IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

Case No. 07/16806

In the matter between:

MARTHA OBERHOLZER	First Applicant
MARGARET BARNES	Second Applicant
LEON STRYDOM	Third Applicant

and

THE BODY CORPORATE OF NAHOON-SAN MARTINHO	Respondent

JUDGMENT

[1] This is an application in terms of s 46 of the Sectional Titles Act 95 of 1986 ("the Act") for the appointment of an administrator to the respondent. In a counter-application the respondent seeks the return to it of all its records, books of account, cheque books and other property against the first applicant and against Executive Rental and Management CC ("ERM"). In an interlocutory application the respondent seeks the joinder of ERM, which application, despite the filing of an opposing affidavit, is not opposed.

[2] Each applicant is a registered owner of a unit consisting of a residential flat and an undivided share in the common property in the Nahoon-San Martinho Sectional Title Scheme ("the scheme"). The scheme *inter alia* comprises two buildings, San Martinho with 209 residential flats and Nahoon with 42 residential flats. The first applicant is also the member of ERM, which corporation has for the past four years acted as the managing agent for the scheme. The respondent is the body corporate for the scheme.

[3] Pursuant to an objection concerning the non-joinder of all the unit owners that was raised by the respondent in its answering affidavit, Horwitz AJ sitting in this division, on 29 February 2008, granted an order compelling the giving of notice to each owner. I was informed by Adv. C Georgiades, who appeared for the applicants, and by Adv. G.F. Pretorius, who appeared for the respondent, that all the parties were *ad idem* that such order was substantially complied with and that any such non-joinder had been remedied.

[4] A court may in its discretion appoint an administrator in terms of s 46(2) of the Sectional Titles Act 95 of 1986 ("the Act"). The circumstances in which a court should exercise its discretion to appoint an administrator are not circumscribed in the Act. Counsel referred me to Bouraimis v Body Corporate of the Towers1995 (4) SA 106 (D), and to two unreported judgments of this divison, namely Levy v Controlling Body of Christina Court [WLD 23-09-1994 Case No 94/18918] and Williams v Nathan and Others [WLD 13-10-2006 Case No. 2006/8985] wherein certain principles relating to the

exercise of such discretion were set out. I was also referred to LAWSA Vol 24 (First Reissue) para 310, which was written by Prof. CG van der Merwe, and to an article entitled 'Die Aanstelling van 'n Administrateur by Wanbestuur van 'n Deeltitelskema', which was also written by Prof. CG van der Merwe and Pieter Kloppers in the Stellenbosch Law Review 1997 3, which academic writings I consider to be instructive and persuasive on the issue.

[5] In Bouraimis v Body Corporate of the Towers *(supra)*, Booysen J said this at p 109H:

> '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.

[6] In Levy v Controlling Body of Christina Court *(supra)*, Fine AJ said this in para 10 of that judgment:

> '[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.'

[7] Similar views have been adopted by Labe J in Williams v Nathan and Others *(supra)*. In para [20] of that judgment it is said that

> '[t]he appointment of an administrator by the court is a drastic step for it to take because it deprives the body corporate wholly or in part of its powers to run its affairs.'

and, apart from referring to the *dictum* at p 109G – H in Bouraimis (*supra*), reference was also made to CG van der Merwe and Sonneke: Sectional Titles, Share Blocks and Time Sharing Vol 1 para 14.6 at page 14-82, wherein it is said

> 'that a court will only exercise its discretion to appoint an administrator in exceptional circumstances and as a 'last resort'.'

[8] With reference to the Bouraimis and Levy judgments, Prof. CG van der Merwe in LAWSA *(supra)*, concludes that

> 'it is clear that a court will only exercise its jurisdiction to appoint an administrator in exceptional circumstances such as serious financial difficulties encountered by the body corporate and flagrant maladministration through non-performance of statutory duties, dishonesty or inefficiency.'

Earlier in the same passage the esteemed academic also says this:

> 'Inefficiency and maladministration by the body corporate or board of trustees can cause confusion and chaos in a sectional title scheme. Before matters get out of hand a prudent sectional owner can take the following steps to forestall disintegration of the sectional title community. Firstly, he can, assisted by 25 percent of the members of the body corporate, request the trustees to convene a special general meeting to discuss the irregularities in the scheme and to endeavour to find an appropriate solution.[1] Secondly, he can ensure that the irregularities are placed on the agenda of the next annual meeting where the owners can iron out the difficulties and, if necessary, elect new trustees to salvage the scheme. As a last resort, certain interested parties are entitled to approach the court for the appointment of an administrator.[2]

[9] In the article entitled 'Die Aanstelling van 'n Administrateur by Wanbestuur van 'n Deeltitelskema' *(supra)*, the authors reviewed the Bouraimis and Levy judgments, and they referred to a New South Wales judgment, Re Steel and the Conveyancing (Strata Titles) Act, 1961 (1968) 88 WN Pt 1 (NSW) 467, on a nearly identical statutory

provision, s 23 of of the New South Wales Conveyancing (Strata Titles) Act, 1961, wherein Else-Mitchell J said the following at p 471:

> '[S]uch cause may be found in a wide variety of circumstances and situations entailing non-feasance or misfeasance by the council or 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.'

