

**IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)**

CASE NUMBER 2006/7480

In the matter between

**BODY CORPORATE OF ALBANY COURT
AND 17 OTHERS**

Applicants

and

NEDBANK AND SEVEN OTHERS

Respondents

JUDGMENT

ANDRÉ GAUTSCHI, AJ

1 On 29 November 2006 Goldblatt J granted the following order in favour of the first respondent (“Nedbank”) against the first applicant (“the body corporate”):

- “1. Craig Forsythe is appointed as administrator for the body corporate of Albany Court (SS5/1987) in terms of section 46 of the Sectional Titles Act, 95 of 1986, as amended.
2. The above appointment shall be for a period of 24 months from the date of this order, provided that the appointed Administrator may apply to this Court to be relieved of his appointment at an earlier date.
3. The above Administrator shall at least 30 (thirty) days prior to expiration of the term of appointment convene a general meeting of members of the Respondent for the purpose of nominating and electing a board of trustees for the Respondent.

4. The remuneration as the above Administrator shall be R400,00 per hour for the time that he is engaged in his duties and R2,00 per kilometre in the execution of his duties, exclusive of necessary disbursements.
5. The costs of this application shall be borne by the Respondent.”

2 The present application was launched on 12 April 2007. It seeks essentially the rescission of the order of Goldblatt J although the relief sought is wider and more convoluted than that. I quote the prayers in the notice of motion :

- “1. Declaring the judgment that was handed down on 29 November 2006 by His Lordship, the Honourable Mr Justice Goldblatt to be null and void *ab initio*, alternatively voidable, further alternatively unenforceable.
2. Rescinding the judgment that was handed down on 29 November 2006 by His Lordship, the Honourable Mr Justice Goldblatt.
3. Declaring that Section 46(3) of the Sectional Titles Act No. 95 of 1986 is invalid, void *ab initio* and/or voidable as it is inconsistent with the Constitution of the Republic of South Africa with specific reference to Section 25 (property) and Section 26 (housing) of the Bill of Rights.
4. Following on the order as in 3 above, declaring that the judgments and the writs of execution mentioned in 3 above are null and void *ab initio*, alternatively voidable, further alternatively unenforceable.
5. Ordering the first applicant to convene, within a period of one month from the date of this order, an annual general meeting (“AGM”) in terms of the relevant parts of the Sectional Titles Act No. 95 of 1986 as amended, and conduct the relevant business of the AGM as prescribed in this Act.
6. Costs of this application.
7. Further and/or alternative relief.”

(Certain errors corrected)

3 The second to eighteenth applicants are all registered owners of units in the block of flats called Albany Court, a sectional title scheme in terms of the Sectional Titles Act, 1986 (Act 95 of 1986) (“the Act”). Nedbank is the holder of mortgage bonds registered over various units in Albany Court. The second respondent (“Forsythe”) is the administrator appointed in terms of Goldblatt J’s order. The third to sixth respondents were the trustees of

the body corporate during the period 1 April 2006 to 29 November 2006. The seventh respondent is the Minister of Housing, and the eighth respondent the Minister of Agriculture and Land Affairs. Of the respondents, only Forsythe was represented before me. The other respondents did not oppose the application, and the seventh and eighth respondents indicated through a letter written by the State Attorney that they abide by the decision of this court.

- 4 The case made out in the applicants' founding affidavit is the following :
 - 4.1 Nedbank's application for the appointment of an administrator was launched on or about 7 April 2006 and the papers were served on 12 April 2006.
 - 4.2 Upon receipt of the application, the trustees of the body corporate convened a special general meeting to discuss the application, and at that meeting a special resolution was adopted that the application be opposed. As a result of the special resolution a notice of intention to oppose was duly served and filed on 24 April 2006. (No minutes of the meeting or copy of this special resolution have been annexed to the founding affidavit. However, the trustees at the relevant time have been joined as the third to sixth respondents and have chosen not to contradict these facts. I believe it a reasonable inference that these facts are by and large correct, save that the special resolution was probably an ordinary resolution.)

