Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

CASE NO: 20371/2010

In the matter between:

DANIEL GRAHAM	Applicant
And	
PARK MEWS BODY CORPORATE	First Respondent
NEBOJSA STOJANOVIC	Second Respondent

JUDGMENT DELIVERED ON 19 SEPTEMBER 2011

HENNEY, J

[1] The applicant is one of the trustees in the first respondent a body corporate known as Park Mews established in terms of section 36 of the Sectional

Titles Act, Act 1995 of 1986 (The Act). He is also the owner of one of the 6 units of Park Mews.

The second respondent is the current chairperson of the first respondent and is the owner of 4 of the units of Park Mews.

[2] The other remaining unit is owned by Mr David Oxendale who is also a trustee of the body corporate. The applicant had been living at Park Mews for approximately 4 years. During this time various disputes had arisen between the second respondent, as Chairman of the body corporate, and the applicant. This resulted in the applicant instituting arbitration proceedings against the first respondent.

[3] The dispute giving rise to the arbitration proceedings centred around certain repair and maintenance work the first respondent failed to perform to the common property in order to prevent any water ingress and consequent damages to the applicant's property.

[4] An award consisting of four components was handed down by the arbitrator Mr Mathew Ash, an attorney, on 30 March 2010. The applicant was successful in respect of three of the four claims whilst one was dismissed.
The award was as follows:

"*29.1.* *Respondent is directed to remediate, repair, and maintain the common property consisting the balcony and appurtenances to Unit 2 of "Park Mews" situate at Glenside Road, Green Point, Cape Town ("the scheme"), including taking the measures as recommended by the experts Mr. J.W. Mitchell and Mr. L. Nyenes, so as to halt and prevent any water ingress from the common property into Claimaint's property, being Unit 1 of the scheme.*

29.2. *Claimant's claim for similar remediation, repair, and maintenance by Respondent of the joint running north and south between the new western extension to Unit 1 and the original unit is dismissed. However, insofar as Claimant may wish to take remedial measures, in particular those as indicated by Messrs, Mitchell and Nyenes, Respondent is directed to take all reasonable steps to facilitate this where such measures may involve common property of the scheme.*

29.3. *Respondent is to pay Claimant's costs of this arbitration on the scale as between party and party according to the High Court tariff, such costs to include the costs of Mr. J.W. Mitchell as expert for Claimant.*

29.4. *Respondent shall not be entitled to reclaim from Claimant any share of such party and party costs which Claimant might otherwise have been obliged to pay by virtue of his membership of the scheme, nor shall Respondent be entitled to claim from Claimant any share of costs incurred by Respondent in the conduct of this arbitration."*

[5] Thereafter the applicant on various dates requested that the first respondent comply with the award that was handed down, substantially in his favour. This resulted in the applicant approaching this Court on 13 July 2010 to declare that the arbitrator's award of 30 March 2010 be made an order of this court. This request was granted by **Baartman, J**.

[6] The applicant thereafter on 14 September 2010 filed an urgent application to be set down for hearing on 5 October 2010. This was opposed by the respondents and the matter was postponed to the semi-urgent roll for 19 April 2011. This was once again postponed to 5 May 2011 and was heard by this court on that day.

[7] The relief being sought by the applicant is:

7.1 declaring that the first and second respondent to be in Contempt of the order of this Honourable court granted 13 July 2010, alternatively should the court not find them to be in contempt, to direct them to take all steps and to do all things necessary to comply with the court order;

7.2 that the first respondent be placed under administration in terms of section 46 of the Sectional Titles Act, Act 95 of 1986;

7.3 that a suitably qualified person be appointed as administrator of the first

respondent for a period of not less that six (6) months or for such time as the court deems fit;

7.4 that the respondent be ordered to pay the applicant's costs jointly and severally on the scale as between attorney and client.

[8] The respondents opposed this application on the following grounds:

8.1 The applicant has failed to set out the grounds for urgency and bringing the application on an urgent basis is an abuse of the court process;

8.2 The respondents have not made themselves guilty of contempt of the order of court and had begun, or are in the process of, effecting the repairs as required in terms of the order. There is therefore a dispute of fact;

8.3 The applicant, by instituting the Contempt of court proceedings is trying to retrospectively authorise an unlawful extension to his unit. Secondly, should he not succeed with the Contempt proceedings, the applicant is seeking to deprive the Second Respondent of his rights by applying to this court that an administrator be appointed;

8.4 The second respondent was not cited in his capacity as the chairperson of the Body Corporate and in the original application, only his personal capacity.

