IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	NOT REVISED.
30/11/2020 DATE	

CASE NO. :19/3666

19/3667

18/40682

18/40683

In the matters between:

19/3666

THE PRUDENTIAL AUTHORITY	Applicant
and	
BOPHELO LIFE INSURANCE COMPANY LIMITED	First Respondent
TRUE SOUTH ACTUARIES AND CONSULTANTS (PTY) LTD	Second Respondent
FRANCOIS HUGO N.O.	Third Respondent
PAUL ZONDAGH N.O.	Fourth Respondent
THE FINANCIAL SECTOR CONDUCT AUTHORITY	Fifth Respondent
LEBASHE FINANCIAL SERVICES (PTY) LTD	Sixth Respondent
TRANSPORT SECTOR RETIREMENT FUND	Seventh Respondent

and

19/3667

THE PRUDENTIAL AUTHORITY Applicant

and

NZALO INSURANCE SERVICES LIMITED First Respondent

TRUE SOUTH ACTUARIES AND CONSULTANTS (PTY) LTD Second Respondent

FRANCOIS HUGO N.O. Third Respondent

PAUL ZONDAGH N.O. Fourth Respondent

THE FINANCIAL SECTOR CONDUCT AUTHORITY Fifth Respondent

LEBASHE FINANCIAL SERVICES (PTY) LTD Sixth Respondent

and

18/40682

THE PRUDENTIAL AUTHORITY Applicant

and

BOPHELO LIFE INSURANCE COMPANY LIMITED Respondent

and

18/40683

THE PRUDENTIAL AUTHORITY Applicant

and

NZALO INSURANCE SERVICES LIMITED Respondent

Delivered: This judgment 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 30 November 2020.

JUDGMENT

YACOOB J:

INTRODUCTION

1. These are four interrelated applications brought by the Prudential Authority ("the Authority") against Bophelo Life Insurance Company Limited ("Bophelo") and Nzalo Insurance Services Limited ("Nzalo"), respectively. The facts in each case are very similar and the relief sought in each case is identical.

2. There is an application for curatorship and an application for liquidation against each of Bophelo and Nzalo. There are also interim orders placing each of them under curatorship and under provisional liquidation. The relief sought by the Authority in these proceedings is the final liquidation of both Bophelo and Nzalo. The Authority contends that the curatorship applications will then simply "fall away".

3. Lebashe Financial Services (Pty) Limited ("Lebashe") has intervened in both liquidation applications, while the Transport Sector Retirement Fund ("TSRF") has intervened only in the application to liquidation Bophelo. Lebashe has also filed affidavits in the two curatorship applications, in its capacity as an "interested party". Lebashe opposes the liquidations and supports the curatorships, as does the TSRF with regard to Bophelo.

4. The provisional curators of Bophelo and Nzalo have not opposed the liquidation proceedings. They filed confirmatory affidavits with the replying affidavits in the liquidation applications confirming that the two companies are hopelessly insolvent.

5. The facts in this matter are largely common cause. The disputes arise from how the law applies and what the appropriate outcome may be.

FACTUAL BACKGROUND

6. Bophelo and Nzalo are both subsidiaries of the Bophelo Insurance Group (Pty) Ltd ("BIG"). Bophelo is a registered long term insurer while Nzalo is a registered short term insurer. Both Bophelo and Nzalo are managed and controlled by the same parties and have been since commencing business. They have also been dealt with jointly by the Authority.

7. Both Bophelo and Nzalo are subject to the oversight of the Financial Sector Conduct Authority and the Prudential Authority, under a new suite of financial regulation legislation which has replaced that under which they were registered. For obvious reasons, both short and long term insurers are required to comply with various conditions in order to conduct their business, to ensure that they are able to fulfil their obligations to members of the public.

8. Bophelo was registered as a long term insurer in 2014. At that time the Long Term Insurance Act[1] ("the LTIA") applied and the relevant regulatory authority was the Registrar of Long-Term Insurance , under the erstwhile Financial Services Board. The Registrar imposed an additional condition on the registration of maintaining a

[1] 52 of 1998

specific Capital Adequacy Requirement. This was in addition to the various requirements of the LTIA, and later, the Insurance Act.[2]

9. Bophelo as at November 2017 had approximately R114 million invested at VBS Mutual Bank Limited ("VBS"), an amount which was at the time about 68% of Bophelo's total assets.

