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

Case No.:10957/12

In the matter between:

CAPE ROYALE 316 A (PTY) LTD	Applicant
and	
THE BODY CORPORATE of Sectional Plan No. SS454/2008 in the scheme known as CAPE ROYALE	First Respondent
PASCHAL PHELAN	Second Respondent
BETTINA HEIBERG	Third Respondent
CAPE ROYALE LUXURY RESIDENCE (PTY) LTD	Fourth Respondent

JUDGMENT: DELIVERED TUESDAY 14 MAY 2013

SALDANHA J

[1.] This is an application for an order placing the first respondent under administration in terms of the provisions of section 46 of the Sectional Titles Act 45 of 1986. The relief is opposed by all of the respondents.

[2.] The applicant is the registered owner of unit 318 in the Sectional Titles Scheme registered as SS454/2008, Cape Royale, situated on Main Road, Green Point, Cape Town. Cape Royale is a multi-storied building which consists of both residential and commercial units. **Mr Andries Jacobus Botha** of Bedfordview, Gauteng, a director and shareholder of the applicant and a qualified chartered accountant and director of companies deposed to the founding affidavit on behalf of the applicant. Botha also practiced as a partner and director in Ernest and Young for almost thirty years prior to retirement and has remained an associate director.

[3.] The first respondent is the body corporate of the Scheme. The second respondent, Mr Paschal Phelan, a businessman resides in one of the penthouse suites of the Cape Royale and was joined in the proceedings in his capacity as current trustee and chairman of the first respondent. Ms Bettina Heiberg, the third respondent was likewise joined in the proceedings in her capacity as a trustee of the first respondent. The fourth respondent was joined in the proceedings apparently as the managing agent appointed by the first respondent to manage and administer the affairs of the first respondent.

[4.] A significant portion, 82 of the 127 residential units in Cape Royale is operated as a rental pool enterprise in terms of which the owners of the participating units enjoy limited rights of occupation for a fixed period of the year while their units are made available to tourists and business people for short term

holiday/business rental during the rest of the year. The net income of the short term rentals is divided between the members of the rental pool. The income and finances of the rental pool is managed by the fourth respondent.

[5.] The developer of the Scheme is **Cape Royale, The Residence (Pty) Ltd** of which the second respondent is the sole director. The developer owns thirty four residential units that are registered in the Deeds Office and has exclusive use of a further thirteen units of which one is a residential penthouse unit (904) and the remainder are commercial units and storerooms. The second respondent is also the sole director of the fourth respondent. The third respondent is employed by Phelan Holdings (Pty) Ltd which apparently owns several units in the Scheme.

[6.] In a nutshell, the applicant claims that the trustees of the first respondent are guilty of gross neglect and incompetence in the management and administration of first respondent's financial and general affairs. It claims that the second respondent in his capacity as chairman of the trustees of the first respondent and third respondent are guilty of breaches of their fiduciary duties in respect of the first respondent. The applicant further claim that as a result of neglect and breaches of their fiduciary duties the owners of the scheme face continuous prejudice and that the appointment of an administrator to the first respondent will not only add value to the management and administration of the first respondent's affairs but will also prevent further prejudice to the owners in

the Scheme. The claims by the applicant are highly contested by the respondents. The respondents also challenged inter alia, the locus standi of the applicant to bring the application, claimed that the applicant had an alternative mechanism to resolve the dispute and emphatically denied that the fourth respondent was the managing agent of the first respondent. With regard to the substantive challenge the respondent disputed that there was any maladministration on their part and denied any breaches of their statutory duties, dishonesty and inefficiency and claimed that in their opposition to the application they provided a sufficient explanation and reasons for any errors in the financial statements of the first respondent . They further claimed that they took steps to investigate the causes of such errors and had since produced redrafted financial statements for the years 2009 and 2010 and draft statements for 2011 and 2012 with new auditors. The respondents claimed that the statements show that the first respondent is financially profitable and that there is a full accounting in respect of its financial affairs.

[7] In there answering affidavits the respondents stated that they wished to deal firstly with what they referred to as certain factual misconceptions which underlined the application. These were, inter alia;

(i) That either the fourth respondent or the firm Clint Riddin and Associates (CRA) are the "*Managing agent of the first respondent.*"

The respondents explained that Clint Riddin and Associates are independent sectional title administrators who operate under the guidance of a Mr Clint Riddin who is apparently an acknowledged and renowned sectional title administrator.

(ii) They claimed that the fourth respondent only managed the maintenance and upkeep of the body corporate and did not operate any bank account or issue any invoices for levies or collect any. The second respondent who deposed to the answering affidavit on behalf of the respondents claimed that it was *"never necessary to appoint a managing agent."*

(iii) The second and third respondent claimed that together with the first respondent they had always relied upon its appointed independent auditors Mazars Moores Rowland (Mazars) and CRA *"to advise and guide us."*

(iv) The respondents claimed that the developer who is not a party to the proceedings has been accused by the applicant of seeking to avoid the payment of levies or to benefit unfairly from the obligations imposed on it in terms of the rules. In this regard the respondents claimed that the developer was from the inception, *"save for minor errors"*, correctly invoiced for levies as at various

times most of the units owned by it were occupied as contemplated by the rules. The respondents claimed that the units owned by the developer were placed in the rental pool and were therefore occupied. The developer was therefore held liable for levies and charged accordingly. The respondents claimed that the applicant had "*indirectly sought to go against the developer*" and should have properly joined the developer in the proceedings.

(v) The respondents disputed the applicant's allegation that the second respondent had abused his position as chairman of the trustees and as the sole director of the fourth respondent and in particular by exercising a right of veto at meetings of the first respondent on the strength of proxies that the fourth respondent obtained from the owners in the rental pool in accordance with clause 21 of the management rules.

(vi) The respondent claimed that the developer still held 34 residential units that were registered in the Deeds Office and one penthouse unit and that the developers investment and interest in the residential component of the first respondent was approximately R100 million.

[8.] The applicant initially based its challenge to the first respondent's handling of the financial affairs of Cape Royale on the audited financial statements prepared by Mazars for the years 2009 and 2010 which were approved and signed on behalf of the first respondent by the second and third respondent.

[9.] On the 16th March 2012 the applicant through Botha together with twenty six other owners and members of the first respondent raised a formal dispute and complaint with the first respondent in terms of rule 75 of the amended rules of the first respondent.

Rule 75.1 provides as follows;

"75 Enforcement of Obligations

75.1 Body Corporate's Positive Obligation to Enforce

If any owner or trustee reports an alleged breach by any owner of any significant obligation under the Act or these rules, the trustees shall, after due notice to the alleged offender, without delay take such action as reasonably necessary to cure or prevent such breach."

