REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: ~~YES~~ / NO ~~(2)~~ OF INTEREST TO OTHER JUDGES: YES/~~NO~~ (3) REVISED. **.....** **9 MAY 2023** **SIGNATURE** **DATE**	**Case No: 2018/24977**

In the *ex parte* application of-

JAN VAN DEN BOS N.O.

Applicant

(In his capacity as Administrator of the

Panarama Place Body Corporate)

In re:

K2016376100 (SA) (PTY) LTD Applicant

and

THE BODY CORPORATE OF PANARAMA PLACE

Respondent

and

KEIKANETSWE CHRISTINA TEME First Intervening

Party

SILINDILE FORTUNATE NDABA Second Intervening

Party

MATILDA MOROKE Third Intervening Party

MOHLOKI HERMAN RAMOKHELE Fourth Intervening Party

MMAKHUDU SIMON LETSOALO Fifth Intervening Party

ALFRED MATOME MPHEKGWANA Sixth Intervening Party

LUKHELE WANG DANIEL Seventh Intervening Party

NORAH BASETSANA MOKHELE Eighth Intervening Party

Neutral Citation: *Ex Parte Jan van den Bos N.O.* (2018/24977) [2023] ZAGPHJHC 443 (9 May 2023)

Summary: Ex-parte application for the extension of the applicant's appointment as administrator of a body corporate - Failure to disclose material facts sufficient reason to dismiss application - Section 16 (1) of the Sectional Titles Amendment Act 8 of 2011 provides for the appointment of an administrator of a body corporate - Onus on applicant to show that he is still a suitably qualified and independent person and that his appointment as administrator of the body corporate should be extended.

ORDER

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1. The rule nisi is discharged with costs. The application to extend the appointment of Mr van den Bos as administrator of the Body Corporate of Panarama Place is refused.

2. The Body Corporate of Panarama Place remains under administration and the Community Schemes Ombud Service ("CSOS") must provide the court with the name of a suitably qualified and independent person with appropriate experience in sectional titles schemes to be considered by the court for appointment as administrator of the Body Corporate of Panarama Place together with a report on the suitability of such person within 15 days of this order.

3. This order, as well as the report of the CSOS (as soon as it is available), must be served on all the owners of the scheme by:

(a) affixing a copy thereof at the foyer of the building and/or the main entrance gate to the buildings of the scheme;

(b) Making available a copy of this order, and the report for inspection at the offices of the intervening parties attorneys of record, Noveni Eddy Kubayi Incorporated, during all office hours and upon reasonable request;

(c) Making available an electronic copy of this order to any resident who provides their email address and seeks a copy thereof;

4. The matter is postponed to 8 June 2023 at 10h00 for the court to consider the report of the CSOS and the appointment of such person as administrator of the Body Corporate of Panarama Place.

JUDGMENT

WINDELL, J:

Introduction

[1] There are two applications before this court. First, an application in terms of which the applicant, Mr van den Bos, in his capacity as administrator of the Body Corporate of Panarama Place ("the body corporate"), seeks an order confirming a rule nisi, obtained on an ex-parte basis, extending his appointment as the administrator of the body corporate ("the extension application"). Second, an intervention and reconsideration application in which the first to eight "intervening parties" seek permission to intervene in the extension application and the setting aside of the ex- parte order ("the intervention and reconsideration application").

[2] It was not necessary for the "intervening parties" to seek permission to intervene in the extension application or to apply for the reconsideration of the ex-parte order. Neither rule 6(8) nor 6(12)*(c)* of the Uniform Rules of Court, (which respectively provides that 'any person against whom an order is granted *ex parte* may anticipate the return day upon delivery of not less than twenty-four hours' notice'[1] and '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'[2]), are applicable in the current circumstances as there was *no order granted against any person* (emphasis added). Rule 6(4) of the Uniform Rules of Court is, however, applicable and provides as follows:

'(4)*(a)* Every application brought *ex parte* upon notice to the registrar supported by an affidavit as aforesaid must be filed with the registrar and set down, before noon on the court day but one preceding the day upon which it is to be heard. If brought upon notice to the registrar, such notice must set forth the form of order sought, specify the affidavit filed in support thereof, request the registrar to place the matter on the roll for hearing, and be as near as may be in accordance with Form 2 of the First Schedule.

(b) Any person having an interest which may be affected by a decision on an application being brought *ex parte*, may deliver notice of an application for leave to oppose, supported

[1] Rule 6(8).
[2] Rule 6(12)*(c)*

by an affidavit setting forth the nature of such interest and the ground upon which such person desires to be heard, whereupon the registrar must set such application down for hearing at the same time as the initial application.'

[3] The intervening parties are owners of units in Panarama Place and are interested parties in the outcome of the extension application. As such, they are entitled to oppose the extension application. All that was required of them was to give notice of their intention to oppose and to file an affidavit setting out their interest and grounds of opposition. As a result of the incorrect procedure utilized by the intervening parties, unnecessary papers have been filed and costs have been incurred. Mr van den Bos did not, however, seek any order for costs against the intervening parties for this failure. No such order is therefore granted against the intervening parties.