- 4.3 The members of the body corporate were thereafter under the impression that the application was being opposed. Sometime during the first week of December 2006, to their surprise, they received a letter from Forsythe notifying them that he had been appointed as the administrator.
- 4.4 Upon perusal of the court file, it emerged that on 22 November 2006, the attorneys of record for the body corporate had served a notice of withdrawal of opposition on the basis that the matter had been settled. Because the special resolution of April 2006 had never been revoked or amended by members of the body corporate, the notice of withdrawal of opposition was said to be unauthorised, and the result is that the present applicants (members of the body corporate) were not given an opportunity to be heard in that application.
- 4.5 Despite having learnt of the order of Goldblatt J during the first week of December 2006, the appellants did nothing until the end of January 2007, when most of the applicants returned from their holidays. Various meetings were then held in order to decide on the way forward. The most part of the month of February 2007 was spent consulting with other owners who do not necessarily stay in the building. That appears to have been a cumbersome process.
- 4.6 The founding affidavit in the rescission application was signed on 24 March 2007. The application was launched on 12 April 2007. Certain confirmatory affidavits which had been annexed in unsigned form, were

signed and attested during May 2007 and delivered on 20 June 2007.

4.7 An answering affidavit by Forsythe was delivered on behalf of certain (it is not clear which) respondents on 9 October 2007. The applicants delivered a notice in terms of rule 30A on 24 October 2007, which stated that Forsythe was “in violation of rule 27” and requiring Forsythe to make a condonation application, failing which the applicants would apply to court for an order directing him to deliver a condonation application. This aspect was apparently not taken any further, but it indicates an objection to the late delivery of the answering affidavit. There is no condonation application before me to allow the answering affidavit.

4.8 On 16 November 2007, Forsythe delivered a supplementary affidavit. Again it is not clear on whose behalf this was done. There was again no condonation application for the late delivery of this affidavit, nor any application for its admission at this stage.

5 Mr Majola who appeared for the applicants objected to the late delivery of the answering affidavit and supplementary affidavit. Despite the challenge to the late delivery of the answering affidavit, made in writing, there was no attempt to make any application for condonation for its late delivery. It was some five months late, without any explanation. It is an elementary requirement that if an affidavit is delivered late, and there is objection thereto, an application for an extension of time or condonation ought to be brought. If an indulgence is sought, it must be sought in the proper manner.

There was no attempt to do so. On the other hand, the applicants have their remedy in rule 30, and could have taken the necessary steps to set aside the affidavits as irregular steps or proceedings, but did not do so. It has been held repeatedly that a party's proper course where a proceeding is irregular is not to proceed as if there had been no such proceeding at all but to apply to court under rule 30 for an order setting it aside¹. It is unnecessary for me to decide whether the respondents should have applied for condonation for the late delivery of the answering affidavits, or whether it was incumbent on the applicants to set them aside in terms of rule 30, in the light of the view I take of this matter. I shall assume, without deciding, that I should exclude the contents of the answering and supplementary affidavits from my consideration of the application.

- 6 Mr Georgiades who appeared for Forsythe argued that the application for rescission was out of time. It took some four months before the application was launched. Again, it is unnecessary for me to decide this aspect. I am prepared to assume, without deciding, that the delay in bringing the application was not unreasonable.
- 7 Mr Georgiades sought to persuade me that, since section 46(3) provides that the administrator shall have powers and duties to the exclusion of the body corporate, the body corporate has no *locus standi* to seek a rescission

¹ Erasmus, Superior Court Practice by Farlam and Others, B1-191 and the cases cited at footnote 6

of an order appointing an administrator. I do not agree. In my view, the body corporate would retain a residual power to rescind an order appointing the administrator. The position is in my view akin to the residual powers retained by the board of directors where a company has been wound-up, to oppose the confirmation of a provisional winding-up order or to seek to rescind or appeal the order². However, even if I am wrong in this, the other applicants are owners of units in the scheme, who undoubtedly have the required legal interest to allow them to seek a rescission of the order.

8 It appears from the founding affidavit that the application for rescission is brought in terms of rule 31(2)(b), rule 42(1)(a) and the common law.

9 Rule 31(2)(b) is not available to a respondent in an application in which the order was obtained by default. That appears from the wording of rule 31(2) :

“(2) (a) Whenever in an action the claim ... is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet.

(b) A defendant may within twenty days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet.”

