

REPUBLIC OF SOUTH AFRICA



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

Case Number: 58950/2021

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

.....3/3/2022.....

*denise fisher*

In the matter between:

**THE PRUDENTIAL AUTHORITY**

Applicant

And,

**3SIXTY LIFE LIMIED**

First Respondent

**NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA**

Second Respondent

**YASHODA RAM**

Third Respondent

**BDO ADVISORY SERVICES (PTY) LTD**

Fourth Respondent

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**JUDGMENT**

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**FISHER J:**

## **Introduction**

[1] This application comes before me in the urgent court. It is set up as interlocutory to an application to confirm or discharge a provisional appointment of a curator obtained under section 5 of the Financial Institutions (Protection of Funds) Act ('the Protection of Funds Act'). Ms Yashoda Ram, the third respondent is the curator in question.

[2] It is sought in these proceedings that the appointment of Ms Ram be 'swopped out' for a new appointee and that this occur in accordance with the legal principles relating to variation of orders. More specifically, the applicant seeks to have paragraph 4 of the provisional order in issue amended by having Ms Ram's name removed and replaced with that of Mr Tinashe Mashoko.

[3] The basis for this purported variation application is that there was a misrepresentation of the qualifications and credentials of Ms Ram to the judge before whom the provisional order was moved, Crutchfield J. This alleged misrepresentation so the argument goes, led the applicant to place before Crutchfield J information which was false and thus the order should be varied to substitute Ms Ram with another more suitable curator. The applicant encapsulates its problem with Ms Ram as that it has 'lost faith in her integrity.'

[4] The variation is sought to be done urgently and preparatory to an anticipated hearing to confirm the order which is set down for special hearing on 22 March 2022 before Dippenaar J.

## **Background to the curatorship order**

[5] 3Sixty sells life insurance and funeral products to groups and individuals and as such is regulated by, inter alia, the Insurance Act 18 of 2017. This regulation entails 3Sixty being required to meet prescribed minimum capital and solvency requirements. The applicant, the Prudential Authority is obliged to ensure that there is compliance with such requirements.

[6] Absent compliance with these prescribed minimum capital and solvency requirements, the applicant is entitled to take the prescribed regulatory steps available

to it to protect the interests of policyholders and their beneficiaries. This includes the placing of the insurer under curatorship. Section 5 of the Protection of Funds Act provides that a division of the High Court with jurisdiction may grant an order for the appointment of a curator on good cause shown and may, at the same time, grant a *rule nisi* calling upon the insurer and other interested parties to show cause on a day mentioned in the rule why the appointment of the curator should not be confirmed.

[7] This is what happened in this case on 21 December 2021. The applicant sought and obtained the provisional appointment of Ms Ram on the grounds that the company is no longer able to meet the prescribed regulatory solvency requirements.

[8] On the return date, the Court may confirm the appointment of the curator if it is satisfied that it is desirable to do so. The Prudential Authority seeks an order in terms of which the appointment of a curator is confirmed. 3Sixty has opposed this confirmation of the provisional order. It sought to anticipate the return day of the order and discharge it urgently. As I have said, this application for the anticipation and discharge of the order is set down before Dippenaar J on 22 March 2022 with time periods for the filing of affidavits and heads of argument agreed.

[9] Ms Ram was furthermore ordered by Dippenaar J to submit a report on the impact of an Internal Recapitalisation Plan for 3Sixty by 21 February 2022. Ms Ram says that the report which she had, at that stage, already drafted shows that the curatorship order should never have been sought by the applicant. She says:

"[T]he report, which I have prepared along with four separate, independent experts, will show that the [Prudential Authority] ought never to have placed [3Sixty] under curatorship. Ultimately, therefore, the [Prudential Authority] wants me removed in order to ensure that its actions in placing [3Sixty] under curatorship is not embarrassed (sic)..."

[10] She comes to the following conclusion in her report:

'Conclusion 1. The facts presented in this report, as well as the expert opinions sourced, show that had the PA [the applicant] considered the transaction prior to placing the license under curatorship in all its merits, the curatorship would not have been deemed necessary, based

on solvency alone and the outcomes of the Internal Recapitalisation Plan proposed at this time.

2. Given that this report was requested by the court in the matter of the Opposition of Curatorship, the conclusion based on this report alone, is that curatorship may have not been appropriate and notwithstanding other allegations put forward by the PA, should be opposed.

3. Given the facts and circumstances that have resulted from this case, insofar as the integrity, livelihood and future prosperity of the provisional curator, the Board and Executive Management of the license, as well as the license itself, one has to consider the motives of all parties concerned.

4. As disclaimed earlier in this report, the various other matters alleged in the Founding Affidavit of the Applicant have not been considered in this report.

5. The outcomes of the opinions of experts from BDO have not been included due to the suspension of the provisional curator from her role and not being in a position to discuss nor verify the findings of these specialists.

Please refer to the Letter of Suspension Annexed hereto as C1.'

