IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

17/08/2021
DATE

SIGNATURE

CASE NO'S: 2021/2054
2020/28772

In the matter between:

Applicant

NETTUS MORAL PHONEY DIBAKOANE *N.O.*

and

JAN VAN DEN BOS First respondent

P GOVENDER Second respondent

M MOYO Third respondent

TRADEWORX 148 (PTY) LTD T/A PAL PROPERTY MANAGEMENT & ADMINISTRATORS Fourth respondent

LWESWIKA GWANGWA Fifth respondent

MEISIE MALAPANE Sixth respondent

GIBSON NDLOVU Seventh respondent

SELLO RAPHELA Eighth respondent

RUTH MOTHIBEDI Ninth respondent

MAGGY KOMANE Tenth respondent

THE BODY CORPORATE OF QUEEN ANNE	Eleventh respondent
ABSA BANK	Twelfth respondent

AND

In the matter between:-

JAN VAN DEN BOS	First applicant
TRADEWORX 148 (PTY) LTD T/A PAL PROPERTY MANAGEMENT & ADMINISTRATORS (Registration number : 2006/004913/07)	Second applicant
THE BODY CORPORATE OF QUEEN ANNE (Registration number : SS105/1981)	Third applicant
THE TRUSTEES OF THE BODY CORPORATE OF QUEEN ANNE and **NCALA VALENCIA THABASILE GUGULETHU**	Fourth applicant First respondent
NETTUS MORAL PHONEY DIBAKOANE N.O	Second respondent
NETTUS MORAL PHONEY DIBAKOANE	Third respondent
NETTUS REAL ESTATES (Registration number : 2007/002327/23) (In final deregistration since 2011)	Fourth respondent
SELOANE-VINCENT ATTORNEYS	Fifth respondent
VINCENT O.M. SELOANE	Sixth respondent

ENGELBRECHT, AJ:

Introduction

1. This judgment concerns a contempt application, and a "*counter- application*" for joinder and reconsideration of the order that forms the basis for the contempt application. I refer to the parties as cited in the contempt application, unless otherwise indicated.

Background and relevant facts

2. At a 17 August 2019 annual general meeting (AGM) of the body corporate of the sectional title scheme and building known as Queen Anne situated in Hillbrow, Johannesburg (Queen Anne), held pursuant to a notice compliant with regulations issued under the Sectional Titles Schemes Management Act 8 of 2011 (the Sectional Titles Act), the fifth to ten respondents were appointed as trustees. At the time, Carleon Properties (Pty) Ltd (Carleon) was the appointed managing agent of Queen Anne.

3. On 9 August 2020, at meeting called and purporting to be an AGM (or a special general meeting), Ms Ncala Valencia Thabasile Gugulethu was alleged elected by those present at the meeting as "*chairperson*". Correspondence from an owner of seven units in Queen Anne would later point out that this meeting had been called without the requisite 30 days' notice (indeed not all owners were notified of the meeting) and that the meeting did not form a quorum, because there were only 14 attendees instead of the required 52. Of the 14 attendees, 2 were not owners and some others were said to be in arrears with their levies, and accordingly not entitled to vote. Indeed, the then managing agent of the Queen Anne Body Corporate informed the attendees that (i) the meeting was an illegitimate meeting; (ii) the meeting could not be a special general meeting as the proper time notice had not been given; (iii) notice had been given only to a "*select few";* and (iv) no agenda had been furnished. There is no minute of the meeting before this Court.

4. It would appear that, sometime in late August the "*trustees"* purportedly elected at the 9 August 2020 meeting informed Carleon Properties that the body corporate would no longer require its services and calling for the hand-over of the bank accounts to them.

5. On 1 October 2020, Ms Gugulethu caused the application for the appointment of the administrator to be issued. In this application, "*The Body Corporate of Queen Anne"* was cited as the only respondent. She sought an order that the applicant be appointed as the administrator of Queen Anne for a period of 36 months, in terms of section 16 of the Sectional Titles Act.

6. In motivating for the order, Ms Gugulethu relied *inter alia* on:

6.1. "*Lack of co-operation from some recalcitrant owners who are refusing to pay levies due or paying contribution towards the fund for the upkeep and management of the common areas including maintenance of the building";*

6.2. *"These unruly owners together with some tenants manipulated the units, they have taken it upon themselves to call meetings and give other owners who are not part of this group instructions that all amounts due and payable for levies and services should be paid into an unknown account(s), which account does not belong to the body corporate of Queen Anne neither is controlled by nor opened in the name of the body corporate of Queen Anne";*

6.3. the managing agent (identified as Carleon Properties) is not registered with the Estate Agents Affairs Board and does not have a valid fidelity fund certificate, nor was the managing agent properly appointed as required by the Sectional Titles Act; moreover, no annual general meeting had been held since the appointment of the managing agent;

6.4. "*the last attempt to hold an AGM was in August 2020 and it elected trustees, who were later unrecognised by the other owners. I attach hereto a copy of the minutes of the meeting held on 09 August of 2020. I was elected the chairperson in that meeting and other owners refused to recognise the newly elected trustees. The old trustees refused to hand over the bank account to the newly elected trustees, hence the bank freezing the account of the body corporate"*;

6.5. there were no audit reports for three years;

6.6. the body corporate is running the risk of financial loss, "*as the funds administered by the unregistered managing agent as the body corporate is not protected against theft or fraud. I [sic] is therefore my submission that the current managing agent be removed";*

6.7. the owners were not contributing levies, the safety of the building was compromised "*and as such it has opened opportunity for some unlawful activities to take place within the said property"* and "*Some residents are not co-operative in the contribution of payment of debt to the city council or to properly maintain the building";*

6.8. *"failure to reach a compromise among the residents has led to misappropriation of funds and mismanagement of the property";*

6.9. *"Some owners are continuously defying the rules and regulations of the body corporate";*

6.10. *"The body corporate's board of trustees is currently dysfunctional and there is breach of duties set out in section 39 read with ss 37, 38 and 40. Failure to effect an appointment of an administrator by the Court will cause a substantial prejudice to the owners of this property";*

6.11. *"Lack of a duly constituted board of trustees has resulted in the increase of unpaid levies"*, and the debt owed to the City of Johannesburg Metropolitan Municipality (the City) was in excess of R800 000 in September 2020;

6.12. there had been a debt settlement arrangement with the City entered into by the managing agent, but the City "*deactivated/cancelled"* the instalment payment due to breach of the settlement agreement;

6.13. the body corporate "*requires a firm control in managing its finances and collection of levies from owners and this can only be achieved if an administrator is appointed";*