[9] At this stage, before dealing with the issues it would be appropriate to mention that the applicant filed his replying affidavit out of time. The second respondent as a result of this filed a further supplementary answering affidavit in the main application in which he raises further issues which he did not deal with in his answering affidavit.

[10] There was no opposition by the applicant to the filing of the further supplementary answering affidavit, but with the reservation that should the application be dismissed, the costs of the filing of this affidavit should not be included.

[11] **ISSUES FOR DETERMINATION**

a) whether the second respondent had the necessary authority to act on behalf of the first respondent;

b) whether the second respondent was properly joined;

c) whether the first respondent is guilty of Contempt of the order of court made on 13 July 2010;

d) whether the second respondent, against whom the original order had not

been given, is also guilty of Contempt of court on the basis that he was responsible for the first respondent's failure to comply with the court order;

e) whether the applicant has made out a case that the first respondent be placed under administration.

[12] During the hearing of the application, after it became apparent that the evidence upon which the applicant relied, especially with regards to the relief he is seeking to have an administrator appointed, might be inadmissible, the court invited counsel to address it on this aspect. Counsel was also invited by the court to submit further supplementary heads of argument on the following issues:

(a) whether, to the extent they were relied upon by the applicant the conclusions and facts as found by the arbitrator, which were attached, are admissible;

(b) whether a report of Mr Jonathan Mitchell and an e-mail of Mr Hodson, submitted as evidence in the arbitration proceedings, can be admitted as evidence in these proceedings despite the applicant having failed to lay a proper foundation to the admission of such evidence in these proceedings;

(c) whether counsel for the applicant relied on section 34 of the Civil Proceedings Evidence Act, Act 25 of 1965 and also on section 3 of the Law of Evidence Amendment Act, Act 45 of 1988;

(d) lastly, counsel were also invited to submit further submissions as regards

to the question whether the exclusion of the trustees from voting in respect of litigation or proposed litigation in terms of management rule 23 promulgated in terms of section 35 of the Act only applies to those parties who were parties to the litigation. Rule 23 ..... *"A trustee shall be disqualified from voting in respect of any contract or proposed contract, or any litigation or proposed litigation, with the body corporate, by virtue of any interest he may have therein."*

I will now deal with these issues.

[13] **LACK OF AUTHORITY**

The applicant raised the question whether the second respondent was duly authorized to act on behalf of the first respondent in these proceedings. According to the applicant a proper notice was not given in terms of rule 15(1) and 15(2) of the Management rules governing the conduct and procedures of Body Corporate's as promulgated in terms of section 35 of the Act.

Rule 15(1) and 15(2) state:

"15.(1) Subject to the provision of subrule (2) and (3) hereof, the trustees may give notice convening meetings, meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit. It shall not be necessary to

give notice of a meeting of trustees to any trustee for the time being absent from the Republic, but notice of any such meeting shall be given to his alternate, if he has appointed one, where such an alternate is in the Republic.

(2) A trustee may at any time convene a meeting of the trustees by giving the other trustees and all first mortgagees in the circumstances referred to in subrule

(3) hereof, not less than seven days' written notice of a meeting proposed by him, which notice shall specify the reason for calling such a meeting: Provided that in cases of urgency such shorter notice as is reasonable in the circumstances may be given."

[14] The applicant contends that there was no proper notice of the meeting and also not a proper resolution authorising the second respondent to defend or oppose these proceedings on behalf of the first respondent. The second respondent contends in his opposing affidavit, as well as his supplementary opposing affidavit, that he is the only authorised representative of the first respondent in these proceedings.

He further contends in his supplementary affidavit that a resolution of the Board of Trustees of the Body Corporate, in which he requested that the current attorneys of record of the first respondent be appointed, constitutes authority given to him to instruct such attorneys and depose to affidavits if necessary.

He attached a copy of the resolution to his affidavit as annexure "NS7". It reads as follows:

"After, many attempts by Body Corporate Lawyers as well as Body Corporate Chairman, N Stojanovic (by e mail) to get a Daniel Graham to withdraw his application to High Court of Cape Town we are announcing that such attempt has failed. Park Mews Body Corporate is forced to defend this matter in court on 5 October 2010. Please vote to appointment RVK Attorneys to be legal representative of Park Mews Body Corporate in upcoming meter in court on 5 October 2010. We need to pass this resolution by tomorrow 30.09.2010 by 11am local time. No reply by any trustee till 30.09.2010 11am local time, will result in decision been made by board of trustees."

