IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL : DURBAN

CASE NO: 16788/2004
18425/2004
2918/2005
11914/2005

In the matter between:

SHEREEN CASSIM	First Plaintiff
NEILOPAHR CASSIM	Second Plaintiff

and

ST MORITZ BODY CORPORATE	First Defendant
VOYAGER PROPERTY MANAGEMENT (PTY) LTD	Second Defendant
BELLAIR MANAGEMENT SERVICES	Third Defendant
T/BMS ESTATE AGENTS	
DEON STRAUSS N.O.	Fourth Defendant
JUAN LE FEVRE N.O.	Fifth Defendant
VERONICA SWANEPOEL	Sixth Defendant

J U D G M E N T

VAN DER REYDEN J:

Introduction

This judgment deals with the issue of the Plaintiffs' *locus standi* in 3 of the 7 claims against the Defendants.

Plaintiffs' Declaration, in its original form, claimed that they acted in terms of section 41 of the Sectional Titles Act. (the Act) In response to the Second Defendant's Plea they amended their Declaration by deleting the reference to

section 41 and pleading that they were duly appointed trustees of the First Defendant, appointed as such at an Annual General Meeting on 29 January 2005, that they were the owners of Flat 18 (First Plaintiff) and Flats 17 and 19 (Second Plaintiff) St Moritz Building and that they were members of the First Defendant by virtue of the provision of section 36 of the Act.

Background

A brief history of this marathon trial is necessary to sketch the background against which the issue of *locus standi* of the two Applicants/Plaintiffs, (who for ease of reference will be referred to either as S Cassim and or N Cassim and or the Plaintiffs), is to be considered.

On 26 April 2005 Hurt J granted an order for the consolidation of three applications involving St Moritz Body Corporate (St Moritz) and the Plaintiffs and referred the matter to trial with the Notice of Motion in Case No 2918/2005 to stand as a Summons. On 29 August 2005 Niles-Dunér J granted an order which *inter alia*, provided for the suspension of the trustees of St Moritz who at that stage were the Plaintiffs and the Fourth, Fifth and Sixth Defendants. It is common cause that the suspension has not been set aside or lifted and that the First Defendant has since 29 August 2005 been without trustees with the result that since that date there has not been a governing body to perform and/or exercise the powers of the Body Corporate in terms of section 39 of the Act

The Judge President allocated the consolidated applications to me for trial and on 14 September 2005 I granted an order which *inter alia* provided for the appointment of a *curator-ad-litem* to St Moritz. On 4 November Swain J appointed Skinner SC to act as *curator-ad-litem.* On 14 February 2006 Skinner SC was released as *curator-ad-litem* in terms of an order granted by Kruger J and Brink Administrators appointed as interim administrators with immediate effect.

On 3 May 2006 the trial commenced before me. At the outset the question of a new curator-ad-litem arose. Due to lack of funds and with no prospect of having a curator-ad-litem appointed Messrs Coetzee and Mr Wright were appointed on 9 May 2006 as administrator and managing agent to St Moritz respectively.

There is no need to deal with the problems Mr Coetzee as administrator experienced. Suffice it to say that not withstanding the fact that Mr Coetzee was the Plaintiffs' candidate, they lost faith in his administration and sought his removal. This was refused. However on 19 October 2007, Mr Coetzee had to be released as administrator due to ill health. He had been diagnosed with Prostate Cancer.

In the absence of an administrator representing St Moritz and the Plaintiffs' insistence that the trial proceed without an administrator the issue of their *locus standi* called for resolution. In terms of Rule 33(4) I granted an order for the separation of the *locus standi* issue from the merits. I do not propose to deal with the procedural objections raised by the Plaintiffs to the separation of the issues and the hearing of the *locus standi* application.

Plaintiffs' Amended Declaration

I do not propose to incorporate the 43 pages of Plaintiffs' Amended Declaration.

However it is necessary to set out the relief in the Amended Declaration in condensed form in order to consider the *locus standi* issue. Under Claim A, as supplemented, the Plaintiffs seek an order compelling the Third, Fourth and Sixth Defendants to forthwith furnish the Plaintiffs with accurate and proper rectified statements of accounts in respect of Flats 17, 18 and 19 of St Moritz reflecting various deductions claimed by the Plaintiffs and for an order terminating the management contract between the First and third Defendants and finally for the removal of the Third Defendant as managing agent of the First Defendant.

Under Claim B the Plaintiffs seek a declaration that they are entitled to the sum of R5,000-00 each in respect of the unauthorised use of Flats 17 and 18 and an order compelling the First, Third, Fourth, Fifth and Sixth Defendants to credit each of their levy accounts in respect of Flats 17 and 18 with the sum of R5,000.

Under Claim C the Plaintiffs seek an order compelling the Second, Third, Fourth Fifth and Sixth Defendants to furnish them with access to books of account of the First Respondent and copies of various documents pertaining to the administration of the First Defendant.

In Claim D the Plaintiffs seek a declaration that the loan agreement concluded between the First and Second Defendant is invalid and of no force and effect, cancellation of the loan agreement and an interdict against First and Third Defendant from paying any monies over to the Second Defendant and an interdict against the Second Defendant from receiving any monies from the First and Third Defendants plus a further interdict against the Second Defendant restraining it from advancing and or lending any further monies to the First Defendant in terms of the Loan Agreement and finally interdicting the First Defendant from receiving any further loan and or monies from the Second Respondent.