6.14. *"The financial debt that the Respondent has incurred due to non-payment of certain creditors affects the members of the Respondent with regards to any legal proceedings instituted by such creditors";*

6.15. *"should the administrator not be appointed, the litigation and costs in the collection of the indebtedness due by the recalcitrant owners will be lost as they have considerable sway and influence over the owners within the building. The owners who are making payment are being prejudiced by lack of co-operation by the non-payers."*

7. In support of the applicant as administrator, Ms Gugulethu asserted that the applicant "*runs a estate agent company, has a diploma in business management administrator of sectional title scheme and dispute resolution. Has 5 years experience in the administration of body corporates and buildings in distress within Johannesburg. I submit that he is suitably qualified to successfully manage the building to the benefit of the respondent".* She attached the applicant's CV, which listed him having obtained a Diploma in Business Management in 1982 and cited under "*Working Experience"* that he is a director of Nettus Real Estates (Pty) Ltd and that his duties are "A*DMINISTRACTOR [sic] OF LOS ANGELS BODY CORPORATE", "ADMINISTRACTOR [sic] OF WESTMOLANT BODY CORPORATE",* and "*ADMINISTRACTOR [sic] OF SECTIONAL TITLE SCHEME"*.

8. On 9 October 2020, the trustees (being those elected at the August 2019 meeting) representing the body corporate of Queen Anne, entered into a management agreement with the fourth respondent (PAL Property Management). Thereafter, on 15 October 2020, Carleon Properties gave formal notice of the termination of their managing agent agreement with the body corporate. It would appear that it no longer wished to perform the duties due to factional issues within the body corporate.

9. In the meantime, on 12 October 2020, the Sheriff served the application for the appointment of the administrator, apparently on the building next door to or across the road from Queen Anne.

10. On 26 October 2020, PAL Property Management notified the body corporate of their appointment as new managing agents.

11. On 1 December 2020, Ms Gugulethu's application was heard. The matter was unopposed, with the respondents in the present application asserting that the Body Corporate had not been served with the application, and the court file in the administration application containing several affidavits showing that no service had been effected on a number of owners. This, despite the fact that the founding affidavit asserted that the applicant's attorney had "*arranged for a copy of this application prior to the hearing of this application to be placed on the Respondent's central noticeboard in a prominent position within the building"* and that he (the attorney) would also deliver a letter to all the unit owners/ occupiers within the building, advising them of the application.

12. The application came before Vally who was apparently not advised of any of the changed circumstances since the issue of the application. Vally J issued the order appointing the applicant as administrator, and vesting him with the powers and clothing him with the responsibilities as contemplated in section 16 of the Sectional Titles Act. This included that he should open a bank account at a registered commercial bank in the name of Queen Anne, "*and/or take possession of any account open in the name of the Body Corporate or any modification thereof, and continue to operate it or transfer such funds into*

the aforesaid account opened by him and therefore close any such account as he deems fit". It was specifically ordered that the order as granted be served upon *each unit* in Queen Anne.

13. The order was emailed to PAL Property Management on 11 December 2020. The email included a letter to the first to fourth respondents (being PAL Property Management and three of its directors) to deliver to the applicant a (i) levy roll; city council account; (iii) water and electricity accounts; and (iv) a list of workers of Queen Anne Body Corporate.

14. On that same day, the trustees of the Body Corporate of Queen Anne (at least until the administrator's appointment) issued a notice to the owners of units at Queen Anne, asserting that:

"*We have just been informed that some owners sneaked into the High Court on the 1st December 2020, to have an administrator appointed, without any notice of such a date to any owners. Claiming that a notice was put under all the flat doors is an outright lie. The way the appointment was made is not legitimate, because all the owners were not informed. We will oppose this appointment. There is no need for an administrator. We, the trustees are in full control of the body corporate affairs, we have managed to settle the municipal accounts, we are busy with various maintenance projects and getting full co-operation from our managing agent. The administrator blocked our Standard Bank account and without our knowledge opened an FNB account. Under no circumstances must owners pay into the FNB account as we will have no control as what will happen to that money. It may take some*

time to sort out the Standard bank account, so in the meantime we have instructed our managing agent in terms of regulations of the Sectional Titles Scheme Management Act to collect the levy payments into their ABSA Trust account. The account number will show on your levy statement, use your flat number as reference. Do not at this stage pay into the Standard Bank, nor FNB account."[1]

15. On 12 December 2020, the attorney for PAL Property Management addressed a letter to the applicant, asserting that PAL Property Management had entered into a formal agreement as property managers as provided for in the Sectional Titles Act and was therefore entitled to retain the documents sought in the 11 December 2020 letter. The applicant was informed that a number of owners of units in Queen Anne had indicated that they had not been informed of the application (taken to be the application to appoint the administrator) and that they would make application to set aside the order. A copy of the property management agreement entered into in October 2020 was attached to the correspondence.

16. The applicant says that "*the respondents"* interfered with the work of the applicant *qua* administrator, in that they issued monthly levy statements to owners and required owners to pay levies into "*the account of the respondents"*, taken as a reference to the Trust Account of PAL Property Management. Certain owners paid their levies in to this account, and the administrator was prompted to bring an urgent application.

[1] Emphasis supplied.

17. On 20 January 2021, the applicant instituted an *ex parte* contempt application for the alleged failure to comply with the order of Vally J, including a prayer that the PAL Property Management trust account be frozen.

18. The matter came before my brother Wright J in the urgent court on 26 January 2021. A rule *nisi* freezing the bank account of PAL Property Management was issued and returnable on 9 March 2021. The alleged contempt was not dealt with.

19. In response, on 18 February 2021, the respondents launched an application for reconsideration and joinder of case number 28772/2020 (in which the applicant was appointed as administrator) with this case (the contempt case). The founding affidavit patently also serves as the answering affidavit in respect of the contempt application, with specific responses thereto included in the body of the affidavit.

20. The application for reconsideration came before Mudau J in the urgent court on 23 February 2021. By order of 24 February 2021, it was struck off the roll for want of urgency. Mudau J held that to his mind "*the application was poorly conceived",* but stated that "*nothing stops the applicants to approach the court to seek an appropriate remedy in relation to a reconsideration application for purposes of the rule nisi."*

21. On 10 March 2020, the rule *nisi* was discharged before by sister Windell J, so that the freeze on the bank account was lifted and consequential relief was granted. The alleged contempt of court was postponed to the normal opposed motion court. In adjudicating upon the matter, Windell J treated the founding

affidavit in the reconsideration application as also constituting the answer to the contempt application. She did so in the exercise of her discretion to forego strict compliance with the rules of court in the interests of justice.

