IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 24858/2020
Date of hearing: 7 and 8 November 2023
Date delivered: 14 November 2023

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

14/11/23
DATE SIGNATURE

In the matter between:

ELIZABETH KILBOURN	**Applicant**
and	
PIETER ZWEMSTRA N.O.	**First Respondent**
PIETER ZWEMSTRA	**Second Respondent**
JAN HARM SMITH N.O.	**Third Respondent**
JAN HARM SMITH	**Fourth Respondent**
JOHANNES HENDRIK BOTHA N.O.	**Fifth Respondent**
JOHANNES HENDRIK BOTHA	**Sixth Respondent**
ALBERT RICHARD MONTEITH N.O.	**Seventh Respondent**

ALBERT RICHARD MONTEITH	Eighth Respondent
SAREL RAUTENBACH N.O.	Ninth Respondent
SAREL RAUTENBACH	Tenth Respondent
JOHAN ERIC VAN DER BANK N.O.	Eleventh Respondent
JOHAN ERIC VAN DER BANK	Twelfth Respondent
MARTHINUS FREDERIK RUDOLPH GEYSER N.O.	Thirteenth Respondent
MARTHINUS FREDERIK RUDOLPH GEYSER	Fourteenth Respondent
VERONICA WATSON	Fifteenth Respondent
DIE REGSPERSOON VAN ZAMBESI AFTREE-OORD	Sixteenth Respondent
DIE REGISTRATEUR VAN AKTES, PRETORIA	Seventeenth Respondent
DIE MEESTER VAN DIE HOOGGEREGSHOF, PRETORIA	Eighteenth Respondent
DIE LANDMETER-GENERAAL, PRETORIA	Nineteenth Respondent
COMMUNITY SCHEMES OMBUD SERVICE	Twentieth Respondent
CURA SENWES (PTY) LTD	Twenty-first Respondent
ZAMBEZI FRAIL CARE MSW	Twenty-second Respondent
ZAMBEZI RETIREMENT VILLAGE CC	Twenty-third Respondent
SINVENT INVESTMENTS 214 (PTY) LTD	Twenty-fourth Respondent
GELDENHUYS BOTHA INC	Twenty-fifth Respondent
DRIE HERBERGE MSW	Twenty-sixth Respondent
RESIDENTIA STIGTING	Twenty-seventh Respondent
FRIEDLAND-HART, SOLOMON & NICHOLSON	Twenty-eighth Respondent
JL WILLIAMS	Twenty-ninth Respondent

JUDGMENT

SWANEPOEL J:

INTRODUCTION

[1] This application concerns the Zambezi Aftree-oord, a sectional title scheme which has been established in terms of the Sectional Titles Act, 95 of 1986 ("the Act"). It particularly concerns a care centre which has been erected within the village. I will attempt to extract a brief synopsis of the relevant facts from the voluminous affidavits filed by the parties. I shall only refer to the parties who have a direct interest in this application, and I shall omit the respondents who are cited simply because they have had some peripheral involvement in this two-decade old saga, and who do not oppose the application.

[2] The applicant, a practicing attorney, is the owner of a number of sectional title units in the scheme. The first to fourteenth respondents are all erstwhile trustees of the Zambezi Frail Care Trust, who are sued in their representative and personal capacities. I shall refer to them as "the trustees". Sixteenth respondent is the Body Corporate of the sectional title scheme ("the Body Corporate"). Twenty fourth respondent is a company which developed thirty sectional title units within the village ("Sinvent"). Twenty sixth and twenty seventh respondents are the original developers of the village ("the developers").

[3] The village was initially known as the Lapa Munnik Aftree-Oord, a housing scheme developed in terms of the Housing Development Schemes for Retired Persons Act, 1988. The scheme was developed by twenty-sixth ("Drie Herberge") and twenty seventh ("Residentia") respondents. Its name was changed to the "Zambezi Aftree-oord" in 2005. At the outset the scheme consisted of 65 units that were occupied by persons who had purchased life-occupation rights from the developer. During 2004 the developers of the scheme opened a sectional-titles register which incorporated not only a large number of new units on the

northern part of the property, but also the initial 65 units which were then occupied by holders of life-occupation rights.

[4] More importantly, the developers retained the right, in terms of s 25 of the Act, to develop a portion of the property as the care centre, which the developers had promised purchasers would be erected within the village. However, by mid-2007 the care centre had not come to fruition, and 43 of the residents launched an action against the developers, the Body Corporate and against the seller of the sectional title units, Paradise Creek Investments (Pty) Ltd ("Paradise Creek").