[4] Because the owners that joined issue with the ex-parte order have been referred to as the 'intervening parties' in all the papers before court, and to avoid any confusion, I will continue to refer to them as the "intervening parties" in the judgment.

The facts

[5] Panarama Place is a sectional title scheme situated at Berea in Johannesburg and consists of 61 units ("the scheme"). In terms of s 2(1) of the Sectional Titles Schemes Management Act 8 of 2011 ("the Act") any person other than the developer, who becomes an owner of a unit in a scheme, '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 body corporate was duly established in terms of s 2(1) of the Act and incorporated and registered in terms of s 36(1) of the Sectional Titles Act 95 of 1986.

[6] Mr van den Bos was first appointed as administrator of the body corporate fourteen years ago, in December 2008.[3] His appointment was extended by the court in 2011 and 2013, but ultimately lapsed in 2015.[4] During 2018 a private company, namely K2016376100 (SA) (Pty) Ltd, as the registered owner of seven units in the scheme, represented by its director Yvette de Wit, together with six other owners of units in the scheme,[5] applied in terms of s 16(1) of the Act, for Mr van den Bos to be re-appointed as the administrator of the body corporate (the 2019 application). On 7 February 2019 Mr van den Bos was appointed as administrator of the body corporate for a period of 36 months. During January 2022, Mr van den Bos applied to this court on an ex-parte basis, as a matter of urgency, for an order extending his appointment as the administrator of the body corporate for a further period of 24 months with the same powers and on the same terms as he had previously been appointed. It is common cause that in the absence of such an order the administration order would have lapsed on 7 February 2022.

[7] On 1 February 2022, Dippenaar J accepted that the matter was urgent and granted an extension order returnable on 24 May 2022. Subsequent to the granting of the extension order, the intervening parties launched the intervention and reconsideration application in the urgent court on 15 February 2022. These applications were subsequently removed from the urgent court roll and set down together with the extension application in the opposed motion court before me.

The extension application

[8] The subject matter of the extension application is the ex-parte interim order granted by the court on 1 February 2022 in the following terms:

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[3] Case number 34347/2008.The applicant was appointed as the administrator of the body corporate in terms of s 46 of the Sectional Titles Act 95 of 1986.
[4] Supplementary affidavit filed by Mr van den Bos on 28 April 2023.
[5] In total the applicants owned 23 units in the scheme.

1. *That the Court dispenses with the ordinary forms and time periods in terms of Uniform Rule 6(12) and hears the application on an urgent basis.*
2. *A rule nisi be issued calling upon all interested to parties, if any, on 24 May 2022, to advance reasons why the order should not be granted in the following terms:*
   - *2.1 Extending the term of the administrator, Jan van den Bos ("Van den Bos") as administrator to the Respondent in terms of Section 16 of the Sectional Titles Schemes Management Act 8 of 2011 and thereby extending the term of the Administrator, Van den Bos, as the administrator of the Body Corporate of Panarama Place sectional title scheme with scheme number 12/1984 ("the scheme"), for a further period of 24 (twenty four) months, on the same terms and with the same powers as those contained in the administration order of 7 February 2019;*
   - *2.2 That in addition to the above powers, the Applicant be authorized to levy all monthly contributions in terms of Section 3 of the Act as well as any arrears owing by a member in the Scheme to the pre-paid meter of each individual owner so that such owner who is in arrears will only gain access to water and electricity services upon payment of all current and arrear charges due to the Scheme;*
   - *2.3 That the costs of this application be paid by the Scheme on an attorney and client scale, save in the event of any person opposing the relief sought herein, in which event such costs will be paid by such person or persons opposing the relief, jointly and severally.*
3. *Pending the return date of the rule nisi herein, the provisions of prayer 2.1 shall apply with immediate effect.*
4. *That the service of this order shall be effected on each member/unit owner of the Scheme by:*

4.1 Delivering a copy of this order by pre-paid registered post or placing one copy under the door of each unit at the member's chosen domicillium citandi et executandi;

4.2 The Applicant's attorney of record (or a person/s nominated by them), displaying a copy of this order by affixing a copy thereof at the foyer of the building and/or the main entrance gate to the buildings of the Scheme;

4.3 Making available a copy of this application for inspection at the offices of the Applicant's attorneys of record, Schuler Heerschop Pienaar Attorneys, Block 3, First Floor, Clearwater Office Park, Millennium Boulevard, Strubens Valley at the offices of Confiance at 16 Skeen Boulevard, Bedfordview, during all office hours and upon reasonable request;

4.4 Making available an electronic copy of this application to any resident who provides their email addressed and seeks a copy thereof;

5. In turn and subsequent to the above, that the Applicant be:

5.1 granted all the powers necessary for the administration of the Scheme, as well as the powers and obligations as now provided for in terms of Section 16 of the Act;