22. The order of Windell J is the subject of an application for leave to appeal pending with the Supreme Court of Appeal (SCA). In the SCA, the applicant contends that Windell J erred in not dealing with the contempt. Be that as it may, the contempt aspect of the application that was enrolled before me for the week of 10 August 2021. I directed that the matter be heard on the afternoon of 11 August 2021.

23. Mr Seloane, who appeared for the applicant, insisted that only the contempt was properly enrolled before me. Indeed, the "*Final Notice of Set-Down"* reflects only the case number of the contempt application. Mr Köhn, for the respondents, directed me to the "*APPLICATION FOR DATE – SIMULTANEOUS"* uploaded to CaseLines on 21 June 2021, reflecting also the date of the reconsideration application. The written heads of argument and the oral argument presented before me underscored that it would be non-sensical to treat the applications as separate. I am minded to enrol the reconsideration application and dispose of it. The arguments in the two matters are intertwined and it is unnecessary to burden yet another court with the hearing of the reconsideration application. In any event, as Windell J also recognised, it is in the interests of justice and finality that these two matters that are so intertwined be dealt with together.

<u>The contempt application</u>

Content of the contempt application

24. In the contempt application, the applicant seeks an order that:

24.1. "*the First to tenth respondents be found to be in contempt of court order granted by Honourable Judge Vally on 01st day of December 2020 under case number 28772/20 ('the court order')"*;

24.2. "*the twelfth respondent be ordered to freeze the bank account belonging to the Fourth Respondent with the following details and the amounts be transferred into the administrator's account (held at First National Bank Acc No: 6287-8581-878:*

Acc Holder: ***Tradeworx (Pty) Ltd***

Bank: ***ABSA***

Acc No: ***408 578 0059****";*

24.3. "*the First to Third Respondents be committed to prison for contempt of a court period of 30 days or such period as the court deems just and equitable";*

24.4. *"the Respondents committal to prison be suspended for a period of 10 (Ten) days on condition that the Respondents fully complies [sic] with the aforementioned Court Order";*

24.5. *"a fine of R35 000 (Thirty Five Thousand Rand) or such as deemed appropriate by this court be imposed upon the Respondents jointly each to pay R3500.00 in regard to such contempt";* and

24.6. *"The First to Tenth Respondents pay the costs thereof on attorney and own client scale, jointly and severally one paying the other to be absolved"*.

The Court Order

25. The evaluation of the contempt application requires that the order in respect of which it is sought be replicated here in full:

"***IT IS ORDERED THAT:-***

1. *Nettus Moral Phoney Dibakoane ('the administrator') is appointed as administrator of the respondent for a period of 36 months from date of appointment in terms of the provisions of section 16 of Act 8 of 2011 ("the Act");*

2. *In the sole discretion of the administrator and in his opinion and belief that it would be advisable to have the period shortened and / or extended, the administrator may apply to the Honourable Court, for leave to do so, in which event the proposed election for the appointment of the board of*

trustees referred to hereunder shall be held earlier or later as the case may be;

3. *The administrator is vested with the powers and obligations as provided in terms of section 16 of the Act, which include, inter alia, the right to:*

3.1 Convene and preside at the meetings required in terms of this Act and the scheme's rules;

3.2 Lodge with the Ombud as defined in section 1 of the Community Schemes Ombud Service Act 9 of 2011:

3.2.1 Copies of the notices and minutes of meetings; and

3.2.2 Written reports on the administration process every three months or at such shorter intervals as the court may direct.

3.3 Perform the functions of the body corporate as fully prescribed in section 4 of the Act and to comply with the regulations and rules of the Sectional Titles Management Regulations, including, inter alia,

3.3.1 To ensure against risk against which the body corporate may encounter in terms of section 3(1)(h) and (i) of the Act; and

3.3.2 To uphold and enforce the rules as prescribed in section 10 of the Act and the Annexures 1 and 2 thereto, specifically Part 6 of Annexure 1;

3.4 Exercise the powers entrusted to the body corporate as fully prescribed in section 4 and 5 of the Act;

3.5 To continue to take under his control and retain all documents and records of the respondent;

3.6 To continue and fund for the administration expenses sufficient for the repair, Up … reasonable provision for the future maintenance and repairs), for the payment of rates and taxes and other local authority charges for the supply of electric current, gas, water, fuel, sanitary and other services to the building or buildings or land and any premiums of insurance, and for the discharge of any duty or fulfilment of any obligation;

3.7 To determine from time to time the amounts to be raised for the purposes the [sic] administration and functioning of the building;

3.8 To raise the amount so determined by levying contributions on the owners in proportion to their quotas of the respective sections;

3.9 To open and operate an account at a registered commercial bank in the name of the respondent, and/or take possession of any account open in the name of the Body Corporate or any

modification thereof or pertaining thereto or purporting of [sic] representing to pertain thereto, by any other parties and continue to operate it or transfer such funds into the aforesaid account opened by him and therefore close any such account as deems fit [sic];

3.10 To keep the building known as QUEEN ANNE in a State of good repair and to Properly maintain the plant, machinery, fixtures and fittings Used in connection with the common property on any section;

3.11 To ensure that the list of members be or Stay updated, and that the record of rules of the scheme be made available for Inspection, specifically the duties of owners as set out in section 13 of the Act;

3.12 To approach the Honourable Court to institute legal Proceedings:

3.12.1 For the recovery of arrears from sectional title owners and others … Owed to the respondent, and to institute further legal Proceedings where Necessary for the aforementioned purposes in terms fully set out in section 15 of the Act;

3.12.2 To institute legal Proceedings to interdict any person that obstructs the Administrator in the running of the building or the Performance of his functions;

3.13 To grant any power that may be assigned to the Administrator at the general meeting of the owners, which Owners must qualify to vote in terms of the rules and the Act;

4. *The costs incurred by the Administrator as administrator be funded out of the administrative fund of the respondent and be fixed at a rate of R450 per hour;*

5. *A copy of this order be served on each unit at the building known as QUEEN ANNE.*

6. *The respondent is ordered to pay this costs of this application on an attorney and client scale."*

The test in contempt

26. The leading judgment on contempt of court is *Fakie.*[2] The SCA explained in that judgment that:

"*It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has in general terms received a constitutional 'stamp of approval', since the rule of law – a founding value of the Constitution –*

[2] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA).

'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained'."[3]

27. It observed, further, that a contempt of court application:

"… is a most valuable mechanism. It permits a private litigant who has obtained a court order requiring an opponent to do or not do something (ad factum praestandum), to approach the court again, in the event of non-compliance, for a further order declaring the non-compliant party in contempt of court, and imposing a sanction. The sanction usually, though not invariably, has the object of inducing the non-complier to fulfil the terms of the previous order.