[15] The second respondent further contended, correctly in my view, that his right to represent the first respondent was never challenged by the applicant during the arbitration proceedings. The applicant accepted all along that he was representing the Body Corporate. The applicant's founding affidavit is entirely based on the allegation that the first respondent is representing the Body Corporate.

[16] I am inclined to agree with the view as postulated by the second respondent and I am of the view that a too formalistic approach to determine whether the second respondent had the requisite authority should be avoided.

I am further of the view that the contention of the applicant that the second respondent lacks the requisite authority is clearly opportunistic and without merit.

[17] I accept that in this case, the resolution and notice of a meeting are surely not in line with what is required in terms of rule 15(1) and 15(2) of the Management rules. The enquiry as to whether the second respondent had the requisite authority, however, does not end there. Regard is to be had to the circumstances in which, and background against which, these proceedings were instituted.

[18] These proceedings were launched on an urgent basis and were served on the second respondent as representative of the first respondent on 14 September 2010, after attempts were made by the second respondent to have this matter settled out of court. This came as a surprise on the respondents, who were still trying to settle this matter at this stage. This fact was not disputed. In the meantime the respondent had started to give effect to the court order as will be shown later. These facts must be borne in mind in deciding whether the failure of the respondents to properly hold a formal meeting must lead one to conclude that the second respondent did not have the necessary authority to act on behalf of the first respondent.

[19] Whether a formal resolution is required in order to give an individual the necessary authority to act in legal proceedings on behalf of a juristic person, it seems, depends on the circumstances of each case.

[20] In **Tattersall and Another v Nedcor Bank Ltd** 1995(3) SA 222 (A) at 228F to 229D, it was held that if according to the evidence it is clear who would be

the person that would act on behalf of a juristic person, then that evidence would be sufficient to indicate that the person so mentioned would have the necessary authority. As stated in the words of **Nedstadt JA**... ***"to hold otherwise would be carrying formality too far"***.

[21] This view was further shared by a full bench of this court in **Mall (Cape) (Pty) Ltd v Merino Ko-operasie B.P.K.** 1957 (2) SA 347 (CPD) and at 352... it was held that "*Each case must be considered on its own merits and the court must decide whether enough evidence has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorized person on its behalf.*"

I therefore dismiss the argument that the second respondent lacked the necessary authority to act on behalf of the first respondent. The first respondent is therefore properly before this court.

CONTEMPT OF COURT

[22] The applicant's case of contempt of court against the first respondent and the second respondent, who the applicant alleges is an accomplice with the first respondent in committing the contempt of court, is based on the following:

(1) That the respondent failed to remediate, repair and maintain the common

property consisting of the balcony and appurtenees to Unit 2 of "Park Mews" and that he further failed to take measures as recommended by the experts Mr J.W Mitchell and Mr L Nyenes to halt and prevent any water ingress from the common property into the applicant's property;

(2) That the first respondent failed to pay the claimant's costs of the arbitration on the scale between party and party according to the High Court Tariff, such costs to include the costs of Mr J.W. Mitchell as an expert.

[23] The applicant contends that the report of Mr Mitchell dealt with the defects to the balcony of Unit 2 and that in such report Mr Mitchell made recommendations, which, according to the arbitrator's award, were to halt and prevent any water ingress from the common property into the applicant's property being Unit 1 of the scheme. It is further important to note that only these recommendations relating to the "halting or the prevention of any water ingress from the common property into the applicant's property was made part of the award by the arbitrator".

[24] It is also important to note that the first respondent in terms of the award had only been directed to remediate, repair and maintain the common property consisting of the balcony and appurtenances of Unit 2.

These included:

a) That all remedial work ought to be done in a proper and workmanlike manner,

b) That all storm water outlets ought to be not less than 75 mm in diameter;

c) That all defective sealant be stripped out and replaced with Polysulphate;

d) That there be a proper water proofing membrane underneath the balcony floor tiles and lastly that all storm water drains be cleared and any obstructions be removed.

[25] The second respondent contends that the award of the arbitrator only relates to the repair and remediation of the common property and the balcony and not to the interior of the property of the applicant.

[26] The second respondent in his initial opposing affidavit denies that he had failed to take steps to effect the repairs as ordered by the court as a result of the arbitrator's award. He in fact says that all the evidence upon which the applicant relies indicates that the first respondent had indeed been in the process of effecting the repairs at the time when these proceedings were commenced. He also pointed out that at the behest of Mr Oxendale a plumber had fixed the outlet pipes as requested by the applicant at a body corporate meeting held on 6 July 2010.

