IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. 9362/2012

In the matter between:

ANGELFISH INVESTMENTS 536 CC **APPLICANT**

and

THE BODY CORPORATE OF ORIENT GARDENS **RESPONDENT**

JUDGMENT Delivered on 26 February 2013

STRETCH A J

[1] This is an application in terms of section 46 of the Sectional Titles Act 95 of 1986 ("the Act") for Mr Andrè Grundler ("Grundler") to be appointed to act as the respondent's administrator.

[2] The application, which was accompanied by a certificate of urgency, was enrolled for hearing on 26 October 2012 with a few days' notice to the respondent and the occupiers of the residential units at Orient Gardens.

[3] On that day three representatives appeared in person for the respondent. The matter was adjourned to 8 November 2012 and on that day was adjourned to be heard as an opposed motion on 23 November 2012.

[4] The crisp issues for determination are the following:

[4.1] whether the applicant has made out a case for urgency;
[4.2] whether there exists a need for the appointment of an administrator and if so, whether Grundler is a suitable appointee.

[5] The applicant (a close corporation) is the owner of eight of 54 units which form part of scheme 804 of Orient Gardens, being a sectional title scheme ("the scheme"). The applicant's sole member is Mr Kadarnath Maharaj ("Maharaj"). Its chief executive officer is Darshi Harase, who has been duly authorised to launch these proceedings on the applicant's behalf. The applicant's member, Maharaj, is not only also a co-director of a company by the name of New Order Investments 29 Pty Ltd (hereinafter referred to as "the developer") but also, it seems, was/is his own attorney, the applicant's attorney, the developer's attorney, and at least during August 2011, also the respondent's attorney.

[6] The applicant seeks for the appointment of an administrator for the scheme, averring, in an affidavit deposed to by its chief executive officer, that the respondent has failed in its fiduciary duties to the

owners and other interested parties in a number of respects which I shall deal with in due course.

[7] The applicant contends that, by virtue of this failure, a wall supporting a bank collapsed onto the applicant's units on the weekend of 7 September 2012. The applicant says that the collapse was due to the lack of maintenance of a burst water pipe and the heavy rains during that weekend. This the applicant says has in turn impacted on the stability of the road.

[8] It is for these reasons that the applicant says it has brought this urgent application for the appointment of Grundler as an administrator.

[9] On the question of urgency itself the applicant's representative, Darshi Harase, says the following on oath:

'This application has become urgent in that the repairs to the wall and other damages needs urgent attention and at this stage the applicant is funding the repairs but the repairs need to be overseen by a responsible person for and on behalf of the Respondent but that is not possible as there is no such person responsible and hence the administrator needs to be appointed to take control of the affairs of the Body corporate.'

[10] The Chair of the respondent, Ms Zibonisle Ngcobo ("Ngcobo"), who has deposed to an affidavit on the respondent's behalf, argues that the applicant has failed to make out a case for urgency. She, in

turn, says that Orient Gardens came into being as a single phase in 1991. Ninety-eight per cent of the trustees were 'Africans' and they managed their affairs well. The development and construction of this first phase was of a high standard and there were no complaints about drainage, sewerage, plumbing and the like.

[11] However, in 2007 the applicant's member (Maharaj) began developing the second phase and erected three units in excess of that determined by the regulations and the engineering specifications, resulting in the properties being 'squeezed' next to each other severely affecting the storm-water drainage, the sewerage and the plumbing. I digress to mention that Maharaj (wearing his developer's hat) and his co-developer deny that too many units were built and refer on oath to various plans, diagrams and certificates which would be made available at the hearing of the application, but as it transpired, were not.

[12] Maharaj, she contends, sold the units with fake water meters which are still on the property (this too is disputed). Ethekwini Water Sanitation ("EWS") inspected the property at the behest of the respondent and it was found that the developer and the plumber had made illegal connections and that the plumbing was sub-standard and 'hopeless'.

[13] She avers that at all times the trustees of the respondent have been playing an active role in championing the cause of the unit owners of Orient Gardens. She seems to be of the view that the

reason why the applicant has launched this application (which she describes as a fruitless one which has been brought behind the respondent's back) is because Maharaj 'is concerned about the hurdles and challenges he has to face with the municipality's enforcement unit.'

[14] Ngcobo goes on to describe in her affidavit that a meeting was held in 2011 with the developer of Orient Gardens, Maharaj and a representative of the municipality, who presented Maharaj with a snag list to be attended to by mid October 2012. This did not happen which ultimately resulted in the respondent approaching a building inspector who conducted an inspection *in loco* and found that sewerage pipes had not been secured and storm water drainage had been laid incorrectly.