In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law."[4]

28. The SCA went on to recount the requisites for contempt as follows:

"In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond

[3] *Fakie* at para 6. Footnotes omitted.
[4] *Fakie* at paras 7 – 8. Emphasis supplied.

reasonable doubt.

But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt."[5]

29. There are six points to be highlighted:

29.1. first, the order concerned must oblige the opponent to do something;

29.2. second, proof of the requirements for contempt – the order, service or notice, non-compliance, and willfulness and mala fides – must be established beyond reasonable doubt.

29.3. third, actual service of the order is not necessary, notification of the order may suffice;

29.4. fourth, even if an order is incorrectly granted, a respondent is obliged to comply with it until such time as it is set aside, except if it is a nullity;

29.5. fifth, the requirement of wilfulness and *mala fides* implies that contempt is committed not merely by the disregard of the court order,

[5] *Fakie* at para 42 (3) and (4).

but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces; and

29.6. finally, the shifting of the evidentiary burden to the respondent to establish that his non-compliance was not wilful and *mala fide* once the first three requirements for contempt have been met (order, service or notice and non-compliance), equates to there being an inference of wilful and *mala fide* non-compliance in such circumstances, which the respondent must rebut through the leading of evidence.

Discussion

30. The first requirement emanating from *Fakie* as identified poses the central question for determination in the present instance. Did the order of Vally J require the respondent in that application (the Body Corporate of Queen Anne) to do something? The short answer is that it did not. Indeed, the extraordinary feature of this application is that the only respondent in the application that led to the order of Vally J, the Body Corporate of Queen Anne, is *not* sought to be held in contempt. And, since none of the remaining respondents in the contempt application were cited as respondents in the application before Vally J, that order could never have imposed any obligations on them. Simply put, if the order was intended to impose obligations on them, they would have had a material legal interest in the outcome of the application and they would have had to be joined.

31. The order was replicated as part of this judgment and its terms are very clear: (i) the administrator is appointed; (ii) the administrator is given the power to approach a Court for lengthening or shortening his period of appointment; (iii) the administrator is given the powers and obligations in terms of section 16 of the Sectional Titles Act (*i.e.* the order places certain duties on the administrator); (iii) those duties include that he should approach a Court for recovery of amounts owed to the Body Corporate of Queen Anne and to obtain interdictory relief where persons obstruct him in the running of the building or the performance of his functions; and (iv) that he serve the order upon the owners of each unit at the building known as Queen Anne. The only person assuming any duties or obligations under this order is the administrator, with the exception of the costs order.

32. The applicant's position appears to be that the order implied an obligation on third parties to allow him to exercise his powers under the order and that, if they did not, they were in contempt of the order. However, that proposition is wrong not only generally, but also in the circumstances of this case. The power conferred upon the administrator by virtue of the order of Vally J included *inter alia* the right to approach the Court to institute proceedings interdicting a person that obstructs the administration in the running of the building or the performance of his functions. In other words, Vally J provided the administrator with a mechanism to enable him to compel third parties to act in a manner that would enable him to perform his functions. Once that is accepted, it must be accepted that Vally J did not contemplate that a party acting in a manner to frustrate performance of the administrative duties would automatically be in contempt of his order. Therefore, the precursor to any

contempt application would have had to be an application to interdict interference with the performance by the administrator of his functions. Since the order in the administration application did not place any duties directly on any person (or on the Body Corporate), it does not constitute contempt for any person to have acted in a manner that has prevented the administrator to perform any of his duties.

33. The further issue is this: it is a requirement in a contempt application that there be service or notice. Indeed, the order of Vally J included an order that it be served on every unit. On the applicant's own version this was not done. In the founding affidavit, the applicant records the obligation to serve on each unit as contemplated in the order of Vally J. This is immediately followed by an assertion that the order was emailed to PAL Property Management. Nothing further is said about service, and so it must be taken that this was the only event of service by or on behalf of the applicant. The only other attempt at service recorded in the founding affidavit was to place the Order on the notice board at the entrance of the Queen Anne Building from 8 December 2020. But that does not constitute service and it does not comply with the requirement that a copy of the order "*be served <u>on each unit</u> at the building known as QUEEN ANNE"*.[6] On his own version, therefore, he has neither complied with the requirement contained in the order of Vally J nor with the service requirement that is a precursor to a contempt application. Let me be clear: at best for the applicant, there was service to PAL Property Management and, by association, its directors. On the applicant's own

[6] Emphasis supplied.

version, there was no service on the trustees (the fifth to tenth respondents) and no service on the Body Corporate of Queen Anne.

34. I cannot accept the assertion in the founding affidavit that the applicant has "*fully complied"* with the procedural requirement of proof of service. It is true that PAL Property Management had been appointed as the managing agents of Queen Anne, but the applicant's position appears to be that his appointment as administrator effectively undid that appointment (he says that "*the Court Order overrides any other arrangement or agreements entered into"*). He cannot have his cake and eat it: if, in consequence of the applicant's appointment, PAL Property Management was no longer the lawfully appointed managing agent of Queen Anne, then he cannot assert that service on PAL Property Management constituted service on the Body Corporate of Queen Anne. And, of course, as noted above, the Body Corporate of Queen Anne, being the opposing party in the application, is not even sought to be held in contempt. He can also not say that somehow PAL Property Management, whose appointment on his version had been undone, had to assume any obligation to distribute the order to others, including the owners of the units.[7]

35. Moreover, since the applicant cannot show that the order of Vally J imposed any direct obligation to be complied with on any of the respondents sought to be held in contempt, the applicant also cannot meet the requirement as reiterated in *Fakie* that there is any wilful and malicious non-compliance. It cannot show any form of non-compliance with an order that does not require

[7] See in this regard, *Grundler NO v Rambadursing* 2011 JDR 0598 (KZD), explaining that the administrator steps into the shoes of the body corporate.

compliance. Again, this Court must reject the assertion in the founding affidavit that non-compliance was proven.

36. Given that the applicant has failed to establish the requirements of (i) an order placing an obligation on the respondents in respect of whom a contempt order is sought; (ii) notice to or service of the order upon all of the respondents sought to be held in contempt; and (iii) non-compliance with an obligation imposed by the court order, the questions of wilfulness and malice do not even enter the debate. It can never be said that there was a deliberate, intentional refusal to comply with an obligation imposed by the Court.