[27] In his initial opposing affidavit, the second respondent further states that it was agreed at the meeting of 6 July 2010 that the first respondent would obtain

further quotations to have the further repairs effected. He states that further steps were taken to effect the repairs and it is his understanding that the repairs should have been completed by 1 October 2010.

[28] In his affidavit filed on 9 March 2011, the applicant replies that on the second respondent's version, the issue of the repairs was dealt with for the first time on 6 July 2010. However, the applicant does not say anything about whether at the meeting it was resolved that the first respondent would obtain two quotations to have the repairs effected.

[29] The applicant also did not deny the second respondent's allegation that further steps were taken to repair the balcony and that it was the second respondent's understanding that the repairs would be completed by 1 October 2010.

[30] From this it is evident that at a meeting held on 6 July 2010, the outlet pipes had been fixed and it was decided that the first respondent would acquire quotations to effect the repairs. This further work had been completed to the balcony of Unit 2 by 8 October 2010 by his contractors. This it seems was acknowledged by the applicant and it seems was not denied in further argument in this court.

[31] Clause 16 of the Mitchell Report reads as follows:

"***16. After the exterior of the building has been properly waterproofed and sealed so as to prevent storm water from being able to ingress to the interior, thereafter, the internal consequential water damaged areas ought to be properly and satisfactorily rectified by a reputable damp proofing company.***"

[32] The applicant had in argument tried to convince the court that on the strength of the Mitchell report which indicated that the latter part of the phrase which reads ...."the internal consequential water damaged areas ought to be properly and satisfactorily rectified by a reputable damp proofing company" should also be read into the arbitrator's award, due to the fact that the arbitrator, at paragraph 29.1, state the following ....."*including taking the measures as recommended by the experts Mr Mitchell and Mr L Nyenes, so as to halt any lapses from the common property....*"

[33] Clearly the arbitrator did not, when he referred to the report of Mitchell in his award, intend to include the recommendations in respect of the portion of the report dealing with the internal consequential damage to the property of the applicant. The respondent was directed only to remediate, repair and maintain damage to the common property including the measures, as recommended by the experts Mr J W Mitchell and Mr L Nyenes so as to prevent any water ingress from the common property into the claimant's (applicant's) property.

[34] Therefore the portion referred to above of Clause 16 of Mitchell's Report therefore could also not form part of the court order and the respondent could therefore not be in contempt of the court order for failing to attend to take such measures. I am in agreement, therefore, with respondents that the applicant has failed to prove that the respondents had not complied with the court order dated 13 July 2010.

[35] The applicant did not deny that on 6 July 2010, the outlet pipes even though it was fixed by Oxendale, were repaired and that a resolution was taken that further quotations would be sought to effect the other repairs. Notwithstanding, this the applicant launched these proceedings. At the very least on 8 October 2010 as seen from an attached document NS3 by MRJ Contractors, the work was completed even before the respondents filed their opposing affidavits. By the time applicant deposed his replying affidavit on 9 March 2011, all the work had been completed.

[36] The definition of civil Contempt of Court proceedings are the deliberate and intentional disobedience of an order granted by a court of competent jurisdiction. There has to be the element of non-compliance. This needs to be proven by the applicant beyond reasonable doubt. See **Fakie NO v CC II Systems (Pty) Ltd** 2006(4) SA 326 SCA and the discussion in Erasmus Superior Court Practice at B1-58G (Service 36 – 2011)

[37] The applicant has failed on the evidence presented to show that there was non-compliance with the court order. It follows that there being no evidence of any non-compliance on the part of first or the second respondent the question regarding the liability of the second respondent on the basis of him being an accomplice need not be addressed.

[38] **APPOINTMENT OF AN ADMINISTRATOR**

The next question to consider is whether the court should on the available evidence exercise its discretion in terms of Section 46 of the Sectional Titles Act, Act 95 of 1986, to appoint an administrator as requested by the applicant.

[39] The applicable provisions of the 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 R500,00 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."

[40] In the matter of **Dempa Investments CC v Body Corporate of Los Angeles** SA 2010(2) SA 69(W) the Court, in deciding whether a case had been made for the appointment of an administrator, applied the following principles, at para [21].

"[21.1] The court has a discretion to appoint an administrator, which must be exercised judicially, having regard to the circumstances of the particular case before it.

[21.2] Special circumstances or good cause must be shown.