[10.] Rule 75.2 deals with the determination of the dispute by an expert within specified timeframes. The rule further provides that any party to the dispute *"shall also be entitled to approach the High Court for any interdict or any form of urgent relief."*

[11.] The complaints raised in the letter were largely the same as that raised in this application. In response to the letter, the first respondent requested an extension of time to deal with the complaints as the person who was primarily responsible for its financial accounting a Ms Leigh-Ann Cullen who had been employed by CRA had been hospitalized. The first respondent undertook to have a review of the accounts of the first respondent and to have the review audited by an independent auditor. As at the date of the launching of this application on 6 June 2012 the review was still in the process of completion. In their answering affidavits which was filed on the 18 September 2012 the respondents provide various explanations with regard to the applicants' claims of financial irregularities and submitted a new set of "*draft*" financial statements for the period 30 June 2009 and 30 June 2010 which had been prepared by CRA. The respondent specifically recorded that the statements had not been audited and were subject to change and had been submitted to auditors Grant Thornton Cape Incorporated (Grant Thornton) for review. The following inscription under the heading Trustees Report appeared on both sets of redrafted financial statements:

"This set of financial statements replaces those issued on the [11 January 2011] [15 February 2011] by Mazars Moores Rowland. The previous financial statements withdrawn by Mazars Moores Rowland by mutual agreement with the trustee on the basis that material adjustments came to light subsequent to those accounts being issued." [dated separately]

[12.] The applicant in its replying affidavit on 15 October 2012 dealt extensively with the redrafted set of financial statements. On the 8th November, five days prior to the hearing of the application the second respondent filed a supplementary affidavit in which he attached on behalf of the respondents a further set of redrafted financial statements for years ending the 30th June 2009 and 30 June 2010 and a set of draft financial statements for period to 30 June 2011 and 30 June 2012. A Factual Findings Report prepared by Grant Thornton dated 5th November 2012 was also filed in a supporting supplementary affidavit by a Mr Ian Murray Scott a chartered accountant of that firm.

[13.] At the hearing of the application on 11 November 2012 I requested that the applicants obtain Botha's responses to the redrafted financial statements and the draft statements for 2011 and 2012. The applicant did so on the 30th January 2012 by way of a supplementary affidavit. On the 2nd April 2013 the respondents filed a further supplementary affidavit in response to that of the applicants.

[14.] From this brief overview it is apparent that in response to the application the respondents admitted that the financial statements for the years 2009 and 2010 did not properly reflect the financial affairs of the first respondents which necessitated a substantive review of the finances of the first respondent from its inception and a redrafting of the financial statements for those periods. Furthermore, the first respondents proposed that new auditors Grant Thornton be appointed in place of Mazars. The complainants in the rule 75 letter had also

demanded that the books of the first respondent be audited by alternate auditors appointed by them to determine the actual financial position of the first respondent. Grant Thornton prepared the redrafted financial statement for 2009 and 2010 based on the financial information obtained from the first respondent and Cullen who from August 2012 was employed by the fourth respondent to assist with the review of the financial affairs of the first respondent. Cullen and the first respondent appeared also to have provided the financial information to Grant Thornton to prepare the draft financial statements for the years 2011 and 2012.

The Law and relevant legal principles.

[15.] It is perhaps appropriate to deal with the law relating to the appointment of administrators in terms of section 46 of the Act at this stage.

Section 46 provides as follows;

"Appointment of Administrators".

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

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

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

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

[16.] In the matter of **Dempa Investments CC v Body Corporate of Los Angeles 2010 (2) SA 69 (WLD)** Gautschi AJ in reference to a decision of Booysen J in the matter of **Bouramis & Another v Body Corporate of The Towers & Others 1995 (4) SA 106 (D)** noted that section 46 of the Act contained no provision that indicated specifically what circumstances the court may or should exercise its discretion to appoint an administer. Gautschi AJ however noted the test enunciated by Booysen J in **Bouramis** as follows;

"It seems to me that the Court should not, where a duly constituted board of trustees is in existence, grant an order for the appointment of an administrator unless the applicant establishes on a balance of probabilities, firstly, that there

have been breaches of the duties set out in s 39 read with ss 37, 38 and 40, and, secondly, that it is likely that the owners of units shall suffer substantial prejudice if an administrator were not to be appointed by the Court. Such breaches could take the form of a failure to perform duties or the improper performance of duties.'

The court in **Bouramis** dealt extensively with each of the complaints raised by the applicants and found that there was no substance to the complaints and that the applicants had failed to establish any prejudice to the members of the body corporate. The application was dismissed.

[17.] Gautschi AJ also referred to the decision of Fine AJ in the matter of **Levy v Controlling Body Corporate of Christina Court – WLD case 18918/94, 23 September 1994,** unreported, in which a more general test was laid out as;

"[S]pecial circumstances or good cause would be required before a court would exercise a discretion in favour of the person seeking the appointment of an administrator."

[18.] With reference to similar provisions as section 46 of the Act with that contained in the **Conveyancing (Strata Titles) Act of 1961 of New South Wales, Australia** and which was considered by Else-Mitchell J in the matter of **Re Steel and the Conveyancing (Strate Titles) Act 1961**, that court held;

'Such cause may be found in a wide variety of circumstances and situations entailing nonfeasance or misfeasance by the council of a body corporate, which it

would be impossible to categorize exhaustively. For present purposes it is, I think, sufficient to say that in the absence of cogent explanation or general agreement, a clear and continuing failure to observe the statutory obligations arising under the by-laws in the First Schedule will constitute a ground for seeking the appointment of an administrator. The Act contemplates that this remedy is to be a summary one, as indeed it must be for the adequate protection of proprietors of strata title lots as well as purchasers, mortgagees and others who claim derivative interests in the strata title lots which usually confer titles in fee simple.'

[19.] Gautschi AJ continued;

"[22] Having regard to the abovementioned authorities and the literature, I intend to apply the following principles:

[22.1] 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.

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

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

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

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

[22.4] 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.

[22.5] 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 willfulness, 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.

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

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

[20.] In **Lawsa**, Volume 24 in considering the topic the author CG van der Merwe makes the following comments;

(a) That the court must exercise its discretion judicially in the light of the circumstances of the case before it.

(b) The applicant must show special circumstances or a good cause in the form of "(i) neglect, willfulness, or dishonesty on the part of the trustees or an event beyond their control, and (ii) likelihood of substantial prejudice to owners if an administrator is not appointed must be shown.

(c) There is not a non-exhaustive list of qualifying acts or admissions which includes maladministration, breaches of statutory duties, dishonesty, inefficiency and managerial atrophy or deadlock.

(d) The administrator must add value where the trustees could not. In this regard inexperience by trustees is not sufficient; however, where such inexperience "is coupled with pigheadedness and financial difficulties as being the cause of the maladministration and dishonesty" an administrator could be expected to achieve a better result than the body corporate.