With reference to the authorities referred to, they conclude as follows on the exercise of a court's discretion to appoint an administratror:

> '(i) Die hof is nie geneë om 'n administrateur op grond van onbenullige, onwesenlike en bekrompe klagtes van die applikant aan te stel nie. Die klagte(s) moet sodanig wees dat die probleme nie deur prosedures ingevolge die Wet uitgestryk kan word nie. Dit beteken dat die applikant alreeds sonder welslae probeer het om die saak op 'n spesiale algemene vergadering of op die jaarlikse algemene vergadering te beredder of dat sy vooruitsigte om die probleme op sulke vergaderings op te los uiters gering is.
>
> (ii) Die hof is slegs bereid om 'n administrateur in spesiale omstandighede of indien daar 'n wesenlike grond daarvoor is, aan te stel. Onses insiens is die vereiste van 'n wesenlike nadeel in die *Bouraimis*-saak die keersy van die vereistes wat in die ander twee hofsake gestel word. Die hof sal slegs bevind dat spesiale omstandighede aanwesig is of dat daar grondige redes (*just cause*) vir die aanstelling van 'n administrateur bestaan indien die nie-aanstelling van 'n administrateur wesenlike benadeling vir die deeltitelskema as sodanig of vir die deeleienaars inhou.'

[10] The applicants allege a number of breaches committed by the trustees of their duties in terms of the provisions of the Act and of the Management Rules contained in Annexure 8 to the Act. The respondent has answered to such allegations and in many respects disputes of fact have arisen on the papers. I have not been asked to refer the

matter for the hearing of oral evidence on such disputed issues or for the matter to be referred to trial.

[11] The applicants contend that the annual general meeting that was held on 30 June 2007 and at which the present trustees of the respondent were appointed, was irregularly convened and that such meeting was therefore invalid. It is also contended that the deponent to the respondent's answering affidavit, Mr. Mohamed Asghar Khan, who is the chairman of the respondent's present board of trustees and elected as a trustee at that meeting, is as a result of the alleged invalidity of that meeting not properly authorised nor is the respondent's attorney of record duly authorised to act on its behalf.

[12] The applicants refer to the provisions of Management Rule 54(1), which require the giving of at least fourteen days' notice of every annual general meeting *inter alia* 'to all owners' [Rule 54(1)(a)] and 'to all holders of registered mortgage bonds over units who have advised the body corporate of their interests' [Rule 54(1)(b)]. They also refer to the provisions of Management Rule 54(5), which state that the '[i]nadvertent omission to give the notice referred to in sub-rule (1) to any person entitled to such notice or the non-receipt of such notice by such person shall, save in the case of the persons contemplated in sub-rule (1)(b) not invalidate any proceedings at any such meeting.'

[13] The applicants allege that 'only 12 days' notice was given to some owners and to others only 5 days' notice' of the 30 June 2007 annual general meeting, and that no notice thereof was given to the holders of registered mortgage bonds over units. The

trustees dispute the allegation of inadequate notice to owners of units and allege that the required 14 days' notice was given. They further admit that no notice was given to mortgage bond holders over units.

[14] The applicants' allegations on the issue of inadequate notice to owners amount to mere conclusions with the necessary primary facts in support thereof omitted, and such allegations, in my view, are insufficient to support the relief they claim [see: Radebe and others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at p 793D; Swissborough Diamond Mines v Government of the RSA 1999 (2) SA 279 (TPD) at p 324F]. Rule 54(1) does not require the giving of notice to all holders of mortgage bonds over units, but only to those 'who have advised the body corporate of their interests'. It is not alleged that any bond holder so advised the body corporate. The applicants' contentions of the invalidity of the 2007 annual general meeting and of the lack of authority of the chairman of the board of trustees and of the respondent's attorney of record must accordingly fail.

[15] The applicants complain that the trustees' report, which in terms of Management Rule 38 is required to be signed by the chairman, was not signed by him prior to the 2007 annual general meeting. The chairman explains that it was an oversight, but that he was present at the meeting and presented the trustees' report in person.

[16] The applicants complain that the financial statement that was sent out prior to and laid before the 2007 annual general meeting was not signed by the trustees or by the

respondent's auditors and contained certain errors, such as an incorrect reference to the Companies Act, and omitted certain explanations or breakdowns. The trustees explain that it was the usual practice for members to first debate the financial statement at an annual general meeting and only once it is accepted by the meeting with or without amendment after such debate is it signed by the trustees whereafter it is returned to the auditors who annex thereto their signed audit report. The trustees further admit the incorrect reference to the Companies Act and the omission of certain explanations or breakdowns, and they explain that the error was insignificant and also that the respondent's attorney is guiding them and had already communicated with the respondent's auditors to furnish the relevant breakdowns and to ensure proper compliance with the requirements of the Act, the Management Rules, and the dictates of sound business practice.