It is clear from this wording that rule 31(2)(a) applies only to actions, and that the expression “such judgment” in rule 31(2)(b) refers to a judgment

² Storti v Nugent and Others 2001 (3) SA 783 (W) at 795G-796C

obtained under rule 31(2)(a). The rule is therefore applicable to actions only, and not to applications under rule 6. It is by now trite law that a rescission under rule 31(2)(b) is not available to a defendant against whom summary judgment has been granted by default³. There is in principle no difference between an application for summary judgment granted by default, or any other application granted by default. The reliance on rule 31(2)(b) is therefore misplaced. As an aside, this finding entails that the 20 day time limit which appears in rule 31(2)(b) is not applicable. The other two bases for rescission do not have specified time limits for the launching of the application.

10 Mr Majola relied heavily on rule 42(1)(a), which provides :

“(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary :

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

...”

He submitted that the order had been erroneously sought or erroneously granted in the following circumstances. The trustees had been instructed by the members of the body corporate in a special general meeting to oppose the application. They had no authority not to oppose the application. By failing to carry out this instruction, they caused the members of the body corporate not to be heard by the court, which if this

³ Louis Joss Motors (Pty) Ltd v Riholm 1971 (3) SA 452 (T) at 454G; Bristow v Hill 1975 (2) SA 505 (N) at 505H.

had been known to the court, would have caused the court not to grant judgment. To that extent, the order was erroneously sought or erroneously granted.

11 Overall control of a sectional title scheme is given to the body corporate, which consists of the developer and all owners of units in the scheme⁴. The functions and powers of the body corporate shall be performed and exercised by the trustees of the body corporate holding office in terms of the rules, and they are to be performed and exercised subject to the provisions of the Act, the rules and any restriction imposed or direction given at a general meeting of the owners of sections⁵. Each trustee of a body corporate stands in a fiduciary relationship to the body corporate⁶. That relationship is defined⁷ and includes the implication that the trustee shall not act without or exceed the powers “aforesaid”, i.e. given by the Act, the rules and any restriction imposed or direction given at a general meeting⁸. A trustee who breaches any duty arising from his fiduciary relationship is liable to the body corporate⁹. A contract, concluded in circumstances where a trustee has a direct or indirect material interest in such contract, is voidable at the option of the body corporate¹⁰.

4 Sections 35 and 36 of the Act.

5 Section 39 of the Act.

6 Section 40 of the Act.

7 In section 40(2) of the Act.

8 Section 40(2)(a)(ii) of the Act.

9 Section 40(3) of the Act.

10 Section 40(3)(b) of the Act.

12 The function of the body corporate in general meeting is legislative. The function of the trustees is executive and administrative, namely the day-to-day management of the scheme¹¹. In transactions with third parties, the trustees act as representatives of the body corporate and the body corporate is bound by all actions for which the trustees have actual or ostensible authority. In the present case, there is no question of actual authority, whether express or implied, and the enquiry is limited to ostensible authority. The body corporate is protected by the doctrine of constructive notice. If any document to which the public has access would show that the trustees would not have the authority to conclude a particular transaction, then the third party cannot rely on the ostensible authority of the trustees. The third party must ascertain whether the contract or transaction was not reserved by the Act or the rules for the owners in general meeting. If however the transaction is one which the trustees may properly be authorised to conclude, and third party assumes in good faith that the trustees were properly authorised in general meeting to conclude such transaction, then, by operation of the Turquand rule¹², the body corporate would be precluded from contending that the trustees were not authorised. There is nothing before me to indicate that the body corporate was precluded by the Act or the rules to delegate the function of instructing attorneys in litigation to the trustees. The instructions given by the general

¹¹ C G van der Merwe, Sectional Titles Share Blocks and Timesharing Vol 1, para 14 3; Lawsa First Re-issue Vol 24 paras 290, 302.

¹² The rule in Royal British Bank v Turquand 119 ER 886

meeting are not in the public domain and the doctrine of constructive notice will not apply. The body corporate is therefore bound by the instructions given by the trustees to the attorneys, albeit that the trustees were in fact unauthorised to do so¹³.

13 Accordingly, despite the fact that the members of the body corporate in the special general meeting may have given instructions to the trustees to oppose the application, if those instructions were not carried out, but the trustees later withdrew such opposition, or settled the matter, or even capitulated as it appears, that would not invalidate the court order but would be binding on the body corporate vis-à-vis Nedbank. The members of the body corporate may claim that such trustees breached their fiduciary duty, and may hold them liable for having done so, but the court order granted in consequence would remain valid.

14 There is accordingly in my view no merit in the point taken by the applicants. The chosen representatives of the body corporate dealt with the application before Goldblatt J, withdrew the body corporate's opposition on the basis of some settlement, and the order was therefore not incorrectly sought or granted.