(e) A balance must be struck between caution to interfere with the management of the scheme and the chosen trustees and the swift assistance to owners who may suffer substantial prejudice when an administrator is not appointed swiftly.

(f) The onus with regards to the appointment of an administrator lies on the applicant to persuade the court to exercise its discretion in favour of the appointment of an administrator. [para 460, page 368-369]

It is in the application of these legal principles and that with regard to the approach that the court must adopt in motion proceedings as set out in the well established Plascon-Evans rule, (see **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984(3) SA 623 (A) 634-635 and **National Director of Public Prosecutions v Zuma** 2009(2) SA 277 (SCA) at 290 paragraph 26) that the applicants' claims against the respondents are to be considered and determined.

The respondent claim of an alternate remedy

[21.] The respondent claimed that the mechanism provided under management rule 75.2 is tailored to resolving the complaints that the applicant seeks to ventilate in this application. Mr Olivier SC who appeared on behalf of respondents submitted that the respondents were willing to follow the procedures under rule 75.2 and to that end had caused new financial statements for 2009 and 2010 to be drawn which addressed most if not all the issues raised by the applicant. He further claimed that the route under rule 75.2 was far more cost effective and expeditious compared to the litigation that the applicant embarked upon.

[22.] In support of the contention that the applicant should have exhausted the alternate remedy provided for in rule 75 the respondent relied on the oft quoted cases on the issue such as ***Balomeros v Jockey Club of South Africa*** 1959 (4) SA 381 (W) at 386 C and **Yiba and Others v African Gospel Church** 1999 (2)

SA 949 (C) 961D-F wherein it is stated that courts will not normally intervene in internal domestic affairs of a voluntary association duly constituted and operating in terms of such rules. Mr Potgieter SC who together with Mr N Boshoff, appeared on behalf of the applicant, submitted very simply and appropriately that rule 75 did not provide for the relief that the applicant sought under section 46 of the Act. Moreover, Mr Potgieter submitted that there was no requirement in section 46 of the Act; or in any of the reported decisions on the issue that an internal remedy must first be exhausted before the relief sought by the owners in a Scheme are entitled to approach the court. The first respondent is moreover not a voluntary association but an entity created under the statute and although it also able to make its own rules, in part; the trustees are charged with serious and far-reaching responsibilities in their fiduciary capacities as provided for under the Act. I am satisfied that the respondents' claim that the applicant should have first exhausted the procedures under rule 75 is without merit.

[23.] Moreover, the applicant's attorneys deposed to a supporting affidavit in which they claimed that all of the twenty six other complainants in the rule 75 letter supported this application. Three of the complainants filed supporting affidavits and two have since sold their units.

[24.] The first respondent moreover, hardly dealt "*expeditiously*" with the complaints under rule 75 and has not engaged any of the complainants (other than in a letter from their attorney requesting an extension of the 14 day period)

in furtherance of the issues raised under the letter of complaint. The willingness of the first respondent to pursue such avenue rings hallow in the manner in which it responded to the complaints by first having to await the return from hospital of Cullen before it was even able to begin a review of its financial affairs.

Other preliminary defences

[25.] The respondents did not press their contention that the applicant did not have the *locus standi* to bring the application. Clearly as an owner it is statutorily clothed with the necessary standing.

An issue of urgency raised by the parties became overtaken by the events that ensued in the prosecution of the application.

The respondent did not formerly raise a point of the non-joinder of the developer. It was however self evident that the developer was aware of these proceedings in the form of the second respondent, its sole director and it would have in any event if it considered it necessary applied to join the proceedings. The applicants claimed though that as no relief was sought against the developer in these proceedings it was not necessary to have joined the developer.

The claims against the respondents

[26.] Irregularities with regard to the charging of levies to the developer.

[26.1] On the 2nd July 2008 the management rules pertaining to the Scheme were registered in the Deeds Office in Cape Town. Management Rule 73.8 (rule 73.8) provides as follows;

"(a) The developer shall not pay levies on any unsold or unoccupied residential unit for a period of 18 months after the formation of the body corporate.

(b) If the result of the arrangement in (a) is that the Residential component runs at a loss for the period, the developer will forthwith pay to the body corporate any shortfall."

[26.2.] The first respondent was formed on the 2nd July 2008 and the 18 month period referred to in the rule extended six months into the financial year of 2010 been the 1st January 2010. During the course of the proceedings before me it appeared that there were different interpretations accorded to the provisions of Rule 73.8 by the parties. The applicant contended that the developer in reference to sub-rule (b) was liable for *"any shortfall incurred by the residential component of the scheme."* (my underlining). The respondents on the other hand contended for a more restricted interpretation of sub-rule (b) and claimed that the developer could not be held liable for any shortfall other than to the extent of the amount that it would have been liable for under sub-rule (a) in respect of levies for any unsold or unoccupied residential units for the 18 month period. I will revert to issue of the interpretation of the rule in due course.

[26.3.] On the 2nd September 2008 the first respondent circulated a notice to all the owners in the Scheme in which a determination by the

trustees of the ordinary levies were set out. On the 8th September 2008, some 6 days later a further schedule headed "Schedule A Correction" was circulated to all of the owners in the Scheme. The respondent explained that the difference between the two schedules was as a result of all the units owned by the developer not being included in the first schedule which resulted in "*a slightly heavy levy contribution by the remaining owners.*" The respondents claimed that it was done in error as the units that belonged to the developers "*still needed to be included in the Participation Quota Schedule regardless of whether or not they were to be charged*". The number of developer units excluded in the initial schedule was fifty-four. The applicant disputed that the omission of the developers units on the schedule was merely an error and as with the redrafted financial statements ascribed a more sinister motive to the respondents for having done so. In effect, the applicant claimed that the respondents had manipulated the financial statements so as to reflect no deficit to the benefit the developer.

[26.4.] In the light of the fact that the various financial statements reflect different amounts for levies due by the developer and other unit owners I do not in this judgment refer to specific amounts save to note the differences and what appeared to be the attempt at subsequently correcting the amounts owed by the developer. The respondents in reference to the re-drafted financial statements for years 2009 and 2010

pointed out that there was no deficit reflected for those years, therefore no payment would have had to be made by the developer in terms of the rule. The respondent did however refer to an amount of R 494 816.81 in respect of levies which had been allocated to the developer after the revision of the accounts but added that such levies had not as yet been invoiced to the respondent. It was apparent from the financial statements filed in response the application that there has not as yet been a proper and independently verified reconciliation of the levies for which the developer would have been responsible for (if any) and whether an amount (if any) is owed by the developer in terms of Rule 73.8. The applicant pointed out that the draft financial statements filed by Grant Thornton which were not audited were inclusive of the amount of R494 816.81 although it had not as yet been invoiced to the developer.