[5] The action (the details of which are not important) eventually resolved itself when two settlement agreements were entered into. The first agreement was entered into between the 43 plaintiffs, and the various defendants. The salient provisions of the agreement were the following:

[5.1] The occupiers of properties in terms of life right use would be entitled to purchase their properties as sectional title units from the developers at an agreed discount, and the amounts paid in respect of their right of occupation would be set off against the purchase price;

[5.2] In the event that the holders of the rights elected not to purchase the units themselves or through a family member or an entity in which they had a majority interest, they were obliged to allow applicant to purchase the unit and no one else. In this manner applicant acquired some nine units in the scheme

[5.3] The section 25 right of extension in respect of the care centre was ceded to the Zambezi Frail Care Trust, an inter vivos trust ("the trust");

[5.4] The trust was obliged to develop the care centre in accordance with a floor plan which was attached to the agreement.

[6] The second settlement agreement, which was entered into more or less concurrently with the first, was concluded between the Body Corporate, the developers and Paradise Creek. The relevant provisions of this agreement were the following:

[6.1] Drie Herberge, undertook to erect a care centre in the village;

[6.2] The section 25 right to develop the care centre was ceded to the trust, which had already applied for financing for the erection of the care centre;

[6.3] The care centre would be erected in phases, and would ultimately consist of 79 bedrooms. It was recorded that the trust had already applied for a loan to build the centre;

[6.4] The trust intended to sell life occupation rights to prospective occupiers of the centre;

[6.5] A service provider would be appointed to provide care services to residents of the centre;

[6.6] As soon as the centre was completed, the Body Corporate would appoint new trustees, and the trust would continue to manage the centre;

[6.7] Drie Herberge intended to cede the section 25 rights to develop 30 new sectional title units in the scheme to a third party.

[7] The second settlement agreement seems contradictory in that, on the one hand, Drie Herberge undertook to erect the care centre, whilst, on the other hand the s 25 development right to the care centre was ceded to the trust, and the agreement recorded that the trust was seeking to procure funds to build the centre. In any event, Drie Herberge never erected the care centre. The second settlement agreement also contained a resolutive condition to the effect that should the trust not obtain finance for the project within 10 months, the clauses relating to the

cession of the development rights to the trust would lapse. Although the trust never obtained finance, the parties nevertheless gave effect to the lapsed terms of the agreement.

[8] A core aspect to applicant's case is that she avers that the trust was obliged by the agreement to develop the care centre in accordance with the section 25 right, as a single sectional title unit with a floor area of 4370 m^2. The relevance of this averment will become apparent later in this judgment.

[9] During June 2010 the Reformed Church as donor entered into a trust deed in respect of the trust, in terms of which it donated R 100 to a board of trustees. The deed did not specify who the initial trustees would be, but once constituted, the trustees could co-opt other persons to the board.

[10] The parties to the trust are recorded as being the church, the board of trustees appointed in terms of clause 5, and the beneficiaries referred to in clauses 8 and 21. Of some importance to this case is clause 8.1 relating to the beneficiaries of the trust:

"Dit is uit die aanhef tot hierdie akte duidelik dat hierdie Liefdadigheidstrust nie ten behoewe van individuele begunstigdes opgerig is nie maar ten behoewe van die openbare belang."

[11] Clause 21 provides that although the donor wished the trust to be permanent, it could be terminated in certain circumstances:

"Indien dit in die toekoms sou gebeur dat dit onmoontlik of onwenslik word om met die Trust voort te gaan (omstandighede wat die Skenker op hierdie stadium nie voorsien nie), mag die Raad van Trustees met kwytskelding van die toestemming van die Skenker, nadat die belange van die bestaande okkupasiereghouers in ag geneem en die beëindiging van die Trust met hulle bespreek is, 'n datum bepaal waarop die Trust beëindig word...."

[12] It is clear that the donor did not wish to appoint individual beneficiaries. In any event, at best for applicant, the only individual beneficiaries that the trust deed may have contemplated were the holders of life occupation rights in the centre. Applicant was never a beneficiary in her individual capacity.

[13] On 13 July 2010 clause 8 of the trust deed was amended. The beneficiaries were then defined as being the:

"Zambezi Aftree-Oord vir die oprigting van 'n versorgingseenheid vir verswakte bejaardes by die Aftree-oord en die Zambezi Aftree-Oord om volgens diskresie van die beheeligaam van die aftree-oord aan te wend vir die versorging van behoeftige verswakte bejaardes in die versorgingseenheid."