5.2 directed to comply with section 16 of the Act, by inter alia:

5.2.1 convening and presiding at the meeting required in terms of the Act and the Scheme rules;

5.2.2 taking control and retaining all documents and records of the Scheme;

5.2.3 establishing or continuing a fund for the administrative expenses sufficient for the repair, upkeep and management and administration of the common property (including reasonable provision for 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 buildings or land and any premiums of insurance, and for the discharge of any duty or fulfilment of any other obligation;

5.2.4 determining from time to time the amount to be raised for the purposes aforesaid;

5.2.5 raising the amount so determined by levying contributions on the unit owners in proportion to their quotas of the respective section;

5.2.6 continuing with the bankers of the Scheme or to open and operate an account with any banking institution in the name of the Body Corporate of Panarama Place;

5.2.7 ensuring that the building of the Scheme is adequately insured as provided for in terms of section 3(1)(h) and (i) of the Act;

5.2.8 ensuring that the building of the Scheme is kept in a state of good repair and that the plant, machinery, fixtures and fittings used in connection with common property of any section is properly maintained;

5.2.9 ensuring that the list of members of the Scheme is brought up to date and that the record of the Rules of the Scheme is made available for inspection;

5.2.10 exercising any of the principal powers assigned to the Scheme in terms of Section 16 of the Act;

5.2.11 lodging with the Ombud as defined in Section 1 of the Community Schemes Ombud Service Act 9 of 2011:

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

(ii) Written reports on the administration process every three months or at such short intervals as the court may direct;

5.2.12 instituting legal proceedings for the recovery of the arrears from sectional title owners and other debts owed to the Scheme and instituting further legal proceedings where necessary for the aforementioned purposes;

5.2.13 interdicting any person that obstructs the administrator in the running of the building or the performance of the administrator's function;

6. That the Applicant be granted any other power that may be assigned by the Scheme at the general meetings of the owners, which owners must qualify to vote in terms of the Scheme Rules and the Act;

7. That the remuneration of the administrator be fixed at the rate of R5000 per month which fee shall increase yearly in accordance with the Consumer Price Index ("CPI").

8. That the administrator be authorised to appoint Tradeworx 148 (Pty) Ltd t/a PAL Properties as Managing Agent to assist the administrator to fulfil his duties and obligations as contained in the administration order and the Managing Agent to be paid R120 per unit per month form the administrative budget and levies by the Administrator on behalf of the Body Corporate to be increased yearly in accordance with the CPI;

9. That all costs incurred by the administrator be funded out of the administrative fund of the Scheme;

10. Notice of this order be given on each unit at the building of the Scheme; and11.That any party opposing this application be ordered to pay costs thereof on an attorney and client scale, ***alternatively*** *that the Scheme be ordered to pay the costs of this application."*

[9] Mr van den Bos, as the deponent in the founding affidavit of the extension application, set out the circumstances which led to the scheme being placed under administration as follows: there was no proper management of the scheme; there had been no annual general meetings ("AGM") held for a number of years; no annual budgets or trustee reports were compiled for the scheme; the levy rolls compiled by Compurent, the previous managing agent, and the balances due were disputed by unit owners in the scheme; the scheme's funds were being mismanaged and/or misappropriated; the then trustees of the scheme were receiving monthly

remuneration in contravention of ss 8(2) and (3) of the Act; numerous creditors of the scheme were not being paid by the then trustees; the erstwhile trustees of the scheme were members of the scheme with the largest arrear amounts owing; numerous unit owners were not making payment of their monthly levies and contributions; and the scheme was severely indebted to the local municipality for water and electricity services resulting in disconnection of the services on numerous occasions by the local municipality.

[10] Since his appointment as administrator of the scheme in 2019, Mr van den Bos stated that he had acted properly and complied with his duties as conferred upon him. Nonetheless, the financial affairs and administration of the scheme remained precarious in that his latest attempts to turn around the scheme, were met with resistance from approximately 45 out of the 61 unit owners within the scheme who simply failed or refused to cooperate with him as the administrator of the scheme. Mr van den Bos explained that the obstructive conduct of the unit owners together with the continued non-payment of levies and monthly contributions combined with the effects of the lockdown due to the COVID-19 pandemic, impeded his ability to successfully turn around the scheme. Hence, for all these reasons, the scheme remained in need of his professional services as an administrator.

[11] Mr van den Bos averred that the only real form of income received, in addition to minimal levy payments received from certain owners in the scheme, was from pre-paid charges collected by the pre-paid vendor in the scheme, which payments were made to the local municipality. At the time of deposing to the affidavit during January 2022, the collective outstanding amount owing to the local municipality by the scheme was R 3 423 184.22 which amount had, according to Mr van den Bos, decreased slightly since his appointment as administrator. He stated emphatically

that there was little to no prospect of the outstanding amount being settled without his reappointment as the administrator of the scheme.