Under Claim E, as supplemented, the Plaintiff seeks an order compelling the First and Second Defendants to render a statement of Account with supporting documents to the Plaintiffs in respect of all financial transactions for the period 2 March 2004 to 28 February 2005 in terms of the Loan Agreement and allied VAT documentation and statements of account in respect of levies collected and loans advanced by the Second Defendant. In the second leg of Claim E the Plaintiffs seek an order compelling the six Defendants to render a statement of account to them in respect of levies collected, payments made to the Municipality and further particulars in respect of the loan agreement with the First Defendant.

Under Claim F the Plaintiffs seek an order compelling the Fourth, Fifth and Six Defendants to deposit all levies due to the First Defendant, and collected, in the First Defendants Bank Account.

Under Claim G the Plaintiffs seek the appointment of an administrator.

An analysis of the individual claims

Claim A

Here the Plaintiffs claim an order against the other Defendants, excluding the Second Defendant, for rectified statements of their accounts with the Body Corporate. This is a direct claim against the Body Corporate.

Claim B

Here the Plaintiffs claim a declarator for a credit on their Flat accounts, and an order compelling the other Defendants, excluding the Second Defendant, for the passing of such credits. Again this is inter alia a claim against the Body Corporate.

Claim C

Here the Plaintiffs claim directly from, inter alios, the Second Defendant compelling access to copies of documents.

Claim D

This is a direct claim by the Plaintiffs against Second Defendant claiming:

a declarator of invalidity and cancellation of the loan agreement between the Body Corporate and Second Defendant; an interdict regarding the payment of funds; and an interdict regarding the payment of further advances.

Claim E

This is a direct claim by the Plaintiffs against Second Defendant for a rendition of account to the Plaintiffs.

Claim F

This is a claim against other Defendants, excluding the Second Defendant, for an order regarding the deposit of moneys.

Claim G

This is a claim for the appointment of an administrator under section 46 of the Act.

Plaintiffs' argument

Although the Defendants commenced argument to which the Plaintiffs' replied I propose to deal with the Plaintiffs' argument first.

Ms N Cassim argued that as individual owner she was entitled to have approached this Court for the appointment of an administrator in terms of section 46 of the Act. There is merit in this submission and in fact an administrator was appointed.

With regard to the validity of the contract (loan agreement) concluded between First and Second Defendant Mrs N Cassim argued that Trinity Asset

Management (Pty) Ltd v Investec Bank Ltd 2009 (4) is authority for her *locus standi* to challenge the loan agreement. She submitted that she has thus discharged the onus to prove *locus standi* on a balance of probabilities. This submission is in issue.

She submitted that Section 40 of the Act read with Regulation 35(1) empowers a trustee with *locus standi*, in the interest of the Body Corporate, to claim delivery of document and debatement of accounts from the Body Corporate's service provider. Save for her reliance on her status as a trustee there is merit in this argument and my understanding of Mr Tobias and Mr Singh's argument on behalf of the Second Defendant is that the Plaintiffs are entitled as owners/members to bring this claim in their own right against the First Defendant as the claim is personal to them.

With regard to Claim D and E relying on Letsing Diamond Ltd v JCI Ltd 2009 (4) 58 SCA in which it was held that an individual shareholder in a company has *locus standi* to approach Court for a determination of the validity of an agreement, Ms N Cassim argued that as an individual member of the Body Corporate, owner and trustee she is entitled to have the validity of the loan determined as it affects her rights of ownership in that the creditors are entitled to recover from her any shortfall which it could not recover from the Body Corporate. Here again her reliance on her status as trustee is questionable in view of the fact that she has been suspended as trustee and the suspension is still in force.

Ms N Cassim submitted that Regulation 35(1) of the Act obliges a trustee to keep proper records of all assets and expenditure of the Body Corporate. Such obligation is placed upon an individual trustee, not trustees acting collectively. Section 40 of the Act obliges a trustee to act in good faith and in the best interest of the members of the Body Corporate. There is a fiduciary relationship between a trustee and the owners in the Sectional Title Scheme by virtue of their

membership in the Body Corporate. In such capacity as trustees, she and her sister were entitled to delivery of documents and debatement of accounts from the Body Corporate service provider, the Second Defendant. In signing the Loan Agreement on 2 March 2004, the fourth and Fifth Defendants did not act collectively with Benny Singh, Mrs Ratcliff and Mr David who were trustees as at 2 March 2004. The fact that the Plaintiffs sued the Body Corporate does not detract from the fact that they were trustees acting in the best interest of the Body Corporate. About twenty five affidavits filed by owners under Case No: 11914/05 supported the relief sought therein. In none of the applications before Court have the Fourth and Fifth Defendants produced even one affidavit by an independent owner supporting their actions in concluding the Loan Agreement on 2 March 2004. Section 40 of the Act read with Regulation 35(1) empowers a trustee with *locus standi* in the interest of the body Corporate and Plaintiffs have such standing. She submitted that there is no merit in the attack upon her and that of her sister's *locus standi*. It is common cause that she and her sister are owners and members of St. Moritz Body Corporate and were trustees for the period 29 January 2005 to 29 August 2005.

She argued that the fact that the Plaintiffs are not party to the Loan Agreement does not affect their *locus standi* to approach this Court to determine the validity of the Loan Agreement. In a report dated 27 August 2006, the Administrator found, according to the records in his possession, that only 17 persons signed the attendance register, but 20% of 88 were required for a quorum for the meeting to be valid. It was at this meeting that the Loan Agreement was approved.