10. Nzalo was registered as a short term insurer in 2016, in terms of the Short Term Insurance Act[3] ("STIA") which applied at the time, by the Registrar of Short-Term Insurance, again under the erstwhile Financial Services Board. Amongst others, the STIA also required a short term insurer to be financially sound, providing sufficiently for liabilities and capital adequacy. Nzalo, like Bophelo, was also subject to a condition for registration of maintaining a specific Capital Adequacy Requirement.

11. Nzalo started to fall below the required Capital Adequacy level in November 2017. This had fallen even further by February 2018. Nzalo also had an investment in VBS, amounting to R78 000.

12. VBS was placed under curatorship on 11 March 2018. The Authority as a result did not consider the VBS investment eligible for statutory solvency purposes.

[2] 18 of 2017
[3] 53 of 1998

13. Bophelo could no longer be considered financially sound if this investment was excluded, either in terms of the additional Capital Adequacy Requirement or in terms of the requirements of the LTIA.

14. Although Nzalo's exposure to VBS was relatively small, the curatorship of VBS also had a negative effect on Nzalo.

15. The Authority then began engaging with Nzalo and Bophelo regarding the solvency concerns, from March to June 2018.

16. Bophelo and Nzalo both received capital injections from Lebashe. Bophelo received R60 million and Nzalo R40 million. Lebashe has clarified that that R100 million was a loan to BIG, for one month. Lebashe in a letter withdrew that loan/ injection.

17. Bophelo appeared already, by March 2018, to be insolvent. Even after the capital injection, and before it was withdrawn, this was still the case in June 2018. In April 2018 the Authority issued a notice prohibiting Bophelo from writing new business. In September 2018 one of Bophelo's two major schemes for which it provided risk policies, the Private Security Sector Provident Fund, responsible for 85% of Bophelo's premiums, gave notice that it intended to terminate its agreement with Bophelo.

18. Nzalo, if the cash injection were not withdrawn, appeared to be financially sound after the cash injecton was agreed to. However, if the cash injection were

withdrawn, it was not, although it already was experiencing cash flow problems. By September 2018 Nzalo appeared to not be trading, and had not paid out certain claims. The Authority had also, in April 2018, issued a notice prohibiting Nzalo from writing new business.

19. The cash injections resulted from an agreement intended to purchase 70% of BIG's shareholdings from Vele Financial Services Group, which was also a majority shareholder in VBS. Vele was then placed in liquidation at the instance of the curator of VBS on 31 July 2018. The transaction was therefore subject to query by Vele's liquidators.

20. In October 2018 Lebashe informed the Authority it did not intend to continue with the transaction, although, according to it, it had somehow assumed operational responsibility for both Bophelo and Nzalo and had commenced retrenchment processes. In addition, by the end of October 2018 there was no board member remaining of either Bophelo or Nzalo.

21. In these circumstances, the Authority brought urgent applications to place both Bophelo and Nzalo under curatorship, set down for 06 November 2018. These applications were granted. Among the curator's duties were to investigate various issues and to advise the authority of what should take place next. The return date on which the curatorship was to have been confirmed was 11 March 2019.

22. The provisional curator provided reports to the Authority on both Bophelo and Nzalo. It recorded that both were factually insolvent, that its prospects were bleak,

and that there were not sufficient funds available for the curator to carry out the rest of its obligations in terms of the provisional order.

23. The Authority then brought urgent liquidation applications in February 2019, which resulted in both Bophelo and Nzalo being placed under provisional winding up on 12 February 2019.

24. The return date for the winding up applications was also 11 March 2019. Both return dates have since been extended more than once and the rules in all four matters have now been extended until judgment is handed down.

25. The Authority filed supplementary affidavits in the curatorship applications on 5 March 2019, submitting that the provisional curatorship orders should be discharged and the winding up orders confirmed, as the reports of the curators showed that the curatorship would not achieve the survival of the two businesses.

26. On 4 February 2019, and after the winding up applications had been issued, Lebashe filed notices of intention to oppose in the curatorship applications. It filed affidavits dated 7 March 2019 which supported the confirmation of the curatorship orders, indicated that Lebashe may provide the required reinvestment if approached, and criticised the launching of the liquidation applications.

