IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

REPORTABLE

CASE NO. 13500/2010

In the matter between:

A GRUNDLER N.O.	**APPLICANT**
and	
MAUREEN JULIA RAMBADURSING	**RESPONDENT**

JUDGMENT

Rall AJ,

[1] This judgment deals with the relationship between administrators and trustees of sectional title schemes.

[2] The applicant is the administrator of the scheme known as Bencorrum. He was appointed by this Court on 24 June 2009 in terms of s46 of the Sectional Titles Act 95 of 1986 ("the Act"). The order was made at the request of six applicants, with the body corporate as the respondent.

[3] The order reads as follows[1]:

1 I have corrected typographical errors.

"1. *That Andre Grundler is appointed to act as an Administrator of the Respondent in terms of Section 46 of the Sectional Titles Act, 1986 as amended.*

2. *That the said Administrator shall exercise the powers and perform the duties contained in the said Act.*

3. *That the terms of appointment of the Administrator shall be for a period of 24 months from date of appointment provided that the Administrator may, if necessary, apply to Court for any further directions in the event of the Administrator not being able to carry out any of the said functions for any good reason.*

4. *That the attorneys representing the Applicants and the Respondent consult and agree the nomination of a new managing agent and attorney to replace the present incumbents within 21 days from the date of this order.*

5.1 *That the Administrator shall convene a general meeting of the Respondent's members within 30 days from the granting of this order to appraise them of the Respondent's current financial position, and outline a plan of action for the 24 months period of his tenure.*

5.2 *At the meeting referred to in 5.1 above the Administrator is to call for the nomination of interim trustees, who shall upon their election be entitled to make recommendations to the Administrator in respect of the running of the affairs of the Respondent, within the ambit and subject to the powers granted to him by Section 46 of the Sectional Title Act.*

5.3 *That the Administrator shall at the meeting referred to above and in consultation with the interim trustees as elected, appoint an attorney and managing agents to replace the present incumbents, John Dua and*

Company and Elsie Marketing respectively.

6. *That the Administrator shall convene a general meeting once every three months, to engage the Respondent's members in respect of the Respondent's financial situation and their general concerns regarding the building.*

7. *That the Administrator shall at least thirty (30) days prior to the expiration of his term of appointment, convene a meeting of all members of the Respondent for the purposes of electing and appointing a Board of Trustees and shall call upon such members to nominate trustees to be appointed to the Board of Trustees of the Respondent.*

8. *That the Administrator shall be remunerated at the rate of R500.00 per hour subject to a maximum fee of R6000.00 per month and the Respondent shall be liable for and pay the Administrator's actual travelling expenses, the expenses if any of his assistant and the recovery of disbursements necessarily incurred in the execution of the Administrator's duties.*

9. *That the costs of this application be borne by the Respondent."*[2]

[4] As can be seen from paragraph 5 of the order, the applicant was required to convene a general meeting of the members of the body corporate at which *inter alia*, interim trustees were to be elected. This meeting was held and the respondent was elected as one of the interim trustees.

[5] This application is for a final interdict aimed at preventing the respondent from interfering with the applicant in the execution of his duties as administrator. The applicant brings the application in his capacity as administrator. However, the respondent is cited in her personal capacity.

2 The order was subsequently amended but that amendment is irrelevant to this judgment.

[6] On 9 December 2010 a *rule nisi* was granted and the applicant seeks confirmation of the rule. The rule reads as follows[3]:

> *"That a rule nisi do hereby issue calling upon the Respondents to show cause, if any, on **23 DECEMBER 2010** at 09h30 or so soon thereafter as the matter may be heard why an order should not be granted interdicting the Respondent from:-*
>
> *a) issuing instructions, either directly or indirectly, or interfering, in any way, with employees and service providers appointed by the Body Corporate of Bencorrum (hereinafter referred to as "Bencorrum"), other than if requested to participate by the Administrator or the Managing Agent or on their express instruction;*
>
> *b) becoming personally involved in the daily operational aspects of Bencorrum other than by way of submissions in writing, to the Administrator, Managing Agent or Building Agent;*
>
> *c) requesting or demanding that employees and service providers report to her on affairs or matters that concern Bencorrum*
>
> *d) making recommendations to the Administrator only after such recommendations have been agreed to by a properly constituted meeting of elected interim trustees.*
>
> *e) In general not to do anything which shall interfere with or in any way obstruct the Administrator in the execution of his duties as Administrator*
>
> *2. That the provisions of paragraph 1 shall operate immediately as an interim order pending the outcome and final determination of this application."*

3 Once again, typographical errors have been corrected.

[7] Before dealing with the allegations made by the applicant, it is necessary to consider the effect of the order of 24 June 2009 ("the order"), particularly paragraph 5.2 thereof. This can only be done against the background of the Act.

[8] First, some general observations. The body corporate is the juristic person created by the Act to manage sectional title schemes.[4] The owners of units in the scheme are members of the body corporate[4] and they elect trustees to carry out certain functions on their behalf.[5] The situation is analogous to that of a company, its members and directors.

[9] The powers and duties of a body corporate are dealt with in sections 37 and 38 of the Act. The latter section lists the powers of a body corporate. It is apparent from the former what a body corporate's duties are because it states that a body corporate shall perform the functions entrusted to it by the Act and the rules, including the eighteen functions listed in that section. It would be fair to say that a body corporate's powers and duties *"contained in the said Act*" (see paragraph 2 of the order) are, to paraphrase paragraph 5.2 of the order, those needed for running the affairs of the body corporate.

[10] In terms of s39 of the Act the functions and powers of the body corporate shall, subject to the provisions of the Act, the rules and any restriction imposed or direction given at a general meeting of owners of sections ("owners"), be performed and exercised by the trustees holding office in terms of the rules. It is clear from s39, the rest of the Act and the rules that the primary responsibility for the day-to-day running of a body corporate rests on its trustees. The owners however have overall control of the body corporate. The situation is much like that of members and directors of a company.

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4 S36
5 S39 and Management Rule 6

[11] In terms of s46(3) of the Act an administrator "*shall, to the exclusion of the body corporate have the powers and duties of the body corporate or such of those powers and duties as the Court may direct"*. In my view this subsection is clear. Firstly, unless the court restricts the administrator's powers and duties the administrator has all the powers and duties of the body corporate.

[12] Secondly, the administrator's powers and duties are held to the exclusion of the body corporate. This means that for so long as the administrator holds office, whatever powers and duties he is given, are no longer possessed by the members or trustees of the body corporate.

[13] This must be so. Although the Act sheds no light on the circumstances under which an administrator should be appointed, our courts have done so. In **Bouraimis v Body Corporate of the Towers 1995(4)SA 106 (D)**, Booysen J stated the following at 109 G-H:

> *"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 s39 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."*

[14] Gautschi AJ referred with apparent approval to the above test in **Dempa Investments v Body Corporate, Los Angeles 2010(2)SA 69 (W)** at 80 D. The learned judge then went on to lay down the principles to be applied in an application for the appointment of an administrator. For present purposes it is not necessary to list them all. However, the court made it clear that special circumstances or good cause must be shown before an order will be granted.

Without attempting to define special circumstances or good cause the learned Judge went on to state[6]:

> *"… but as a minimum there should be*
>
> *[21.3.1] some neglect, wilfulness or dishonesty on the part of the trustees, or an event beyond their control; and*
>
> *[21.3.2] a likelihood that the owner of units will suffer substantial prejudice if an administrator is not appointed."*

[15] It is apparent from these two cases that administrators do not get appointed to manage the affairs of well run bodies corporate. This only happens in exceptional cases, and in my view, only where the trustees and owners have proved incapable of resolving the difficulties being experienced by the body corporate. Furthermore, I consider that the purpose of the appointment of an administrator is to turn the body corporate around. It would therefore run counter to the purpose of appointing an administrator to allow the members and trustees to retain many of their powers and duties.