[12] Mr van den Bos further alleged that the scheme was at risk at having the municipal services to the building suspended in the event that it continued to operate without an administrator after his term of appointment lapsed. Furthermore, Mr van den Bos submitted that it would be virtually impossible to continue with the disbursement of payments to creditors if he was not to be reappointed as an administrator of the scheme.

[13] An amount of R6 735 724.53 was owed to the scheme in respect of outstanding levies, special levies and other contributions by unit owners in the scheme. Mr van den Bos explained that certain owners, who had previously acted as trustees, blatantly refused to pay their monthly levies and contributions in order to lead to the demise of the scheme. Legal action was instituted against these owners and, in most instances, judgments had been obtained for arrear levies.

[14] Mr van den Bos disclosed in his founding affidavit that legal work pertaining to litigation against non-paying members of the scheme was performed by his current attorneys of record (Mr Hein Gouws) and upon his instruction. He also disclosed that he is a director of Trade Worx 148 (Pty) Ltd t/a PAL Property Management & Administrators ("PAL Properties") which is the managing agent of the scheme and that he had worked extensively with PAL Properties in all of the buildings that he had been appointed to act as an administrator. This arrangement enabled Mr van den Bos to ensure that accounting and other functions outsourced to PAL Properties was done in "*a professional, efficient, and workmanlike manner as I have direct oversight over the work done"*. Furthermore, Mr van den Bos confirmed that he was entitled to

charge additionally for such services in terms of s 16 of the Act and that it would not be prejudicial in the function being "*outsourced to a specialist company at a rate lower than what I would normally charge, if I had to fulfil the same duty".*

[15] Mr van den Bos stated that in the event that his appointment is not extended it could lead to the collapse of the entire scheme and that the unit owners could potentially lose their investments and properties. Should the court not come to the assistance of the scheme, the scheme would implode as the trustees of the scheme were incapable of managing its affairs. Chaos would ensue in the scheme as it would not have any means of ensuring that unit owners acted in accordance with the Act and the Rules of the scheme. There would be no mechanism in place to recover arrear levies and other contributions from defaulting unit owners. It was not in the interest of the members of the scheme for the building to deteriorate and possibly to be hijacked by criminal elements. He submitted that the pre-paid electricity system was capable of being used as a collection mechanism for the payment of levies, special levies, water and other legal charges. It could prevent an owner from selectively deciding to contribute to certain expenses of the scheme such as the refuse removal and not to others such as those pertaining to the administrative budget of the scheme.

The intervention and reconsideration application

[16] The reconsideration application was launched by eight intervening parties after a copy of the extension order was placed under the door and came to the attention of the owner of unit number 18, Keikanetswe Christina Teme ("Ms Teme") on 11 February 2022. Ms Teme is the first intervening party and deposed to the founding affidavit in this application.

[17] Mr van den Bos was cited in his official capacity as the administrator of the body corporate as well as in his personal capacity as the holder of a Fidelity Fund certificate from the Estate Agency Board. The applicant in the 2019 application, that is, K2016376100 (SA) (Pty) Ltd represented by Yvette de Wit, was also cited in the application.

[18] Ms Teme stated that the purpose of the application was to request the court to reconsider and set aside the interim order granted on 7 February 2022, which was granted without service to the scheme or to the unit owners who have an interest in the matter. She also expressed her dissatisfaction with the conduct of Mr van den Bos for omitting to disclose all the material facts known to him, even though such facts could prove prejudicial to him and result in the dismissal of his extension application.

[19] The founding affidavit set out the numerous complaints of the residents against the extension of Mr van den Bos' appointment as the administrator of the scheme. One of the complaints was that he failed to disclose to the court that there was existing litigation between the parties in this court under case number 2020/30565. In that matter seven owners of units in the scheme applied for the removal of Mr van den Bos and PAL Properties as administrator and managing agent respectively. Mia J delivered judgment on 23 December 2020 an ordered, *inter alia,* for the Community Scheme Ombud Service ("CSOS") to investigate all financial transactions from 2008 till to date regarding the sale of units (during Mr van den Bos's terms as administrator) and for Mr van den Bos to disclose all financial statements from 2008, to the present date, together with bank statements in respect of accounts he was using to receive all payments in respect of the body corporate. Mr van den Bos had to provide this information within 30 days of the receipt of the

order to a meeting of the body corporate to be communicated to all residents and to the CSOS. The order of Mia J reads as follows:

1. *The fifth respondent* **[the community scheme ombudsman]** *shall investigate all financial transactions from 2008 till to date, regarding the sale of units during the term of the first respondent* **[Mr van den Bos];**
2. *Should the investigation of the fifth respondent* **[the community scheme ombudsman]** *indicate during his/her investigation that the first respondent* **[Mr van den Bos]** *is not suitable to continue as an administrator for any reason including a conflict of interest, the administrator's term is to be terminated upon application to this court, by supplementing the papers herein, alternatively on application based on the finding of the fifth respondent;*
3. *The administrator* **[Mr van den Bos];** *shall provide the fifth respondent* **[the community scheme ombudsman]** *with proof of the execution of his function in terms of section 16(4)(a) and (b) of STSMA for the period of appointment to date;*
4. *The first respondent* **[Mr van den Bos]** *shall disclose all financial statements from 2008 to the present date together with bank statements in respect of accounts he was using to receive all payments in respect of Panarama Place Body Corporate within thirty (30) days of the receipt of the order*
   4.1 to a meeting of the body corporate to be communicated to all residents;
   4.2 the fifth respondent **[the community scheme ombudsman]** *as required for the investigation per paragraph 1 above;*
5. *If there appears to be a conflict of interests regarding the appointment of the second respondent* **[PAL Properties]** *the body corporate may approach the court on the same terms as in paragraph 2 above for the second respondent's appointment to be terminated;*
6. *The second respondent* **[PAL Properties]** *shall disclose all financial books, all records of financial records of monies collected on behalf of Panarama Body Corporate;*
7. *The first respondent* **[Mr van den Bos]** *or anyone authorised by him is interdicted and restrained from threatening, intimidating or inciting violence against the applicants;*
8. *Costs of the application to be paid by the first or second respondents jointly and severally".*

[20] Ms Teme stated that although Mr van den Bos appealed the judgment of Mia

J, the appeal was never prosecuted as a defective notice of application for leave to appeal was filed by Mr van den Bos' erstwhile attorneys of record.

[21] According to the residents, Mr van den Bos's tenure had been marked by "*criminality, corruption, nepotism, violence and racist remarks".* Ms Teme averred that Mr van den Bos acted in a discourteous manner towards residents and that he was capable of being a "*bully"*. Other allegations of an alarming and serious nature were also made against Mr van den Bos in the founding affidavit such as: (1) his failure to collect rates and taxes and furnish the financial statements to members of the scheme; (2) the illegal disconnection of electricity and water by Mr van den Bos to the units of those residents who oppose his appointment as administrator; (3) incidents where criminals and security companies had been used to assault owners which had led to further litigation against Mr van den Bos in this court under case number 2021/0011144 as well as case number 2021/0011143; (4) the appointment of PAL Properties as the managing agent of the scheme in circumstances where an adjudicator, appointed in terms of the provisions of the Community Schemes Ombud Service Act 9 of 2011, found that such conduct amounted to a conflict of interest (discussed in more detail below).

[22] It was further alleged that Mr van Bos sold a unit, belonging to Mrs Edith Mamonyane, in execution of a judgment debt despite a pending application for the rescission of such judgment debt. The unit of the Ms Mamonyane was allegedly sold for an amount of R1000 despite the unit being valued at an amount of more than R250 000. It was also alleged that the unit was bought by DG Heerschop ("Heerschop") under the instruction of Mr van den Bos' attorney of record, Mr Hein Gouws. At the time of the sale, Mr Heerschop was either a candidate attorney or a professional assistant under the supervision of Mr Gouws. Rather confusingly, the

unit was then registered under Red Oak Property (Pty) Ltd ("Red Oak"), belonging to a friend of Mr van den Bos, a certain Mr Roos.

[23] The founding affidavit set out that Mr Roos was the person who attended a round table meeting at the office of the intervening parties' attorney of record, Mr Kubayi, during 2020. It was alleged that Mr Roos claimed to be the "*CEO"* and that he was working with Mr van den Bos. As a result, the intervening parties were concerned about the ability of Mr van den Bos to carry out his duties as he was an octogenarian and pointed out that Mr van den Bos was relying on Mr Roos "*to do his dirty work*".

[24] The intervening parties also submitted that Mr van den Bos was not fit to be appointed as the administrator of the scheme as he had failed to comply with s 16(4) of the Act in that he had never convened any meetings as required by the Act and has not lodged reports with the CSOS as required by the order of Mia J.

[25] According to Ms Teme, despite Mr van den Bos being the administrator of the body corporate for more than 12 years, there was no development in the building which was indicative of a lack of proper administration of the scheme. His conduct was described as "*unethical"* and "*unprofessional*" and it was alleged that the extension of his appointment was unjustifiable and the prejudice and hardship caused to unit owners outweighed any interest that he might have in the building. In the event of the court not extending Mr van den Bos' appointment, the intervening parties proposed the appointment of Lebohang Mgobozi as administrator. If the court was not inclined to appoint Mr Mgobozi, it was suggested that the CSOS or the Estate Agency Affairs Board appoint a person to act as the administrator of the body corporate.

[26] Mr van den Bos filed an answering affidavit in response to the allegations raised in the intervention and reconsideration application. He stated that the intervening parties were only disgruntled defaulting owners in the scheme, against whom judgments for non-payment of levies had been obtained in the Johannesburg Magistrate's Court on his instruction. Default judgment or summary judgment had been obtained against the following intervening parties:

26.1 against the first intervening party under case number 26098/2019 for the sum of R36 934.89;

26.2 against the third intervening party under case number 19416/2019 for the sum of R46 153.84;

26.3 against the fourth intervening party under case number 19417/2019 for the sum of R113 660.46;

26.4 against the fifth intervening party under case number 2289/2019 for the sum of R226 805.40;

26.5 against the sixth intervening party under case number 19403/2019 for the sum of R106 346.51;

26.6 against the seventh intervening party under case number 19419/2019 for the sum of R47 948.93;

26.7 against the eighth intervening party under case number 19407/2019 for the sum of R172 683.70.