[14] It seems clear that the "Zambezi Aftree-oord" is a reference to the Body Corporate, and that the Body Corporate was intended to be the beneficiary of the trust. The original trust deed specifically excluded individual beneficiaries, and there is no reason to believe that that intention was not carried forward when the amendment to the trust deed was effected. This conclusion will have some impact on the relief sought by the applicant, as will become clear hereunder.

[15] Drie Herberge eventually ceded the development rights to the additional thirty units to Sinvent, a company now in liquidation. It later emerged that Zwemstra (second respondent) and Smith (fourth respondent) were both directors of Sinvent, and applicant alleges, sixth respondent also had an interest in the company. The purpose of the cession was that Sinvent would finance the erection of the care centre from the sale of its 30 additional units. This did not materialize, nor was the trust able to obtain a loan for the development.

[16] Although the trustees initially wished to develop the care centre by selling life-use rights to occupation of the centre, it became apparent to the trustees that there was no appetite in the market place for such a model, and they started exploring other options by which to finance the

centre. It was eventually decided to develop the care centre as fifty-two sectional title units, with a fifty third unit to be used as a communal area. The care centre currently consists of the fifty-two sectional title units, a ten-bed frail care facility, and various communal areas. Applicant questions the decision to change business models. She says that a number of the sectional title units were purchased and then made available on a life-use basis by the purchasers. She says there was clearly a market for the life-use model, and that the decision to change business models was not motivated by financial pressures, but by the trustees' desire to personally make a profit from the units.

[17] Applicant's averment seems to me to be speculative. There is no information on what the life-use model as envisaged by the trust originally entailed, and on what basis the purchasers of the units sold life-use rights once they had purchased the units. Respondents have stated that the trust was unable to get any traction on the life-use model, and unless their explanation is clearly untenable, I must accept their version.[1] I see no basis to reject their evidence. The result was, however, that the trust divested itself of the 52 units. The fifty third unit, the common area remains the property of the Body Corporate.

[18] On 28 July 2016 the trustees met and resolved to terminate the trust with effect from 31 July 2016. They did so on the following grounds:

[18.1] The care centre which the trust had been tasked with building had been completed;

[18.2] There were no life-use occupiers residing in the care centre as originally envisaged (save those that had purchased their rights from sectional title owners);

[18.3] The trust had no assets and no liabilities;

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[1] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (AD)

[18.4] The trust's rights and obligations in respect of the care agreement with the care provider was to be ceded and assigned to the Body Corporate;

[18.5] It had become undesirable, in the view of the trustees, to continue the trust.

[19] Applicant was aware of the trustees' intention to terminate the trust, as on 29 July 2016 she threatened to launch an urgent application against the trustees to prevent the termination of the trust. Applicant's view was that the termination of the trust was in conflict with the two settlement agreements, and the trust deed, in that it had been the parties' intention that the trust should be permanent, and that it should manage the centre on a life-use basis.

[20] Applicant is clearly wrong in her view that the trustees were not entitled to terminate the trust. A simple reading of clause 21[2] reveals that the contracting parties to the trust deed foresaw that the trust might have to be terminated by the trustees. It only required of the trustees to discuss the possible termination of the trust with life-use occupiers (of which there were none), and to consider their interests. I am firmly of the view that applicant's submission that the trustees were prohibited by the settlement agreements from terminating the trust is erroneous.

[21] Since the trust was terminated, more than seven years ago, the care centre has been successfully managed by the Body Corporate with the assistance of a frail-care service provider.

RELIEF SOUGHT

[22] The aforesaid brief summary of the facts brings me to the relief sought by the applicant. The notice of motion is as lacking in brevity as

[2] Quoted in paragraph 11 above

the rest of applicant's papers (as I will refer to more specifically hereunder). I will attempt to summarize the relief sought:

[22.1] Applicant seeks a declaratory order that the Promotion of Access to Information Act, 2 of 2000 ("Paia") is applicable to trusts;

[22.2] Applicant seeks an order in terms of Paia, that the trustees be ordered to respond to a request in terms of Paia dated 13 July 2016, alternatively, that it be declared that by virtue of her ownership of sectional title units in the village, and her resulting membership of the Body Corporate, applicant is entitled to a response to her Paia request.

[22.3] That the decision to terminate the trust be set aside, that the trust be reinstated, and that the Master of the High Court be ordered to give effect to the order.