[26.5] The applicant further claimed that there were substantial amounts of levies owed by other owners which had also not as yet been collected despite being overdue in excess of between 90 and 120 days. The applicant raised a concern about whether the first respondent would in fact be able to recover part of the outstanding amounts as levies owed in respect of the 2009 year may have become prescribed and some of the units had already been sold and levy clearance certificates were furnished by the first respondent to the owners. In effect, applicant claimed it may be difficult if neigh impossible to recover certain amounts, where levies are

disputed on the basis of prescription or that levy clearance certificate were issued by the second respondent on behalf of the first. This the applicant claimed would have dire consequence on the liquidity of the first respondent as the first respondent was entirely reliant on levy income for its cash flow for the payment of its debts to service providers. The applicant submitted that this clearly constituted dereliction of the trustee's fiduciary duties to the detriment of the owners in the Scheme.

[26.6] In the absence of the exact figures relevant to the determination of the developers liability (if any) under rule 73.8 I am of the view that it is not necessary for this court to determine the interpretation of the rule. If necessary, the first respondent can in due course obtain clarity on the interpretation or arrive at a consensus with regard to its meaning.

[26.7] In response to the claim by the applicants that the respondents attempted to artificially reduce the deficits so as to avoid liability on the part of the developer the second and third respondent claimed that as the trustees they "*acted on the advice of Mazars and CRA and not for the specious reasons now suggested by the applicant*".

[27.] Improper allocations/deferred expenditure.

[27.1.] The applicant claimed that expenditure reflected in the adopted financial statements for 2010 had in fact been incurred during the 2009

financial year and which should have been reflected in that financial year. That expenditure, the applicants claimed was deferred to the 2010 financial year, notwithstanding the fact that the expenditure formed part of the 2009 budget. The applicant claimed that the effect of posting the 2009 expenditure to the following year was that it reduced the deficit for the 2009 financial year which ought to have been covered by the developer. The respondents for their part again disputed the applicant's claim that they had artificially reduced the deficits. The second respondent reiterated that he and the trustees had "*acted on the advice of Mazars and CRA*".

[27.2.] The respondents further explained that the City of Cape Town's accounting system with regard to water and sewerage charges in respect of the Cape Royale building was *"in a complete mess"*. Therefore no proper cost allocations could be made until proper details had been obtained relative to the actual charges that the developer was liable for prior to the 2nd July 2008 and those payable by the owners after the opening of the sectional title register and based on actual meter readings as opposed to mere estimates. The respondent claimed that the City Council only provided the revised accounts in March 2010. They also claimed that the developer and the 4th respondent had made substantial payments in respect of arrear amounts owed to the City of Cape Town by the first respondent. These amounts were apparently set off against the

amounts owed by the developer as levies and were also reflected as inter-company loans in respect of the fourth respondent. I will revert to the basis of the set offs in due course.

[28.] **Improper allocation of provision for maintenance and other reserves.** The applicants claimed that the first respondent made provision in the budget for the 2009 financial year in accordance with the management rules and section 37(1)(a) of the Act for future expenditure of the scheme in particular with regard to maintenance disbursements. The applicant claimed that provision for a maintenance fund should have been reflected as an expense provision in the audited financial statements for the 2009 financial year. The applicants remarked that the 2009 financial statements did not provide in the income statement for maintenance of the Scheme during that financial year. In this regard the applicant referred to the minutes of the AGM of the first respondent held on the 19 February 2010 in which Clint Riddin who chaired the meeting dealt with the high electricity expenses which had been unforeseen and were not budgeted for and stated that; *"... The reason for not reflecting a large deficit as a result of unforeseen expenses was that the maintenance reserve that was built into the levy fund had not been journalized and so subsidized the effect of the electricity expense."*

[29.] Botha claimed, that in his opinion the respondents acted in contravention of Rule 73.8 since the unforeseen electricity expenses was not a maintenance

item and that it would have increased the first respondent's deficit for the 2009 financial year which would have been for the account of the developer. The respondents again disputed that there was any responsibility on the part of the developer to have funded any shortfall. [my underlining]. The respondent explained that the trustees provided for unforeseen contingences in the budget and used the amount incorrectly termed "*maintenance fund*" for payment of the unforeseen high electricity change. They claimed that there was no need to have established a "*Maintenance Reserve*" for a new building for which there were guarantees and warrantees in place. The respondents claimed that the applicant had in fact been informed of this position at the very AGM referred to.

[30.] **The body corporates financial position (as at June 2012).**

[30.1] The applicant referred to and attached various financial statements that CRA had sent to Mr Dayne Marshall, who until his resignation on 16 March 2012 was one of the trustees of the first respondent. In respect of a document headed "*The Debtors Age Analysis for Cape Royal Parking as at 12 March 2012*" the applicants pointed out that there was a total arrear levy amount of R4 597, 961.32 due to first respondent. Units that were apparently not registered in the Deeds Office were also included. The respondent claimed that the actual amount owed was in fact R3 500,000. The applicant remarked that the statements reflected that the developer and the developers holding company, Phelan Holdings (Pty) Ltd of which the second respondent was also the sole

director reflected that almost 55% of the total debtor's book was owed by them. The respondent disputed the amount and explained that a large portion of the amount "*still needs to be deducted*" by set-off in respect of amounts paid by the developer to the City of Cape Town towards the first respondent's arrear utility charges. The respondents also denied that Phelan owed any units despite it been reflected to the contrary in the documentation.

The respondents also disputed that amounts reflected in a document "*Balance Sheet and Debtor Age Analysis for June 2011, October 2011, January 2012*" incorrectly reflected the actual outstanding liability of the developer.

[31.] The applicant claimed that a "*Balance Sheet for 2012*" reflected that the first respondent was indeed in dire financial trouble based on an amount reflected as cash in hand against that of accrued expenses, accounts payable and an amount due to the Rental Pool. The respondents disputed that first respondent was in any financial difficulty and attached a bank statement from ABSA bank reflecting a credit balance of R156 459,14.

[32.] The applicant claimed that based on the financial statements produced by CRA – it was apparent that the first respondent was mal-administered and that the trustees had failed to collect outstanding levies due to first respondent in violation of their fiduciary duties. The applicant further claimed that the first

respondent's position was also indicative of the conflicted role that the second respondent was faced with as the sole director of the developer.