37. The contempt application falls to be dismissed.

38. For the sake of completeness, I have to deal with the prayer in the notice of motion calling for the freezing once more of PAL Property Management's trust account. Given the framing of the relief sought and the order in which the prayers are set out, it seems to me that this order is sought in consequence of the prayer that the first to tenth respondents be held in contempt and therefore once I find that the contempt application falls to be dismissed, the consequential relief cannot be entertained. I have analysed the founding papers in the contempt application and it appears that there is no separate case made out for the grant of the relief sought in relation to freezing the bank account. In any event, the question of the freezing (and unfreezing) of the bank in question is the subject of an appeal to the SCA. It would be inappropriate for this Court to pre-empt the adjudication by the SCA by making a finding that may be inconsistent with any order to be issued by the SCA. I

decline to entertain the relief sought in respect of the freezing of the bank account insofar as it may stand separately from the contempt application.

The reconsideration application

Introduction

39. The notice of motion in the reconsideration application signals in the heading between the tram lines that it is an application made "*IN TERMS OF RULE 6(12)(C)".*

40. Rule 6(12)(c) reads: "*A person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order*."

41. While subrule 6(8) allows a person against whom an order has been granted *ex parte* to anticipate the return day upon notice, this subrule allows a person against whom an order was granted in his absence in an urgent application to set the matter down on notice for reconsideration. It is for this reason that Mr Seloane argued before me that rule 6(12)(c) does not find application in respect of the order freezing the bank account: after all, the application here was brought *ex parte*. I do not find the submission convincing. It is particularly unconvincing to make the argument in the circumstances of the case, where no return date was provided for in the order that is sought to be made the subject of reconsideration. In any event, it is the absence of the aggrieved party that has been termed the "*underlying pivot*" to which the exercise of the power under subrule 6(12)(c) is coupled. The

essential rationale for the rule is to give effect to the *audi* principle. Th requirement of absence is satisfied in the present instance. It is also notable that in *Competition Commission v Wilmar Continental Edible Oils & Fats (Pty) Ltd and Others*[8] the reconsideration application in question was launched pursuant to an order being granted *ex parte.* The Court there explained:

"In terms of rule 6(12)(c) the respondents are entitled to have an order reconsidered on the presence of two jurisdictional facts: that the main application was heard as a matter of urgency; and that the first order was granted in their absence. The dominant purpose of the Uniform Rule is to afford to an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted as a matter of urgency in his absence. See ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others 1996 (4) SA 484 (W) ([1996] 4 All SA 58) at 486H – 487B. Read also Oosthuizen v Mijs 2009 (6) SA 266 (W) at 268H – I."

42. What, then, is the duty of this Court in the reconsideration application? Guidance may be taken from *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others*[9]

"*The Rule has been widely formulated. It permits an aggrieved person against whom an order was granted in an urgent application to have that order reconsidered, provided only that it was granted in his absence. The underlying*

[8] 2020 (4) SA 527 (KZP).
[9] 1996 (4) SA 484 (W) at 486H- 487C

pivot to which the exercise of the power is coupled is the absence of the aggrieved party at the time of the grant of the order.

Given this, the dominant purpose of the Rule seems relatively plain. It affords to an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted as a matter of urgency in his absence. In circumstances of urgency where an affected party is not present, factors which might conceivably impact on the content and form of an order may not be known to either the applicant for urgent relief or the Judge required to determine it. The order in question may be either interim or final in its operation. Reconsideration may involve a deletion of the order, either in whole or in part, or the engraftment of additions thereto.

The framers of the Rule have not sought to delineate the factors which might legitimately be taken into reckoning in determining whether any particular order falls to be reconsidered. What is plain is that a wide discretion is intended. Factors relating to the reasons for the absence, the nature of the order granted and the period during which it has remained operative will invariably fall to be considered in determining whether a discretion should be exercised in favour of the aggrieved party. So, too, will questions relating to whether an imbalance, oppression or injustice has resulted and, if so, the nature and extent thereof, and whether redress is open to attainment by virtue of the existence of other or alternative remedies. The convenience of the protagonists must inevitably enter the equation. These factors are by no

means exhaustive. Each case will turn on its facts and the peculiarities inherent therein."[10]

43. Let me turn then to the application at hand.

The relief sought

44. What is expressed in terms is, in the first place, a request for reconsideration of the order of Wright J of 26 January "*in terms of Rule 6(12)(c)".* However, as the chronology hereinabove shows, the rule *nisi* issued on that day has been discharged. The order of Windell J is the subject of a pending application for leave to appeal to the SCA. No reconsideration of the order of Wright J can competently be entertained in the circumstances. In any event, when the application came before me, this relief was not pressed for.

45. However, the reconsideration application was not confined to that. What is sought, is "*to set aside the appointment of [the applicant], in terms of section 16(5)(a) of the [Sectional Titles] Act on the grounds that"* he –

45.1. "*is a director of a financially distressed company, Nettus Real Estates (Pty) Ltd in final deregistration since 2011*";

45.2. "*has failed to make out a case in terms of the provisions of section 16 of the [Sectional Titles] Act";*

[10] Emphasis supplied.

45.3. "*is not qualified to administer a sectional title on representations as contained in his curriculum vitae";*

45.4. *"is not in possession of an EAAB trust account, neither does he hold a trust account in order to administrate a sectional title scheme in terms of the provisions of the [Sectional Title] Act and the Regulation";* and

45.5. *"the administration application has yet to be served on any of the occupants and/or owners of the body corporate of Queen Anne"*.

46. The framing of the relief sought here, as being for a setting aside of the appointment is infelicitous, since it does specifically invoke Rule 6(1)(c) upon which the application is said to be premised; rather, on the face of it, it appears to invoke section 16 of the Sectional Titles Act to have the administrator removed from office. But the mere fact that express reference is not made to Rule 6(12)(c) in this part of the relief does not mean that reconsideration was not sought in terms of the rule – indeed the short heads filed on behalf of Ms Gugulethu and the applicant indicate that they understood and responded to this relief as constituting a reconsideration application.