[16] In addition, to allow the administrator on the one hand and the members and trustees on the other, to exercise the same powers and perform the same duties simultaneously, is self evidently a recipe for disaster, irrespective of the competence of the trustees.

[17] It is apparent from the order that at the time of the applicant's appointment Bencorrum had no trustees. Why this was so, does not appear from the papers. However, this factor is no doubt what prompted paragraph 5.2 of the order to be made. Paragraph 5.2 provides for the election of so-called interim trustees and the order then states what rights the interim trustees will have.

[18] It was argued on behalf of the respondent that the fact that this court ordered

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6 At 82B-C

trustees to be appointed for Bencorrum meant that these trustees would have all the powers and duties of trustees in terms of the Act. I do not agree. As I have already found, in terms of s46(3), the appointment of an administrator temporarily divests the trustees of their power and duties. In my view, the fact that this court ordered the appointment of trustees makes no difference. The court was simply ensuring that a void was filled, one which could not have been filled without such an order. It could not be filled because the appointment of the applicant deprived the members of their rights, one of which is to elect trustees.

[19] As was held in the Dempa Investments case[7] there is nothing in s46 which prevents a court from appointing an administrator when there are existing trustees. In other words, an appointment is not limited to situations where there are no trustees. Accordingly, the fact that the order of 24 June 2009 required trustees to be elected, does not mean that these trustees would be different from ones elected before the applicant's appointment.

[20] Finally, there is no magic in the fact that the order refers to the trustees as interim trustees. In my view, this was merely to denote that the trustees were to hold office during the administratorship, or to be more precise until the election of the trustees referred to in paragraph 7 of the order. It would seem that it was anticipated that the administratorship would end after the initial two year period and therefore that the trustees elected in terms of paragraph 7 would then take over from the applicant. The reason for the election of trustees was probably to ensure that the members, through their representatives could have some input in the management of the body corporate, something which the Act does not expressly provide for.

[21] In this case there is no limitation on the applicant's powers and in fact, paragraph 2 of the order expressly states that the applicant has the powers and duties "*contained in the said Act*". Accordingly, subject to the qualification

7 At 79F-H

mentioned below, the applicant was entitled to exercise all the powers and duties of the body corporate.

[22] The applicant's powers were limited by paragraphs 5.2 and 5.3 but, only paragraph 5.2 is relevant to this case. That paragraph gives the interim trustees the right to make recommendations to the applicant in respect of the running of the affairs of the body corporate.

[23] It is arguable that the interim trustees would have had this right even without the order. Nevertheless it is quite clear that this right is very limited and this is because the order expressly makes it subject to the powers granted to the applicant by s46. In my judgment therefore, the interim trustees are limited to making recommendations, unless authorized by the applicant to do more than that. I must stress however, that where a trustee is authorized by the applicant to perform some or other function in connection with the body corporate, that trustee performs that function not as trustee, but as the duly authorized agent or employee of the applicant in his capacity as administrator. In such a case, the interim trustees are in no different a position to trustees of any other body corporate under administratorship.

[24] It follows from what I have already said that the applicant has the right to manage the body corporate to the exclusion of the members and the interim trustees, including the respondent. It follows therefore that the applicant has established the first requirement for an interdict, namely a clear right.

[25] The applicant contends that the respondent has violated his rights by interfering in the management of Bencorrum, and that without an interdict, this unacceptable conduct is likely to continue.

[26] I turn now to consider some of the applicant's complaints. In doing so, I am mindful of the fact that the applicant seeks final relief and so the well known

Plascon Evans test[8] must be applied.