[33.] In their overall response to the redrafted financial statements for the years 2009 and 2010 the applicants claimed that the first respondent was operating in *"a highly illiquid position"*. In this regard the applicant claimed that the first respondent's cash position was vastly overshadowed by its monthly commitments to its creditors. The applicant claimed that insofar as there was no overdraft facility available to the first respondent it would be unable to pay its debt as and when it became due. The applicant further contended that the September 2012 bank balance did not address the financial well-being and management of the first respondent. The amount in the bank had to be considered against the background of the first respondent's running expenses and the fact that the respondent has no overdraft facility available to it.

[34.] **Special levy raised and the timing thereof.**

[34.1] The AGM for the 2010 financial year had been scheduled for the 17th March 2011. The Chairman's report dated February 2011 relating to the 2010 financial year contained the following reference, *"In addition we believe a special levy is needed to address the deficit position to date and will be discussed at the AGM."* At that stage the reported deficit reflected in the audited financial statements for 2010 financial year amounted to R454 741.00. On the 3rd March 2011 the trustees (second and third

respondent) passed a resolution for a special levy of R1 202 130.00 to be charged as from the 1st April 2011. The applicant challenged both the timing of the resolution as well as the amount of the special levy with specific reference to what they referred to as discrepancies relating to the first two years actual deficits and the subsequent redrafted financial statements. The applicant also referred to the position of one of the unit owners Mr James Stephen Bowie of unit 201 who had been involved in litigation against the first respondent in the matter of **James Stephen Bowie v The Body Corporate of Cape Royale** (Western Cape High Court, case number 4943/2011, judgment handed down by Cleaver J on the 15th of March 2011 two days prior to the scheduled AGM. In brief, it appears that there was a dispute between Bowie and the first respondent which resulted in the first respondent refusing to furnish him with a levy clearance certificate as Bowie intended to selling his unit. The applicant pointed out that with regard to the timing of the resolution Cleaver J in his judgment stated at para 17;

"In my view a strong inference to be drawn from the facts is that the resolution ostensibly passed by the trustees of the Body Corporate on 3 March 2011 was prompted by the service of the application on the respondent and but for that service would in all probability not have been taken at any stage prior to the Annual General Meeting. There is therefore in my view no basis for the submission that the respondent should not pay the costs of the application because it was entitled to delay

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[34.4] The applicant further claimed that on the respondents own version that there was no deficit for the financial year on the basis of the redrafted financial statements strengthened the impression that the special levy was raised without proper cause and merely to reduce whatever deficit that the developer may have been liable for under Rule 73.8. Moreover, the special levy should have been reflected as a credit against levies in the 2011 draft financial statements. This was not done and neither was any explanation offered by the respondents for their failure to deal with it in the re-adjusted financial statements and nor did Mr Olivier offer any explanation for it during argument. Furthermore the trustees had raised the monthly levies by almost 41% at the 17 March 2011 AGM. The applicant submitted that such increase strengthened the perception of a lack of proper financial insight by the second and third respondents.

Discrepancies relating to floor area and levy liability

[35.] In reference to the rules of the body corporate the applicant referred to various parts of the residential area in particular the exclusive use of certain units which were allocated to unit 904 occupied by the developer and the failure of the first respondent to have held the developer fully accountable for levies. Grant Thornton subsequently claimed that "*the substantial changes*" between the financial statements prepared by Mazars and that prepared by them "*were in the*

recalculation of participation quotas in terms of the scheme's Management Rules and the accruals being made in the correct years".

[36.] **The irregular assignment of the proxy to the managing agent**

As indicated, the respondents disputed the applicant's claim that the fourth respondent was appointed by the trustees as the first respondent's managing agent as provided for in management rules. The respondent's principal contention was that although the fourth respondent performed some of the functions of a management agent it was never formally appointed as such by the trustees. The respondents maintained that the first respondent did not have a formally appointed management agent and claimed that it was "*not* necessary" to do so. The applicants contended that the respondent's denial that the fourth respondent was not the managing agent was simply not genuine nor a *bona fida* dispute of fact as it was common cause that:

(i) The fourth respondent was responsible for the maintenance and upkeep of the first respondent.

(ii) The fourth respondent was referred to as the "*management company*" and the agent of the first respondent in correspondence to owners in the Scheme and to the public. In this regard the applicant referred to a letter dated 11 June 2012 in which the fourth respondent addressed the owners with regard to a notification of levy reductions as from the 1st July 2012 in which it stated "*The management company continues to have difficulties collecting monthly levies from certain owners.*

We will be bringing more onerous proposals to the AGM in order to penalize those defaulters as it is adding to the cost of the level of management time required to deal with these levy arrears". The applicant also referred to a copy of a levy clearance certificate in respect of one of the units signed by the second respondent in which he certified that "*The Body Corporate of Cape Royale is managed by Cape Royale Luxury Hotel Resident...*" Moreover in the audited financial statements by Mazars the fourth respondent was referred to as the managing agent of the first respondent.

(iii) The respondent claimed that notwithstanding such references the fourth respondent had not in fact been appointed as managing agent of the first respondent.

[37.] The applicant referred to a proxy notice that informed owners of the units participating in the rental pool that in terms of clause 21 of the Rental Pool Agreement they had each given Power of Attorney to the management company of the Rental Pool, the fourth respondent to vote on their behalf at all meetings of the first respondent and to sign any document required by the first respondent to put into effect any resolution taken by it. The applicant referred to Rule 67(3) of the management rules which provided that "*a proxy need not be an owner, but shall not be the managing agent or any of his/her employers, or any employer of the body corporate.*" The applicant claimed that the Powers of Attorney granted to the fourth respondent pursuant to the Rental Pool Agreement and the

subsequent proxies granted by the fourth respondent to the second respondent were in direct conflict with management rule 67(3). The applicant claimed that this was done with the sole purpose of securing for the fourth respondent through the second respondent effective control over the first respondent.

[38.] The applicant further claimed that if the fourth respondent was in fact the managing agent of the first respondent (which applicant submitted that it was) the trustees of the first respondent allowed a grave contravention of the management rules to be persisted in. The applicants submitted that with such proxies the second respondent in his various capacities as the sole director of the developer, sole director of the fourth respondent and trustee of the first respondent had complete control over the management of the first respondent. The applicant claimed that the trustees willful failure to enforce management rule 67.3 constituted a breach of their fiduciary duty to the first respondent.

[39.] The applicant also referred to Rule 73.10 which stipulate that;

"The nominee of the developer shall be the chairman of the trustees and of any general meeting with the body corporate until the developer owns no units and holds no rights in the scheme."

[40.] Applicant claimed that the second respondent would therefore remain the chairman of the first respondent as long as the developer owned a single unit regardless of the owners input.