Ms N Cassim referred to **Trinity Asset Management (Pty) Ltd v Investec Bank Ltd 2009 (4) SA 89 GCA,** in which the SCA held that the question whether a Loan Agreement was valid or invalid was a material factor which the shareholders were entitled to know before voting. It was accordingly held that the Court *a quo* had wrongly found that the Appellants had lacked *locus standi* to

bring their application. She also referred to **Letsing Diamonds Ltd v JCI Ltd 2009(4) SA 58 at 59** in which there were five issues in respect of which the Appellants *locus standi* was challenged. They all related to the validity of a Loan Agreement. It was held that an individual shareholder in the company has *locus standi* to approach the Court for a determination of issues relating to the validity of the Agreement. She argued that as an individual member of the body Corporate, owner and trustee she is entitled to have the validity of the Loan determined, as it affects her rights of ownership in that the creditor is entitled to recover from her, any shortfall which it could not recover from the Body Corporate. Further, the Fourth and Fifth Defendants have exceeded their powers outlined in the Act, in the terms to which they bound the Body Corporate in the Agreement.

In the second leg of her argument, Ms Cassim argued that she and her sister are entitled to rely on Section 38 of the Constitution as their rights to ownership guaranteed in the provisions of Section 25 of the Constitution, are threatened by the provisions of Clause 6.3 of the Loan Agreement which provides "that the Body Corporate shall ……be liable to pay to the Company (Second Defendant) any shortfall in amounts not recovered, for any reason whatsoever, from the ceded debts." She relied on the evidence of maladministration referred to by Mr Coetzee in his report dated 27 August 2007 in respect of the chaotic state of the books of account, the invalid sale of roof of St. Moritz building to Fourth Defendant. In paragraph 1 of the Amended Declaration, Plaintiffs allege that they are owners of Flats in St. Moritz. The allegations contained in the declaration reflect that their rights to ownership were threatened in consequence of the conduct of the Defendants.

She also relied on a passage in **Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and others**, where Chaskalson P stated that:

> "Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues, I can see no good reason for adopting a

narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing."

She submitted that in SLC Property Group (Pty) Ltd and A v Minister of EA & ED (Western Cape) & A 2008 (1) All SA 627 (c) at par [21] it was held "that section 38(a) of the Constitution provides that a person who acts in his own interest has the right to approach a competent Court for relief where a right in the Bill of Rights has been infringed or threatened."

She submitted that In Ferreira's case (*supra*), the majority of the Constitutional Court took the view that it is enough if the complainant is affected directly by the conduct complained of. She submitted that her evidence in the proceedings of May 2006 and subsequent thereto, is sufficient to confirm that her rights of ownership were threatened by the conduct of the Defendants and that the issues pertaining to the claims in the declaration are not hypothetical or abstract, but relate to the Plaintiffs' rights of ownership guaranteed by Section 25 of the Constitution.

Dealing with Plaintiffs' Claim C which relates to information required she argued that in terms of Section 32(1)(b) of the Constitution "Everyone has the right of access to:- (b) any information that is held by another person and that is required for the exercise or protection of any rights." She argued that it is apparent from the allegations in the Plaintiffs' Amended Declaration that the rights which were under threat and needed protection by the supply of the information sought, was the rights of ownership. At the AGM of 29 January 2005, the Second Defendant was unable to furnish details on the loan. As owners and members of the Body Corporate liable for the shortfall of the Loan in terms of Clause 6.3 thereof, she argued that she is entitled to access to all the information pertaining to the loan Agreement. Further in her capacity as trustee, with the obligations defined in the provisions of both Regulation 35(1) of the Act

and Management Rule 35 (1), she was entitled to access to the information pertaining to the Loan Agreement from the Second Defendant and to access to all information pertaining to the assets and expenditure from all the Defendants.

She pointed out that the Second Defendant relies upon the decision of **Land and Agricultural Bank of SA v Parker** for its submission that trustees must act collectively. It is apparent from the Plaintiffs' Amended Declaration that at the time when the Fourth and Fifth Defendants signed the Loan Agreement on 2 March 2004, Benny Singh and Mrs Ratcliff were trustees. The resolution authorizing Fourth and Fifth Defendant to conclude the Loan Agreement is not authorized by these 4 trustees collectively. Mr Coetzee found that there was no quorum at this meeting of 2 March 2004. On these grounds alone, the loan is invalid.

She argued that Second Defendant's reliance on the Land Bank decision (*supra*) to preclude their rights of access to information based on the provisions of Regulation 35(1) and Management Rules 35(1) is misconceived. The decision does not support the conduct of the Fourth and Fifth Defendants in their signing the loan on 2 March 2004, without Benny Singh and Mrs Ratcliff. She argued that in **Thorpe and Others v Trittenwein and Others 2007 (2) SA 172 (SCA),** the Court held that the "trust could not be bound by the assent of a single trustee in the absence of the joint decision of the co-trustees" (or the majority if that is all that the trust did require). The power of Fourth and Fifth Defendants to sign the Loan Agreement was dependent upon the collective decision including Benny Singh and Mrs Ratcliff. This was not done. In Thorpe's case, the Court found that the Agreement of sale is void *ab initio* and of no force and effect.

She argued that a trustee, when exercising the powers of Regulation 35(1) and Management Rules 35(1) does so as "an individual trustee". She referred to the **Ingledew v Financial Services Board 2003(4) SA 584 (CC),** in which the Applicant therein relied on the provisions of Section 32 of the Constitution for

information which he required in order to be able to plead. The Court held that he could exercise the right of access to documents through Rule 35 only. In this case, the Plaintiff's also relied for access to information on Regulation 35(1) read with Management Rule 35(1) in order to realize their individual obligations embodied therein.