[27] The following is common cause between the parties:

1. In an e-mail dated 13 October 2009, the respondent stated the following to the applicant:

> *"As trustees we have come to a decision and have appointed Rob Millar to do the following on our behalf:-*
>
> *''1. Keys to both offices are handed to him for any emergencies that may arise within the 24hour periods in the absence of the manager or caretaker in future.*
>
> *2. Rob Millar will oversee the Manager in his duties and all staff of Bencorrum including security and must ensure that Bernard Unger does not prevent Andrew from carrying out his duties as agreed by the managing agent.*
>
> *At the rate of R9000+ I believe he does need to provide a service that we the owners will benefit from, however should he not be able to perform in his duties he will have to be relieved of his duties and replaced by a more competent and efficient manager.*
>
> *3. All business quotes, contractors' repairs, etc will be overseen by Rob Millar as he has made himself available and will report to the Trustees*

8 Laid down in Plascon Evans Paints v Van Riebeeck Paints 1984(3)SA 623(A) at 634

and keep us informed of the management services in the building."

2. By email dated 3 September 2010 the respondent stated to the managing agent in connection with the cleaning of the building "*kindly report to me by 12h00 today as this cannot continue*"

3. In her email to the applicant on 22 September 2010, the respondent issued instructions to the applicant in peremptory terms. She stated:

> "*I noticed that you and Andrew met with lift consultants and Andrew also took pictures for the companies of the buildings lift shafts. I was not advised by Andrew of this meeting, kindly advise why?*
>
> *…Apparently the lifts stopped working last Saturday and have still not been repaired by Express Lifts. Kindly advise why? I have read an article in the news paper two days ago that the lift situation is serious and must be attended to…*
>
> *…Kindly forward me all correspondence from Express Lifts by close of business tomorrow…"*

4. By email dated 5 October 2010 the respondent stated the following to the managing agent:

> *"Dear Mr Felton*
>
> 1. *I want to remind you that you have been appointed by*

Bencorrum Body Corporate on a 'MASTER & SERVANTS" (sic) relationship and therefore do not go beyond your duty in terms of the Sectional Titles Act.

2. *In future we as trustees must be advised who the service providers are that have presented their quotes according to the spec. It will be in the best interest of the body corporate for the trustees according to the portfolio's to liaise with the service provider.*

3. *One that is accepted it must be signed by 3 trustees and the trustee in charge of the portfolio must oversee that the work is done properly.*

4. *Once the job is done and if all the 3 trustees are satisfied with the workmanship the invoice would then be presented and again 3 trustees must sign the invoice for payment.*

5. *Please arrange with the BANKING INSTITUTIONS THAT 3 (three) trustees are signatories to all cheques as from today 05/10/2010.*

6. *We are fully aware what Managing Agents are doing and let it not go beyond this whereas (sic) it leads to FRAUD as this could be proved beyond any doubts (sic).*

Let this working relationship be on a 'MASTER & SERVANTS" in future until your tenure (sic)."

[28] In addition, there are allegations which the respondent has not dealt with properly. She simply responded to them with a bare denial. Such a response does not create a true dispute of fact, and so the applicant's version must be accepted on these issues. Examples of these are:

1. The respondent ordered Bencorrum employees to move furniture; and

2. She interfered with an employee of Bencorrum, the building manager in the execution of his duties by telling him on 22 October 2010 that he was a servant and she (the respondent) was the master, that he should remember his place, and that she would back down for no one.

[29] It is common cause that by letter dated 8 October 2010 the applicant, through his attorneys, pointed out some respects in which the respondent had interfered with the applicant in the carrying out his duties and called upon him to undertake to comply with various demands.

[30] The respondent failed to give the undertaking. In fact, in a letter from her attorneys it was denied that the respondent had done anything wrong and the respondent refused to give any undertakings. In this letter the following was stated:

"Our client is entitled to enquire, query, question, find out and make decisions with her fellow trustees regarding service providers, employees, security personnel, managing agents and the lift service providers, after

all it is the unit owners (including our Client) that pay monthly levies to the Body Corporate fund in order to pay for services provided to the building. Your Client should be more co-operative with the interim trustees as he is also being paid remuneration for his services."

[31] Furthermore, as appears from paragraph [28] above, the applicant persisted in her attitude even after receipt of the letter of demand.

[32] On the face of it therefore, the applicant has shown both that his rights were violated and that they were likely to be violated in the future.