### **This urgent application**

[11] Reference to the report of Ms Ras and the affidavit which she has filed in these proceedings show that she supports the discharge of the order.

[12] She alleges that this attempt by the applicant to now unseat her as provisional curator is for this reason alone. She denies any misrepresentation of her credentials. She abides the decision of this court but says that she has been compelled to make an affidavit to set the record straight in relation to the allegations which have been made by the applicant in relation to the alleged misrepresentations and her lack of integrity. Indeed these allegations cannot be left unchallenged. The impact that the allegations have had and are likely to continue to have on her career are severe. She

has been suspended from her employment with the fourth respondent, BDO and faces an inquiry into her alleged dishonesty.

[13] Counsel for 3Sixty, Adv Ngalwana SC aligns himself with the assertion that the attempt to unseat Ms Ras is precisely because she does not support the case of the applicant. He argues that the application is a ruse intended to prevent the discharge of the *rule nisi* and setting aside of the curatorship order.

[14] The allegation that the application is made in bad faith and out of an ulterior motive is serious, more especially as it is made against a State regulatory functionary.

[15] The representations relied on by the applicant are as follows: that Ms Ras was a member of the Actuarial Society of South Africa (ASSA) and that she held a BSC in Actuarial Science when in truth she was simply a student member of ASSA and did not hold a degree.

[16] Ms Ras denies that she has misled the applicant and states that she is eminently qualified for the position of curator.

[17] Mr Ngalwana argues that the application does not find a basis under rule 42. This is clearly the case. Mr Peer, on behalf of the applicant argues that the application is brought under the common law. Mr Ngalwana counters that there is no common law provision which allows for the rescission or variation of an *ex parte* order because the applicant brought the application on information which it, itself, placed before the court and which it subsequently contends was false.

[18] It seems to me that the applicant seeks to achieve the removal of the curator under the guise of a variation of a court order. I agree with Mr Ngalwana that such an approach is not competent. If the removal of Ms Ram is sought this must be done expressly.

[19] Section 5 (9) of the Protection of Funds Act provides the procedure to be followed. It provides that a court can cancel the appointment 'on good cause' at any time.

[20] Mr peer argues that even if the variation of the order is not the correct procedure a case has still been made out for cancellation of the curatorship order under section 5(9).

I move to deal with this submission.

[21] 'Good cause' for cancellation of an appointment or removal of a fiduciary has been dealt with extensively in the field of liquidators and trustees of insolvent estates. Whilst not entirely on all fours, this jurisprudence gives some guidance as to what the requirement of good cause entails. Having said this, I accept that the position of liquidator differs in that the good cause element is, to an extent, codified in the Old Companies Act 61 of 1973. Among the listed grounds for removal of liquidators in the Old Companies Act are:

' (b) that he has failed to perform satisfactorily any duty imposed upon him by the Act;

...

(e) that in [the court's] opinion the liquidator is no longer suitable to be the liquidator of the company concerned.'<sup>1</sup>

[22] In *Standard Bank v Master of the High Court*<sup>2</sup> the Supreme Court of Appeal examined the fiduciary obligations of liquidators as statutory functionaries.

[23] Our Courts have held that there will be 'good cause' for the removal of a liquidator where that person is not suitable for the appointment or where she has acted contrary to the duties of the office.<sup>3</sup> 'Good cause' is not confined to misconduct or personal unfitness for office, but includes any conduct which is such that the Court is

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<sup>1</sup> *Old Companies Act section 379(1)(b) and (e)*.

<sup>2</sup> *Standard Bank of South Africa v the Master of the High Court and Others* 2010 (4) SA 405 (SCA).

<sup>3</sup> See generally Meskin Insolvency Law Chapter 4.50; Goocher's Case (1872) 7 Ch app 207 at 2011.

able to conclude that it would be to the advantage of the persons sought to be protected by the curatorship.<sup>4</sup>

[24] Most of the law relating to the removal of fiduciaries entails inquiry into their qualification, suitability, and performance. This must obviously be viewed within the context of the requirements of the position of a curator in the context of the requirements for the position.

In *Executive Officer FSB v Dynamic Health*<sup>5</sup>, the SCA held as follows in relation to the inquiry that a court must engage in under section 5 of the Protection of Funds Act :

'The registrar must therefore satisfy the court that there is good cause to appoint a curator. Reading ss (1) together with ss (4), that means that the court must be satisfied on the basis of the evidence placed before it that it is desirable to appoint a curator. Something is desirable if it is 'worth having, or wishing for'. The court must assess whether curatorship is required in order to address identified problems in the business of the financial institution. It assesses this in the light of the interests of actual or potential investors in the financial institution or investors who have entrusted or may entrust the management of their investments to it. It must determine whether appointing a curator will address those problems and have beneficial consequences for investors. It must also consider whether there are preferable alternatives to resolve the problems. Ultimately what will constitute good cause in any particular case will depend on the facts of the case ... '<sup>6</sup>

[25] From this we can discern that the inquiry of a court called upon to grant a curatorship order involves itself less in the credentials of the curator and more in the determination of whether curatorship is appropriate. Clearly the court faced with such an application will rely on the applicant's assertions as to the suitability of the suggested curator. It will be assumed by the court that such qualifications and experience as is deemed appropriate will have been corroborated by the applicant given its position as regulatory functionary. It is specialist and is more qualified than the court to determine what qualifies a curator for the position. Whilst not to underestimate the importance of the qualifications of the suggested curator in an

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<sup>4</sup> See Meskin Chapter 4.34.