As regards the maladministration in St. Moritz she argued the evidence before this Court is sufficient to have entitled Plaintiffs to have approached Court for the appointment of an administrator. This Court itself found that there was sufficient evidence before it to justify the appointment of an administrator. The appointment of the administrator on 12 May 2006 is justification of the Plaintiffs' *locus standi* to have approached this Court for relief against all the Defendants.

She dealt at length with the reasons why she and her sister commenced proceedings against the Defendants. Although the factual situation against which the proceedings were launched may not be all that relevant to the issue of *locus standi* I am of the view that it is relevant to the extent that it is crying out for legal intervention to do whatever is possible to resuscitate a terminally ill Body Corporate. I will revisit this question in the conclusion to this judgment. Her reasons are the following: As at the 27th of June 2003 financial statement prepared by Templar, Egleton & Barry the arrear levies were R1,198,820.00 whereas the arrear levies now are approximately R6 million. An increase of approximately R5 million, whilst Second Defendant came in to collect the arrear levies and Fourth Defendant was the Chairman. The increase in levy since 2004 of R2 million to approximately R6 million, is maladministration. Whilst the Second Defendant continued to allegedly lend money to St. Moritz, services were disconnected, the lifts were not working and *inter alia*, with the no insurance on the building. Yet, the debt is at approximately R6 million. From the Financial Statements of 2003, the arrear levy was allegedly R1,198,620.00. In 2002 the arrear levy was R957,560-00. In 2001, it was R723,265.00. She argued that as a trustee, she is entitled to approach Court to disclose these problems and call

for accountability. After the Loan Agreement concluded in 2004, the arrear levy increased at the rate of ±R1 million to R1.5 million annually. Because of the interest charged by Voyager, a special levy was imposed and was put onto the 32 abandoned flats also, in spite of the fact that those owners did not exist. This is maladministration. She submitted that as an owner she has the right to approach Court. Three forensic audits were ordered by Court, which to date, have not been complied with, 62 summonses were allegedly issued against owners in arrears and some flats sold in order to settle the arrear levies. Mr Coetzee the erstwhile Administrator was silent on all these issues. As an owner, she submitted that she has the right to access to all information, which related to her ownership of her units.

On the question of the Body Corporate's obligation to indemnify trustees in terms of Management Rule 12(1) of St. Moritz Rules for the control and management of the building against all costs, losses, expenses and claims which they may incur or become liable by reason of any act done by them in the discharge of their duties, Ms N Cassim submitted that as at 18 February 2005, Plaintiffs were trustees, when the application under case number 2918/05 was instituted. Section 40 of the Act, obliges a trustee to act in good faith, honestly and in the interest of the owners in the Body Corporate. It was in consequence of the Plaintiffs' efforts in approaching Court that a copy of the Loan Agreement was obtained and the AGM of 29 January 2005 compelled. It was revealed by the Administrator, that the books of accounts of St. Moritz Body Corporate were in a chaotic state and there were no individual ledger account since 1998. Second Defendant took cession of the debt. On what records did Voyager take cession, if no individual ledger account existed? It was revealed that the owners' levy accounts were not rectified to reflect their credit payments and consequently they have been precluded from voting at meetings and at the January 2005 AGM, where Second Defendant was present. Three forensic audit orders have since been issued by this Court. Such orders reflect that the financial affairs of St. Moritz are not in order, and the owners are gravely prejudiced, as they will never

be in a position to vote at any meeting on issues which concern their affairs in St. Moritz. There are 32 abandoned flats, all of which have been rented and monies may have not been paid into the account of the Body Corporate. The above are but examples which confirm that the Plaintiffs have at all material times acted in the best interest of the owners of St. Moritz, and have endeavoured to fulfil their obligations in terms of Rule 35(1) to obtain records and information on the assets and expenditure of the Body Corporate.

She argued that Fourth and Fifth Defendants on the other hand, have litigated without the authority and consent of the owners as determined at the AGM of 29 January 2005, and in so doing caused the Body Corporate Flat 32 to be sold in execution in order to pay the legal fees of Attorneys Du Toit, Havemann & Lloyd for the present High Court litigation. Fourth and Fifth Defendants have exceeded their powers as defined in the Act and breached Section 40, by indemnifying the creditor Voyager, (Second Defendant and its employers etc.) against all costs, losses, expenses and claims which it may incur or become liable against the Body Corporate.

I have not referred to the arguments and submissions made by First Plaintiff in person. She is a lay person and had the benefit of Second Plaintiff, her sister's argument. Most of her arguments developed into hysterical outbursts and negative remarks about the Court's conduct of the proceedings.

Second Defendant's Argument

Mr Tobias on behalf of the Second Defendant dealt with the provisions of the Sectional Titles Act in so far as they relate to the *locus standi* of a member of a Body corporate in an action instituted by the member against the Body Corporate.

With regard to the original Claims A and B, he conceded that the Plaintiffs are entitled as owners/members to bring this claim in their own right. Such claims are personal to them.

As regards Claim C he argued that the Plaintiffs have no right to institute such claim. They have no contractual connection with the Second Defendant. Any such claim is limited by the **Foss v Harbottle [(1843) 67 ER 189]** principle. A party who initiates legal proceedings, whether by application or summons, must indicate in the commencing papers that he/she has *locus standi* to bring such proceedings. It would not be sufficient for the litigant to assert that he/she is legally entitled to institute the proceedings.

Mr Tobias questioned the Plaintiffs' right, as members of a Body Corporate, to compel a creditor, Second Defendant, with whom they have no contractual connection to do anything. He argued that there exists no fiduciary, contractual or statutory relationship between Second Defendant and the Plaintiffs; there is not even a fiduciary relationship between the Second Defendant and the Body Corporate.