[33] However, it was argued that the applicant was not entitled to an interdict because he had authorized the interim trustees to perform certain functions in relation to Bencorrum. Reference was made to the trustees meeting of 22 February 2010 at which trustees were assigned various portfolios. The respondent was assigned the security and cleaning portfolios. However, this delegation was very limited, as explained in the applicant's e-mail to trustees of 6 May 2010, in which the following was stated:

"*Further to the e-mails below and operational documents attached including the minutes of a meeting where portfolios were assigned, I wish to confirm that I support trustee involvement in the rehabilitation challenges facing Bencorrum. The participation at present has been largely limited to substantial involvement of Mrs Rambadhursing. Participation by trustees however needs to take into account the operational responsibilities and accountability specific to Bencorrum, which includes final responsibility and accountability by the administrator and thereafter that of employees and the managing agent. The trustees are not accountable under the High Court Order and accordingly in my view cannot be assigned responsibilities to act in the capacity which trustees would ordinarily do in a self managed body corporate.*

In summary, I support that the interim trustees are in place to represent owner interests and concerns in the rehabilitation of Bencorrrum. The participation however needs to remain advisory and inclusive, without trustees assuming the responsibilities and functions of the administrator, employees or the managing agent. It is on this basis that the operational responsibility document was tables (and agreed) at the last trustee meeting.

The operational structure as tabled in my view does not conflict with the provisions of the Court Order. In sundry matters, in the interests of containing my input and costs, the trustees would interact with the building manager in their relevant portfolio areas, which then gets directed to the managing agent, who will where appropriate involve the administrator. The building manager is obligated to involve and keep the relevant portfolio trustees informed in all relevant matters. The managing agent's authority to act at this level is on the basis of responsibilities I have assigned in terms of the powers available to me as appointed administrator. It needs to be considered that we are holding monthly trustee meetings where key matters are jointly addressed between the administrator, trustees and the managing agent. Further, the process does not preclude any trustee from raising matters directly with me or the managing agent.

A meeting has been called for tomorrow morning 09h00 at Bencorrum, between myself, the managing agent, building manager and Mrs Rambadhursing, to finalise the position relating to participation by trustees. All trustees are welcome to attend. "

[34] The applicant's attitude was spelt out in equally clear terms in his letter to owners of 20 May 2010. The applicant stated the following:

"*Various matters have arisen which appear to have created confusion relating to the nature of the involvement of interim trustees in the management and control of Bencorrum, which are clarified below.*

The provisions of the High court Order relating to the appointment of interim trustees are as follows:

> *"…interim trustees, who shall upon their election be entitled to make recommendations to the Administrator in respect of the running of the affairs of the Respondent, within the ambit and subject to the powers granted to him by Section 46 of the Sectional Titles Act."*

The operational management and control of Bencorrum in an environment of interim trustees is as follows:

1. *Trustees do not have the authority to issue instructions to employees or service providers, and other than as specified below, may not authorise any purchases or address any operational, service or contractual aspects or concerns directly with the service providers, which shall be done via the building manager, the managing agent or the administrator;*

2. *The building manager, managing agent and administrators shall keep the relevant portfolio trustees informed of all substantial matters relating to the trustee portfolios and invite input and participation in key proposed actions and*

planning, from the trustees;

3. *The trustees shall be entitled to make recommendations arising from their portfolios to the building manager, managing agent or administrator;*

4. *Regarding daily operational aspects of Bencorrum, the trustees are entitled to schedule meetings with the building manager on a weekly basis to discuss concerns and recommendations, to be followed up with a written submission to the managing agent or administrator confirming the actions proposed;*

5. *All policy matters or rehabilitation processes of significance will be discussed at meetings of the trustees, managing agent and administrator, to be held from time to time, except where urgency dictates otherwise, in which event the trustees shall be informed of such matters;*

6. *Trustees are not authorised to communicate with owners, tenants or service providers in an instructing capacity or submit any written communication to any such parties on an official Bencorrum letterhead or in any manner which conveys or implies an official representative appointed authority capacity."*