[17] The applicants complain that a surplus was budgeted for, but that the trustees exceeded such approved annual budget to an extent that the financial statement for the financial year ending 28 February 2007 reflected a net deficit of R139 417.00 from a net surplus of R467 499.00 the previous financial year. The trustees explain that the unanticipated deficit essentially originated from a failure by the 2006 elected board of trustees to properly budget for amounts payable to the Ekurhuleni Council and for amounts for repairs, maintenance, and management fees. It is denied that the present trustees could be blamed for the inadequate budgeting. The trustees further explain that the respondent's attorneys and the managing agents, Angor Management Services

Limited, which they intend to appoint, will guide and assist them in future. They say that the said company is a well-established and reputable sectional title managing agency.

[18] The applicants allege that the trustees have caused to be replaced four waste pipe columns at a cost of R55 000.00 each without complying with the financial restriction that was placed upon trustees at the 2006 annual general meeting that three quotations must be obtained and approved by the board of trustees for all repairs of R50 000.00 and over. The trustees answer that the instruction for the replacement of waste pipe columns was given by a previous board of trustees and prior to the financial restriction placed on trustees at the 29 June 2006 annual general meeting. It is further explained that the replacement of the waste pipes was necessary.

[19] The applicants complain that the trustees have reinstated the employment of the building manager of the respondent who had been dismissed by the board of trustees, which had been appointed at the 2005 annual general meeting. The applicants allege in their founding affidavit that it was 'resolved' at the 2006 annual general meeting that an advocate, who was also elected as a trustee, would examine the documents relating to his dismissal and make recommendations to the trustees as to whether his dismissal should be withdrawn. It is alleged that the trustees withdrew the dismissal of the building manager without consulting the advocate. The trustees deny such resolution in their answering affidavit and also point out that the minutes of the annual general meeting do not reflect such resolution. They also point out that had the advocate given them constructive advice such would have been taken into account by them. They explain that

they took the decision in his absence, because he was unable to attend the scheduled meeting of trustees. A comprehensive and perfectly reasonable explanation is furnished by the trustees for reinstating the employment of the building manager.

[20] It is common cause that the trustees concluded a contract with iBurst in terms whereof monthly rental is paid to the respondent for a 'base station' mounted on the roof of one of the buildings. A unanimous resolution for the conclusion of such contract as well as the written consent of an owner residing immediately below the base station and who had complained about noise disturbance from it, are requirements for the conclusion of such agreement on the applicants' interpretation of sections 17 and 1(3)(c) of the Act. The trustees interpret the Act differently and deny the causing of noise disturbance to the relevant owner. The allegations on the papers are insufficient to determine whether the lease in issue falls within the scope of the provisions relied upon by the applicants. But even if I am wrong in this view and these disputed issues were resolved in favour of the applicants, such would not affect the outcome of the applicants' application.

[21] Other complaints, *inter alia* pertaining to lesser disbursements in respect of the common property and the trustees' management style, are also raised by the applicants and answered by the trustees. Such complaints and answers do not in my view require specific mention.

[22] Upon a consideration of the applicants' complaints individually and cumulatively and the trustees' answers thereto, I am unable to conclude that special circumstances or

good cause or compelling reasons exist to abrogate the rights of the owners and trustees by appointing an administrator. Some of the applicants' complaints constitute mere unsubstantiated allegations or no more than petty disputes, and others constitute insignificant or less serious breaches of their duties by the trustees or formal breaches in ignorance of the provisions of the Act, which breaches, with reference to the principles outlined in the judgments and academic writings referred to herein and adopted by me, are not in themselves sufficient grounds for the appointment of an administrator. The trustees intend to appoint a new managing agent for the scheme and they receive advice from the respondent's attorney in order to properly administer the affairs of the respondent and to comply with their duties in terms of the Act and Management Rules. The complaints raised are matters that ought to have been raised at a special general meeting or at the next annual general meeting before these proceedings for the appointment of an administrator were resorted to. The applicants have failed to establish that the owners of units shall suffer substantial prejudice if an administrator is not appointed in these proceedings.

[23] ERM's appointment as managing agent has expired and the trustees gave notice that it would not be renewed. The only ground upon which Adv. Georgiades relied in support of the opposition of the first applicant and of ERM to the relief claimed in the counter-application was that the trustees were not properly appointed and accordingly lacked the authority to have given such notice as a result of the alleged invalidity of the annual general meeting that was held on 30 June 2007. The invalidity of that meeting has, in my judgment, not been established.

[24] In the result the following order is made:

1. Executive Rental and Management CC ("ERM") is joined as a party to these proceedings.

2. The applicants' application is dismissed with costs, including the costs reserved on 29 February 2008.

3. The first applicant and ERM are ordered to:

3.1 return to the respondent forthwith all of its books, records, equipment, cheque books and other property;

3.2 pay the respondent's costs of the counter-application jointly and severally.

_____

P.A. MEYER
JUDGE OF THE HIGH COURT

18 November 2008.