27. Lebashe similarly filed notices to oppose the winding up applications. It filed affidavits in those applications also dated 7 March 2019. It denied the withdrawal of the cash injections, despite its own letter to that effect, and contended that they

were loans for one month, and that BIG was to invest in the Bophelo and Nzalo. It pointed out that the curator had indicated that the businesses could be turned around with substantial capitalisation. It suggested that the curator ought to be permitted to carry out its duties, and that in any event, once there was a curator appointed the Authority no longer had the power to bring an application to liquidate the insurers.

28. Lebashe made the submission in its affidavits that the cash injections or loans had staved off curatorship for at least a few months. It fell short of making any specific allegation or otherwise showing that it was in a position to invest sufficiently to turn the companies around.

29. The TSRF also opposed the winding up of Bophelo, and supported the confirmation of the curatorship. The basis of its opposition is that Bophelo could still be turned around. It referred to a transaction with 3Sixty Financial Services group which did not appear to have been considered by the Authority. It suggests that the offer by 3Sixty which had emerged in November and December 2018 is still “on the table” although there is no confirmation from 3Sixty of that. The TSRF is now Bophelo’s biggest creditor with claims against it of approximately R86 million arising from premiums paid in advance or overpaid. It suggests that the liquidation application was an attempt to circumvent the curator’s duties.

30. According to the TSRF 3Sixty was considering taking over BIG. It filed a supplementary affidavit after the replying affidavit was filed, together with an affidavit from 3Sixty’s CEO, confirming 3Sixty’s interest and that there was

R200million available for the purpose. TSRF had transferred its funeral plan business to 3Sixty and there was an agreement between TSRF and 3Sixty that they would return that business to Bophelo if it was not liquidated.

31. It is clear from the versions of both Lebashe and the TSRF that neither disputes substantively that the two businesses are in fact insolvent, that they have no business, no board and no staff. The contention of both is that there are further possibilities to be explored. In addition, Lebashe raises the point that once a curator is appointed it is not open to the Authority to apply for liquidation, because that is the curator's prerogative.

ISSUES

32. By the time the matter was argued, the issues had crystallised into the following:
    32.1. whether applications for liquidation were permissible while there were already provisional curatorships in place;
    32.2. whether the curatorships should be allowed to continue to finality, and
    32.3. whether the provisional winding up orders should be confirmed.

33. It was common cause between the parties that a decision had to be made between confirming the curatorships and confirming the windings up. There was no situation in which both could be discharged or both confirmed. The court has to, essentially, decide which would prevail.

34. In determining whether the curatorships should be confirmed it is necessary to consider the purpose of the curatorships and whether that purpose is likely to be

achieved. Before doing so, I examine the legal framework in which the decisions were taken to apply first for the curatorships and then for the liquidations.

LEGAL FRAMEWORK

35. The Authority was established, together with the Financial Sector Conduct Authority, by the Financial Sector Regulation Act,[4] ("FSRA") which also provided for the end of the Financial Services Board. The Authority has among its objectives the promotion and enhancement of the safety and soundness of financial institutions and market infrastructures, protection of customers, and assisting in maintaining financial stability. It does this by using the powers given in various applicable statutes which impose requirements on financial services providers, and give the Authority power to take steps when necessary for the objectives described.

36. Amongst the applicable statutes are the Insurance Act and the Financial Institutions (Protection of Funds) Act[5] (FIPF).

37. The Insurance Act is intended to provide a legal framework for regulating insurance in South Africa so that a fair, safe and stable insurance market is promoted. The Authority has the responsibility to oversee insurers to this end.

38. The applications for curatorship were brought in terms of section 54 of the Insurance Act read with section 5 of the FIPF.

[4] 9 of 2017
[5] 28 of 2001

39. Chapter 9 of the Insurance Act sets out various steps that may be taken by the Authority, in addition to other action it is empowered to take, if an insurer does not comply with an approved plan, scheme or strategy or if it submits a plan, scheme or strategy that the authority considers to be inadequate. The Authority may appoint a statutory manager, a curator (in terms of section 5 of the FIPF), place the insurer in business rescue or apply for its winding up (in terms of the Companies Act[6]).

