

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

**CASE NUMBER 07/16617
CASE NUMBER 07/18122**

In the matter between

DEMPA INVESTMENTS CC

Applicant

and

BODY CORPORATE OF LOS ANGELES

Respondent

JUDGMENT

ANDRÉ GAUTSCHI, AJ

[1] There are two applications before me. The first is an application for the rescission of an *ex parte* order granted by Satchwell J on 31 July 2007. The second, which only becomes relevant if the rescission succeeds, is for the appointment of an administrator to a sectional title scheme in terms of section 46 of the Sectional Titles Act, 1986 (Act 95 of 1986) (“the Act”).

[2] The relevant facts are the following :

2.1 The applicant is the registered owner of a unit in the sectional title

scheme known as Los Angeles, a building comprising some 50 flats situated in Berea, Johannesburg. The applicant is represented by Ms Noah, who is the beneficial member of the applicant.

2.2 It appears that Ms Noah was appointed as administrator in terms of section 46 of the Act during 2005 and 2006. Thereafter, in about April 2007, Messrs Peter Watt Kaye-Eddie and Nettus Moral Dibakwane were appointed as joint administrators for a period of two months until the end of June 2007.

2.3 The court order in terms of which Messrs Kaye-Eddie and Dibakwane were appointed as joint administrators is a lengthy one. Amongst their duties they were to convene a general meeting of the body corporate to be held at 19h00 on a day to be selected by them, which could not be later than 28 June 2007, and they had to give notice of such meeting in accordance with rule 54 of Annexure 8 to the Sectional Titles Regulations (“the Regulations”). The general meeting was to be chaired by an advocate to be appointed by the chairperson of the Johannesburg Bar Council, and at the meeting trustees were to be elected.

2.4 A general meeting was convened to take place at 18h30 on 28 June 2007 at the building. Mr R L Selvan SC had been appointed by the chairperson of the Johannesburg Bar Council to chair the meeting. His report is dated 24 July 2007 and forms part

of the papers. He reports that the meeting was a “fiasco”. Very few people were present and it appears that the notice convening the meeting had not been delivered to most of the owners. Ms Sylvia Phalane (who will feature later in this judgment) was at the meeting and adopted a hostile attitude. She “enquired what we were doing in her building and intimated that there was no need for us to be there inasmuch as the building was being satisfactorily managed by the *de facto* body corporate”. (I gather that by “*de facto* body corporate” is meant the *de facto* governing body of the body corporate.) In the result, no meeting was in fact held.

2.5 Another meeting was organised thereafter, it seems by the Phalane camp. The following notice was apparently circulated :

“MEETING OF ALL OWNERS OF LOS ANGELES (BODY CORPORATE)”

DATE : 29 JUNE 2007

VENUE : LOS ANGELES GARAGE

TIME : 19H00

MINUTES

The owners will be discussing about the following problems :-

1. Switching off of electricity;
2. Reopening of an account;
3. The issue of Nettus Dibakwane and Kaye-Eddie as Administrators
4. About administrator – there is a need for an administrator at the

building?

5. If not what is the way forward or what needs to be done?
6. If yes, how are we going to manage our building as owners
7. Other issues relating to our building" (*sic*)

It will be noticed that the agenda (which is what this clearly is) does not contain any reference to the election of trustees.

2.6 A meeting was then apparently held. A four page handwritten minute is annexed to the papers. The date of the meeting as it appears from the minute is 1 July 2007, but it appears to have been corrected in pen. It seems that the handwritten date might originally have been 29 June 2007, but had thereafter been overwritten or corrected in pen. At the outset of the minute, the agenda as set out in the notice quoted above, is repeated. The following is recorded under the heading "Owners who were present" :

"All owners who are currently living in the building inclusive of some from outside the building who came to attend the meeting in the building."

The items on the agenda are then addressed. Each page is initialled in the bottom right corner. The third page ends close to the foot of the page, and the initials follow immediately thereafter. Following that, apparently in a different handwriting, it is recorded that certain persons were elected as trustees and that the court will declare them as such. The minute then records the names of

seven persons and their respective positions. Ms Phalana was one of them, and her position is recorded as caretaker.