[21.3] It is not possible to define what would constitute special circumstances or good cause, but as a minimum there should be:

[21.3.1] some neglect, wilfulness or dishonesty on the part of the trustees, or an event beyond their control; and

[21.3.2] a likelihood that the owners of units will suffer substantial prejudice if an administrator is not appointed.

[21.4] Acts or omissions which would qualify would include maladministration, breaches of statutory duties, dishonesty, inefficiency and managerial atrophy or deadlock. The list is not exhaustive.

[21.5] The problem must be such that an administrator could be expected to add value where the trustees could not. For instance, mere inexperience on the part of the trustees may not be sufficient, for they could appoint an experienced managing agent. So too it may be insufficient that the body corporate is experiencing serious financial difficulties, for the trustees and managing agent may be as capable an administrator to deal with the problem. If, however, inexperience is coupled with wilfulness, or the financial difficulties have been caused by maladministration, dishonesty or the like, an administrator could be expected to achieve results which the trustees would not.

[21.6] A balance should be struck between, on the one hand, being slow to interfere in the management of the scheme of the body corporate's chosen representatives and, on the other hand, not hesitating to come to the assistance of owners of units who may suffer substantial prejudice by the actions or omissions of trustees.

[21.7] The applicant bears the onus to persuade the court that this is a suitable case for the exercise of the discretion."

[41] From this it is clear that the unseating of the management structure of a Body Corporate by replacing it with an administrator is a very drastic step. The management of the Body Corporate and control thereof are taken over and replaced by an administrator, in terms of section 46(3) of the Act, who 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.

[42] The party seeking the appointment of an administrator has to convince the court that such appointment would not only be to his or her exclusive benefit, but that it would also be to the benefit of all the owners or other interested parties as contemplated in section 46(1) as a whole.

[43] In a matter like this where there is usually an underlying feud between the parties occasioned by complaints and counter complaints, some of which are without substance. A court should therefore carefully scrutinise the merits of such an application.

To convince the court to exercise its discretion and appoint an administrator, the applicant must make out a case that there are special circumstances or show good cause.

[44] In his founding affidavit the applicant cites various instances of conduct on the part of the second respondent which in his opinion, are sufficient to make out a case that there is maladministration on the part of the second respondent in the management of the Body Corporate.

[45] In summary this amounts to the following:

45.1 The second respondent abuses his position as chairperson by effecting repairs without the knowledge of the rest of the trustees. This is denied by the respondent who says that the repairs were effected to his own unit for his own account for which no permission is needed.

45.2 The second respondent had abused his position by making use of the resources of the Body Corporate to install new light fittings in his own unit and effect other repairs to his own unit. This is denied by the second respondent who says that the light fittings were replaced because they were rusted and old and that they in fact formed part of the common property. The other repairs effected were to the common property.

45.3 When the second respondent is in arrears with his own levies nothing would be done about it, but when other owners are not up to date, this would be demanded from them. This was once again denied by the second respondent.

45.4 The second respondent had caused his mother, who is not an owner of any unit, to be appointed as a trustee, such that he was able, by using his majority vote, to manipulate meetings and all other decisions for his own benefit. This is once again denied by the second respondent who states that when his mother was voted onto the Body Corporate as a trustee, the applicant did not object to this.

45.5 A request that an extraordinary meeting be held to raise complaints was ignored or overruled by the second respondent. Furthermore, complaints also raised at an Annual General Meeting were simply ignored or overruled.

The applicant further contends that as a result of this there was a break down in the relationship between himself and the second respondent. This is once again denied by the second respondent who claims that requests of the applicant had been approved and complaints had been attended to.

45.6 Their relationship had deteriorated to such an extent that the second respondent was not prepared to communicate with him and for this reason the applicant had to resort to legal processes to resolve the disputes.

The second respondent once again denies this and alleges that he and the applicant had a round table discussion on 6 July 2009, where they agreed in principle about certain issues, but the applicant, when he was given a written agreement, ignored and or refused to sign it and proceeded with arbitration.

The applicant, in his replying affidavit, contends that he had to resort to legal proceedings due to the unwilling, uncooperative and unreasonable attitude displayed by second respondent.

45.7 Due to the second respondent's attitude and unwillingness to co-operate the second respondent had incurred legal costs on behalf of the second respondent which is totally unnecessary. This is once again denied by the second respondent who alleges that the legal costs are being incurred as a result of the applicant's vexatious litigations.