40. Section 54(2) sets out the duties and powers of the curator, in addition to any which may be given to it by the court, and subject to section 5 of the FIPF. Amongst others the curator must inform the Authority if the curator deems it necessary to apply for the winding up of the insurer. Section 54(5) provides that an insurer may not be wound up while under curatorship unless the curator applies for the winding up.

41. Section 5 of the FIPF provides for the Authority[7] to apply to Court for the appointment of a curator. It empowers the court to appoint the curator provisionally and to grant a rule *nisi*. In terms of section 5(4), the court may confirm the appointment of the curator if it is "satisfied that it is desirable to do so". Section 5(9) permits the court to cancel the appointment of the curator at any time on good cause shown.

[6] 61 of 1973 read with the Companies Act 71 of 2008
[7] Section 5 refers to "the registrar" which is defined as the Authority for purposes of these particular insurers.

42. The question which of the Chapter 9 remedies to apply for appears to be entirely in the discretion of the Authority. The decision must be informed by what the consequences of each option are, and the powers of the person appointed as manager, curator, business rescue practitioner or liquidator.

43. The powers of the statutory manager, curator and business rescue practitioner have some overlaps. The purpose of the statutory manager appears to be more geared to preserving the business and advising on steps to be taken to make the business sound. The curator's purpose is much broader, as the curator has the powers to take almost any decision. It is the powers set out in the court order that are most definitive of what the curator's purpose may be. The purpose of the business rescue practitioner is the same as in any other company, as is that of a liquidator.

44. Part 4 of Chapter 9 of the Insurance Act deals with Winding-Up.

45. Section 57(1) deems the Authority to be a person authorised under the Companies Act, 71 of 2008, and also provides that the Companies Act applies to the winding up of an insurer.

46. In addition, section 57(2) provides that an inability of a company to pay its debts must be construed as meaning also an "inability to comply with the financial soundness requirements of" the Insurance Act. It requires that the interest of policyholders also be considered in determining whether winding up is just and

equitable, and exempts the Authority from the requirement to give security when making an application for winding-up of an insurer.

47. Section 58(1) of the Insurance Act provides that the Authority may make an application for winding up if the Authority "reasonably believes" that winding up would be in the interests of the policyholders of the insurer.

48. Where someone other than the Authority applies for winding up, or where the winding up is by resolution, this is subject to approval by the Authority.

WINDING UP WHILE THE COMPANIES ARE UNDER CURATORSHIP

49. As I mentioned above, Lebashe contends that section 54(5) of the Insurance Act precludes the Authority from applying for the winding up of the companies while they are under curatorship since only the curator may apply for winding up while an insurer is under curatorship.

50. The Authority takes the position that this submission has no merit because sections 57 and 58 do not state that the Authority may not apply for the winding up of an insurer while it is under curatorship.

51. In my view there is no merit in this argument. It is by now trite that a statute must be interpreted in the context of all its provisions. Where the Insurance Act already deals with winding up while the insurer is under curatorship, there is no need for it

to deal with it again. Section 54, 57 and 58 must be read congruently with one another.

52. Section 54(5) provides:

> An insurer or a controlling company may not begin or enter business rescue or be wound-up while under curatorship within the meaning of the Financial Institutions (Protection of Funds) Act, unless the curator applies for the business rescue or winding-up.

53. It is significant that the section does not state that no application may be brought to wind up the insurer while it is under curatorship. The provision is that the insurer may not be wound-up. That means that an application for winding up cannot be successfully finalised while the company is under curatorship unless the curator applies for that winding up.

54. The Authority suggests that this interpretation would mean that the Authority would have no power to bring an application for winding up if the curator and the Authority are at odds about the correct way forward.

55. This is not the case. There are remedies available to the Authority if it becomes evident to it that an insurer ought to be wound up because it is in the best interests of policy holders (which appears to be the only time it has the power to bring such an application).

56. For example, if there is still only a provisional curatorship order, it could convince a court that it is not desirable to confirm the order, in terms of section 5(4) of the FIPF. If there is a final order in place, it could bring an application in terms of section 5(9) of the FIPF showing that there is good cause to cancel the curatorship. It could then proceed to the winding up.