2.7 On 24 July 2007, the respondent launched an *ex parte* application, seeking a declarator that the seven persons who had purportedly been elected as trustees, be declared to be trustees, and declaring that they remain in office for a period of one year, within which period they had to convene an annual general meeting.

2.8 The deponent to the founding affidavit in that application was one Anna Mosemaka, who alleged that she was the owner of unit 21 and one of the elected trustees. She attached a copy of the handwritten minute referred to above to her founding affidavit. She claimed that the meeting had been held “by the owners and members” of the body corporate Los Angeles on 1 July 2007. She asserted that the trustees had indeed been elected, and listed them. She asserted that “There is therefore a need for a declaratory order confirming the said people as the trustees for the Applicant”.

2.9 In regard to the previous court order, she said the following :

“8. I wish to point out to this Honourable Court that before the meeting referred to hereinabove, the Applicant was under administration in terms of the order of court granted under case no: 06/24417. I attach hereto marked “AM3” a copy of the said court order. This Honourable Court will note that the court order was valid up to and including 30th June 2007 on which date it will terminate.

9. The said court order has indeed lapsed. Upon it lapsing, the Applicant held a meeting and elected trustees.” (*sic*)

2.10 She also submitted that there would be no harm or prejudice suffered by anyone if the order were granted.

2.11 On the strength of this, Satchwell J granted an order on 31 July 2007 in the following terms :

“1. Declaring the undermentioned people to be the trustees for the Body Corporate Los Angeles elected in terms of the provisions of the Sectional Titles Act 95 of 1986, as amended –

1.1 Kekeletso Don Korea – Unit 14 Los Angeles;

1.2 Metja Pauline Sumbane – Unit 13 Los Angeles;

1.3 Ramadimetja Julia Leshilo – Unit 36 Los Angeles;

1.4 Masimogang Sylvia Phalane – Unit 56 Los Angeles;

1.5 Annah Mosemaka – Unit 21 Los Angeles;

1.6 Lefula Humphrey Makaleng – Unit 46 Los Angeles;

1.7 Nqobi Victor Ncube – Unit 94 Los Angeles.

2. Declaring that the said trustees shall remain in office for a period of 1 (one) year from date of the order and that they will convene an annual general meeting in terms of the provisions of the Sectional Titles Act 95 of 1986 as amended before the expiry of the said period of 1 (one) year in order to consider the business relating to the scheme Los Angeles, Scheme No: 82/1984.”

2.12 Apparently in ignorance of the aforesaid court order, the applicant launched the application for the appointment of Mr Kaye-Eddie as administrator on 10 August 2007. The answering affidavit, delivered on 19 September 2007, referred to the appointment of the

trustees and the fact that their appointment had been authorised by the court on 31 July 2007.

2.13 On 30 November 2007 the application for rescission was launched. No answering affidavit was delivered in the application for rescission.

[3] When the matters were called, Mr Masenamela, who appeared for the respondent, submitted that the application for rescission was not ripe for hearing because no answering affidavit had been delivered. That application had been issued and served on 30 November 2007. A notice of intention to oppose was delivered on 6 December 2007, and the answering affidavit was therefore due on or before 2 January 2008. The matter was called before me on 13 February 2008. No answering affidavit had yet been prepared, nor was there any application before me for condonation or an extension of time. This was not a case where the matter was not ripe for hearing; it was ripe for hearing despite the absence of an answering affidavit. Rather, if the respondent required an extension of time or condonation to deliver an answering affidavit, it should have launched a substantive application therefor. In the absence of any such application for condonation or an extension of time, there was no basis to grant the respondent any indulgence, and I directed that the matter had to proceed.

[4] I deal firstly with the application for rescission. The *ex parte* application was a strange application to start with, since there is nothing in the Act or

Regulations which requires or even authorises the court to declare that trustees have been duly elected. The High Court is empowered to “enquire into and determine any existing, future or contingent right or obligation, ...”¹. Since Ex parte Nell², an existing dispute has not been a pre-requisite for the making of a declaratory order. The court could however, depending on the circumstances, refuse to exercise its discretion when there was no dispute³. The court will not deal with abstract, hypothetical or academic questions⁴. In addition, there should be interested parties upon whom the declaratory order would be binding⁵, by operation of *res judicata* and not merely *stare decisis*⁶. This latter requirement entails that there would usually be a cited respondent before the court, although not necessarily so⁷. It does however seem to me an anomaly, and illogical, that a declarator could be sought by way of an *ex parte* application⁸, since the applicant will inevitably find itself on the horns of a dilemma. This is namely that, on the one hand, if there is no dispute, the question to be declared will usually (not always) be binding only on the applicants, who in any event do not dispute the position, and will therefore tend to be abstract, hypothetical or academic. On the other hand,

¹ Section 19(1)(a)(iii) of the Supreme Court Act, 1959 (Act 59 of 1959).