With regard to Claim D Mr Tobias argued that these claims pre-suppose that an individual member of a Body Corporate has, in law, a derivative right to institute such proceedings as a Plaintiff. He argued that these claims by the Plaintiffs are bad in law, and they have not shown in their re-amended Declaration by what right they bring these claims, save for para 9.1(v).

Originally in the Amended Declaration, [the existing Declaration is the Re-Amended Declaration], the Plaintiffs had a paragraph 1.4(i) which reads:

"(i) Plaintiffs as trustees and in compliance with their duties of a fiduciary nature, are obliged to take this action on behalf of the First Defendant and

pursuant to the provisions of both Sections 35 and 41 respectively of the Act."

The procedure to institute a derivative action envisaged by section 41 of the Sectional Title Act 95 of 1986 was never instituted even though para 9.1(v) of the Declaration remains in the same wording as the previous sub-paragraph namely they were two, (out of five), trustees and they are members of the body Corporate. As erstwhile trustees they have to act jointly with the other trustees. As owners they are statutorily confined to the limitation imposed by section 41 of the said Act – hence their previous reliance on that section.

He submitted however that the nature of Plaintiffs' claims, apart from those validly instituted as conceded does not warrant an exception to the **Foss v Harbottle** rule. He argued that there are several factors why the Court should not relax the **Foss v Harbottle** rule, namely:

(i) The decision to enter the loan was approved by a majority of the members of the Body Corporate. The administrator has said the loan was necessary and cheaper than the Municipality charges;
(ii) The decision was thereafter ratified at a duly constituted AGM when the Plaintiffs' resolution in regard to opposition to the loan was defeated by a substantial majority;
(iii) A derivative action means that the Plaintiffs are stepping into the shoes of the Body Corporate. This is totally irreconcilable with the Plaintiffs' claim for costs against the Body corporate. There is an unquestionable conflict of interests if Plaintiffs act for the Body Corporate as well as against it;
(iv) An examination of the individual causes of action against Second Defendant shown that even had the Body Corporate itself been the Plaintiff, the Body Corporate itself would not have been entitled to relief under Claim C, Claim E and the second Claim E.

There exists solely a debtor/creditor relationship with the Second Defendant and the Body Corporate. He argued that the compelling of documents can only be maintained where there exists a fiduciary relationship; a contractual duty and a statutory duty.

In conclusion Mr Tobias submitted that one of the Second Defendant's main concerns has been the plight of the unfortunate members of the Body Corporate. This whole saga has not brought any benefit to these persons and their position has, in fact, became worse. He stressed that in the pleadings, it is not the Second Defendant who seeks an order for costs against these people. The Plaintiffs, who claim to act both for and against the Body Corporate are the ones claiming costs. Quite obviously, the Body Corporate urgently needs a cash injection: this has been the position throughout these entire proceedings. It would, however, be ludicrous for the Second Defendant to advance any large sums of money to the Body Corporate when the Plaintiffs maintain that the Voyager agreement is invalid, despite the fact that the Administrator has accepted the agreement and utilized funds from Voyager to the benefit of the Body Corporate. The evidence has clearly established, despite some initial carping by the Second Plaintiff, that the Voyager loan was cheaper than that which the Municipality charges. Mr Michael Wright in his evidence, also mentioned that the Plaintiffs' would-be investor or any investment from this un-named investor was "pie in the sky". This goes to show that if a genuine investor wishes to invest, now or in the future, the contract is quite capable of being terminated on 3 months' notice. In the meantime, the unfortunate members of the Body Corporate are suffering. It is and was of paramount importance for Voyager to have a firm and binding decision on the validity of its contract by a senior judge. It must be stressed that there are other bodies corporate with largely similar contracts. Had the trial proceeded without all the side issues which the Plaintiffs have brought up, the validity of the Loan agreement would and could have been decided at least within the time of the earlier session thereby assisting other bodies corporate from embarking on

unnecessary extensive and expensive litigation, the costs of which would be born by other bodies corporate. We are not progressing. That is why the lack of locus was raised at this stage in order to obviate yet a further 5 or even 10 days of interminable trial. The cost of these proceedings is virtually sealing the financial ruin of the body corporate which surely cannot be in anybodies interest.

Mr Singh also appearing for the Second Defendant addressed me on the plaintiffs' reliance upon various provisions of the Bill of Rights for *locus standi.* He supplemented his argument with helpful Heads of Argument.

He submitted that in respect of claim D in which the relief is directed at interfering with a contract concluded between the Body Corporate and the Second Defendant, the plaintiffs are not parties to the contract. Mr Singh argued that the plaintiffs have not brought the proceedings in a representative capacity on behalf of the body corporate. Nor do they enjoy derivative rights to sue. He relied on **Gross & Others v Pentz 1996 (4) SA 617 (A) at 625 F – G & 632 G – I** for this submission. He submitted that the capacity in which the plaintiffs allegedly sue differ in that the First Plaintiff claims to act in her own interest and on behalf of a class of persons or both; and the Second Plaintiff that she is acting in her own interest.