[27] The fourth, sixth, seventh and eighth intervening parties, along with certain other members against whom summary judgment had been obtained, unsuccessfully sought to rescind the judgments granted against them on 8 December 2020. Subsequently, certain of the intervening parties filed a notice of appeal against the order granted on 8 December 2020. According to Mr van den Bos, that appeal had

been abandoned and lapsed in that the appellants had failed to provide security for costs as required. However, subsequently, on 13 September 2022 the Full Bench upheld the appeal and granted leave to the first, fourth, sixth and seventh intervening parties to defend the actions.[6]

[28] It was Mr van den Bos' submission that the intervening parties were opposing the extension application in a deliberate attempt to continue the non-payment of their monthly levies and other contributions, whilst still enjoying the use of the scheme and their respective units. He denied that the intervening parties reside in the properties registered in their names and submitted that he was not required to serve a copy of the extension application on all interested parties as it would have defeated the purpose of the ex-parte application.

[29] Mr van den Bos did not dispute that the judgment delivered by Mia J ordered the CSOS to investigate his tenure as administrator. He, however, denied and rejected the allegations that he acted unethically or in an unprofessional manner. He admitted that a copy of the judgment delivered by Mia J was not attached to this extension application, yet he denied that he failed to show the utmost good faith when deposing to his founding affidavit in the extension application. He submitted that he fully disclosed all material facts in that the judgment had no bearing on his appointment as administrator as he was not prohibited from acting as the administrator nor was he removed as the administrator of the body corporate.

[30] Mr van den Bos denied that he had targeted any persons, members or occupants who are against his appointment in an illegal manner. He also denied that he or any security company employed for or by the scheme was used to assault owners. However, he did admit that action was instituted against him in this court

[6] A3057/21 delivered on 13 September 2022.

under case number 2021/0011144 and case number 2021/0011143 but stated that the claims contained therein were without merit and that they stood to be dismissed.

[31] Mr van den Bos denied that the property of Ms Ms Mamonyane was purchased by Mr Heerschop. He averred that Mr Heerschop's involvement in the matter was limited to attending an auction on behalf of Red Oak and purchasing the property by virtue of a power of attorney granted to him. He also denied that his age impedes him from attending to his duties and that he uses third parties such as Mr Roos to carry out his duties on his behalf.

[32] Mr van den Bos further denied that he has not complied with s 16(4) of the Act and he referred the court to the latest reports, income statements and cash flow reports sent to the CSOS on 17 January 2022 which were attached to his answering affidavit as annexures. He however admitted he had not been able to meet with owners in the scheme, as any attempt to meet with them was met with hostility by the defaulting owners and meetings could accordingly not be arranged. As a result, no AGM had been held since his appointment.

[33] Mr van den Bos denied that there was no development in the scheme. He did, however, acknowledge that progress was slow, as all his attempts to develop the scheme, had been frustrated by the conduct of the owners, who failed to make payment of their levies and contributions.

Evaluation

The use of ex-parte procedure

[34] Mr Van den Bos stated in his answering affidavit that the terms of the order granted on 7 of February 2019, gave him the *'requisite authority and duty'* to

approach the court ex-parte for the interim extension of his appointment as administrator. He was therefore not required to serve the application, '*as service would defeat the purposes of an ex-parte application and due to the fact that the administration order was to 'expire imminently'.*

[35] It is unclear to which terms of the February 2019 order Mr van den Bos is referring to, and I cannot find anything in the order that permits Mr van den Bos to bring the application ex-parte as a matter of course. It is clear that he chose to bring the application ex-parte and not give any notice to the owners of the scheme or any other party having an interest in the matter. He must, therefore, show utmost good faith. This entails, *inter alia*, that all material facts which might influence a court coming to its decision must be disclosed. In *Schlesinger v Schlesinger,*[7] the court held that the '*withholding or suppression of materials facts, by itself, entitles a Court to set aside an order, even if the non-disclosure or suppression was not wilful or mala fide'.*[8]

[36] In considering whether Mr van den Bos acted with utmost good faith in bringing the application ex-parte, the following two factors are, in my view, dispositive of the extension application. Firstly, Mr van den Bos was acutely aware that any extension of his appointment as administrator would be disputed. The complaints against him and the objections against the extension of his appointment as administrator, as well as his involvement in several court proceedings (civil and criminal), are testimony of that. Under the circumstances it was inappropriate of him to proceed ex-parte.

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[7] *Schlesinger v Schlesinger* 1979 (4) SA 342 (W)

[8] At 348E-349B). See also *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) para 21.