² 1963 (1) SA 754 (AD) at 759H-760B.

³ Nell’s case at 760A-B; see also Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others 1995 (4) SA 1 (AD) at 124F-G.

⁴ See for example Shoba v Officer Commanding supra, at 14F; SA Mutual Life Assurance Society v Anglo-Transvaal Collieries Ltd 1977 (3) SA 642 (AD) at 658H.

⁵ Nell’s case, at 760B-C, Shoba v Officer Commanding supra at 14G-H.

⁶ Ex parte Ginsberg 1936 TPD 155 at 158; Ex parte Attorney-General, Witwatersrand Local Division 1997 (2) SA 778 (W) at 782I-783B and 783G.

⁷ Ex parte Attorney-General, Witwatersrand Local Division, supra at 783F-G.

⁸ Save in certain recognised cases such as declaratory orders in regard to the meaning and effect of a will.

if there are persons who dispute the order sought, they should be cited as respondents, and it is then inappropriate to proceed *ex parte*. The applicants in this case are in my view faced with this dilemma.

- [5] The applicant is the body corporate, which is by definition all owners of units in a scheme, and the developer until he ceases to have a share in the common property⁹. The *ex parte* order of Satchwell J would be binding on all the owners of units in the scheme Los Angeles. On that score, the requirement that the declaratory order would be binding on interested parties appears to be met. However, the functions and powers of the body corporate are performed and exercised by the trustees¹⁰ and it is apparent that the *ex parte* order was sought by the trustees purporting to act on behalf of the body corporate. As such, the trustees' actions would bind the body corporate and therefore all owners of units, whether they knew of the application or not. By proceeding *ex parte*, the impression was created that there were no dissidents. That was a material non-disclosure to which I shall return presently as a separate topic. If there were no persons disputing the election of the trustees and their right to hold office, as proceeding *ex parte* would tend to convey, the question arises whether there was any real purpose to the declaratory order or whether the question was merely abstract, hypothetical or academic. If the latter, the order was

⁹ Section 36 of the Act.

¹⁰ Section 39 of the Act.

erroneously sought and erroneously granted, and would fall to be set aside in terms of rule 42(1)(a).

[6] On the other hand, the trustees probably anticipated that some of the owners would dispute their election and the propriety of their holding office, for it is hard to imagine why else they would have sought the *ex parte* order. In that case, the interested persons who were expected to dispute the election of the trustees and their right to hold office should have been cited as respondents. The failure to follow this course of action had as a result that interested persons had no notice of the application, and that the order was for that reason too erroneously sought and erroneously granted. In either event, it seems to me, the order should be set aside in terms of rule 42(1)(a).

[7] Mr van der Merwe for the applicant referred me to the case of *Ex parte Body Corporate of Caroline Court*¹¹, and submitted that in the light of that decision interested parties such as the local authority should have been cited in the *ex parte* application. That case concerned an application in terms of section 48(6) of the Act for the winding-up of a body corporate where it is alleged that the body corporate is unable to pay its debts. It was held that in such a case there are numerous interested parties who in the ordinary course would be entitled to receive notice of the application, such

¹¹ 2001 (4) SA 1230 (SCA).

as the local authority if it is creditor, individual owners and bondholders. I do not read that case as creating any new categories of interested parties. At 1239A-D Navsa JA (who delivered the judgment of the court) referred to Amalgamated Engineering Union v Minister of Labour¹² in which it was held that the court will refrain “from dealing with issues in which a third party may have a direct and substantial interest” in the absence of joinder or another suitable arrangement. Applying that principle, Navsa JA came to the conclusion that there were numerous interested parties who would in the ordinary course have been entitled to receive notice of the intended application and who may be affected by the decision. He dealt with the unusual and drastic provisions relating to the winding-up of the affairs of the body corporate, which is quite distinguishable from an order declaring trustees to have been duly elected and entitled to hold office. The question of the election of trustees does not affect the legal rights (although it may be of interest to them) of any persons other than the members of the body corporate. I am of the view that, if the *ex parte* application were otherwise in order, it would not have been necessary to join the local authority, bondholders, creditors and the like.