[22.4] That it be declared that the manner in which the s 25 right of extension was exercised was unlawful;

[22.5] That it be declared that the trustees failed in their fiduciary duties to the trust, that they be removed as trustees, and that the Master be ordered to appoint interim trustees on behalf of the trust;

[22.6] That it be declared that twelfth respondent as trustee of the Body Corporate failed in his fiduciary duties to the sixteenth respondent;

[22.7] That the Registrar of Deeds be ordered to remove a certain caveat from the title deeds of sectional title units in the scheme, to the effect that purchasers in the scheme were obliged to be members of Zambezi Frail Care;

[22.8] That an administrator be appointed in terms of s 16 of the Sectional Titles Management Act, 8 of 2011 with the powers and functions set out in Annexure "A" to the notice of motion, and that specific respondents be ordered to provide information and documents to the administrator;

[22.9] That the administrator must render a report and liaise with the Master regarding the appointment of new trustees for the trust;

[22.10] That the costs of the administrator be paid by the Body Corporate, but be re-claimable by the Body Corporate from the trustees.

APPLICATION OF PAIA TO TRUSTS

[23] Paia provides for persons to access information held by both public or private bodies. S 1 of Paia defines a private body as:

"(a) a natural person who carries on or has carried on any trade, business or profession, but only in such capacity;

(b) a partnership which carries or has carried on any trade, business or profession; or

(c) any former or existing juristic person,

but excludes a public body."

[24] If a private body receives a request which complies with the procedural requirements of Paia, the information must be provided. Section 50 (1) reads as follows:

"**50 Rights of access to records of private bodies. -**

(1) A requester must be given access to any record of a private body if-

(a) that record is required for the exercise or protection of any rights;

(b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and

(c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part." (emphasis added)

[25] In the first prayer of the notice of motion applicant seeks a declaratory order that Paia applies to trusts on the basis that a trust is a private body as defined by Paia. In *Land and Agricultural Bank of South Africa v Parker and Others*[3] the Court said that a trust is not a legal person. It is an accumulation of assets and liabilities which form the trust estate, and which vests in the trustees. However, in my view, the trustees are natural persons who carry on the business of the trust, albeit in a representative capacity. In my view, therefore, a trust falls squarely within the definition of a private body.

[26] The aforesaid interpretation is consonant with the Constitutional imperative that information should be accessible to persons seeking to exercise or protect a right. Whilst under the pre-democracy regime secrecy often led to abuses and violation of human rights, under our democratic dispensation it is important to promote transparency. I can see no reason why a trust should be treated any differently to any other juristic or natural person which carries on a business or trade. For the aforesaid reasons, I believe that the trustee's counsel, Mr. Els, was correct to concede in argument that Paia was in fact applicable to a trust. However, it is not necessary to make a declaratory order to that effect. A party relying on Paia simply asks for an order that the request must be complied with, as applicant has done in prayer 2 of the notice of motion.

CONDONATION

[27] S 78 of Paia provides an aggrieved requestor whose request for information has been refused the opportunity to approach a court within 180 days of the refusal for appropriate relief. It is common cause that the request for information was refused on 13 June 2016. This application was launched some four years later. The trustees argue that in the absence of an application for condonation, applicant's application cannot be considered.

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[3] 2005 (2) SA 77 (SCA)

[28] Applicant contends that it was not necessary to seek condonation because the trustees refused the request on the grounds that Paia did not apply, and not on any of the grounds for refusal in Chapter 4 of Paia, and consequently, that applicant did not have to comply with the 180-day limitation. This argument is spurious. Applicant was correctly of the view that Paia applied to the matter and that the trustees were wrong in their approach. S 78 does not say that a requestor may approach a Court within 180 days if a request is refused under one of the grounds set out in Chapter 4. In my view, whatever the grounds upon which access is refused may be, the aggrieved party must approach a court within 180 days, or apply for condonation.

[29] I have some reservations, in any event, whether applicant would have been entitled to relief in terms of Paia even if she had brought her application within 180 days. The first requirement of s 50 is that applicant has to show that she seeks the information in order to protect or exercise a right.[4] In argument it became clear that applicant wishes to access the trust records in order to establish whether the trust acted properly and whether there were irregularities in the trustees' conduct. Applicant is engaged in a fishing expedition, and that is not what Paia was intended for. However, given my view on the late filing of the application, I do not have to decide this issue.

[30] Applicant sought, in the alternative, an order that by virtue of the provisions of the trust deed, and her membership in the scheme, she is entitled to the information sought without having to resort to a reliance on Paia. I shall deal with this contention briefly. Firstly, Mr Els is, in my view, correct that the principle of subsidiarity precludes the applicant from seeking information other than under Paia. Secondly, applicant is not, as I have found above, a beneficiary of the trust, and the trust deed in itself

[4] See the analysis of section 50 in Manuel v Sahara Computers (Pty) Ltd 2020 (2) SA 269 (GP) at para 21 and further

does not give her any right to access information of the trust, nor, in my view, does her membership of the scheme.