The plaintiffs contend that their rights in terms of section 25 of the Bill of Rights have been infringed or threatened by the contract. The plaintiffs contend that this permits them to rely upon the broader recognition of standing provided in section 38 of the Bill of Rights. Section 38 can only be relied upon where a right in the Bill of Rights has been infringed or threatened. More importantly, section 38 cannot be relied upon where a right in the Bill of Rights is not infringed or threatened. Claims brought upon rights under the common law or statute, must be decided on the ordinary rules applicable to standing. The ordinary rule is that the plaintiff must have a direct and substantial interest in the claim that is brought. To have a direct and substantial interest requires a legal interest in the

claim, and not an indirect interest in rights that vest in some other person. The plaintiffs have not pleaded that they rely upon any rights in the Bill of Rights in claiming the relief. It is trite that where a constitutional right is relied upon it is incumbent upon the claimant to allege which right is relied upon and the grounds on which it does so. In this regard he referred to **Prokureursorde van Transvaal v Kleynhans 1995 (1) SA 839 (T).**

Relying on **Beukes v Krugersdorp Transitional Local Council & Ano. 1996 (3) SA 467 (W) at 472 & 474** he argued that the plaintiffs have also not alleged that they act on behalf of a class of persons, and identified who such persons are.

He argued that important consequences arise from a suit brought as a class action as is stated by and referred to the following extract from **C Loots, Constitutional Law of South Africa, pg 8-7**

> "*The concept of an action being binding upon persons not party to the action, in the sense that it will be res judicata against them, is foreign to South African lawyers, since class actions have never been part of our law. It is important to realize that where the action fails on the merits members of the class will be prevented from taking the same issue to court themselves. For this reason due process requires that class members be given notice of the action and the opportunity to exclude themselves from the class if they could be prejudiced by a decision given in the matter. If a judgment is to have binding effect on the members of the class, the court should consider whether notice to the class members is necessary and what type of notice is appropriate."*

Relying on **Ingledew v Financial Services Board 2003 (4) SA 584 (CC) at [23] – [24]; Transnet Ltd & Others v Chirwa 2007 (2) SA 198 (SCA) at [37] – [42]**

he submitted that the plaintiffs cannot rely upon a constitutional provision where a statute affords an adequate remedy to the claimant to deal with their grievance.

He argued that the Plaintiffs enjoy adequate remedies under the Sectional Titles Act in that section 41 provides a comprehensive statutory right for an owner of a sectional title unit to seek the appointment of a *curator ad litem* to bring proceedings in the name of the body corporate, where the body corporate has not instituted proceedings for the recovery of damages or loss or where it had been deprived of any benefit in respect of a matter mentioned in section 36 (6) of the Act. He referred to **Wimbledon Lodge (Pty) Ltd v Gore NO & Others 2003 (5) SA 315 (SCA)** in support of his argument.

He also referred to section 46 which provides that an owner of a sectional title unit may apply for the appointment of an administrator and that he has the powers and duties of the body corporate or such of those powers and duties as the Court may direct. This is a broad power that enables an owner to have an administrator exercise some or all of the powers and have duties of the body corporate. The owner may raise the matter at an annual general meeting or special general meeting for the meeting to give directives to the trustees; and the owner has the right to have the dispute with the body corporate resolved by way of arbitration. In support of his argument in this regard he referred to **Body Corporate of Greenacres v Greenacres Unit 17 CC 2008 (3) SA 167 (SCA).**

He argued that in the light of the carefully constructed remedies in the Act, which was carefully thought out, balancing the individual owner's interest and the collective interest of owners, there can be no justification for the contention that the plaintiffs' section 25 rights are infringed by the Act in not affording the owner a direct remedy. Put another way, the plaintiffs' section 25 rights are not infringed by the contract. The contract does not in any way deprive the plaintiffs of any property. In the absence of any deprivation of the plaintiffs' property it is incomprehensible for the plaintiffs to contend that their section 25 rights are

infringed or threatened. Section 25 of the Constitution does not afford the plaintiffs a remedy against the third party who has contracted with the body corporate, if they disapprove of the contract. The basis on which the plaintiffs contend that their section 25 rights are infringed or threatened, is to postulate a sequence of events that could result from the contract. This raises a purely hypothetical issue, and cannot form the basis for an infringement of section 25 rights.

He argued that the plaintiffs reliance upon – **McCarthy & Others v Constantia Property Owners' Association & Others 1999 (4) SA 847 (C) and Highveldridge Residents Concerned Party v Highveldridge Traditional Local Council & Others 2002 (6) SA 66 (T)** is misplaced. In McCarthy the members brought the proceedings in a representative capacity asserting the right of the association, and not an individual interest in the form of some derivative right that in law did not vest in them. In Highveldridge the association represented a group of concerned residents and acted on behalf of a class of persons. This is not the case here.

Dealing with **CLAIMS C, E & G** he argued that the first plaintiff referred to section 32 of the Bill of rights in the heads of argument in relation to claims E and G on the basis that these claims have to do with access to information. Claim C relates to access to documents but neither of the plaintiffs in their heads of argument refer to section 32 in relation to Claim C. Since neither of the plaintiffs rely upon section 32 for the relief in Claim C, it follows that they do not rely upon any constitutional right for this claim, hence they do not rely upon the broader basis for standing in section 38 of the Constitution to seek this relief. Accordingly for the purposes of Claim C their *locus standi* must be determined on the ordinary principles for standing. The second plaintiff in her argument sought to rely upon her status as a trustee to claim access to the documents in terms of Claim C from second defendant. A trustee cannot act alone, but has to act as a collective with the other trustee. In addition she can only advance those rights

that vest in the body corporate, but she has stated that "we never contended we act on behalf of the body corporate". This must therefore render her claim in terms of Claim C bad in law. Section 39 of the Act makes it plain that trustees must act collectively when exercising the functions and powers of the body corporate. This must include litigation. This principle is a restatement of the common law. In this regard Mr Singh referred to **Land & Agricultural Bank of SA v Parker 2005 (2) SA 77 (SCA); and Thorpe & Others v Trittenwein & Ano. 2007 (2) SA 172 (SCA)**