- [8] An *ex parte* application brings with it a peculiar duty to make full disclosure to the court of all the material facts that might affect the granting or

¹² 1949 (3) SA 639 (A) at 651.

otherwise of an order¹³. In the present case, several material facts were not divulged to the court. Although the court order appointing Messrs Kaye-Eddie and Dibakwane as administrators was attached to the founding affidavit, the court was not told of the appointment of Mr Selvan SC to chair the general meeting, nor of the abortive attempt to have the general meeting. The report of Mr Selvan SC was not attached, but it is not clear to me that it was in the hands of the respondent and I shall accordingly ignore that fact. The fact that the meeting was apparently intended to be held on 29 June 2007, and may have been held on that date but the date on the minutes changed to 1 July 2007, was not explained to the court. It seems more likely that the meeting was in fact held on 29 June 2007, but that the newly elected trustees realised that the meeting would then be in conflict with the court order of April 2007 and therefore changed the date to 1 July 2007. Nor was it explained to the court that there had been no proper notice of the meeting (or no notice at all if the meeting had indeed been held on 1 July 2007), and no notice of the fact that trustees would be elected thereat. The entire election process was flawed, but none of those facts was disclosed to the court. It was finally not disclosed that it could reasonably be anticipated that certain of the owners of units would not accept the result of the election. There was in my view a gross non-

¹³ See for instance Schlesinger v Schlesinger 1979 (4) SA 342 (W) at 348F-350C; Estate Logie v Priest 1926 AD 312 at 323; Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd and Others 2006 (5) SA 306 (W) at 315A-G.

disclosure of material facts in the *ex parte* application, and the order should for that reason too be set aside.

[9] Mr Masenamela recognised the difficulties with regard to the order of Satchwell J, but submitted that setting aside that order would not *per se* remove the trustees from their office as trustees. He submitted that, if the election process was flawed, then the election of the trustees must be set aside, but there was no relief sought to that effect. I believe that this submission is sound.

[10] Mr Masenamela however went further and submitted that, unless the election of the trustees was set aside, no administrator could be appointed. He submitted, referring to a passage from Paddock The Sectional Title Handbook, that an administrator could not be appointed in terms of section 46 of the Act for as long as the existing trustees were willing and able to act as such. Since they indicated in their answering affidavit that they were so willing and able, the relief sought in the second application could not be granted.

[11] The latest edition of Paddock's textbook¹⁴ contains the following statement, largely unchanged from the first edition :

“In some circumstances a body corporate in general and its trustees in particular, are unwilling or unable to properly control, manage and administer the scheme in

¹⁴ Now called Sectional Title Survival Manual

accordance with the Act and the scheme's rules.”¹⁵

[12] Section 46 of the Act 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.”

[13] Nothing in this section prevents a court from appointing an administrator where there are existing trustees. As a matter of logic, an administrator would in most cases be appointed for the very reason that the incumbent trustees have made themselves guilty of maladministration. Bouraimis and Another v Body Corporate of The Towers and Others¹⁶ is a case in point. In that matter there were existing trustees and the complaints were that they

¹⁵ Paddock's Sectional Title Survival Manual, January 2008, para 8.4.9
¹⁶ 1995 (4) SA 106 (D&CLD).

had committed a number of breaches of their duties to the prejudice of owners of units. Although the applicants in that case failed, no point was made of the fact that there were existing trustees, and it is clear that if the complaints had been of sufficient substance, an administrator would have been appointed despite the existence of trustees. Section 46 would in my view be largely emasculated if an administrator could only be appointed when there were no trustees in place.

[14] It does not avail the trustees to declare themselves willing and able to act, nor is that what the learned author either says or intended. The statement that the trustees are “unwilling or unable to properly control, manage and administer the scheme”, does not have the meaning ascribed to it by Mr Masenamela. A trustee who is unwilling or unable to properly control, manage and administer the scheme is not willing and able.