[41.] Applicant also referred to the first AGM of the first respondent that was held on the 19 February 2010 in which Botha raised the issue of the composition of the first respondent's trustees and moved for a motion to include an *"outside"* trustee. The motion was supported by a Mr Ingwersen and Mr Swiel both owners in the Scheme. It appeared from the minutes that the second respondent moved for a resolution keeping the composition of the trustees as they were and used his majority votes (held as the representative of the developer) as well as a representative of the fourth respondent to vote against Botha's motion. The second respondent explained that no proper notice had been given prior to the AGM to increase the number of trustees or for the addition of an outside trustee and for that reason alone the applicant's motion was defeated. However inasmuch as the respondents claimed that they were committed to transparency and openness it is clear that an "*outside*" or independent trustee would have added value to the first respondent and would certainly have increased the confidence of the members in the first respondent. The minutes of the meeting record that *"As Mr Phelan (second respondent) represents 45% of the scheme as an owner and in excess of 80% when combining the proxies he holds for the rental pool holders, the meeting accepted that the trustees he voted for would be the trustees for the ensuing year."* The applicant submitted that the second respondent as representative of the developer and the fourth respondent used his control over the first respondent to block any attempt to bring about a change in the day to day management of the first respondent and in so doing effectively

abused his position to the prejudice of the individual unit owners and to the advantage of the developer and indirectly to himself. The applicant further submitted that the owners in the scheme had no other means of asserting their rights of bringing an end to the abuse by the second respondent other than through the relief sought in the Notice of Motion.

Lack of transparency

[42.] On 18 January 2011 Mr Andrew McDavid in his capacity as owner of unit 301 lodged a request for access to information in terms of the Promotion of Access to Information Act 2 of 2000 with the information officer of the first respondent Ms Lorna Gay of CRA. The annexure to the request detailed the items requested which included an up to date list of unit owners, the details of all units owned at that stage by the developer, an updated list of owners who were in arrears with levies and the amounts due, copies of the body corporate's accounts and financial statements for 1 January 2010 to 31 December 2011. McDavid also required proof of the payment by the developer of levies and copies of contracts as well as invoices in respect of service providers from the 1st March 2010 to 31st December 2011 entered into between the body corporate and the fourth respondent and various other entities. Copies of the body corporates monthly utility bills received from the City of Cape Town for the period 01 January 2009 to 31st December 2011, were also requested together with copies of returns filed with SARS relating to the Schemes tax and, VAT liability. Copies of minutes and resolutions of trustees meetings were also required. In response to the

request McDavid was requested to make payment of the amount of R1600.00 which he apparently did on the same day. The applicant claimed that no documentation or any correspondence had since been forthcoming from the first respondent or its appointed information officer. This, the applicant claimed was once again indicative of a lack of transparency and a complete unwillingness of the trustees to deal openly with the owners in the Scheme. In response the second respondent claimed that he had no objection to furnishing McDavid with any of the documents as long as he complied with all outstanding formalities with regard to the request. The second respondents however failed though to indicate what, if any, other formalities remained outstanding. This complaint against the first respondent also featured as far back as March 2012 in the letter of complaint in terms of rule 75.

[43.] **Irregular charging of levies**

The applicant raised the position of a Ms Catherine Fingleton the owner of unit 414 with regard to a statement she received in respect of outstanding levies. It appeared that there were various discrepancies in the statements furnished to her. Moreover it appeared that when Fingleton wanted to sell her property she experienced difficulty in obtaining the levy clearance certificate on account of outstanding amounts allegedly owed by her. These amounts were then paid by her in protest. It appeared that in the financial reconciliations done more recently by the respondents Fingleton was in fact owed an amount of R400 which at the

time of deposing to its further supplementary affidavit by the second respondent the first respondent had still not repaid to her.

[44.] **Improper appointment of the fourth respondent.**

Insofar as the applicant claimed that the fourth respondent collected or received money from any person on behalf of the developer or body corporate it was required to be registered with the Estate Agent Affairs Board and to hold a Fidelity Fund Certificate. The fourth respondent on its own admission claim that it did not have a Fidelity Fund Certificate and maintained its denial that it was the appointed managing agent. The respondents claimed that CRA who were responsible for the collection of levies were however in possession of a valid Fidelity Fund Certificate.

[45.] **The redrafted annual financial statements.**

The applicant maintained as its principle contention that the audited financial statements of the first respondent for the financial years ending 30th June 2009 and 30th June 2010 on which the application was initially based had grossly incorrectly reflected the first respondent's financial position at the time. Those financial statements indicated *inter alia* a deficit at the end of the financial year 2010 of R454 741.00 which apparently led to the raising of the special Levy of R1.2 million to cover the deficit. The applicant claimed that the respondents' initial defence to the applicant's claim was to produce a set of redrafted statements by CRA that reflected no deficit and a claim by the respondents that

the financial statements for 2009 and 2010 had been withdrawn. The applicant claimed that insofar as it was apparent that the audited financial statements for 2009 and 2010 were wrong it maintained that the figures on those statements were manipulated to reduce the liability of the developer in conflict with management rule 73.8. Moreover the applicant pointed out that the respondents claim that the audited financial statements for 2009 and 2010 had been withdrawn by mutual agreement with Mazars was incorrect as a formal and complex procedure had to be undertaken in order for financial statements to be withdrawn. The statements could only be withdrawn if proper procedures were adopted to replace them with correct statements that reflected the financial position of the respondents "*at the time*".[applicant's emphasis] The applicant claimed that what the respondents did was to have produced a new set of financial statements for 2009 and 2010 and subsequent years by Grant Thornton. The applicant was of the view that the figures contained in the redrafted financial statements had no value *"either in the quest to establish the first respondents true financial position for the financial year 2009 and 2010 or in the context of this application*". The applicant claimed that it was simply a theoretical exercise based on information supplied by the trustees and was no more than a "*vain attempt to provide a defence to this application*".

[46.] In this regard the applicants referred to the terms of the engagement letter between the first respondent and Grant Thornton dated 31 October 2012 in which it is recorded that the services were provided *"On the basis of information*

you provide, we will compile .... We will not carry out an audit or review engagement procedures in relation to such financial statements." Grant Thornton states further that *"Management is responsible for both the accuracy and the completeness of the information supplied to us and responsible to users for the financial information complied by us... Our engagement cannot be relied upon to disclose whether fraud or errors or illegal acts exist..."*

[47.] In response to the most recent set of financial statements prepared by Grant Thornton the applicant remarked that *"The audited statements are depended entirely on the integrity of the source documents provided to the auditing firms by the respondents."* Botha claimed that in his expert opinion the respondents redrafting of the financial statements was an "*exercise in futility*". At this point it is perhaps necessary to indicate that during the course of argument Mr Olivier referred to the lack of objectivity on the part of the Botha as an independent expert and that the court should be cautious in accepting his opinions. Mr Olivier referred to the decision of Davis J in the matter of **Schneider NO and Others v A And Another 2010 (5) SA 203 (WCC)** as to the manner in which the court should treat the evidence of such witness. It is so, that Botha holds himself out as an expert in financial affairs and at the same time on behalf of the applicant is the key protagonist in these proceedings. For that reason his opinions must be considered with a measure of caution and circumspection. Botha however, may be biased with regard to the opinions he expressed but is nonetheless a qualified chartered accountant and able to have

provided a factual analysis of the financial statements. Mr Olivier moreover accepted in argument that the present financial statements when eventually audited may vary from that which were presently before the court. The applicants submitted that given the manner in which the respondents had conducted the financial affairs of the first respondent and on its own admission of the discrepancies in the various financial statements little reliance could be placed on the draft financial statements.