[46] In further amplification of his claim that an administrator be appointed the applicant relies on the findings of the arbitrator, the reports of experts who testified during the arbitration proceedings and certain correspondence in the form of an e-mail by the Managing Agent, Hodson. This evidence and findings are:

a) The arbitrator found that the first respondent is inherently dysfunctional;

b) The arbitrator noted that the second respondent appears to have made use of the scheme as if it was his own personal fiefdom, only dealing with those aspects that affected him directly, and otherwise remaining supine and/or ignoring the issues;

c) The arbitrator found that the building even posed a danger to people coming on to the premises;

d) In a report by Mr Mitchell produced during the arbitration proceedings as evidence it is stated:

> "... In the opinion of the Building Consultant this building does not appear to be well maintained, or frequently maintained."

e) The applicant alleges that the (second/first respondent) has failed to establish a fund to cater for the expenses of the scheme. He relies on e-mails and correspondence that was sent by the managing agent Mr Hodson;

f) The applicant alleges that there were no finances to pay the creditors and the managing agents fees and furthermore that there are substantial legal fees owing as a result of the arbitration process.

g) The applicant further contends that the financial situation of the scheme is so dire that individual owners are compelled to pay for various things by themselves.

This, according to the applicant, is evidence to show that the second respondent is failing in its duty as chairperson, in terms of Section 37(1)(i) of the Act.

[47] Apart from denying these allegations the second respondent also contends that they are either hearsay, argumentative and or irrelevant and should be struck out.

He further contends that it is absurd to rely on the hearsay words of the arbitrator to allege that he in his personal capacity is causing the first respondent not to comply with Section 37 of the Act.

[48] The second respondent further contends that the functioning of the Body Corporate (first respondent), and in particular the raising of levies, is an obligation of the Board of Trustees of which the applicant is a member. Therefore, any failure (which he denies exists) to raise levies or to fulfil its

statutory obligations is a failure of the Board of Trustees, of which the applicant as a trustee, and would therefore be equally responsible.

[49] The first/second respondent maintains that the reason why the applicant had launched these proceedings was to ensure that an administrator be appointed so that his unlawful building work can be regularised and approved to his and Mr Oxendale's prejudice.

[50] The second respondent also argued that the allegation that he is intentionally behaving in a manner to prejudice the interest of the members is absurd as he is majority member and it would be in his best interest that the Body Corporate is properly run to look after his significant investment in the scheme.

[51] **EVALUATION OF THE APPLICATION TO HAVE AN ADMINISTRATOR APPOINTED**

The applicant contends that the evidence he presented is admissible either in terms of Section 3 of the Law of Evidence Amendment Act 45 of 1988 and or Section 34 of the Civil Proceedings Evidence Act 28 of 1965. The applicable section of the Law of Evidence Amendment Act reads as follows:

"(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice."

In **Metedad v National Employers' General Insurance Co Ltd 1992(1) SA 494 Van Schalkwyk R at 4981- 4994** describes the section as follows:

"This section invests the court with a discretion, to be judicially exercised in the interests of justice. It seems to me that the purpose of the amendment was to permit hearsay evidence in certain circumstances where the application of rigid and somewhat archaic principles might frustrate the interests of justice. The exclusion of the hearsay statement of an otherwise reliable

person whose testimony cannot be obtained might be a far greater injustice than any uncertainty which may result from its admission".

[52] Section 34 of the Civil Proceedings Evidence Act 25 of 1965:

"34. Admissibility of documentary evidence as to facts in issue

(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact, provided-

(a) the person who made the statement either-

(i) had personal knowledge of the matters dealt with in the statement; or

(ii) Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with therein are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had or might reasonably have been supposed to have personal knowledge of those matters; and

(b) the person who made the statement is called as a witness in the proceedings unless he is dead or unfit by reason of his bodily or mental condition to attend as a witness or is outside the Republic, and it is not reasonably practicable to secure his attendance or all reasonable efforts to find him have been made without success.

(2) The person presiding at the proceedings may, if having regard to all the circumstances of the case he is satisfied that undue delay or expense would otherwise be caused, admit such a statement as is referred to in subsection (1) as evidence in those proceedings-

(a) Notwithstanding that the person who made the statement is available but is not called as a witness;

(b) Notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof proved to be a true copy."

[53] It is my view that the applicant has failed to show that the reports of Mitchell or Hodson's email correspondence are admissible in terms of Section 34. The applicant did not explain why supporting or verifying affidavits from Hodson and Mitchell could not be produced in which they attest to the truth of such evidence said. This evidence in my view therefore has no independent and substantial evidential value.