[15] I therefore come to the conclusion that the fact that trustees are in place, whether duly elected or not, and even if they declare themselves to be willing and able to act, is not an obstacle to the appointment of an administrator in terms of section 46 of the Act.

[16] The existence of Satchwell J’s order would of course be an obstacle to the appointment of an administrator, because the two orders would conflict. It is for that reason that the application for the rescission had to be dealt with first, and had to succeed before the appointment of an administrator could be considered.

[17] I then turn to consider the merits of the application for the appointment of an administrator.

[18] Section 46 contains no provisions indicating in what circumstances the court may or should exercise its discretion to appoint an administrator.

Booyesen J in Bouraimis case¹⁷ laid down the following test :

“It seems to me that the Court should not, where a duly constituted board of trustees is in existence, grant an order for the appointment of an administrator unless the applicant establishes on a balance of probabilities, firstly, that there have been breaches of the duties set out in s 39 read with ss 37, 38 and 40, and, secondly, that it is likely that the owners of units shall suffer substantial prejudice if an administrator were not to be appointed by the Court. Such breaches could take the form of a failure to perform duties or the improper performance of duties.”

A number of complaints were raised in that matter against the trustees.

Some were found to be without substance, whilst others amounted to breaches of duty, but the court found that no prejudice arose therefrom.

The application was accordingly dismissed.

[19] Fine AJ ventured a more general test in Levy v Controlling Body of Christina Court¹⁸ :

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

I have not had sight of this judgment, but according to Van der Merwe and Kloppers¹⁹ the applicant made a number of petty complaints which the court

¹⁷ *Supra*, at 109G-H.

¹⁸ WLD Case No. 18918/94, 23 September 1994, unreported and referred to in Van der Merwe and Kloppers, Die Aanstelling van 'n Administrateur by Wanbestuur van 'n Deeltitelsskema 8 (1997) Stellenbosch Law Review, 309 at 312-314.

¹⁹ *Op cit.*, at 312-314.

found were neither individually nor cumulatively indicative that the scheme had been managed in an improper or unworkmanlike manner. The applicant had, notwithstanding considered and reasonable attempts by the trustees to accommodate his complaints, stubbornly persisted in bombarding the body corporate with irrelevant and petty complaints. The court declined to appoint an administrator.

[20] Section 46 of the Act was largely copied from section 23 of the Conveyancing (Strata Titles) Act of 1961 of New South Wales, Australia, which was considered by Else-Mitchell J in Re Steel and the Conveyancing (Strata Titles) Act 1961²⁰. Section 23 of that Act uses the expression “on cause shown”. Else-Mitchell J held the following²¹ :

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

In that case a large volume of evidence had been submitted to show irregularities in the conduct of the affairs of the body corporate by the appointed council (the equivalent of the board of trustees). There was not a full disclosure of the management by the “self-designated administrator”,

²⁰ (1968) 88 WN (Pt. 1) (NSW) 467.

²¹ At 471.

and minutes, accounts and other records were not made available for inspection, and such inspection was indeed continually refused; no general meeting was called in 1967, which the learned judge found to be a “wilful neglect of the statutory duty which the council of a corporate body undertakes”; there had never been any attempt to maintain a separate set of books of account or a separate bank account for the body corporate’s affairs, with the result that various small sums seem to have been untraceable, and the accounts of the equivalent of the developer were confused with those of the body corporate. At 471, Elise-Mitchell J held :

“In some cases it may be proper to say that domestic disputes between members of a body corporate should be resolved by resort to the domestic forum of a general meeting rather than the appointment of an administrator, but where there have been breaches of the by-laws in the First Schedule and such breaches are clear and continuing, the appointment of an administrator may be the only effective remedy and one which the court should not shrink from exercising.”

He therefore held that the applicant had made out a case for the appointment of an administrator.

[21] Having regard to the abovementioned authorities and the literature²², I intend to apply the following principles :

21.1 The court has a discretion to appoint an administrator, which must be exercised judicially having regard to the circumstances of the

²² See the useful discussions in C G Van der Merwe, Sectional Titles, Share Blocks and Time Sharing, Vol 1 on Sectional Titles, paragraph 14 6; Lawsa First Reissue Vol 24, para 310; and (on the 1971 Sectional Titles Act) Rorke, A Commentary on the Sectional Titles Act 1971, 139 and Shrand on the Sectional Titles Act (1972) 79-81.

particular case before it.