[15] In July 2012 the respondent was advised by the building inspectors that they had attempted to contact Maharaj in connection with these problems but that he had failed to respond, resulting in the problem being referred to the municipality's law enforcement unit.

[16] In Ngcobo's opinion, the wall referred to by the applicant's deponent did not collapse due to rain and pre-existing badly maintained plumbing (which is apparently the version of the applicant), but because the pipe was exposed due to a fatal construction error on the part of the developer. The wall (as a result of heavy rain) collapsed onto the pipe, causing it to burst. She says that after the wall had collapsed a crisis committee was formed consisting

of five members of the respondent, the chief executive officer of the municipality's law enforcement unit, and the building inspectors.

[17] Ngcobo avers that the municipality's law enforcement unit was still in the process of investigating and attempting to correct the 'transgressions' of Maharaj (*qua* developer) when these urgent application papers were served on the respondent and the unit owners out of the blue. At no stage, she says, did Maharaj ever suggest the need for an administrator, and they were taken completely by surprise. It is prudent to mention that the applicant's deponent avers that 'at no stage did the enforcement unit intimate any investigation' against Maharaj, and that according to this unit the buildings had been built according to plan and their sole concern was the rectification of the damaged wall.

[18] Ngcobo, on behalf of the respondent, states that the applicant has launched these proceedings with the deliberate intent to shift the focus from Maharaj onto the respondent. She believes that he will ultimately be held liable for the damage to Orient Gardens and may even be charged for contravening building regulations. The appointment of an administrator, she says, will result in innocent home owners having to pay to correct Maharaj's errors, as has apparently already happened with home owners having been constrained to pay for the installation of water meters to replace fake ones which she says had been supplied by Maharaj. It goes without saying that these allegations are also denied.

[19] Ngcobo also complains that due to short service she was unable to vent in full the complaints which the respondent has against Maharaj. She stresses however, that before Maharaj became a trustee (Maharj denies having been a trustee), the respondent thrived at phase one of Orient Gardens. Administration, she says, will drain the respondent of its hard earned cash, as it is Maharaj, and not the respondent who has been 'negligent and wreckless' in the construction of the second phase of Orient Gardens.

[20] Finally, Ngcobo argues in her affidavit that the applicant has failed to make out a case for urgency. She alleges, for example, that despite the fact that Maharaj had been invited to attend the respondent's meetings before the applicant launched this application, he declined to do so. The applicant's deponent disputes that Maharaj (who has deposed to a confirmatory affidavit) was invited to attend such meetings. On the contrary a letter written by Maharaj in his capacity as the applicant's attorney it seems, suggests that on 16 August 2011 Ms Ngcobo and Ms Mkwanazi (representing the respondent) were invited to address an issue pertaining to the water connection of a certain phase of Orient Gardens. In this letter the respondent is referred to the Act and afforded an opportunity to comply with its provisions failing which the applicant would be constrained to launch an application for a curator for the scheme or for an order that would benefit the scheme (this scheme being the extension of Orient Gardens to include units 27 to 54, eight of these units being owned by the applicant).

[21] The applicant contends that there are no material disputes of fact in this matter despite the papers being riddled with collateral disputes, ambiguities and inconsistencies, the most significant of which seems to be the cause of the collapse of the wall. It may well be argued that the collapse of the wall was the proverbial last straw. On the other hand, I have some misgivings as to whether this court would have been approached in the manner in which it has, if the wall was still standing.

[22] Notwithstanding the existence of these factual disputes and of averments made by the applicant which are simply met with bare denials, the material issue for this court's determination, putting aside for the moment as to why the wall collapsed, is whether the respondent's trustees have fulfilled their duties under sections 37 to 40 of the Act and if not, whether this firstly calls for the appointment of an administrator, and secondly, whether the applicant ought to have sought such appointment affording the respondent the brief notice which it did.

[23] The applicant complains that the respondent has failed to comply with its fiduciary duties to the owners of the 54 units in the scheme in the following respects:

[23.1] It has failed to establish for administrative expenses a fund sufficient for the repair, administration and maintenance of the common property of Orient Gardens, and has failed to sufficiently provide for the payment of rates and taxes and other local authority charges.

[23.2] It has failed to require the owners to make contributions to such a fund for the purpose of satisfying any claims against it.

[23.3] It has failed not only to determine from time to time how much money ought to be raised for the aforesaid purposes, but has in fact not raised any funds by levying contributions on the owners as per their respective participation quotas.

[23.4] It has failed to maintain the common property and to keep it in a state of good and serviceable repair.

[23.5] It has failed to maintain and repair all pipes, wires, cable and ducts existing on the property.