47. If they are correct in their understanding, that fact disposes of the preliminary point that the applicants had no *locus standi* to bring the application. The conclusion cannot be right. On the applicant's version of events, his appointment as administrator affected the rights of PAL Property Management under a management agreement concluded with the trustees elected at the 17 August 2021 meeting; it affected the rights of the persons elected as

trustees at that meeting; and it affected the rights of the Body Corporate of Queen Anne. By right, these parties ought to have been joined in the application to have the administrator appointed. Not only was this not done, there is also no evidence before this Court that these parties were given notice of the proceedings. Something must in particular be said about the alleged absence of *locus standi* of the Body Corporate of Queen Anne. It cannot be so that, as the applicant insists, the Body Corporate of Queen Anne had no *locus standi* to pursue the reconsideration application on account of the administrator having been appointed. That would be to hold that an order appointing an administrator that was granted in the absence of the body corporate can never be challenged in a reconsideration. I find that the appointment of an administrator does not devoid a body corporate of the *locus standi* to seek reconsideration. I am fortified in this conclusion that section 16(5) of the Sectional Titles Act empowers the body corporate to bring an application to remove an administrator. The statute thus recognises that the body corporate, despite the conferment of powers on the administrator, retains the right to ask for the removal of the administrator. If the body corporate has standing to bring application for removal in terms of section 16(5), it must equally have standing to bring a reconsideration application.

48. The second point taken is that the order appointing the applicant as administrator was not an order taken in urgent court. The point is this: it appears to be jurisdictional requirement for a reconsideration application that the application was to have been made I urgent court. It seems to me undesirable that the Body Corporate of Queen Anne ought to be precluded from bringing a reconsideration application by the mere fact that the

application for the appointment of the administrator was not heard in the urgent court, but where the circumstances of the case are akin to an order granted in urgent court. As the case precedent referred to above shows, the "*pivot"* is the absence of the party. Surely, this Court must interpret and apply the rules in a manner that is consistent with the access to court right in section 34 of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution). As O'Regan J explained in *Giddey NO v JC Barnard and Partners:*[11] "*A court that fails to consider the relevant constitutional provisions will not have properly applied the rules at all"*. Moreover, in accordance with section 173 of the Constitution, the High Court "*has the inherent power to protect and regulate their own process … in the interests of justice"*. The Constitutional Court confirmed in *S v S*[12] that "*where strict adherence to the rules is at variance with in the interests of justice, a court may exercise its inherent power in terms of s 173 of the Constitution to regulate its own process in the interests of justice"*.

49. However, even if I am wrong in my assessment that I am able to overlook the fact that the "*reconsideration*" sought may competently be entertained under rule 6(12)(c), that is not the end of the relief that is sought in the reconsideration application. I explained hereinabove that I considered the language in the prayer concerning the set-aside of the appointment of the administrator as infelicitous. But maybe it is not. Upon reflection, it would appear that what is being relied on is not rule 6(12)(c) – hence the absence from the prayer of any reference to rule 6(12)(c). The substance of the prayer

[11] 2007 (5) SA 525 (CC).
[12] 2019 (6) SA 1 (CC) at para 58.

and the provisions invoked in support of the prayer give credence to the conclusion that one is in fact concerned here with an application in terms of section 16(5) of the Sectional Titles Act. As I have already indicated, a body corporate retains the entitlement to make such an application even where an administrator is appointed.

50. For the sake of completeness, I will consider the application both (i) under rule 6(12)(c), assuming I can condone the fact that that the original order was not granted in urgent court; and (ii) under section 16(5) of the Sectional Titles Act.

51. The starting point for the analysis must be the provisions of the Sectional Title Act.

The Sectional Titles Act

52. According to its Long Title, the Sectional Titles Act is to provide *inter alia* for the "*establishment of bodies corporate to manage and regulate sections and common property in sectional titles schemes and for that purpose to apply rules applicable to such schemes"*.

53. In accordance with section 2(1), "*With effect from the date on which any person other than the developer becomes an owner of a unit in a scheme, there shall be deemed to be established for that scheme a body corporate of which the developer and such person are members, and any person who thereafter becomes an owner of a unit in that scheme is a member of that body corporate*". The developer ceases to be a member when they cease to

have a share in the common property and when an owner owns a unit, the membership of such an erstwhile owner in the body corporate also ceases.[13]

54. The body corporate is responsible for the enforcement of rules as contemplated in section 10 of the Sectional Titles Act, and for the control, management and administration of the common property for the benefit of all owners.[14] It must perform the functions entrusted to it by or under the Sectional Titles Act or the rules, and those functions include those listed in section 3(1) of the Sectional Titles Act. I do not intend to rehearse those functions here. Moreover, the statute in section 4 entitles the body corporate to exercise certain powers, which include to (i) appoint agents or employees of the body corporate; and (ii) do all things reasonably necessary for the enforcement of the rules and for the management and administration of the common property.[15]

55. The functions and powers of the body corporate must, "*subject to the provisions of [the Sectional Titles] Act, the rules and any restriction imposed or direction given at a general meeting of the owners of sections, be performed and exercised by the trustees of the body corporate holding office in terms of the rules*". The Trustees stand in a fiduciary relationship to the body corporate.[16]

[13] Sectional Titles Act s 2(2) and 2(3).
[14] Sectional Titles Act s 2(5).
[15] Sectional Titles Act s 4(a) and 4(i).
[16] Sectional Titles Act s 8(1).

56. A body corporate may sue or be sued in its own name in respect of any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under the Sectional Titles Act or any rule.[17]

57. In addition, an owner may initiate proceedings "*on behalf of the body corporate"*:

> *"(a) when such owner is of the opinion that he or she and the body corporate have suffered damages or loss or have been deprived of any benefit in respect of a matter mentioned in section 2 (7), and the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit; or*
>
> *(b) when the body corporate does not take steps against an owner who does not comply with the rules."*

58. In such a case, the owner must give notice as contemplated in section 9(2) of the Sectional Titles Act and a court may make an order as contemplated in the remainder of section 9.

59. Moreover, a body corporate, a local municipality, a judgment creditor of the body corporate or any owner or other person having a registered real right in or over a unit "*may apply to a Magistrate's Court for the appointment of a suitably qualified and independent person to serve as the administrator of the body corporate*".[18] Upon hearing of such an application, a Magistrate's Court

[17] Sectional Titles Act s 2(7)(d).
[18] Sectional Titles Act s 16(1).

may appoint an administrator for a fixed period and on such terms and conditions as it deems fit, subject thereto that it finds:

> *"(i) evidence of serious financial or administrative mismanagement of the body corporate; and*
>
> *(ii) that there is a reasonable probability that, if it is placed under administration, the body corporate will be able to meet its obligations and be managed in accordance with the requirements of [the Sectional Titles Act]"*

60. Upon such appointment being made, the administrator then has "*to the exclusion of the body corporate"* such powers and duties of the body corporate as the Magistrate's Court directs, and "*must exercise these powers to address the body corporate's management problems as soon as possible"*.[19] Any person that has the entitlement to bring an application to appoint an administrator is empowered under section 16(5) of the Sectional Titles Act to remove the administrator from office.