[37] Secondly, there was a gross non-disclosure of material facts by Mr van den Bos in the ex-parte application. Mr van den Bos was first appointed as administrator in 2008 and remained in that position until 2015. His appointment then seemingly lapsed and he was re-appointed in 2019. He did not disclose this important fact in his ex-parte application and there is no information before this court about the 'missing' eleven years. In fact, *nothing* is known about his previous tenure as administrator. Further, as alluded to above, there are several court proceedings pending against Mr van den Bos in his capacity as administrator of the body corporate. None of those proceedings were disclosed to the court. The judgment of Mia J, in particular, was clearly relevant to his extension application and the explanation provided by Mr van den Bos for not disclosing this information, is not convincing.

[38] A court will be slow to come to the assistance of a party who fails to disclose material facts that might influence a court in granting an order. With the true facts at my disposal, I am not inclined to exercise my discretion in favour of Mr van den Bos. The order obtained ex-parte should for these reasons alone be set aside.[9]

Suitably qualified and independent person

[39] But, even if the extension application was brought on notice, Mr van den Bos was unable to persuade me to extend his appointment as administrator. I say so for the following reasons. First, s 16 of the Act provides that: (1) 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. In *Body Corporate of Stamford Hall v*

[9] See *Dempa Investments CC v Body Corporate, Los Angeles* 2010 (2) SA 69 (W).

Molapo and Another [10] the Full bench held that s 16 of the Act envisages a two-step process in an application for the appointment of an administrator. The first step is a factual enquiry whether the appointment of an administrator is warranted. If that factual enquiry results in a finding that an administrator is to be appointed, the enquiry as to the suitability of the proposed administrator will commence.

[40] There is no suggestion by the intervening parties that the body corporate is no longer in need of an administrator, and I accept that without an administrator the owners in the scheme would in all likelihood suffer substantial prejudice. It is therefore only the extension of the appointment of Mr Van den Bos that is disputed (emphasis added).

[41] An administrator must be a 'suitable qualified and independent person'.[11] To succeed in the extension application the onus is on Mr van den Bos to convince this court that he is still a suitable qualified and independent person and that his appointment needs to be extended. In doing so, he has (as administrator) a fiduciary duty to the court to disclose all material facts which will impact on a court's decision whether he is a proper and fit person to be appointed as an administrator. Moreover, a judicial exercise of this court's discretion can only properly occur if all material facts are placed before the court for consideration. As stated above, Mr van den Bos failed to disclose material facts that might impact on his appointment. His failure to mention the judgment of Mia J is, in my view, the most egregious.

[42] Second, in *Herald Investments Share Block (Pty) Ltd and Others v Meer and others; Meer v Body Corporate of Belmont Arcade and Another*,[12]Wallis J (as he was then), stated that it must be '*borne in mind that the purpose of appointing an*

[10] (A3086/2021;9568/2020) [2022] ZAGPJHC 498 (3 August 2022)
[11] Section 16
[12] [2011] 2 All SA 103 (KZD)

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.' Section 16 of the Act therefore provides that an administrator must be appointed for a fixed period (which may be extended) and must exercise his powers to address the body corporate's management problems '*as soon as reasonably possible'*. The body corporate has been under administration for approximately fourteen years. Mr van den Bos was the administrator from 2008 to 2015 and again from 2019 to date. The position of the body corporate has not improved. In fact, the evidence shows that it has deteriorated. In 2018, the outstanding debt owing to the local municipality was R462 035.20. In January 2022 the amount owing to the municipality was R3 423 184.22. In November 2021 the outstanding amount owed to the scheme in respect of outstanding levies, special levies and other contributions by unit owners was approximately R5 266 345. In January 2022, it had increased to R6 735 724. It is evident that Mr van den Bos had not succeeded or made any progress in turning around the negative financial position of the body corporate.

[43] Third, an administrator is put under the supervision of the ombud appointed under the provisions of the Community Schemes Ombud Service Act 9 of 2011. It is not disputed that an adjudicator (appointed in terms of that Act), gave a ruling against Mr van den Bos on 15 September 2020 in which he made certain findings against Mr van den Bos and PAL Properties. The adjudicator found, *inter alia*, that there is a conflict of interest between Mr van den Bos and PAL Properties. Although the ruling does not relate to Panarama Place, the conflict of interest finding relates to the same parties before this court. Despite the ruling of the adjudicator, Mr van den Bos appointed PAL Properties as managing agent of Panarama Place and PAL

Properties remains the managing agent until today, in spite of Mia J's disparaging remarks about this issue in 2020.