[23.6] It has failed to control, manage and administer the common property for the benefit of all the owners.

[23.7] It has not held an annual general meeting since 2007.

[23.8] It has no books of account or records available to be signed off by an auditor as provided for in the management rules.

[23.9] It has not ensured that common property is utilised and maintained in such a way so as not to interfere with the use and enjoyment thereof by the common body of owners.

[23.10] It has not properly dealt with issues such as the number of trustees and the election of trustees, the approval of a budget, the appointment of an auditor or accounting officer, the preparation of

annual financial statements and the approval of a schedule of insurance replacement values.

[23.11] A retaining wall and an associated bank which collapsed on 7 September 2012 have not been repaired and this has impacted on the stability of the roadway which is also under threat of collapse.

[23.12] Units are in a state of disrepair and are not being maintained adequately, resulting in financial institutions refusing to finance them.

[24] These are undoubtedly serious allegations, aggravated by the fact that it is not at all clear whether the respondent is made up of a duly constituted board of trustees. All Ngcobo's affidavit says in this regard is that she is the respondent's chair and that she has been 'duly authorised' to depose to the respondent's opposing affidavit. She does not indicate at all whether she is a trustee, whether there are any other trustees and if so who they are and where she derives her authority from. She does not annex to her affidavit any resolution from any other trustees and/or unit owners authorising her to speak for the respondent and/or on behalf of the owners.

[25] The actual content of Ngcobo's affidavit does not improve things. It does not even begin to touch on the allegations which have been levelled at the respondent. I have gone to lengths to underscore anything at all reflected therein, which might suggest that there is little or no substance in the concerns raised by the applicant, and I record the verbatim responses. They are:

[25.1] ‘There is no mismanagement.’

[25.2] ‘We were busy trying to correct the wrongs of the developer Mr Maharaj/New Order Investments, when the application papers were served on us.’

[25.3] ‘Before Mr Maharaj became a trustee, the Body Corporate managed its affairs. All our light bill, water bills, rates and insurance were all up to date … There were no issues regarding collapsed walls, storm water blockages, exposed electricity, water and sewer pipes.’

[25.4] ‘There is much more to say however due to time constraints and the fact that we only consulted with our attorney yesterday … we were unable to include all of Mr Maharaj’s transgressions.’

[26] It is clear from the above, that although Ngcobo has raised a number of domestic disputes, none of them touch on the material issues which have been raised by the applicant justifying the need for the appointment of an administrator. In some cases it may be proper to say that domestic disputes between members of a body corporate should be resolved by resorting to the domestic forum of a general meeting rather than the appointment of an administrator, but where there have been clear and continuing breaches of the kind complained of by the applicant, the appointment of an administrator may be the only effective remedy and one which this court should not shrink from exercising (see Else-Mitchell J in re *Steel and the Conveyancing (Strata Titles) Act 1961 (1968) 88 WN (Pt 1) (NSW) 467 at 471).* In my view, the criticisms which the applicant has levelled at the respondent

with respect to its fiduciary duties remain unchallenged. The only question then, is whether these complaints are sufficiently serious so as to merit the appointment of an administrator.

[27] In the exercise of my judicial discretion, I am of the view that they are. The averments made by the applicant (who is not only the owner of a number of units in the scheme, but who has also been a developer of the scheme and was at some stage the respondent's attorney), supported by graphic images of the neglected condition of the complex, in my view constitute special circumstances for the appointment of an administrator. The collapsed wall and the collapse of the embankment supporting it, which appears to have become the subject matter of dispute and acrimony, also seems to have become an event beyond the control of the respondent's purported trustees, whoever they may be. Furthermore, there certainly appears on the face of it to have been maladministration, breaches of statutory duties, inefficiency, managerial atrophy and a deadlock having been reached after the collapse of the wall.

[28] It is so that this court should endeavour to strike a balance between, on the one hand, being slow to interfere in the management of the scheme by the respondent's chosen representatives, and on the other hand, not hesitating to come to the assistance of owners of units who might suffer substantial prejudice by the actions or the omissions of the purported trustees. However, when this court is in the dark as to who the trustees are and what their roles have been in the scheme, this court has no alternative but to come not only to the applicant's assistance, but also to the rescue of other registered

owners who have not opposed this application despite the papers having been served on them (see *Dempa Investments v Body Corporate, Los Angeles 2010 (2) SA 69 WLD at 82A-H).*

[29] The scheme at Orient Gardens is an extensive one. It comprises of 54 units, eight of which are owned by the applicant and a further five by the applicant's member. It has been submitted on the respondent's behalf that the 41 remaining owners all oppose this application. However, there is no direct or indirect evidence of this on the papers, and I reiterate that this is a case where not only the applicant, but the other unit owners are owed a visible and accountable duty of care.