Analysis

61. In accordance with the duties upon this Court, it now falls to me to consider whether the relief sought in the reconsideration application can be competently granted. This exercise must be done against the backdrop of the

[19] Sectional Titles Act s 16(3).

requirements to be fulfilled in an application where an administrator is appointed. In this I am guided by -

61.1. the test in *Bouramis and another v Body Corporate of the Towers and others:*[20]

> *"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 37, 38, and 40, and, secondly, that it is likely that the owners of units shall suffer substantial prejudice if an administrator were not appointed by the Court. Such breaches should take the form of a failure to perform duties or the improper performance of duties.";* and

61.2. the requirement in *Dempa Investments*[21] that there be "*special circumstances"* shown, which "*as a minimum"* include "*some neglect, wilfulness or dishonesty on the part of trustees, or an event beyond their control"*, and "*a likelihood that the owners of the units will suffer substantial prejudice if an administrator is not appointed"*;

61.3. the consideration in *De la Harpe Body Corporate of Bella Toscana*[22] that "*a mere disagreement or stand-off between the body corporate and an owner or group of owners is not sufficient to trigger the*

[20] 1995 (4) SA 106 (D) at 109G-I.
[21] *Supra* at para 21.
[22] 2014 JDR 2306 (KZD) at para 26.

decision to appoint an administrator. The threshold is much higher and the onus is on the applicant to show that he or she will suffer 'substantial prejudice' should an administrator not be appointed."

62. I also take notice of the reasoning of the Court in *Dempa Investments* that the question whether an administrator should be appointed hinges in part on the consideration that "*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".*

63. Let me comment at the outset that there is no jurisdictional issue with the application for the appointment of the administrator: even though the Sectional Titles Act speaks of the application to have an administrator appointed and the one to have the administrator removed being brought in the Magistrate's Court, the judgment in *Gert v Body Corporate of Albany Court*[23] confirms that the section is not peremptory. Ironically, as an aside, it is the first respondent that was appointed as the administrator in that case.

[23] 2013 JDR 0923 (GSJ).

64. I am in respectful agreement with my brother Wepener J's assessment in *Oosthuizen v Mijs*[24] that, if I engage upon a reconsideration, I cannot confine my analysis to the application that served before Vally J alone. That would do violence to the *audi alteram partem* principle, which is the very point of a reconsideration application. Indeed, as Froneman J said in *Reclamation Group (Pty) Ltd,*[25] *"the reconsideration of the matter needs to be done on the basis of a set of circumstances quite different to that under which the original ex parte order was obtained".*

65. I thus consider the basis for Ms Guglethu's application against the full facts now available, and on the standard applicable to applications for an administrator to be appointed.

66. <u>Lack of co-operation from recalcitrant owners and payment of levies into account not operated by the Body Corporate of Queen Anne</u>

66.1. It would appear that the lack of co-operation complained of was lack of co-operation with Ms Gugulethu and her faction. In any event, in the case of such a complaint, the solution appears to lie in section 9 of the Sectional Titles Act, not in seeking the appointment of an administrator. Section 9 would also provide the mechanism in response to the (wholly unsubstantiated) complaint that *"Some owners are continuously defying the rules and regulations of the body corporate".*

[24] 2009 (6) SA 266 (W).
[25] 2004 (1) SA 215 (SE) at 218D-F.

66.2. The complaint relating to the bank account appears to be a complaint relating to payment into the trust account of PAL Property Management, although that allegation is not directly made. There is nothing untoward about payment made into a trust account.

66.3. Indeed, the real problem with seeking appointment of an administrator on these two bases is that it is completely lacking in detail. It cannot form the basis of an order to appoint an administrator.

66.4. The same is true of allegations of undefined illegal activities, misappropriation of funds and mismanagement of the property. No facts underlying any of these allegations were provided by Ms Gugulethu. Being unsubstantiated, they cannot form the basis of an order that an administrator be appointed.

67. Complaints about Carleon Properties

67.1. By the time that the application for the appointment of the administrator was launched, Ms Gugulethu and her cohorts had given notice to Carleon Properties. On her own version (in which she asserts authority to have acted), they were therefore not the managing agents at the time the application was heard.

67.2. Given the findings of this Court, that notice was ineffective, but in any event, Carleon Properties itself gave notice and the duly elected trustees had made appointment of PAL Property Management well before the application for the appointment of the administrator was

heard. Whatever shortcomings Carleon Properties might have had, by the time the application came to be heard, such shortcomings could not be relied on as a basis for the application.

67.3. Quite apart from the fact that a number of the allegations (such as failure to produce financial statements and failure to call meetings) have in the meantime been shown to have been untrue, it is also a fact that, by the time Ms Gugulethu brought the application, new managing agents had been appointed by the duly appointed trustees.

67.4. Notably, the only allegation of risk of financial loss to the Body Corporate was premised on the allegations concerning Carleon in its continued role as managing agent. Once it is accepted (as it has to be) that PAL Property Management had replaced Carleon as managing agents by the time the application was heard, then there are no relevant allegations of risk of financial loss left before this Court. Ms Gugulethu knew this very well, as is evident from the fact that the only service of the order of Vally J purportedly effected was upon PAL Property Management. The administrator, no doubt on the advice of Ms Gugulethu that PAL Property Management was the appointed managing agent, also sought co-operation from that entity in pursuit of his efforts to take up his duties under the order of Vally J.

67.5. In respect of PAL Property Management, it is clear that Mr Van den Bos (the first respondent in the contempt application) and his firm (the

fourth respondent) hold a valid certificate from the Estate Agency Affairs Board.

68. The election of Ms Gugulethu and the failure to co-operate

68.1. On the objective evidence, the meeting at which Ms Gugulethu was allegedly elected was not a legitimate meeting of the Body Corporate. Notice was not appropriately given and there was no quorum. Members in arrears with levy payments were apparently allowed to vote. No minutes of this meeting have been provided to substantiate Ms Gugulethu's assertion that she was elected as the chairperson, and no indication is given in the agenda (relied on in the application as constituting "*minutes"* as to who else might have been elected as trustees at that meeting.

68.2. In the circumstances, there was no obligation on the "*old trustees"* to hand anything over to Ms Gugulethu and her cohorts. It was directly as a result of Ms Gugulethu's improper interference with the work of the duly elected trustees that the bank froze the account.

69. No audit reports for three years

69.1. This allegation has been shown to be false.

70. Board of Trustees dysfunctional and breach of duties

70.1. The first problem for Ms Gugulethu is that she does not make clear whether she relies on the dysfunctionality of the trustees properly elected at the 17 August 2019 meeting or the ones purportedly elected at the 9 August 2020 meeting.