[35] The respondent also relied on a delegation made at a meeting of trustees on 21 April 2010. However, this was a very specific and limited delegation, relating only to minor repairs in the following terms:

> "*It was agreed at the meeting that day to day expenses approved by the building Manager can be given to the Trustees to approve for payment subject to the following condition:*
>
> > *"The repairs being carried out do not exceed R2 000.00 on any one job and a total of R10 000.00 may not be exceeded in one month.""*

[36] I am accordingly of the view that these appointments and delegations did not justify the conduct complained of by the applicant.

[37] Finally, it was suggested that the applicant's failure to raise his objections to the respondent's conduct at meetings of trustees precluded him from bringing this application. As I understood the argument, this failure constituted some form of tacit consent. Whilst it is correct that no complaints were raised at trustee's meetings, the applicant repeatedly expressed his concerns in correspondence. This was done as early as 10 November 2009 when the applicant correctly stated the legal position in the following terms to the trustees:

> "*It would appear that the advice per my previous mail and the contents of the Court Order in terms of which I have been appointed have not been understood.*
>
> *To make matters clear:*
>
> 1. *The trustees are not authorized or entitled to issue instructions to employees;*

2. *The trustees are not authorized or entitled to issue instructions to service providers;*
3. *The trustees are entitled to make recommendations to me.*

As advised previously, the trustees are invited to assign portfolios to different trustees to participate in key areas of Bencorrum's operations.
Such participation would be by way of constructive engagement with the building manager regarding these areas and any concerns or proposals dealing with the day to day running of Bencorrum's affairs."
Thereafter he did so again, as evidenced by the examples I have quoted. There is therefore no merit in this point, and I am satisfied that the applicant has shown a clear right and an injury actually committed and reasonably apprehended.

[38] It was argued on behalf of the respondent that the applicant had no right to bring this application without first having called a special general meeting or a meeting of trustees. According to this argument, the calling of those meetings was an alternative remedy which the applicant failed to exhaust. As I understood the argument, these meetings would have put a stop to the respondent's conduct because she could have been removed as a trustee or the trustees could have prevented the respondent from persisting with her conduct.

[39] Whilst it is correct that a general meeting of a body corporate may remove a trustee from office[9], what the respondent overlooks is the effect of the order. As I have found, the applicant's appointment as administrator, divested the members of their powers. This includes the power to hold general meetings, save for the limited purposes mentioned in the order. The members of Bencorrum would therefore not have been able to remove the respondent as a trustee.

[40] The trustees of a body corporate do not have the power to restrain a fellow trustee from behaving in a particular way. The most they could do was to

9 Management Rule 13(e)

attempt to persuade the trustee to change his or her ways. Even if trustees generally have this power, the trustees of Bencorrum do not, for the reasons already mentioned. There was therefore no purpose in the applicant convening a meeting of trustees.

[41] I am accordingly satisfied that the applicant had no alternative remedy.

[42] That the applicant had suffered prejudice and was likely to suffer further prejudice as a result of the respondent's conduct, is beyond doubt. Not only was the applicant hampered in carrying out his functions but there was a real risk of employees and service providers of Bencorrum resigning or refusing to deal with Bencorrum.

[43] I am therefore satisfied that the applicant has satisfied the requirements for a final interdict. It goes without saying that because the applicant brought the application in his capacity as administrator, the interdict will only be effective for so long as the applicant occupies that position. The respondent's fear of permanent prejudice is therefore not justified.

[44] It was argued that even if I am satisfied that the applicant has made out a case for a final interdict, I nevertheless have a discretion to refuse an interdict. I shall assume that I have such a discretion.

[45] Whether the discretion is bound up with the question of an alternative remedy, or is a more general one, I see no reason for not granting an interdict. The respondent only suggested two factors which weigh against the granting of an interdict. They are that the applicant ought to have called a general meeting of members and that the applicant was "d*ragging the respondent to court at huge expense*" bearing in mind that she was unemployed, had a terminally ill husband and had devoted energy to Bencorrum without remuneration.