[44] Fourth, Mr van den Bos stepped into the shoes of the body corporate, and is required to discharge his duties of administration in the interests of the owners and in administering the fund, established in terms of s 36(1) of the Sectional Titles Act. In *Mogane v Rosen N.O. and Another*,[13] the court held that an administrator occupies a position of trust *vis-à-vis* the owners of units in the scheme, to the same extent as the elected trustees would have occupied, had they not been discharged.[14] It held that this position carries with it a duty to account to the owners/occupiers who contributed to the fund.[15]

[45] It is unknown how many owners of units in the scheme support the extension of Mr van den Bos's appointment as administrator. No affidavits of owners supporting the extension application were filed, and Ms Yvette de Witt, that launched the 2019 application, no longer owns any units in the scheme. In his founding affidavit Mr van den Bos mentioned that his latest attempts to turn around the scheme, were met with resistance from approximately 45 out of the 61 unit owners within the scheme. In other words, the majority of the owners have lost all confidence and trust in Mr van den Bos as administrator. This is also evident from the numerous court proceedings and unsavoury incidents between Mr van den Bos and owners of units in the scheme. The latest incident was the AGM scheduled for 16 February 2022. As a result of violence and threats of violence towards Mr van den Bos and his staff, the meeting did not take place. Mr van den Bos and his staff were also prohibited from

[13] *Mogane v Rosen* NO 2015 JDR 0464 p14.

[14] See *Robinson v Randfontein Gold Mining Co. Ltd* 1921 AD 168 at 178-188; *Volvo (Southern Africa) (Pty) Ltd v Yssel* [2009] ZASCA 82 para 14.

[15] At page 14.

entering the building. It is unclear how Mr van den Bos would be able to administer and manage the scheme under these circumstances.

[46] Fifth, Mr van den Bos averred that substantial work and effort had been expended since his appointment to remedy the mismanagement of the scheme and to improve the financial affairs of the scheme albeit it at a slower pace than had been anticipated. He makes the averment without providing a detailed exposition of all of the work or tasks undertaken by himself as the administrator of the scheme since 2019. Seemingly, there is no development in the building, the debts of the body corporate are increasing and most owners have elected not to support Mr van den Bos and have been withholding their levies and monthly contributions. Although Mr van den Bos contended that in the absence of him being reappointed as an administrator of the scheme and considering the present position of the scheme's financial affairs, that it will be '*virtually impossible to continue with the negotiated payments with creditors of the scheme and/or to negotiate and maintain such negotiated settlements'*, it is not clear how these standing arrangements with creditors will be affected if another person is appointed as administrator. On the other hand, the intervening parties submitted that the situation at Panarama Place is tantamount to a monarchy as Mr van den Bos is vested with all the powers from being administrator to appointing his own company as a managing agent. It is alleged that he is unwilling to work with the owners by disclosing the financial statements together with bank statements even after ordered to do so by Mia J. They state that Mr van den Bos' '*unethical and unprofessional behaviour'* is due to the personal interest he has developed towards the body corporate and this should be dealt with immediately or they will end up losing their units. It is alleged that Mr van den Bos's '*maladministration*' will continue to affect the value of the building and

lower the morale of owners who have ended up not paying for levies, and that the prejudice and hardship to be caused to the unit owners if their units are sold to cover the debts, far outweighs any interest he might have in the building.

Conclusion

[47] Mr van den Bos bears the onus to convince this court that his appointment as administrator of the body corporate should be extended. He firstly failed to disclose material facts in his application and secondly, failed to convince this court that his further appointment, after being in the position of administrator for a period of at least 11 years, will be of any benefit to the body corporate. There is no trust between the majority of the owners of units in the scheme and Mr van den Bos and the parties have reached a stalemate.

[48] In the result the following order is made.

1. The rule nisi is discharged with costs. The application to extend the appointment of Mr van den Bos as administrator of the Body Corporate of Panarama Place is refused.

2. The Body Corporate of Panarama Place remains under administration and the Community Scheme Ombud Service (“CSOS”) must provide the court with the name of a suitably qualified and independent person with appropriate experience in sectional titles schemes to be considered by the court for appointment as administrator of the Body Corporate of Panarama Place together with a report on the suitability of such person within 15 days of this order.

3. This order, as well as the report of the CSOS (as soon as it is available), must be served on all the owners of the scheme by:

(a) affixing a copy thereof at the foyer of the building and/or the main

entrance

gate to the buildings of the scheme;

(d) Making available a copy of this order, and the report for inspection at the offices of the intervening parties attorneys of record, Noveni Eddy Kubayi Incorporated, during all office hours and upon reasonable request;

(e) Making available an electronic copy of this order to any resident who provides their email address and seeks a copy thereof;

4. The matter is postponed to 8 June 2023 at 10h00 for the court to consider the report of the CSOS and the appointment of such person as administrator of the Body Corporate of Panarama Place.

L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG
Electronically submitted therefore unsigned

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 9 May 2023.

APPEARANCES

Attorneys for the applicant:	Schüler Heerschop Pienaar Attorneys
Counsel for the applicant:	Advocate N. Lombard
Attorneys for the intervening parties:	Noveni Eddy Kubayi Incorporated

Counsel for the defendant:	Mr E. Kubayi
Date of hearing:	7 February 2023 - supplementary affidavit filed by the intervening parties on 21 April 2023 and by the applicant on 24 April 2023.
Date of judgment:	9 May 2023.