As regards the plaintiffs' claims for an accounting, he argued that this claim cannot be advanced on the basis of section 32 of the Bill of Rights. Section 32 relates to existing information that is held by another person. The relief claimed is not in relation to existing information, but for something that has still to be compiled on the basis of an obligation that arises in law and if the order is granted. On this basis alone the reliance upon section 32 is misplaced. As far as reliance upon section 32 is concerned, this is not permissible on the same principles aforementioned where legislation exists that affords remedies relating to access to information. Section 32 (2) provided that national legislation must be enacted to give effect to the right in section 32 (1). Pursuant to this constitutional mandate, the Promotion of Access to Information Act, 2 of 2000 ("the PAIA") was passed. This means that the plaintiffs must exercise their rights of access to information in terms of the PAIA. It is only if they contend that the PAIA is unconstitutional and thus infringes their right of access to information because it does not adequately provide for their constitutional right that they can rely upon section 32 (1). No such case was ever advanced in the pleadings or in argument. In this regard Mr Singh relied on **Ingledew (supra) at [25] – [29]**

Relying on **CCII Systems (Pty) Ltd v Fakie & Others NNO 2003 (2) SA 325 (T) at [21]**, Mr Singh submitted that In terms of the PAIA they do not enjoy a right of access to information inasmuch as they have not complied with section 83

thereof. In addition in terms of section 7 the PAIA does not apply after the commencement of civil proceedings.

In conclusion he argued that, the plaintiffs cannot rely upon section 38 of the Constitution for standing. Accordingly their *locus standi* must be determined according to the ordinary common law principles which has been dealt with in the heads of argument of Mr. Tobias, from which it is plain that the plaintiffs do not have *locus standi*.

Third, Fourth and Fifth Defendants' Argument

Mr Levin on behalf of the Third, Fourth and Fifth Defendants submitted that the Heads of Argument of the Second Defendant are comprehensive and accurately reflect the true facts in the matter and the law regarding *locus standi* and the Third, Fourth and Fifth Defendants and Brink Property Administration align themselves where applicable with Second Defendants' argument.

He argued that the Plaintiffs, in their multitude of applications and actions, cite themselves in their personal capacities and not as trustees with the one exception that in their amended Declaration they belatedly refer to themselves as trustees but do not plead that they act on the authority of the majority of the trustees in office at the time as is required by Management Rule 22 nor do they claim that they have the necessary *locus standi* to bring their actions and applications, this notwithstanding the fact that the Plaintiffs were only trustees over the seven month period 29 January 2005 to 29 August 2005.

At paragraph 9.1.(v) of the Plaintiffs' amended Declaration, the Plaintiffs claim that they were obliged to take the action referred to in the Declaration on behalf of the first Defendant, the Body Corporate of St Moritz, yet in their Declaration and the applications that followed, the Plaintiffs sued *inter alia* the Body Corporate and claimed costs against the Body Corporate. Had they acted solely

in their capacities as owners as they claimed to have done, the Plaintiffs were obliged to comply fully with the provisions of Section 41 of the Sectional Titles Act but failed dismally to do so and nevertheless, having claimed that they had complied with Section 41, they proceeded to sue the Body Corporate, the very *persona* they claim to protect.

Mr Levin argued that the Plaintiffs had at their disposal alternate remedies other than those they adopted in their several actions and applications. The alternate remedies are Arbitration in terms of Management Rule 71(1). They also had remedies in terms of the provision of Section 41 of the Sectional Title Act; a resolution of the majority of owners at the Annual General Meeting; a resolution of the majority of owners at a Special General Meeting and a directive to trustees in terms of Section 39(1) of the Sectional Title Act.

He submitted that the Plaintiffs have a combined participation quota of 2.4 percent and yet they purport to represent the interests of the majority of the owners. The Plaintiffs have failed to prove such support nor have they joined the alleged supporters as co-Plaintiffs nor co-Applicants in their many legal challenges. A party that launches legal proceedings, whether actions or applications, must indicate in their founding papers that they have the necessary *locus standi* to bring such proceedings.

Consideration of the Arguments

I do not intend to deal at length with the argument with regard to the relevant provisions of the Sectional Titles Act. I have incorporated the parties' argument as comprehensively as possible in this judgment. However for completeness sake section 41 of the Act is set out hereunder:

"41 **Proceedings on behalf of bodies corporate.-** (1) When an owner is of the opinion that he and the body corporate have suffered damages or loss or

have been deprived of any benefit in respect of a matter mentioned in section 36 (6), and the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit, or where the body corporate does not take steps against an owner who does not comply with the rules, the owner may initiate proceedings on behalf of the body corporate in the manner prescribed in this section.

(2) (a) Any such owner shall serve a written notice on the body corporate calling on the body corporate to institute such proceedings within one month from the date of service of the notice, and stating that if the body corporate fails to do so, an application to the Court under paragraph (b) will be made.

(b) If the body corporate fails to institute such proceedings within the said period of one month, the owner may make application to the Court for an order appointing a *curator ad litem* for the body corporate for the purposes of instituting and conducting proceedings on behalf of the body corporate.

(3) The court may on such application, if it is satisfied –

(a) that the body corporate has not instituted such proceedings;

(b) that there are *prima facie* grounds for such proceedings; and

(c) that an investigation into such grounds and into the desirability of the institution of such proceedings is justified,

appoint a provisional *curator ad litem* and direct him to conduct such investigation and to report to the Court on the return day of the provisional order.