[46] I have already dealt with the first point. I do not consider the second point to be relevant. In any event, the respondent was given an opportunity to reflect and reconsider her position before this application was launched. She did not reconsider but instead persisted doggedly with her misguided attitude both before and after the application was launched. I therefore find that there are no grounds for refusing a final interdict.

[47] However, in my view, the *rule nisi* is too widely worded. Paragraph 1(d) places an unnecessary restriction on the respondent. I can see no harm in the respondent being permitted to make recommendations in her personal capacity. It is any event by no means clear that the order requires all recommendations to be joint recommendations of the trustees as a body. In my view, this paragraph should be deleted. Furthermore, the paragraph contradicts the penultimate paragraph of the e-mail of 6 May 2010 quoted above.

[48] I turn now to the question of costs. Ordinarily I would have no hesitation in ordering the respondent to pay the applicant's costs. However, it was suggested for the first time in argument that by virtue of management Rule 12 I am precluded from making such an order. In terms of s35(2)(a) the prescribed management rules may be substituted, added to, amended or repealed by the body corporate. There is no evidence before me to show whether the prescribed rule 12 applies to Bencorrum. I cannot assume that it does and so must decide the question of costs on the assumption that it does not. However, even if it did, it would not preclude me from ordering the respondent to pay the applicant's costs.

[49] The relevant part of the rule reads as follows:

> "(1) (a) *Subject to the provisions of sub-rule (2), every trustee, agent or other officer or servant of the body corporate shall be indemnified by the body corporate against all costs, losses, expenses and claims which he*

may incur or become liable to by reason of any act done by him in the discharge of his duties, unless such costs, losses, expenses or claims are caused by the mala fide or grossly negligent act or omission of such person.

(b) It shall be the duty of the trustees to pay such indemnity out of the funds of the body corporate."

[50] It is clear that this rule creates a statutory indemnity and is not a prohibition on the granting of a costs order. In fact, it presupposes that a costs order may be granted against a trustee, and provides that in appropriate circumstances the body corporate must bear those costs.

[51] It will be for Bencorrum to decide whether or not it wishes to pay the costs for which the respondent is liable. In doing so, it will have to decide whether the costs were incurred by reason of any act done in the discharge of the respondent's duties as trustee. This issue is not before me and so I decline to decide it or express any views on it.

[52] The applicant initially asked for costs on the party and party scale. In his replying papers he requested a punitive costs order because of the prolixity and irrelevance of much of the answering papers. There is merit in this criticism but in the applicant's heads of argument no request for a punitive costs order was made. I am accordingly of the view that it would unfair to accede to the request during argument for a punitive costs order.

[53] The applicant employed senior and junior counsel during argument and asked for the costs of two counsels. The respondent made use of a very experienced senior counsel, the papers were voluminous and the legal issues reasonably complex. I am accordingly of the view that the employment of two counsel was justified.

[54] In conclusion, I should mention one last matter. Much of the respondent's answering papers was taken up with finding fault with the applicant on issues not relevant to this application. This was an ill conceived exercise. If the respondent had valid complaints against the applicant, s46(3) of the Act gave her a remedy. She ought to have approached the court to have the applicant's powers altered or limited, or to have him removed from office. In saying this I am by no means suggesting that the respondent's accusations were in fact justified.

[55] I accordingly make the following order:

1. Paragraphs 1(a), (b), (c) and (e) of the rule granted on 9 December 2010 are confirmed.

2. The respondent is ordered to pay the applicant's costs, these costs to include the costs of senior and junior counsel where applicable.

Date of Hearing	:	6 May 2011
Date of Judgment	:	20 May 2011
Counsel for Applicant	:	Advocate Pammenter SC Advocate Jorgensen
Instructed by	:	Erasmus Van Heerden Attorneys

Counsel for Respondent	:	Advocate Cassim SC
Instructed by	:	Bilal Malani and Associates