SETTING ASIDE OF THE DECISION TO TERMINATE THE TRUST

[31] A more vexed question is applicant's attempt to set aside the decision of the trustees to terminate the trust. Applicant contends that she does not seek to set aside the trustees' decision on the grounds of legality, but on the basis of the trust deed and the settlement agreements. Applicant's claim is therefore contractual in nature.

[32] A trust is formed when a donor donates property to a trustee to hold in trust for a beneficiary. It is created by a contract between these three parties, and as I have already found, applicant is not a beneficiary of the trust. She is thus not a party to the contract, and I do not find any basis for her to enforce the terms of a contract to which she was not a party.

[33] Moreover, a court may, in terms of s 13 of the Trust Property Control Act, Act 57 of 1988 ("the TPC Act") amend a trust deed or terminate a trust. It may also remove a trustee in terms of s 20, or by virtue of s 23 make any order it deems meet in respect of the authorization, appointment or removal of a trustee. However, I find no authority, either in the TPC Act or in common law, that a court may breathe life into a trust that has been terminated.

[34] If I were to grant the order sought by applicant, I would do so at the instance of someone who is not a contracting party to the trust deed. I would have to either reinstate the original trust deed (even though the provisions of the deed no longer apply), or write a new deed, thereby writing a contract for the parties. Applicant was not clear on which route she proposed I should take. I would have to remove trustees from their office, even though they have not been trustees since 2016. The trust

would then somehow exist without any trust property and without trustees, until the Master of the High Court has appointed trustees.

[35] The above summary of the relief sought illustrates how ill-conceived the relief is that applicant seeks. In any event, the trust deed specifically foresaw that the trust might be terminated in future. In my view the applicant's interpretation of the trust deed is incorrect, and the trustees were fully entitled to terminate the trust.

JURISDICTION IN RESPECT OF THE APPOINTMENT OF AN ADMINISTRATOR

[36] In terms of s 16 of the Sectional Titles Schemes Management Act, 8 of 2011 ("STSM Act") an administrator may be appointed on application by a Body Corporate, a local municipality, a judgment creditor of the Body Corporate or an owner in a sectional title scheme, to administer a scheme for a fixed period. S 16 (2) (a) of the STSM Act reads as follows:

"(2) (a) If a Magistrate's Court on hearing the application referred to in subsection (1) finds –

(i) evidence of serious financial or administrative mismanagement of the Body Corporate; and

(ii) that there is a reasonable probability that, if placed under administration, the Body Corporate will be able to meet its obligations and be managed in accordance with the requirements of this Act,

the Magistrate's Court may appoint an administrator for a fixed period on such terms and conditions as it deems fit."

[37] Sixteenth Respondent, the Body Corporate, has taken the position that an order in terms of s 16 may only be granted by a Magistrate's Court, and that the jurisdiction of the High Court is ousted by the provisions of the section.

[38] S 1 of the STSM Act defines a court as "the High Court having jurisdiction" unless the context of the Act otherwise indicates. S 9 of the STSM Act provides that an owner may approach a 'Court' when the owner acts in the place of the Body Corporate. The word 'Court' is used throughout s 9. Similarly, s 15 allows a judgment creditor to approach a 'Court' to join members of the Body Corporate as joint judgment debtors. S 17 allows the 'Court' to determine a remedy if the building is destroyed. S 16 is unique in that it is the only section in the STSM Act that refers to a 'Magistrate's Court'. It does so seven times. The question is whether the legislature intended to give jurisdiction to the High Court in all matters related to the management of sectional titles schemes, save for the appointment of administrators in terms of s 16.

[39] In terms of s 21 (1) of the Superior Courts Act[5]:

"A Division has jurisdiction over all persons residing or being in, and in relation to all causes of action and all offences triable within, its area of jurisdiction and all matters of which it may according to law take cognizance, and has the power-
....."