(4) The Court may on the return day discharge the provisional order referred to in subsection (3), or confirm the appointment of the *curator ad litem* for the body corporate, and issue such directions as it may deem necessary as to the institution of proceedings in the name of the body corporate and the conduct of such proceedings on behalf of the body corporate by the *curator ad litem."*

This section, in my view is the alpha and omega of the enquiry into the Plaintiffs' *locus standi* and provides an adequate remedy for an aggrieved member of the Body Corporate in the circumstances of this case.

The short answer to the Plaintiff's argument is that they lack *locus standi* under the Section Titles Act in any claim in which the Body Corporate would have had *locus standi*.

As far as the Plaintiff's reliance on the Bill of Rights is concerned Mr Singh's submission on behalf of the Second Defendant, that the Plaintiffs have not pleaded reliance on any rights in the Bill of Rights, is unfounded. The Constitutional issue is raised in paragraphs 12 of the Plaintiffs' reply to the Second Defendant's Amended Plea in which the lack of *locus standi* on the Plaintiffs' part is raised by way of a point *in limine.* I should however state in his defence that even this Court, who has been steeped in this trial for a number of years, had to scrutinise pleadings in excess of 366 to establish that the Constitutional issue had in fact been raised in the pleadings.

If one has regard to the dire financial straits in which the Body Corporate finds itself and the Plaintiffs' tenacious efforts to get the Body Corporate on even keel, it is clear that the equities are crying out for some assistance to the Plaintiffs in their quest to protect their own investment in St Moritz and the investment of the members of the Body Corporate who support their litigation in the present case. One is tempted to seek an equitable answer where after a number of years in which the initial appointment of a *curator-ad-litem* resulted in nought when he was discharged after a couple of months, thereafter to be followed by the appointment of an administrator whose investigation into the affairs of the Body Corporate and their trustees were inconclusive at the stage when he was discharged because of ill health. One can understand the Plaintiffs' frustration and their stance that the trial should proceed on the merits without a *curator-ad-litem* and/or an administrator. However, as much as any court will do its utmost to give an equitable judgment, based on sound legal principles, one knows that in practice this result is not always achievable.

The Letseng Diamond and Trinity Asset Management decisions (*supra)* relied upon by the Plaintiffs, unfortunately in my judgment, do not lend support to Ms N. Cassim's argument that her and her sister's Constitutional rights have been infringed.

The procedure provided for in section 41 of the Act is available to them. They have not attacked the Constitutionality of section 41, instead they decided to side-step the section. There is in my judgment no substance in their argument that their Constitutional rights have been infringed. The procedure laid down in section 41 of the Act is available to them.

I am satisfied that section 41 of the Sectional Titles Act protects an aggrieved owner "and the body corporate who have suffered damages or loss or have been deprived of any benefit in respect of a matter mentioned in section 36(6) and where the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit", by providing for the appointment of a *curator-ad-litem* at the request of an aggrieved owner, provided the court is satisfied that the requirements of section 41(3) have been met.

The present trial has developed into quagmire of applications, enquiries, counter applications, objections to procedures, complaints to the Judicial Service Commission, the appointment of an *amicus curiae* to assist this court on the question of a potential *meru motu* recusal following complaints by the plaintiffs of incompetency of this court with the suggestion that a senior judge be appointed to assist in the further conduct of the trial. The least said about the chaotic and disruptive progress of this trial the better.

The only way forward, with some prospect of concluding this trial within a reasonable and acceptable time frame, is for the appointment of a *curator–ad-litem* in terms of section 41 of the Act who should *inter alia* be given the powers to consider the prospects of success of the Plaintiffs' claims and if so satisfied to

approach this Court for the necessary powers to intervene and take over the prosecution of the Plaintiffs' claim.

Mr Singh, on behalf of the Second Defendant argued that should this court hold that the Plaintiffs do not have *locus standi* in the claims identified, those should be dismissed.

I am not persuaded that such a judgment would be in the interests of the Plaintiffs and the Body Corporate. Too much time has been wasted because of the Plaintiffs' lack of *locus standi* and the possibility of prescription looms should the Plaintiffs' claims be dismissed

Because of the confusing cross-reference procedure followed by the Plaintiffs in the amendment of their claims and despite the fact that I am satisfied that they lack *locus standi* in Claim C, D and E, I thought it wise to put it beyond doubt that their lack of *locus standi* cover all claims in which they were obliged, but failed to, follow the procedure provided for in section 41 of the Sectional Titles Act.

As far as costs are concerned I am satisfied that costs should follow the event. The Sixth Defendant was not before Court and did not incur any costs.

I grant the following relief:

1. The First and Second Plaintiffs lack *locus standi* in respect of all claims in which they were obliged but failed to follow the procedure provided for in section 41 of the Sectional Titles Act and more specifically lack *locus standi* in respect of Claims C, D and E.

2. The First and Second Plaintiffs are to pay the Second, Third, Fourth and Fifth Defendants' costs pertaining to the Rule 33(4) application and the

hearing of argument on the issue of *locus standi.*

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DATE OF DELIVERY: **11/06/10**

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SECOND PLAINTIFF APPEARED IN PERSON

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FIRST DEFENDANT'S COUNSEL: **NO COUNSEL**

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THIRD, FOURTH and FIFTH DEFENDANTS' COUNSEL: **ADV. E. LEVIN**

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SIXTH DEFENDANT'S COUNSEL: **NOT BEFORE COURT**

SIXTH DEFENDANT'S ATTORNEYS **NOT BEFORE COURT**