

REPUBLIC OF SOUTH AFRICA



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

Case No: 2018/8948

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

16 March 2023

.....
SIGNATURE

.....
DATE

In the application between:

SAINET NGHONYAMA

First Applicant

GORDON EPHRAIM NDLOVU

Second Applicant

TSAKANI MARTHA KHOSA

Third Applicant

EPHRAIM DHLAMINI

Fourth Applicant

NATHANIEL MARTIN ZULU

Fifth Applicant

and

THE BODY CORPORATE OF PEARLBROOK

Respondent

JUDGMENT

Heard: 16 January 2023

Delivered: 16 March 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 16 March 2023.

Summary: Sectional Titles Schemes Management Act 8 of 2011 – section 16 - appointment of administrator - failure to account – termination of appointment.

TURNER AJ

[1] On 5 March 2018 the applicants in this matter, as owners of units in the building known as Pearlbrook, launched an application in which they sought the following relief:

- “1. Pending the finalisation of the matter to be heard under **Part B** of the application, **JAN VAN DEN BOS** (the Administrator) is appointed as Administrator to 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. Provided that 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 events the proposed election for the appointment of the Board of Trustees referred to hereunder shall be heard earlier or later as the case may be.
3. The Administrator [sic] 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 3 of the Act and to comply with the regulations and rules of the Sectional Titles Management Regulations.

...

3.9 To open and operate an account at a registered commercial bank in the name of the respondent ...

3.10 To keep the building known as Pearlbrook in a state of good repair ...

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

6. A rule nisi be issued returnable on the [left blank] 2018 where any party who has any claim shall be entitled to oppose the grant of final relief therein ...”

[2] The notice of motion goes on to set out under the heading “Part B”, that the relief to be claimed in Part B was –

“9. The rule nisi in Part A of the application be confirmed.

10. The respondent pays the costs of this application alternatively any party opposing this application be ordered to pay the costs thereof on an attorney-and-client scale ...”

[3] It appears that Part A of this 2018 application was unopposed and an order was granted on 1 August 2018. Strangely, however, the terms of the main order differed from the terms of the order sought in Part A of the Notice of Motion. The remaining relief in Part A appears to have remained the same as that set out in the notice of motion. The relevant part of the order read as follows:

“JAN VAN DEN BOS N.O. (‘the Administrator’) is appointed as Administrator to the respondent for a period from where a date obtained from the court’s Honourable Registrar to hear Part B opposed and/or unopposed, from a final appointment up to date of appointment in terms of the provisions of section 16 of Act 8 of 2011 (‘the Act’).”

- [4] There does not appear to have been any opposition to the application but it is not clear whether the content of the amended order was shared with the respondents before it was presented to the Court and granted. The order having been granted and notwithstanding the text of the order, Mr van den Bos relied on the Part A order to hold himself out and act as administrator after the order was granted. Part B of the relief claimed was never set down.
- [5] In January 2022, more than 36 months after the Part A order was granted, an affidavit was delivered on behalf of the respondent. The deponent acknowledged that the answering affidavit was extremely late and requested condonation. For the reasons set out below, I grant condonation for the late filing of the answering affidavit.
- [6] The crux of the case made in the answering affidavit is that the members of the respondent have a serious objection to the permanent appointment of Jan van den Bos as administrator. What emerges from the answering affidavit is:
- (i) From the date of the Part A order, Mr van den Bos has purported to be the “appointed administrator” asserting that he has authority to act over Pearlbrook in terms of powers granted by the 1 August 2018 court order. He did so during the three-year period following August 2018 and thereafter up to the point where the answering affidavit was delivered in January 2022.

- (ii) Mr van den Bos has not carried out the functions mandated by section 16(4) of the Act, namely:

“(4) The administrator must-

(a) convene and preside at the meetings required in terms of this Act and the scheme's rules; and

(b) lodge with the ombud-

(i) copies of the notices and minutes of meetings; and

(ii) written reports on the administration process every three months or at such shorter intervals as the Magistrate's Court may direct.”

[7] Mr Mhlanga, who appeared for the respondent, argued that there were significant difficulties with the reformulation of prayer 1 of the order (quoted above). Not only did it differ from the prayer sought in the notice of motion but it is extremely unclear as to what was intended. On the interpretation argued by Mr Mhlanga, the order does not purport to appoint Mr van den Bos at all but, rather, to record merely the terms on which he would be appointed on the return date contemplated in Part B.

[8] Clearly, Mr van den Bos (and the applicants) took a different view and conducted themselves on the basis that the 1 August 2018 order did appoint Mr van den Bos indefinitely, unless or until Part B was set down and the appointment was set aside.

[9] In argument, Mr Kohn who appeared for the applicants, conceded that Mr van den Bos' appointment as administrator could no longer be valid. Mr Kohn suggested that this was because 36 months mentioned in the notice of motion had passed during August 2021. I agree that Mr van den Bos' appointment as

administrator can no longer be valid, but I do not agree that it is merely because the 36-month period expired during 2021.

[10] It ought to have been brought to the court's attention when the 2018 order was sought that the provisions of section 16(2)(a) of the Sectional Title Schemes Management Act 8 of 2011 requires the court to appoint an administrator "*for a fixed period and on such terms and conditions as it deems fit*". These requirements are not met in the order. Further, where the order which was granted was not granted in terms of the notice of motion (which recorded that the appointment would be for 36 months) but in terms of reformulated relief which did not mention the 36 months, there is no basis to rely on the 36 months referred to in the original notice of motion.