[40] S 21 thus grants the High Court wide powers to determine all causes of action within its area of jurisdiction. In *Robinson v BRE Engineering CC*[6] the question was whether section 7 of the Close Corporations Act, 69 of 1984 which gave jurisdiction to a Magistrate's Court over matters concerning a close corporation, including liquidations, ousted the jurisdiction of the High Court. The Court said (per Seligson AJ):

"It is furthermore a well-established rule of statutory construction that there is a strong presumption against legislative ouster or interference with the jurisdiction of courts of law and that a clear legislative provision is required to displace this

[5] Act 10 of 2013
[6] 1987 (3) SA 140 (C)

presumption. See Lenz Township Co (Pty) Ltd v Lorentz NO en Andere 1961 (2) SA 450 (A) at 455 B; Steyn Die Uitleg van Wette 5th Ed at 78-9"

[41] An example of an instance where the legislature has expressly ousted the jurisdiction of the High Court is s 65 of the Competition Act, 89 of 1998. The High Court's jurisdiction has also been ousted in other legislation, such as the National Water Act, 36 of 1998, and s 157 of the Labour Relations Act, 66 of 1995. In these instances, the legislature has very clearly and explicitly expressed its intention to limit the High Court's jurisdiction. It did not do so in the STSM Act.

[42] I can also not conceive of any reason why the legislature would wish to reserve jurisdiction for the Magistrate's Court in the appointment of administrators. There may be cases in which the issues are complex, and which should be considered by a High Court, such as this in case, as Mr Lamey for applicant argued, correctly in my view. Therefore, even though s 16 speaks only of a Magistrate's Court, my view is that the legislature intended rather to additionally give the Magistrate's Court jurisdiction over such matters, and not to oust the jurisdiction of the High Court. I consequently find that the High Court has jurisdiction to entertain applications in terms of s 16.

SHOULD AN ADMINISTRATOR BE APPOINTED?

[43] It may at this point be useful to set out the reasons why applicant is of the view that an administrator should be appointed. I shall attempt to summarize, as applicant's complaints are numerous and voluminous:

[43.1] The Body Corporate allegedly failed to secure the owners' rights arising from the settlement agreements;

[43.2] The Body Corporate allowed the care centre to be developed contrary to the right of development, it allowed the centre to be developed contrary to the original concept, it allowed the trust to be terminated which resulted in a substantial portion of the centre becoming common property;

[43.3] The Body Corporate failed to take action where conflict of interests arose;

[43.4] The current arrangement means that the Body Corporate bears the financial risk of the centre, and it has financed certain expenses for the centre. The Body Corporate is also accused of applying unsound corporate practices;

[43.4] The Body Corporate has not acted in a transparent manner and has not provided proper information to owners;

[43.4] The Body Corporate did not compel the trustees to comply with statutory obligations, and is continuing to operate the care centre as a residential facility without proper consent;

[43.5] The Body Corporate has allowed the operation of the centre to become enmeshed with the affairs of the rest of the scheme, and has appointed a service provider which possibly is not paying sufficient monies for the right to operate the centre.

[44] As is obvious from the above, many of applicant's complaints are historical in nature. She takes extreme umbrage at the fact that the centre was not developed, and is not now operated, exactly as she believes it was envisaged when the settlement agreements were entered into, even though the evidence shows that the original model was unworkable. Such complaints are not a basis for the appointment of an administrator.

[45] Furthermore, applicant is concerned that the commixtio between the financial affairs of the centre and that of the rest of the scheme constitutes a potential risk for the Body Corporate. There is simply no evidence to support her theory. The Body Corporate has a healthy reserve fund, and it earns a net profit of approximately R 400 000.00 per annum from levies generated by the sectional title units in the centre. Moreover, applicant is concerned that the owners are subsidizing the

centre, and she takes umbrage at every contribution that the Body Corporate makes to the centre. What applicant fails to understand is that the care centre is a feature of the scheme which enhances the value of the properties in the scheme. In funding the centre the Body Corporate is acting in the best interests of all the owners in the scheme.

[46] Perhaps more telling regarding the applicant's motivation for this application is the powers that she seeks to secure for the administrator. Applicant wants the administrator to be appointed to take over the affairs of the Body Corporate only to the extent set out in Annexure "A" to the notice of motion. In terms of Annexure "A" the administrator is to be clothed with the authority to investigate the care centre and the manner in which it was developed. The administrator must also consider the centre's financial viability, and consider whether the business model must be revised. The administrator must then report to court within 7 months on his findings. He must also consider whether the trust should be revived and if he believes that it should, he must nominate the trustees. He should also consider whether the common property in the centre should be registered as a fifty-third sectional title unit. The administrator is not to be appointed to manage all the affairs of the scheme, and would seemingly exercise his duties in conjunction with the Body Corporate.

[47] Applicant concedes that, save for her reservations regarding the care centre, the scheme is well-administered and is financially stable. From the aforesaid it is clear that what applicant wants is a sleuth to investigate her issues with the centre. Applicant wishes, in my view, to embark on a fishing expedition. That is not the purpose of an administrator.