¹³ See generally Van der Merwe, *op cit.*, para 14 5 2; Lawsa, *op cit.*, para 302; Delpont, Contracting with the body corporate of a sectional title scheme, 2006 *Obiter* 571.

15 The effect of this finding is that the body corporate deliberately allowed the order by Goldblatt J to be granted, which would put paid to any attempt to have the order rescinded, even if the applicants were strong on the merits, which I do not believe to be the case.

16 The applicants have further raised the constitutionality of section 46(3) of the Act as distinct relief, and I now turn to deal with that. Section 46 provides as follows :

“46. Appointment of Administrators

- (1) A body corporate, a local authority, a judgment creditor of the body corporate for an amount of not less than R500, or any owner or any person having a registered real right in or over a unit, may apply to the Court for the appointment of an administrator.
- (2)
 - (a) The Court may in its discretion appoint an administrator for an indefinite or a fixed period on such terms and conditions as to remuneration as it deems fit.
 - (b) The remuneration and expenses of the administrator shall be administrative expenses within the meaning of section 37(1)(a).
- (3) The administrator shall, to the exclusion of the body corporate, have the powers and duties of the body corporate or such of those powers and duties as the Court may direct.
- (4) The Court may in its discretion and on the application of any person or body referred to in subsection (1) remove from office or replace the administrator or, on the application of the administrator, replace the administrator.
- (5) The Court may, with regard to any application under this section, make such order for the payment of costs as it deems fit.”

17 The applicants’ contention is that the powers bestowed on the administrator in terms of section 46(3) of the Act violate the constitutional rights of the owners of units in the scheme protected by section 26 of the Constitution of

the Republic of South Africa, 1996 (“the Constitution”)¹⁴. In particular, they contend that by allowing the administrator to act “to the exclusion of the body corporate” the section denies the registered owners their right of access to adequate housing protected under section 26(1) of the Constitution and that such denial is *prima facie* unconstitutional and open to abuse; and further that the powers bestowed on the administrator are not reasonable and justifiable “in an open and democratic society based on human dignity, equality and freedom.”

18 I deal immediately with the contention that the administrator may abuse his or her position. This type of attack on a legislative provision has been rejected by the Constitutional Court in Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening) 2002 (5) SA 246 (CC) and South Africa Police Service v Public Servants Association 2007 (3) SA 521 (CC). As was said in Van Rooyen’s case at paragraph [37] :

“Any power vested in a functionary by the law (or indeed by the Constitution itself) is capable of being abused. That possibility has no bearing on the constitutionality of the law concerned. The exercise of the power is subject to constitutional control and should the power be abused the remedy lies there and not in invalidating the empowering statute.”

One must therefore assume that the power vested in the administrator to govern the scheme will be exercised properly and responsibly.

¹⁴ Although the notice of motion also refers to section 25 of the Constitution, no argument was presented with regard to that section.

19 The question remains whether the section is unconstitutional on other grounds. Although the relief sought in the notice of motion relies on both sections 25 and 26 of the Constitution, the argument centred on section 26(1). Section 25 need not detain me. Section 25(1) forbids deprivation of property except in terms of law of general application, and forbids law which permits arbitrary deprivation of property. The Act is of general application, but there is in fact no deprivation, and even less arbitrary deprivation, of property. Section 25(1) of the Constitution appears to me not to be breached by the powers bestowed upon an administrator. In terms of section 26(1) "Everyone has the right to have access to adequate housing." The applicants are deprived neither of *access* to their units nor of access to *adequate housing* by the appointment of an administrator. In any event section 26(1) is concerned with access to housing and does not require the granting of ownership to immovable property. The positive obligation placed on the State by section 26 does not extend to a paternalistic intrusion into the property rights of individual owners. The applicants' reliance on Government of the RSA and Others v Grootboom and Others¹⁵ is misplaced. The applicants are the registered owners of their units, and in possession thereof. There is no threat of eviction or dispossession which arises with the granting of powers to the administrator. Their access to adequate housing is not threatened thereby.

¹⁵ 2001 (1) SA 46 (CC) at para [35].