[11] It is not necessary for me to resolve the interpretational debate on these matters because, with the applicants' counsel's concession, it was common cause at the hearing of the matter that Mr van den Bos cannot continue as administrator in terms of an appointment under the above case number. Consequently, it is necessary for me to make an order discharging the rule and the relief granted on 1 August 2018. I confirm that Mr van den Bos is, as at the date of this judgment, no longer appointed as administrator of the respondent – the Body Corporate of Pearlbrook.

[12] I must make it clear, however, that having taken on the mantle of administrator during this extended period and having collected monies and purported to act as administrator on behalf of the Body Corporate, Mr van den Bos remains accountable to the members of the Body Corporate and to the Ombud (as

contemplated in clause 3.2 of the order) for everything done during the entire period up to the date of this judgment.

[13] The only issue which was ultimately in dispute at the hearing of this matter was the issue of costs. Mr Kohn argued that I should exercise my discretion in favour of an order where each party pays its own costs. Mr Mhlanga contends that the applicants should pay the costs of the application.

[14] The applicants did not file a replying affidavit or heads of argument, the latter despite an order by Mia J on 5 September 2022 compelling them to do so. No explanation was given for this non-compliance. Instead, shortly before the hearing, on 12 January 2023, AM Ellis Attorneys the attorneys for the applicants, wrote a letter to the respondents alleging vaguely that “*you have failed to comply with the Rules of Court which specifically includes the consolidated practice directives applicable*”. The letter then goes on to record:

“These deficiencies are fatally defective to the hearing of an opposed motion and will be presented and argued at the hearing of the application at which time an order for costs *de bonis propriis* will be sought against your firm should you fail to remove the matter before close of business 13 January 2023.”

[15] This letter was uploaded on to Caselines. This vague and empty threat did not feature at the hearing of the matter but provides a glimpse of what appears to have been the attitude of those instructing Mr Ellis. I suspect that this is less likely to be the attitude of the named applicants and more likely the attitude of Mr van den Bos and his firm PAL Property Management. My suspicion was supported by the fact that the same attorney, AM Ellis, acted for Mr van den Bos and PAL Property Management in a different matter, unrelated to the

current applicants, which was heard in terms of the Community Schemes Ombud Service Act (Case No. DSOS001285/GP/17) [Caselines 013-112 at 115]. No doubt Mr van den Bos and PAL Property Management have an interest in continuing to earn income from Pearlbrook.

[16] The uncontradicted evidence on the answering affidavit is that, during the period since the 1 August 2018 order was granted; Mr van den Bos has not held any meetings as required by the Act (this is in fact confirmed in his attorneys response to the Rule 35(12) notice delivered by the respondent); Mr van den Bos has not disclosed the financials of the respondent despite requests that he do so; Mr van den Bos has not provided the bank statements for the respondent; Mr van den Bos has used the bank account at Absa Bank opened for “Pearlbrook” to receive monies from persons who are unrelated to Pearlbrook. One example of this was provided by the respondent which shows that Mr van den Bos, via PAL Properties, was collecting payments from properties in Yeoville into the same account as those received in respect of Pearlbrook.

[17] From all of this, it is clear to me that the respondents have made out a case that Mr van den Bos ought not to be appointed as administrator of Pearlbrook.

[18] It is also clear to me and uncontroverted on the papers that if the respondent had not delivered its affidavit, compelled the delivery of heads and set the matter down, Mr van den Bos would have continued to act as administrator of Pearlbrook, notwithstanding that 36 months had elapsed and that no Part B appointment had ever been made. No doubt a threatening approach such as that adopted in the AM Ellis Attorneys letters would also have been a persistent

theme in his engagement with the members of the Pearlbrook Body Corporate, to persist with this behaviour.

[19] In the circumstances, I find that the respondents are entitled to their costs and that the applicants are liable for those costs. I am however alive to the fact that the applicants may not be individuals of means and that a costs award may be a significant imposition upon them.

[20] I am not in a position to make an order that other parties (such as AM Ellis Attorneys or Mr van den Bos) pay the costs *de bonis propriis* as those parties have not been given notice. I do note the following, however : if the instructions to persist with the matter and to conduct the litigation in the way in which it was conducted were instructions given by the parties other than the applicants personally, the applicants may be entitled to recover any amounts paid out from those who were in fact pursuing the litigation in their name. As I have no facts in this regard, I express no view as to whether such a claim would succeed.

[21] In the circumstances, I make the following order:

(1) Part B of the application made by the first to fifth applicants (the “applicants”) is dismissed and the rule *nisi*, insofar as a rule *nisi* was issued on 1 August 2018, is discharged.

(2) It is declared that Mr Jan van den Bos is no longer appointed as administrator of the Body Corporate of Pearlbrook.

(3) The applicants are to pay the costs of this application, jointly and severally, the one paying and the others to be absolved.

TURNER AJ

Counsel for the applicants: Adv Kohn

Instructed by: AM Ellis Attorneys

Counsel for the respondent: Adv L Mhlanga

Instructed by: P Muleya Inc

Date of hearing: 16 January 2023

Date of Judgment: 16 March 2023