- 21.2 Special circumstances or good cause must be shown.
- 21.3 It is not possible to define what would constitute special circumstances or good cause, 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 owners of units will suffer substantial prejudice if an administrator is not appointed.
- 21.4 Acts or omissions which would qualify would include maladministration, breaches of statutory duties, dishonesty, inefficiency and managerial atrophy or deadlock. The list is not exhaustive.
- 21.5 The problem must be such that an administrator could be expected to add value where the trustees could not. For instance, mere inexperience on the part of the trustees may not be sufficient, for they could appoint an experienced managing agent. So too it may be insufficient that the body corporate is experiencing serious financial difficulties, for the trustees and managing agent may be as capable an administrator to deal with the problem. If, however, inexperience is coupled with wilfulness, or the financial difficulties

have been caused by maladministration, dishonesty or the like, an administrator could be expected to achieve results which the trustees would not.

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

21.7 The applicant bears the onus to persuade the court that this is a suitable case for the exercise of the discretion

[22] Underlying the allegations and counter-allegations, is what is undoubtedly a personal feud between Ms Noah and Ms Phalane. It is not necessary that I detail the nature of the feud, other than to state that they are clearly hostile to each other and that Ms Noah has obtained two court orders against Mr Phalane, the one for a spoliation in relation to the supply of electricity and certain interdicts and the second for committal for contempt of court, which was suspended pending Ms Phalane's compliance with the first mentioned court order. I shall return to this feud, but I first consider the evidence of possible mismanagement relating to the scheme. In doing so I shall ignore the many disputes of fact in the papers, and concentrate solely on the undisputed facts and the respondent's own version.

[23] It is common cause that the body corporate owes the City Council of Johannesburg almost R1,5 million for arrear rates and taxes, and City Power, Johannesburg more than R100 000 for arrear electricity. Mr Masenamela submitted that the arrears arose in the time when Ms Noah, and Messrs Kaye-Eddie and Dibakwane were the administrators. Ms Noah alleges that when her appointment as administrator lapsed, the amount outstanding for rates and taxes was some R1,1 million. The response to that allegation is a bare denial. It is also clear that the rates amount to some R10 000 per month, and that the arrears of almost R1,5 million must have arisen over a period of perhaps ten years. The problem can therefore not be laid at the door of the former administrators. The present trustees maintain that they have reached some arrangement with the City of Johannesburg and City Power, Johannesburg. The respondent annexes, to a supplementary answering affidavit, two acknowledgments of debt. The one in favour of City Power, Johannesburg indicates that payments would commence on 7 December 2007, and by the date of the hearing before me, three monthly payments would have fallen due in terms thereof. The other acknowledgement, in favour of the City of Johannesburg Metropolitan Municipality, is not signed by the trustees, nor is it dated. What is conspicuously absent, however, is any proof or even indication by the respondent that any payments were in fact being made as required by these acknowledgements of debt.

[24] In the answering affidavit, Ms Phalane alleges that service providers were being paid, and attaches a bundle of documents in proof. Those documents indicate small amounts (mostly R1 000,00 at a time) paid to the City of Johannesburg, City Power, Johannesburg, Beta Lifts Maintenance and Bad Boyz Security. The deposit slips are strange, because some of the deposits appear to have been made by or on behalf of specific units, whilst no deposits seem to have been made by the trustees. It was explained to me that various owners were asked to pay amounts directly to service providers so that, as I understand it, perhaps ten owners would be asked to pay R1 000,00 each to City Power, Johannesburg, another ten owners would be asked to pay R1 000,00 each to the City of Johannesburg, and so on. This is hardly good governance. It is clear, in terms of section 37 read with section 39 of the Act, that the body corporate, represented by the trustees, has a duty to make payments to service providers, and the trustees cannot and should not expect individual owners of units to make piecemeal payments on their behalf. It appears that the trustees do not have access to a bank account. It is not clear precisely what the difficulty is, but one of the consequences thereof is that on 6 July 2007, an amount in cash of R24 000 was paid to City Power, Johannesburg. It is hardly good governance that the trustees should be making cash payments of that magnitude to creditors of the body corporate.