[48] S 46 of the Act was the predecessor to s 16 of the STSM Act. It provided for the appointment of an administrator, but it did not indicate under what circumstances an administrator should be appointed. In *Herald Investments Share Block (Pty) Ltd v Meer and Others; Meer v*

Body Corporate of Belmont Arcade and Another[7] the Court said that the purpose of appointing an administrator is remedial, and that the conduct of the affairs of the Body Corporate should be restored to the members of the Body Corporate.

[49] In *Dempa Investments CC v Body Corporate, Los Angeles*[8] the Court stated a number of principles which apply to the appointment of administrators:

[49.1] The Court has a discretion to appoint an administrator which discretion it should exercise judicially;

[49.2] Special circumstances or good cause have to be shown, which should at least entail neglect, willfulness or dishonesty on the part of the trustees and a likelihood that owners of units would suffer substantial prejudice if an administrator were not appointed;

[49.3] Applicant must demonstrate acts or omissions which would constitute maladministration, breaches of statutory duties, dishonesty, inefficiency and the like;

[49.4] The administrator should be able to add value which the trustees cannot;

[49.5] A balance should be struck between being slow to interfere in the management of the scheme on the one hand, and coming to the assistance of owners who might suffer substantial prejudice by the acts or omissions of the trustees, on the other.

[49.6] Applicant bears the onus of proving that the appointment is appropriate.

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[7] 2010 (6) SA 599 (KZD)
[8] 2010 (2) SA 69 (W)

[50] *Dempa* was written before the advent of the STSM Act. The STSM Act now prescribes in a broad manner in what circumstances an administrator may be appointed. These are cases of serious financial or administrative mismanagement. Notwithstanding that *Dempa* was written before the advent of the STSM Act, I believe that the principles laid down in *Dempa* nonetheless provide a good guideline to follow. What is clear from *Dempa* is that there has to be a threat of substantial prejudice to owners should an administrator not be appointed.

[51] In this case, there is not even an allegation that owners may be prejudiced should the administrator not be appointed. In fact, the scheme seems, on applicant's own version, to be functioning well. These are not the circumstances in which one appoints an administrator.

DECLARATORY ORDERS

[52] Applicant seeks a further three declaratory orders:

[52.1] That the manner in which the s 25 development right was exercised was unlawful;

[52.2] That first, third, fifth, and eleventh respondents failed in fulfilling their fiduciary duties as trustees to the trust, primarily by divesting the trust of assets, and then terminating the trust;

[52.3] That eleventh respondent failed to fulfil his fiduciary duties as trustee to sixteenth respondent.

[53] A court may, in terms of s 21 (1) (c) of the Superior Courts Act, grant a declaratory order:

"In its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

[54] S 21 of the Superior Courts Act mirrors the wording of its predecessor, s 19 of the Supreme Court Act, 59 of 1959. It has now become settled that the enquiry into whether a declaratory order should be granted is a two-phase one. Firstly, a Court has to determine whether the applicant is an 'interested person'.[9] The second step is to determine whether the Court should exercise its discretion in applicant's favour.

[55] In *Electrical Contractors Association (South Africa) and Another v Building Industries Federation (South Africa) (2)*[10] Nicholas J (as he then was) said:

"A person seeking a declaratory order of rights must set forth his contention as to what the alleged right is . . . . He must also show that he has an interest in the right . . . . Inherent in the concept of a right is the idea that it resides in a determinate person, and the persons interested in a right are those in whom it inheres or against whom it avails . . . . In that case Watermeyer CJ stated at 32 'Clearly the interest of the applicant must be a real one, not merely an abstract intellectual interest."

[56] The learned Judge went on to say (at 520 D):

"In the present matter ECA nowhere asserted that it had any right as against BIFSA and they did not seek a declaration of rights against it. All that is sought in the notice of motion was a declarator that the circular contained false statements. But that is a declaration as to a fact not as to a right."

[57] In this case applicant has no direct right in respect of the development of the care centre, even if the s 25 development right was unlawfully exercised (on which I express no view). Even if applicant can be said to have a financial interest in the matter, that is not sufficient, she must have a legal right. The same applies in respect of the alleged breach of a fiduciary duty by eleventh respondent of his duties as trustee of the

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[9] Reinecke v Incorporated General Insurances Ltd 1974 (2) 84 (A) at 93 A; Durban City Council v Association of Building Societies 1942 AD 27; Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005 (6) SA 205 (SCA)
[10] 1980 (2) SA 516 (T)

Body Corporate. If there were such a breach, that is for the Body Corporate to pursue. Even more obvious, is that applicant cannot have any rights in respect of an alleged breach of the trustees' fiduciary duties in respect of the trust. In the words of Nicholas J, applicant is seeking a declaration of fact, and not of a right. Applicant has fallen at the first hurdle, which is to prove that she is an interested person.