[54] This being motion proceedings the court has to find on the undisputed facts whether the applicant had made out a case that an administrator be appointed. Due to the history and constant feud between the applicant and second respondent which ultimately lead to the present court proceedings, a dispute of fact was reasonably foreseeable. The question is whether it is a real, *bona fide* and genuine dispute of fact. The allegations of mismanagement, inefficiency and abuse and neglect of powers, which were set out earlier were mostly denied by the second respondent.

[55] The only other evidence which seems to be common cause was that which was contained in the award which later became an order of court. This was to the effect that the respondent had to remediate, repair and maintain the

common property consisting of the balcony and appurtenances of Unit 2 of Park Mews estate.

[56] These repairs, as found earlier, and which is also common cause, had been effected by the respondent. Under the rule set out in **Plascon-Evans v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623(A)** in motion proceedings where a dispute of fact arises on the affidavits, a final order can only be granted if the facts averred in the applicant's affidavits which have been admitted by the respondent; together with the facts alleged by the respondent, justify an order. See also National **Director of Public Prosecutions v Zuma 2009(2) SA 277 (SCA) at 290: 24-26** where it is stated that it "*may be different if the respondent's version consists of bald or uncreditworthy denials*".

[57] It cannot also be said, and it was also never alleged in the replying affidavit of the applicant, that the respondent's version amounts to such. In respect of most of the applicant's allegations the respondents had provided an answer which satisfactorily unsettled the version of the applicant on that specific allegation.

[58] In these proceedings, the applicant, after having been successful in the arbitration proceedings, relied on the findings of the arbitrator and the evidence used in those proceedings, without presenting the evidence independently as a foundation upon which to build his case.

The opinions of the experts who testified in the arbitration proceedings, especially that of Mr Mitchell, as reflected in his report, that "In the opinion of the building Consultant this building does not appear to be well maintained nor frequently maintained", is inadmissible as evidence.

[59] The rule laid down in **Hollington v F Hewthorn (Pty) Ltd** [1943], 2 ALL ER 35 provides that the conviction of an accused in a criminal court cannot be used as evidence in a subsequent civil trial of the fact that the accused had indeed committed the crime of which he was convicted.

Schmidt at p 1-3 Law of Evidence; states.... "Hollington is therefore authority for the view that a finding in a criminal case cannot in a subsequent civil case serve as evidence of a fact that the criminal had considered to be proved."

[60] I am of the view that such rule is applicable in the present matter, even though the previous proceedings were not a criminal trial, but arbitration proceedings.

There seems to be a general rule that findings of another tribunal cannot be used to prove a fact in a subsequent tribunal. I also see no logical reason why the application of this rule cannot be extended to the findings, orders and awards of other tribunals, so as to exclude the opinion of triers of fact in these proceedings in civil or criminal matters.

[61] In **Land Securities plc v Westminister City Council [1993] 4 ALL ER**. **Hoffmann J** applied this rule and held that an arbitrator's previous finding was held inadmissible in respect of the facts in dispute as in the matter because such previous finding was considered an irrelevant opinion. At page 127 **Hoffmann J** says the following:

> *"In principle the judgment, verdict or award of another tribunal is not admissible evidence to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties. The leading authority for that proposition is Hollington v F Hewthorn & Co Ltd [1943] 2 All ER 35, [1943] KB 587, in which a criminal conviction for careless driving was held inadmissible as evidence of negligence in a subsequent civil action. There has been criticism of this decision and important exceptions have since been created by statute, notably in the Civil Evidence Act 1968, but none of them apply here.*
>
> *In Hunter v Chief Constable of West Midlands [1981] 3 All ER 727 at 734, [1982] AC 529 at 543 Lord Diplock said that Hollington's case was 'generally considered to have been wrongly decided'. He did not elaborate on this remark, which in any case was not necessary for the decision. In Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV [1984] 1 All ER 296 at 303, [1984] 1 WLR 271 at 280 Peter Gibson J said that Hollington's case still represented the common law. Still more recently the principle has been applied by the Privy Council to exclude evidence of the conviction of a principal offender at the trial of an accessory (see Hui Chi-ming v R [1991] 3 All ER 897, [1992] 1 AC 34).*
>
> *Mr Barnes QC for the plaintiff did not seek to challenge Hollington's case as a statement of the common law, but he said that it is based upon the rule which excludes opinion evidence. Goddard LJ, who gave the judgment of the court said ([1943] 2 All ER 35 at 40, [1943] KB 587 at 595):*
>
> > *'It frequently happens that a bystander has a complete and full view of an accident; it is beyond question that while he may inform the court of everything that he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide; but in truth it is because his opinion is not relevant. Any fact that he can prove is relevant; but his opinion is not. The well-recognised exception in the case of scientific or expert witnesses depends on considerations which, for present purposes, are immaterial. So, on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant.'*
>
> *This case, said Mr Barnes, fell within the well-recognised exception to which Goddard LJ referred. The rental value of the property was a matter which could properly be proved by expert evidence and Mr Clark is an expert."*