[48.] The applicant submitted also that the original statements have as yet not been put through a proper audit and financial test so as to ensure that the figures for the subsequent years (which rely on the figures in the original statements for the opening balances) are correct. The applicant submitted that the redrafted statements were not a genuine attempt to rectify the first respondent's records but a completely theoretical exercise undertaken years after the fact simply to oppose this application. The applicant claimed that had the application not been brought nothing would have happened and that if the application is refused nothing will happen.

The position of Clint Riddin and Associates

[49.] It appeared that Leigh Cullen as a senior accountant was one of the key persons at CRA responsible for the financial management of the first respondent. When she took ill the first respondent was not able to respond to the complaints in the letter in terms of rule 75. Needless to say, that was clearly an

unsatisfactory situation where one person was almost indispensible to the financial accounting of the first respondent. Moreover it appeared in emails from Cullen to Mazars on the 8 June 2012 with regard to the finance of the first respondent that Cullen claimed; "*Since the above decision (by the first respondent to have the books of account redrafted from the date of inception to date) was taken we have found that the entries we passed to correct the 2010 financial statements were in fact the incorrect as we were given incorrect details. We were meant to credit the developers levies and set off Hotel expenses to the Hotel account but these journals were not passed to the correct accounts as we were given incorrect details regarding the developers account*". It is not clear who provided her with such "*incorrect information*" whether, from within CRA or within the first respondent or from the developer. Inasmuch as the respondents claim that the fourth respondent was not responsible for any financial management then clearly the "*incorrect information*" would have emanated from the first respondent itself or the developer. It is significant that the "*incorrect information*" was not discovered at an early stage by Cullen who was closely associated with the financial affairs of the first respondent. The "*errors*" only appeared to surface when the applicant and others had raised discrepancies in the financial records of the first respondent in the rule 75 letter and in this application. Moreover it appeared that such "*incorrect information*" had found its way into the audited financial statements which were subsequently signed off by the second and third respondents. The second and third respondent for their part claimed though that they had simply acted on the advice of CRA and the

auditors and appear to have disavowed any responsibility for their own lack of oversight over the financial affairs of the first respondent. Mr Potgieter in this regard referred to an article written by Clint Ridden on 23 March 2011 titled "*The trustee's responsibilities relative to the audited financial statement*" in which Ridden emphasized that the final responsibility for the financial accounts of the body corporate lay with the trustees themselves.

Fourth respondent as managing agent/control over own funds

[50.] The second respondent claimed "*that all monies are paid by owners into the bank account of the first respondent and not into the bank account of the fourth respondent*". He also claimed that the fourth respondent did not have any access to such funds. Moreover he claimed that CRA were the only people who had signing power over the ABSA account of the first respondent. The respondents however claimed that a total of R8 565 495.00 was paid to creditors of first respondent by either the fourth respondent or the developer on behalf of the first respondent. Those funds were clearly never under the control of the first respondent nor on the respondents own admission; "*did it flow through the bank accounts of the first respondent*". The applicant claimed that close onto 60% of the first respondent's possible income being in respect of invoiced levies less electricity charges and arrear levies had been managed and controlled by entities other than the first respondent. Such entities the applicant claimed were according to the respondents not formally appointed to do so. The applicant claimed that the respondents version with regard to the first respondent's funds

were not only ambiguous and misleading but that had it also confirmed the situation where the first respondent had no direct control over its own funds, payment of its creditors and accordingly its own debt management. This applicant claimed again raised the question of the fourth respondent as being the managing agent and the respondent's denial that it was so.

[51.] Having considered the question as to whether the first respondent was in fact the managing agent I am satisfied that notwithstanding the denials by the first, second and third respondents and although the fourth respondent was not formally appointed as the managing agent it had in fact carried out part of that function and in this regard the following was particularly telling;

(i) There was a significant amount allocated for "*the management fees*" in the various sets of financial statements under "*operating expenses*".

(ii) At the AGM of 17th March 2010 the second respondent records "*It is the job of the Managing Agent and auditors to monitor the expenses and reflect the correct amounts per component*".

(iii) Fourth respondent is expressly mentioned as the managing agent in the Mazars annual financial statements for 2010 dated 15 February and again in the draft financial statement for 2010.

(iv) Fourth respondent literally handled millions of rands of First respondent's finances; in particular in settling amounts owed to creditors of the first respondent directly from income earned from owners in the rental pool.

The 2011 draft financial statements by Mazars

[52.] In response to the amended draft financial statements for 2011 and 2012 prepared by Grant Thornton the applicant obtained from Mazars copies of draft and amended draft financial statements which Mazars had prepared for the year 2011. These financial statement had not been disclosed by the respondents who simply claimed that it was not relevant insofar as it was a draft and had not been adopted by the trustees. However what was significant was that there were discrepancies in these very financial statements with that prepared by Grant Thornton. It is not necessary to deal with each of the discrepancies save to note that both financial statements would have been prepared from information provided by CRA and Cullen. It was therefore surprising that the second respondent adopted the position that they were not obliged to have disclosed the draft and the amended draft financial statements prepared by Mazars given the nature of the complaints raised by the applicants regarding the financial affairs of the first respondent. Mazars furnished CRA with the amended drafts on the 9 May 2012 with the initial draft furnished on the 2 March 2012. The respondents however sought to point out that the amounts and the discrepancies were not significant. What is of importance though is the very fact that once again there were draft financial statements prepared by Mazars that effectively had to be corrected by a further set of draft financial statements by Grant Thornton. It must be recorded that although Mazars were furnished with the draft financials prepared by Grant Thornton, Mr Norman Silbowitz a partner in Mazars in a letter dated 9 October 2012 claimed that they "*have not yet been officially advised of*

the adjustments made which appear to be material" Silbowitz further stated that Mazars had been appointed by the first respondent and normally in such engagements would have dealt with the managing agent and that there would be limited contact with the trustees. In this case they dealt with CRA.