[58] In any event, I would have hesitated to exercise my discretion in applicant's favour. In *Naptosa and Others v Minister of Education Western Cape, and Others*[11] the Court warned about granting declaratory orders in respect of historical events:

"I consider that the substantial delay in bringing these proceedings is another reason for exercising our discretion against the grant of a declaratory order. It is well-established law that undue delay may be taken into account in exercising a discretion as to whether to grant an interdict or a mandamus, or to grant relief in review proceedings."

[59] This application deals with historical events. It is now seven years since the trust was terminated, and even longer since the centre was developed in the manner that it was. The application was launched three years after these events had played out. Even if applicant had grounds to seek a declaratory order, I would not have exercised my discretion in her favour, given the extensive delay that has occurred.

COSTS

[60] Respondents have sought a punitive costs order against applicant. They allege that the application is not only devoid of merit, but that it also constitutes an abuse of the Court proceedings.

[61] The founding affidavit comprises of 1395 pages, and includes 215 annexures. It sets out a twenty-year history of the matter. Applicant has

[11] 2001 (2) SA 112 (C)

dealt at length with every complaint that she has had during these years, every slight that she felt, real or imagined, even detailing her feelings regarding these various events. She has analyzed documents, queried the format in which they were written, even pointing out spelling errors. Applicant has joined parties who have no conceivable interest in this matter, one example being the joining of JL Williams, the twenty-ninth respondent, simply because he signed a surveyor map on behalf of Drie Herberge on 31 March 2010.

[62] Applicant has alluded to utterly irrelevant events, such as the erection of a cell phone tower, in an attempt to create the atmosphere that the Body Corporate and the trustees were irresponsible, uncaring, authoritarian and even lawless. Throughout her papers applicant has questioned the trustees' bona fides, in my view, without any factual basis.

[63] Upon receiving what were comparatively brief answering affidavits, applicant filed voluminous replying affidavits, and ultimately applicant's papers amounted to a total of 1901 pages. I have a strong sense, from the repeated attacks on the trustees and the Body Corporate, that applicant was motivated more by grievance against all the other role players than by a genuine desire to obtain relief.

[64] I take note of the approach of the Constitutional Court on costs in *Tjiroze v Appeal Board of the Financial Services Board*[12] when it said[13]:

"In Public Protector v South African Reserve Bank Mogoeng CJ noted that '[c]ost orders on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of process. Although it was a minority judgment, I do not read the majority judgment to differ on this. In the majority judgment Khampepe J and Theron J noted that a punitive costs order is justified where the conduct concerned is

[12] CCT 271/2019) [2020] ZACC 18
[13] At para [23]

'extraordinary' and worthy of a court's rebuke. Both judgments referred to Plastic Converters Association of SA, in which the Labour Court stated:

'The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium'".

[65] It is therefore clear that attorney and client costs should only be awarded in extraordinary cases, where the case for punitive costs is clear. In this case the application was ill-advised. Applicant's case on all the relief sought was simply bad in law, and not based in fact. Applicant compounded the situation by inserting irrelevant and vexatious averments in her papers, ultimately resulting in the papers totaling some 2400 pages. Applicant did her utmost, as I have said, to paint the trustees in a negative light. She dragged the trustees into a conflict relating to events that occurred seven years ago, and she caused the Body Corporate to have to incur substantial expense in defending the application. Applicant did so in the knowledge that the owners of the scheme are elderly, and that most likely at least some of them have to be careful with their retirement funds.

[66] In my view the Body Corporate should not be out of pocket because of applicant's conduct. Taking the above factors into account cumulatively, I believe that a punitive costs order is appropriate.

[67] I make the following order:

[67.1] The application is dismissed with costs on the attorney/client scale.

SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

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ATTORNEY FOR APPLICANT:	**Bernard van der Hoven Attorneys**
COUNSEL FOR 1st, 2nd, 3rd, 4th, 5th, 6th and 11th Respondents:	**Adv. A Els**
ATTORNEY FOR 1st, 2nd, 3rd, 4th, 5th, 6th and 11th Respondents:	**Friedland Hart Solomon Nicholson**
COUNSEL FOR 16th Respondent:	**Adv. D Van den Bogert**
ATTORNEY FOR16th Respondent:	**JI Van Niekerk Inc**
DATE HEARD:	**7 and 8 November 2023**
DATE OF JUDGMENT:	**14 November 2023**