[25] Ms Noah states in her affidavit that she is currently making payment of the insurance on the building from her own account. She annexes a bank

statement which reflects debits made in favour of ABSA Bank and which forms corroboration for her allegations. In the answering affidavit, these allegations are denied and it is said that the body corporate is taking care of its own affairs and that there is no need for Ms Noah to continue to pay anything on behalf of the respondent. The denial amounts to a bare denial. The respondent could easily produce proof that it is now paying the insurance premiums, but it fails to do so. The inference is that the trustees are not paying insurance on the building as they are obliged to do.

[26] There is accordingly not only an absence of any concrete evidence that the trustees are in fact making payments of the debts of the body corporate, but on their own showing they appear to be causing individual owners to make payments on behalf of the body corporate of small amounts in some haphazard fashion. It is clear to me that the trustees are not managing the affairs of the body corporate in a proper manner, and are thereby acting to the substantial detriment of owners of units, and that this is a suitable case for the appointment of an administrator.

[27] Whilst the feud between Ms Noah and Ms Phalane would not in itself be a ground for the appointment of an administrator, the existence of the feud in the light of the maladministration referred to above simply makes it more difficult to imagine that any normality could be restored to the administration of the building. The feud has quite apparently caused two camps to form in

the building, and this state of affairs simply reinforces my view that this is a suitable case for the appointment of an administrator.

[28] Although there are aspersions cast at Mr Kaye-Eddie, he was previously appointed as a co-administrator, and I have no reason to believe that he is not a suitable person to be so appointed.

[29] I mention in passing that the trustees were joined as respondents in Bouraimis' case, and I think properly so, since a trustee need not necessarily be an owner or the nominee of an owner which is a juristic person²³. The trustees were not joined to this application, but as no point was made of this apparent non-joinder, and it seems to me that it is in effect the trustees who are driving the opposition on behalf of the respondent, I also make no point of this.

[30] In the result I make the following orders :

- 1 The order of the Honourable Ms Justice Satchwell granted on 31 July 2007 in case number 16617/07 is hereby set aside.
- 2 The costs of the application for the rescission of such order shall be paid by the respondent.

²³ Rule 5 of Annexure 8 of the Regulations.

- 3 Mr Peter Watt Kaye-Eddie of Kaye-Eddie Estates (Pty) Ltd, 164 Louis Botha Avenue, Orange Grove, Johannesburg is hereby appointed as administrator to the Body Corporate of Los Angeles in terms of section 46 of the Sectional Titles Act, 95 of 1986, as amended (“the Act”).

- 4 The said Mr Kaye-Eddie is granted all the powers set out in section 38 of the Act and shall perform all the functions entrusted to the Body Corporate in terms of section 37 of the Act, and is in addition empowered :
 - 4.1 to collect and retain all documents and records of the Body Corporate of Los Angeles;
 - 4.2 to operate an account with a banking institution in the name of the “Body Corporate Los Angeles”;
 - 4.3 to ensure that the list of members, which has been brought up to date, stays updated, and that the record of rules of the scheme continues to be made available for inspection;
 - 4.4 to institute and prosecute legal proceedings (including arbitration as provided for in rule 71 of annexure 8 of the Regulations) for recovery of arrears from sectional title owners and other debts owed to the Body Corporate of Los Angeles; and

- 4.5 to interdict any person that obstructs him in the running of the building or the performance of his functions and powers.
- 5 Mr Kaye-Eddie shall act as administrator for a period of two years from the granting of this order.
- 6 Mr Kaye-Eddie shall at least 30 days prior to the expiration of the term of his appointment convene a general meeting of members of the respondent for the purpose of nominating and electing a board of trustees for the respondent.
- 7 The remuneration of the administrator shall be fixed at the rate of R50,00 per unit per month.
- 8 The costs incurred by Mr Kaye-Eddie are to be funded out of the administrative fund of the respondent.
- 9 The costs of the application for the appointment of an administrator shall be paid by the respondent.

ANDRÉ GAUTSCHI
ACTING JUDGE OF THE HIGH COURT

Date of hearing : **13 and 14 February 2008**

Date of judgment : **27 March 2008**

Counsel for the appellants : **Adv C van der Merwe**
(Instructed by AM Ellis Attorney)

For the respondent : **Mr N F Masenamela** (attorney with the right
of appearance) of N F Masenamela Inc