[30] Were it not for these other unit owners, I would have had no hesitation in dismissing this application for lack of urgency. What the parties have described is not a situation which has emerged suddenly. The parties are *ad idem* that there have been serious problems going as far back as 2007. The applicant has for some reason elected, five years later, to arm himself with a purported certificate of urgency (wherein counsel for some mystical reason certifies that on 18 October 2012 the papers disclosed circumstances making it 'appropriate' for the matter to be heard on 26 October 2012) and approaches this court in extreme haste on two to three days' notice to the respondent and the other unit owners. This type of conduct on the part of litigants is to be discouraged and it is the duty of their attorneys to advise them to approach the court in a sensible fashion as provided for in the uniform rules of this court and in the cases traversing

degrees of urgency (see *Luna Meubel Vervaardigers (Edms) Bpk v Makin 1977 (4) SA 135 W at 137 A – F).*

[31] There is one further aspect which deserves mention. The applicant has proposed the appointment of Grundler as the respondent's administrator. The respondent has opposed the appointment of an administrator altogether. On the papers, it has not objected to the appointment of Grundler should the application succeed, nor has it proposed anybody else.

[32] During the course of argument before me the respondent's representative questioned Grundler's suitability as an administrator but has not mooted the appointment of anyone else in his stead, should the application on the merits succeed. The respondent has referred me to an unreported judgment of this Division, where this court refused to extend Grundler's appointment as an administrator for various reasons (see *Grundler NO v Body Corporate Flamingo of Lot 2371 Flamingo Heights and Others 2012 ZAKZPHC53* (delivered on 22 August 2012)).

[33] I have read the judgment in that matter and do not believe that it sets forth convincing reasons, when dealing with the facts and circumstances of this particular case, for me to decline the application for Grundler's appointment. If anything, it seems to me that the difficulties and challenges he was constrained to face and traverse in the management of that scheme (consisting of some 72 units) could only have served to add to his experience, and I expect him, in this

case, to add value to the scheme, where the purported trustees have not shown to have been able to do so themselves.

In the premises I make the following order:

a) Andrè Grundler is appointed to act as the administrator of the respondent in terms of section 46 of the Sectional Titles Act 95 of 1986 (“the Act”).

b) The aforesaid appointment shall terminate after the expiry of two years from the date of this order, or upon an earlier date should the administrator produce, to this court’s satisfaction, a report advising on the completion of a rehabilitation plan; alternatively, should good cause be shown why the administrator’s appointment should be set aside.

c) In the event of the administrator being unable to complete or substantially comply with a rehabilitation plan within the two year period, he may approach this court for an extension.

d) The administrator shall perform the functions and have the powers of a body corporate referred to in sections 37, 38 and 46 of the Act.

e) The respondent is directed (within ten days of the date of this order) to deliver to the administrator all its books, documents and records in terms of the provisions of the Act, and to pay or cause to be paid into the trust account of

the administrator's attorney on behalf of the respondent, any and all funds which are held for and on the respondent's behalf.

f) The administrator shall, at least 30 days before the expiry of his term of appointment, whether abridged or extended, convene a meeting of all the members of the respondent for the purpose of electing and appointing a board of trustees of the respondent and shall call upon such members to nominate trustees to be appointed to the respondent's board.

g) The administrator shall act as chairman of this meeting and shall, thereat, determine who is eligible to nominate trustees and to vote in accordance with the provisions of the Act and the respondent's rules.

h) In the event of the board of trustees not being duly and properly elected, the administrator's office shall be deemed to be extended and the administrator shall forthwith report the absence of due and proper election to this court and seek appropriate directions from this court in that regard.

i) The remuneration of the administrator shall be fixed in accordance with his quotation dated 18 September 2012, and shall be limited to R850,00 per hour for administrator functions and R350,00 per hour for assistant functions.

j) Any reasonable and necessary additional costs incurred by

the administrator are to be funded out of the respondent's administrative fund.

k) The respondent is directed to pay the costs of this application.

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STRETCH A J

Appearances /…

Appearances:

For the Applicant	:	Mr H.P. Jeffreys SC
Instructed by	:	Sham & Co. Inc Durban C/o Schorie & Sewgoolam Inc. Pietermaritzburg
For the Respondents	:	Mr A.B. Maharaj
Instructed by	:	Baba Ntoi Attorneys Durban
Date of Hearing	:	23 November 2012
Date of Filing of Judgment	:	26 February 2013