The complaint of prejudice; an example

[53.] The applicant referred to a rejection of a bond application by Standard Bank in respect of the sale of one of the units. Standard Bank apparently based its refusal on the draft statements of the 2011 financial year issued by Mazars on the 9th May 2012. The respondents for their part also refer to other banking institutions which had approved recent bold applications for units in the Scheme. The applicant pointed out that though that a significant banking institution not only shared the applicant's concerns with regard to the financial affairs of the first respondent but that it also confirmed the potential prejudice to owners who had no means of ensuring the liquidity of their investment in the Scheme.

Prejudice to owners/abuse of managerial powers

[54.] It appeared that Mazars had requested that the trustees provide a resolution with regard to the set-off of monies advanced by the developer against the amounts which the developer had paid to the City of Cape Town and other creditors. This resolution was required for the purposes of the 2011 draft financial statement. The second respondent called a trustees meeting for 20th January 2011 at which he was the only trustee present. Notably present were

also Clint Ridden and Leigh Cullen. At this *"trustees meeting"* which was not quorate a resolution was passed which the applicant claimed had far reaching consequences in respect of first respondent's financial affairs and more particularly for the liability of the developer to the first respondent. The applicant claimed that the second respondent derived a direct benefit from this invalid resolution since enormous amounts previously owed by him as developer to the first respondent was cleared and the future liability in respect of the units held by the developer was reduced and/or removed. Applicant claimed that despite the invalidity of the resolution, it was incorporated into the latest set of financial statement approved by Grant Thornton. This the applicant claimed not only had financial consequences for other owners in the scheme but cast serious doubt on the reliability of the latest set of financial statements. The applicant submitted that the respondent's contention that they at all times relied on the advice of inter alia Clint Riddin & Associates and Mazars when conducting the financial affairs of the respondent was therefore disingenuous. Of particular significance is that Clint Ridden and Cullen was present at the very meeting where the resolution was taken despite Riddins' expertise on sectional title management.

Meeting of trustees

[55.] The applicant further pointed out that no formal trustees meeting had been held for the entire period 17 March 2011 to the 16 March 2012. In this regard it relied on an affidavit by Marshal who was a trustee at the time and who deposed to an affidavit in which he claimed that he had neither been informed of any

trustees meeting during the period either telephonically or attended any in person. The second respondent however contented that meetings were held by email but simply failed to disclose details or copies of any such emails. The applicant claimed that this was further proof that the second respondent had simply managed the first respondent on his own and to his own benefit.

Finding's by the court

[56.] The applicant has claimed that the trustees have been grossly negligent in the handling of the affairs of the respondents. While there is no definition as to what grossly negligent in the circumstances entails it would in my view entail a measure of recklessness in the handling of the financial affairs of the first respondent. In this regard such conduct is not determined on any one particular incident or on any one set of accounts or for that matter one particular meeting. The court must consider all of the evidence cumulatively. In respect of the complaints raised by the applicant I am of the view that the majority of the complaints were patently very serious and not without merit. Where there have been mere discrepancies in arithmetic and simple accounting which the respondents have been able to satisfactorily explain this court must accept such explanation. However what has emerged in the overall picture with regard to the financial affairs of the first respondent was that it necessitated the drastic measure by the respondents of having to have re-audit the financial statements for years 2009 and 2010 and propose to have Mazars replaced as the appointed auditors.

[57.] I am also of the view that the applicant had both proved and demonstrated on balance of probability that second and third respondents failed to carry out their fiduciary responsibilities to the first respondent. Mr Olivier submitted that there was no indication that first respondent was in any dire financial predicament at the moment and to the contrary the draft financial statements by Grant Thornton indicated that it was presently operating with a surplus. However as contended for by applicants the draft financial statements prepared by Grant Thornton have not been audited and are subject to change. Moreover Grant Thornton themselves eschewed any responsibility for the correctness of any of the information used in the financial statements which responsibility they also emphasized rested solely with the trustees. The respondents for their part stated that upon the financial statements prepared by Grant Thornton being audited appropriate "*checks and balances*" will be put in place. It is significant though that they do not spell out exactly what "*checks and balances*" need to be put in place and who will be responsible for carrying out such measures. Moreover the second and third respondents have repeatedly in this application disavowed any responsibility for the discrepancies found in the financial statements of the first respondent and claimed that they had simply "*relied on the advice of CRA and the Mazars*". Having considered the complaints raised by the applicant and in taking an overall view of not only the concerns raised about the financial management but also the responses by the respondents, I am of the view that the present situation of the first respondent warrants the appointment of an

administrator. Moreover second respondent has in my view failed in his capacity as chairman of the first respondent to ensure that his interests in the developer and the fourth respondent did not compromise or impact on his financial duties to the first respondent. Clearly the resolution taken on the 20 January 2011 is a clear indication of such dereliction on his part.

[58.] The respondents submitted that should the court appoint an administrator I should consider appointing Clint Riddin to the position. Given that the second and third respondents claim that they acted on the advice of CRA and given the fact that there were serious discrepancies found in the financial statements which CRA had produced I am surprised that the second respondent deemed it appropriate to have recommended Clint Riddin & Associates in the circumstances. Clearly they would be conflicted in the responsibility as an administrator of the first respondent.

[59.] The applicant has submitted the name of Nolands Forensics as an appropriate administrator.

I therefore make the following order.

(1) The first respondent is placed under administration in terms of section 46 of the Sectional Titles Act, 95 of 1986 (the Act), subject to the terms and conditions in paragraph 3 below.

(2) Nolan ds Forensics is appointed as the administrator with the powers and duties of the first respondent.

(3) The administrator is granted all the powers in section 38 of the Act and shall perform all the functions entrusted to the body corporate in section 37 of the Act, and is in addition empowered to;

(3.1) collect and retain all documents of the first respondent;

(3.2) to operate an account with a banking institution in the name of the first respondent; and

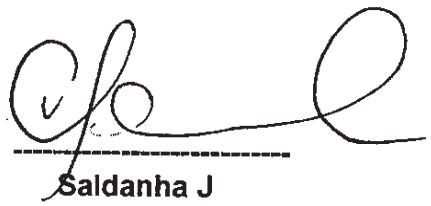
(3.3) to institute and prosecute legal proceedings on behalf of the first respondent.

(4) The administrator shall call a general meeting of the owners as soon as possible to inform them of this order and the process to be followed.

(5) The administrator shall act as such until 30 May 2014, on which date it shall file a report to this court for its period of administration as well as the financial years ending 30 June 2009, 30 June 2010, 30 June 2011 and 30 June 2012, including proposals to be implemented for the future financial administration of the scheme.

(6) If the parties to this litigation cannot agree on the administrators proposals within two weeks after filing of the administrators report, any party may approach this Court for an order in this regard.

(7) The costs of this application for the appointment of an administrator, including the costs of two counsel, shall be paid by the first respondent.



Saldanha J