, the exercise by a court of a discretion is one of the central issues raised which must be determined. A court can only properly do so, if it is properly apprised of all the relevant facts. A comprehensive report by the administrator would shed much light on the true factual matrix which a court must consider.

[10] It is well established that a court has the inherent power to protect and regulate its own process taking into account the interests of justice⁴ and that courts adopt a flexible approach in construing and applying the rules⁵. A court further has a discretion as to the future course of the proceedings⁶.

[11] When I raised my concerns with the parties during argument regarding the absence of proper information from the administrator, the applicant adopted the approach that a provisional winding up order should be granted and the administrator be directed

² 1996

³ Van der Walt, AJ Constitutional Property Law (2005) at pages 305 to 306.

⁴ Constitution, s173

⁵ Helen Suzman Foundation v Judicial Service Commission 2018 (4) SA 1 (CC) at para [87]

⁶ Sassin supra para [71] and the authorities cited therein; R6(5)(g)

to provide a comprehensive report to the court to consider on the return date. It proposed that the discharge of the administrator be postponed until the return date.

[12] The second to eighth respondents on the other hand, adopted the approach that the applicant had not made out a proper case in its founding papers and that the winding up application should be dismissed with a punitive costs order. It was contended that the order for the discharge of the administrator should be granted.

[13] In my view, neither these approaches would serve the interests of justice as either order would have implications for the rights of the respective parties. The interests of justice rather dictate that none of the relief sought should at this stage be granted.

[14] A discharge of the administrator at this stage, albeit that this relief was not opposed, would result in the administrator never providing a proper accounting prior to being discharged from his duties. A winding up order, even a provisional order, would have clear implications for ACHA. In similar vein, dismissal of the application at this stage would have clear implications for the applicant.

[15] Considering the issues which are raised in the application, the proper administration of justice requires that the application be postponed and that a comprehensive report be placed before the court before the application can properly be determined.

[16] As the person in charge of ACHA 's affairs for more than five years, the administrator must account for his administratorship and for the financial position of ACHA to clarify the position in relation to rentals received by it and compliance by it with its financial obligations to the applicant and other creditors.

[17] It would be appropriate to direct the costs of the proceedings on 26 January 2023 to be costs in the cause.

[18] The directors launched a condonation application for the late delivery of their heads of argument. That application was not opposed and no costs order will be granted in relation thereto. I am persuaded that a proper case was made out for such relief.

[19] I grant the following order:

[1] The late delivery of the second to eighth respondents' heads of argument is condoned;

[2] The application is postponed sine die;

[3] The first respondent's administrator, Mr Pehlukwayo, is directed in that capacity to deliver a comprehensive report and affidavit pertaining to the affairs of the first respondent from the date of his appointment to date to the parties and to the court within 45 days of date of this order. Such report must include a comprehensive report on the first respondent's financial position including its assets and liabilities, income and expenditure and rentals. The report must further particularise when and how the administrator complied with his duties and obligations in terms of the orders granted under paragraph 5 of the order of 31 May 2017 as confirmed in the order of 31 July 2017 granted under case number 16798/2016;

[4] The applicant is granted leave to deliver a supplementary affidavit/s dealing with the issues raised by the administrator in his report within 15 days of receipt of such report if it elects to do so;

[5] The second to eighth respondents are granted leave to deliver a supplementary affidavit/s dealing with the issues raised by the administrator in his report and to respond to any supplementary affidavit delivered by the applicant within 15 days thereafter, if they elect to do so;

[6] Any replying affidavit is to be delivered within 10 days of the expiry of the period in [5] above;

[7] The parties are granted leave to deliver supplementary heads of argument dealing with the report and the additional affidavits, within 15 days of expiry of the period in [6] above;

[8] The parties may not enroll the matter for hearing until the administrator of the first respondent has delivered the report in [3] above;

[9] The costs of the hearing on 26 January 2023 are to be costs in the cause;

[10] A copy of this order must be served on the first respondent's administrator, Mr Pehlukwayo forthwith.



**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 26 January 2023
DATE OF JUDGMENT	: 01 February 2023
APPLICANT'S COUNSEL	: Adv. E. Kromhout
APPLICANT'S ATTORNEYS	: Malatji and Co Attorneys
SECOND TO EIGHTH RESPONDENT'S	

COUNSEL

: Adv. D. Linde

**SECOND TO EIGHTH RESPONDENT'S
ATTORNEYS**

: Kropman Attorneys