70.2. The second problem is that a sweeping statement of "*breach of duties contained in section 39, read with sections 37, 38 and 40*" is made. What sections are being referred to here is not identified – the Sectional Titles Act does not contain such sections. What appears to have happened is that Ms Gugulethu or her legal representative slavishly copied and pasted from considerations in the *Bouramis* judgment,[26] which concerned interpretation and application of the predecessor to the Sectional Titles Act. No basis for the application can be founded in these allegations, which in any event are conclusions of law, not pleading of facts.

71. Lack of duly constituted board of trustees

71.1. The evidence before the Court is that trustees were duly elected in August 2019.

[26] *Supra*.

72. Debt owed to the City

72.1. The affidavits exchanged show that it is true that the Body Corporate of Queen Anne had fallen into arrears with municipal payments. But even on the version presented by Ms Gugulethu, efforts had been made by the previous management agents to come to an arrangement with the City.

72.2. Although it is accepted that the Body Corporate of Queen Anne had not been in a position to honour its settlement agreement with the City due to the effects of Covid-19, the trustees elected at the 17 August 2020 meeting and PAL Property Management truly appear to have matters in hand. Account statements even in respect of October 2020, when the application for the appointment of the administrator was launched, already indicate that the reduction of the debt was being managed quite effectively. Indeed, by that stage the account was in credit.

72.3. Notably, the City made no application to have an administrator appointed, as it would have been entitled to do if it considered the management of the debt owed to it to required such intervention.

73. The body corporate "*requires a firm control in managing its finances and collection of levies from owners and this can only be achieved if an administrator is appointed*"

73.1. That firm control is needed is not a basis for the appointment of an administrator.

73.2. Wallis J (as he then was) in *Herald Investments Share Block (Pty) Ltd and others v Meer and others; Meer v Body Corporate of Belmont Arcade and another*[27] correctly described the step to appoint an administrator as a “drastic Power”:

"….it removes control of the affairs of the body corporate from those in whom it should be vested, namely the trustees elected by the members of the body corporate. In my view, therefore, it would normally only be exercised when those persons are not in a position properly to perform the functions assigned to them under the [Sectional Titles] Act, or when the body corporate has not elected trustees, or where for some other reason the affairs of the body corporate are not being, or are not capable of being, administered in the fashion that the Act contemplates. …. But it must be borne in mind that the purpose of appointing an administrator is remedial, the idea being that the conduct of the affairs of the body corporate should after administration be restored to the members of the body corporate."

[27] [2011] 2 All SA 103 (KZD) at para 46.

73.3. This allegation that firm control is required (devoid of factual underpinning once more) cannot form the basis of the appointment of an administrator.

73.4. In any event, a bank statement that is attached to the reconsideration application indicates that, as at 8 December 2020, there was a health balance in the account of the Body Corporate of Queen Anne.

Conclusion

74. With the benefit of both sides of the story, the benefit not enjoyed by my brother Vally J, it would appear that the application to have the Body Corporate of Queen Anne be put under administration was driven by a group of disaffected owners and tenants, many of whom according to the levy roll were significantly in arrears. That, of course, might (at least in part) explain the inability of the Body Corporate of Queen Anne to have met its obligations to the City for some time. Upon reconsideration, I find that there was no basis for such appointment.

75. Even if this Court were not to have jurisdiction to entertain a reconsideration application under section 6(12)(c), the considerations listed hereinabove indicate that this Court does can accede to the request for the setting aside of the appointment of the administrator (or his removal) in accordance with section 6(5) of the Sectional Titles Act. The Body Corporate of Queen Anne has the *locus standi* to bring such an application and the Court enjoys jurisdiction to entertain such application.

76. The point is this, the appointment of an administrator is only ever an interim solution until such time as the affairs of a body corporate have been sorted out. Here, insofar as the Body Corporate of Queen Anne had in fact experienced any problems, those have manifestly been sorted out, particularly insofar as payment of monies due to the City is concerned.

77. The removal of the applicant as administrator is also appropriately motivated by reason of the fact that the applicant does not appear to have been an appropriate person to have been appointed as administrator. His CV as relied upon does not provide any degree of detail necessary to lead one to the conclusion that he qualifies for appointment.

78. In response to an allegation that estate agent company of which the applicant is a director is deregistered, the applicant says that the financial distress of that entity is not relevant. To this Court it seems highly relevant that a director of an entity in financial distress is appointed to manage the financial affairs of a body corporate. A bald denial of the allegation that the applicant is not duly qualified also does not assist him. In view of the serious challenges raised, this supine approach gives credence to the conclusion that the applicant is not appropriately qualified. This Court would have expected him to provide details of his qualifications and experience to convince the Court that he allegations made against him are not spurious. He did not do so, and therefore the allegation that he is not qualified and accordingly ought to be removed is unchallenged.

Costs

79. In both directions the parties have asked for punitive costs orders. An effort was made in the reconsideration application to argue for the joinder of the applicant's attorney and the imposition of costs orders upon him as well. This Court declines to make the costs orders sought in the form proposed. The adverse effects upon the Body Corporate of Queen Anne can be appropriately managed by the costs orders that I propose to make. The Body Corporate should not be held responsible for the costs; the *dramatis personae* who drove the applications should. This does not for present purposes include the attorney acting for the applicant and Ms Gugulethu. There mere fact that criticism may lie against the conduct of an attorney does not warrant that he should be made a party to the litigation or burdened with a costs order. Insofar as the costs in the reconsideration application are concerned, this Court takes the view that the costs cannot be on a punitive scale. The manner in which the reconsideration was framed presented an opportunity to challenge its basis and even though that challenge was ultimately unsuccessful, it was not spurious.

Conclusion

80. In the circumstances, I make the following order:

80.1. The application under case number 2021/2054 and the application under case number 2020/28772 are joined.

80.2. The application under case number 2021/2054 is dismissed with costs on an attorney and own client scale, such costs to be borne by Mr Nettus Moral Phoney Dibakoane in his personal capacity;

80.3. Mr Nettus Moral Phoney Dibakoane is removed as administrator of the Body Corporate of Queen Anne.

80.4. The applicant for appointment of an administrator in case number 2020/28772, Ms Ncala Valencia Thabasile Gugulethu, is directed to pay the costs of the applicants in the reconsideration application under the same case number, on a party-and-party scale.

MJ ENGELBRECHT
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 17 AUGUST 2021.

Date of hearing: 11 August 2021

Date of judgment: 17 August 2021

Appearances

For the applicant:	Mr V.O.M Seloane of Seloane Vincent Attorneys
For the respondents:	Mr M Köhn
Instructed by:	AM Ellis Attorneys