<sup>5</sup> 2012 (1)SA 453 (SCA)

<sup>6</sup> Id at para 4.

application for removal, it is generally considered that the expertise and actual conduct of a functionary will form a large part of the basis for any application for removal.

[26] The basis of the complaint which founds the purported application for the variation of the curatorship order is that the curator misrepresented her formal qualifications and that the applicant has thus lost confidence in her integrity and ability to do the job. This is the high-water mark of the allegations which seek to found the removal. There are not the usual allegations which one expects in removal applications of fiduciaries; conflict of interest, bias, maladministration, fraud – are not present.

[27] As I have said, the curator, although she abides the ruling of this Court, has briefed attorneys and counsel to place her version before the court. Ms Shahim is the counsel concerned. Ms Shahim correctly points out that given the form of the application, Ms Ram has been met with allegations against her which seek to reduce that which the applicant must show to get removal relief to the requirements for variation of an order.

[28] On Mr Peer's submission the requirements of good cause are generic and apply in the same way to variation and cancellation of curatorship alike. For this reason he argues that a case has been made out for both removal and variation.

[29] I disagree; in the former procedure the question is whether there is some irregularity in the process which vitiates the order; in the latter procedure the inquiry centres on the performance of the curator, her suitability for the position, her conduct of the curatorship administration and how it has affected those whom the curatorship serves. In my view, Ms Ram has been unfairly deprived of the opportunity to deal with these aspects – which are central to the inquiry. These aspects are also central to her employment as she has been suspended from such employment by her employers.

[30] Ms Shahim argues that, although there may be a misunderstanding as to whether Ms Ram had a BSc degree, there is no indication that the fact that she does not have one is so material that renders her unqualified for the job. Ms Shahim correctly makes the point that there are no specific qualifications for a curator under



section 5(4). Ms Ram confirms that she has actuarial knowledge and experience of almost sixteen years and that she was appointed as Head of Actuarial, Predictive Analytics and Insurance Innovation by the fourth respondent, BDO in August 2021. She explains that the obtaining of appropriate qualification such as opens the door to ASSA membership can be achieved in one of two ways. The first option is to obtain an actuarial science degree but the actuarial profession is also open to another option which is to allow access to individuals from other professional and educational backgrounds, provided that the underlying qualification has a mathematical basis. Ms Ram states that she is taking this latter route. This has entailed her obtaining sufficient credit in maths-related undergraduate modules to qualify for acceptance to ASSA as a student member and then furthering her qualification through the ASSA board examinations. This is not disputed. As I have said, the applicant does not rely on any misconduct in the actual carrying out of her fiduciary function.

## **Conclusion**

[31] The dispute as to whether Ms Ram misled her employers and the applicant cannot be determined without more and perhaps oral evidence.

[32] The fact is that the applicant has adopted an incompetent procedure to seek a removal of the curator.

[33] The urgency of this application is dependent on the applicant showing the prejudice to be suffered if Ms Ram is not removed urgently. It has shown none. The fact that Ms Ram may not be as qualified as the applicant believed her to be for whatever reason does not mean she is not performing her function properly.

## **Costs**

[34] I can make no findings as to the allegations pertaining to the motivations of the applicant in bringing this application at this stage of the proceedings and thus I am not fully equipped to determine whether punitive costs are warranted. It seems to me that the court dealing with the confirmation of the order will be in a better position to determine the costs.

**Order**

[35] I thus make the following order:

The application for variation of the curatorship order is dismissed for want of urgency with costs reserved.

*denise fisher*  
FISHER J

**HIGH COURT JUDGE  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Date of Hearing:** 22 February 2022.

**Judgment Delivered:** 03 March 2022.

**APPEARANCES:**

**For the Applicant** :Mr Y Peer.

**Of** : Edward Nathan Sonnenbergs Inc.

**For the 1<sup>st</sup> Respondent** : Adv V Ngalwana SC with Adv T Makola.

**Instructed by** : Malatji & Co. Attorneys.

**For the 2<sup>nd</sup> Respondent** : Adv B Lekokotla.

**Instructed by** : Ditsela Incorporated Attorneys.

**For the 3<sup>rd</sup> Respondent** : Adv C Shahim.

**Instructed by** : Kern Armstrong & Du Plessis Incorporated.

**For the 4<sup>th</sup> Respondent** : Adv T Dalrymple.

**Instructed by** : Webber Wentzel Attorneys.