In **Msunduzi Municipality v Natal Joint Municipal P/P Fund** 2007 (1) SA 142 NPD at 151 at [11] **Pillay J** held..... *"Having had regard to the rule in **Hollington v F Hewthorn Co Ltd** ([1943] KB 587 (CA) [1943] 2 ALL ER 33), and the controversy surrounding that decision insofar it remains part of our law of evidence, I am constrained to find therefore that the objection to the admissibility into evidence of the disciplinary hearing must be upheld."*

See also **Schwikkard and Van Der Merwe: Principles of Evidence 3 ed at 103** and the criticism of this rule by **Zeffert, Paizes and Skeen: The South African Law of Evidence at 315 and Schmidt on 21-6 at 21.3.5**.

[62] Although there is much controversy and criticism against this rule it is still part of our law of evidence. See **Danielz NO v De Wet 2009 (6) SA 42 (C).**

The underlying rationale of this rule is that the finding of another forum, which is based on an opinion of that forum, is inadmissible to prove a fact or a fact relevant to the fact in issue in other proceedings.

There may well be instances where the rule may not find applicability. The procedures before other tribunals where certain facts are to be found proven are sometimes different from the procedure where those facts are sought to be proven.

[63] There may be different standards of proof. A case may well be made out that due to the fact that there is a higher standard of proof in criminal cases in order to prove a fact that this rule should not apply. In other tribunals like disciplinary proceedings in which a fact was proven by a less onerous means or where the rules of procedure and evidence had been relaxed, a good case may well be made out that the rule (Hollington) should still apply. Regard should also be had to the purpose for which such evidence would be required to be admitted.

[64] In a subsequent disciplinary hearing following a criminal trial against a party for example where an application for the removal of an attorney is sought, it may well be admissible not to prove theft, but an honest disposition See the discussion in Schmidt on 21-5 at 21.3.4; **Hassim (also known as Essack) v Incorporated Law Society, Natal 1979 (3) SA 298 (A)**.

The fact remains that in cases where certain facts need to be proven as a result of a standard of prove, where such facts are in dispute as in these proceedings, the rule is still applicable.

[65] The findings of the arbitrator, whether correct or not, that the first respondent is inherently dysfunctional and that the second respondent appears to make use of the scheme as if it was his own personal fiefdom, only dealing

with those aspects that affect him directly, and otherwise remaining supine and/or ignoring issues, is evidence of an opinion of another forum, which is therefore clearly inadmissible. It is inadmissible as evidence in these proceedings to show that special circumstances exist or that a good cause exists to appoint an administrator.

[66] For this court to make such a finding, evidence should be presented in a proper manner to enable it to arrive at a decision whether it should exercise its discretion to appoint an administrator.

[67] In my view as held earlier the applicant did not even attempt to persuade the court that these proceedings were admissible in terms of Section 3(1) (c).... and had in any event did not make out a case on any of the grounds set out in this subsection why this evidence should have been admitted.

[68] In my view, therefore, the applicant only managed to succeed to prove that the property was in need of repairs to the balcony of Unit 2, which was subsequently effected.

There is therefore insufficient evidence presented in these proceedings, to convince the court there exist special circumstances or good cause to appoint an administrator.

[69] The application therefore to have an administrator appointed in terms of section 46 of the Sectional Titles Act 45 of 1986 is dismissed.

In the light of the above, I also find it unnecessary to make a finding whether, in terms of management rule 23, either of the parties lacked the necessary authority from voting on a resolution involving proposed litigation against the body corporate if either party as a trustee was involved in the litigation.

[70] **ORDER**

The application for an order:

70.1 Declaring that the first and second respondents are in contempt of an order of this court granted on 13 July 2010, and;

70.2 That the first respondent be placed under Administratorship in terms of section 46 of the Sectional Titles Act 95 of 1986 is dismissed with costs.

HENNEY, J