20 Secondly, the powerful right of ownership of an immovable property is not an absolute right. Indeed, the very essence of the Act is to render many of the interests of owners of units in a sectional title scheme subservient to the will of the majority. Certain of the normal rights of an owner, for instance the right to keep pets or make building alterations, may be curtailed by the rules imposed by the majority. It is not suggested on behalf of the applicants that such interference with the rights of an owner is unconstitutional, and nor could it be. The interdependence of owners within a single building or complex logically requires co-operation, and compliance with and subservience to the will of the majority. The administrator, once appointed, exercises his powers to the exclusion of the body corporate and supplants the body corporate for the duration of his appointment, in respect of those powers and duties of the body corporate which the court assigns to him. On an overall conspectus, the administrator is in no different position from the body corporate, and does not detract from the rights of the owners of units any more than the body corporate does. To the extent that it may be countered that an owner of a unit may voice his opinion and exercise his vote at a general meeting, if at the end of the day he is in the minority, he will be no better off than if the administrator made a decision of which he did not approve.

21 The administrator does not have an unfettered discretion to interfere with the rights of owners of units. He is appointed by the court, and his powers and duties are determined by the court in its discretion. Although there is

no provision for a reporting back to the court, the administrator will undoubtedly be liable to account for his actions during the period of tenure, and remains answerable to the court. See in this regard the *dictum* in Kleynhans NO v Smith¹⁶ in which Van Rooyen AJ held that :

“Wanneer ‘n hof ‘n administrateur aanstel, verkry hy of sy die magte en pligte van die regs persoon of daardie pligte wat die hof aan haar of hom toeken. Dit beteken egter nie dat die administrateur ‘n vrye hand het nie : hy of sy is verantwoordelik teenoor die hof ...”¹⁷.

22 The existence of judicial oversight may constitute the difference between a legislative provision being constitutionally valid or not. See Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others¹⁸. In the case of section 46 of the Act, the court has a wide discretion whether or not to appoint an administrator, to determine his powers, and to terminate his appointment¹⁹ This safeguard of judicial oversight allows section 46 to pass muster on that score as well.

23 Even if section 46 of the Act is found to violate or limit the applicants’ rights under section 26(1), there is still section 36 of the Constitution to consider. That section provides :

“36. **Limitation of rights**

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

¹⁶ [2006] JOL 18048 (T).

¹⁷ At paragraph [6].

¹⁸ 2005 (2) SA 140 (CC).

¹⁹ Body Corporate of Greenacres v Greenacres Unit 17 CC [2007] SCA 152 (RSA).

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”

The limitations imposed by the appointment of an administrator are to my mind reasonable and justifiable within the meaning of that expression in section 36 of the Constitution. The owners of units in the scheme are necessarily reliant on a collective effort to protect and safeguard their investment in the scheme. If the trustees mismanage the scheme, the owners are in danger that their investment may be diminished or even lost. The mechanism of appointing an administrator allows for the equivalent of a judicial manager to be appointed in order to nurse the scheme back to health. It is not an unduly harsh limitation and is subject to the safeguard of judicial oversight. I have found that section 46 does not limit any rights under sections 25(1) or 26(1) of the Bill of Rights, but even if it does, it is to my mind reasonable and justifiable as envisaged by section 36 of the Constitution.

24 I then turn to the specific relief claimed by the applicants, as set out in paragraph 2 above.

25 No case has been made for the relief sought in prayer 1. There is no basis in law why the order of Goldblatt J should be “null and void ab initio or “voidable” or “unenforceable”, and no attempt was made before me to argue

for the relief in this prayer. It falls to be dismissed. The rescission sought in prayer 2 must fail, for the reasons I have set out. The declaration that section 46(3) is “invalid, void *ab initio* and/or voidable” (unconstitutional) has been dealt with above and this prayer also falls to be dismissed. Prayer 4 follows on prayer 3, and should be dismissed as well. The relief sought in prayer 5 would only follow if a rescission were granted, and should accordingly also be dismissed. As far as the costs are concerned, it would in my view be unfair on other owners of units if the body corporate were ordered to pay the costs, and I therefore intend to grant a costs order against the remaining applicants only.

- 26 The application is dismissed. The costs are to be paid by the second to eighteenth applicants jointly and severally.

ANDRÉ GAUTSCHI
ACTING JUDGE OF THE HIGH COURT

Date of hearing : **13 February 2008**

Date of judgment : **27 March 2008**

For the applicants : **V Majola** (attorney with the right of appearance) of Majola Attorneys

Counsel for the second respondent : **Adv C Georgiades**
(Instructed by Van Rensburg Bleijs Attorneys)