57. As far as the question whether the Authority (or anyone) may *apply* for winding up while the insurer is under curatorship is concerned, in my view the wording of the statute is significant. It does not say that no-one other than the curator may apply for the winding-up. It provides only that the company may not be wound up unless the curator applies for that winding up.

58. In my view this means that it is open for anyone to apply to court to wind up an insurer while it is under curatorship, provided that the insurer is not wound up unless the curatorship is either not confirmed, cancelled, or otherwise ended.

59. Whether this means the completion of the winding up process, or the issue of a final order placing the insurer in winding up, I do not have to decide, since on the facts of this case neither has happened.

60. In my view it would be formalistic in the extreme to hold that the section precludes also the issue of a provisional winding up order during the existence of a curatorship. This would mean that before a provisional winding up order is made, the curatorship must either not be confirmed or must be cancelled. This could lead to unnecessary delays and duplications.

61. The *locus standi* point raised by Lebashe must therefore fail.

SHOULD THE PROVISIONAL CURATORSHIPS BE CONFIRMED?

62. Section 5(4) of the FIPF provides:

> "If at the hearing pursuant to the rule *nisi* the court is satisfied that it is desirable to do so, it may confirm the appointment of the curator."

63. In terms of section 5(5) the Court also has the power to amend the powers of the curator, and to suspend any legal proceedings against the institution for the duration of the curatorship.

64. In order to confirm the appointment of the curator, I must therefore be satisfied that it is desirable for me to do so.

65. The curator delivered one report to the Authority, in which it was stated that the two companies were insolvent, that they had no significant business remaining, and that they needed significant investment which would amount to starting a new business to have a hope of continuing to survive. The curator also commented that there was not enough funding within the businesses to carry out a number of the investigations required in terms of the court order.

66. The Authority then applied for the windings up, and submitted to the court that the curatorships ought not to be confirmed, because it was more appropriate to wind

the two insurers up. It must also be remembered that the basis on which curatorship was initially sought was that there was insufficient information on which to decide whether winding-up was necessary or what other steps ought to be taken.

67. It is at this point that the TSRF and Lebashe intervened, opposing the winding up and supporting the confirmation of the curatorship.

68. Lebashe raised various issues such as that it had not been approached to recapitalise the companies and that it had not withdrawn the funding it had provided but that it was a loan. With respect, this is not enough to convince the court that it is desirable to confirm the curatorship. Lebashe makes no concrete tenders about how it may recapitalise the two insurers, and does not even attempt to satisfy the court or the Authority that there is a safe and secure source of sufficient funding.

69. The TSRF suggests, for Bophelo, that it will bring its business back, but does not explain why that would be desirable. It also refers to the willingness of 3Sixty to invest in Bophelo, but again, there is very little detail and not enough certainty to convince the court that confirmation would be desirable.

70. It was suggested that the court could make a conditional order dependant on the required funding appearing within a determined period of time, however it does not appear to me that such an order is “desirable”. If funding was available, that ought to have been clearly and properly put before the hearing of this matter, either to the curator, the Authority or the court.

71. Both the TSRF and Bophelo suggested that it would be appropriate to let the curatorships run their course, with a contribution to funding by the Authority. In order to determine whether it may be desirable that the curatorships run to completion, it is necessary to examine the purpose of the curatorships.

72. The purpose of the curatorships is also evident from the terms of the orders.

73. The orders in terms of which the curators were provisionally appointed in these matters provide specifically for the curator to investigate and report on

73.1. the financial positions of the companies;

73.2. the status of the business of the companies and related companies related to insurance;

73.3. the number and value of policies issued;

73.4. any irregularities by the companies or anyone associated with them;

73.5. further steps to be taken which may safeguard investors and policyholders;

73.6. the viability of the businesses;

73.7. the curator's opinion on the Lebashe transaction, in particular whether the funds were withdrawn and whether this was permissible;

73.8. the curator's opinion whether the companies should be placed in liquidation, and

73.9. the curator's opinion whether the rules *nisi* should be confirmed.

74. It is clear from the above, and from the terms of the founding affidavits in the curatorship applications that the primary reason for the applications to place the two companies under curatorship was to obtain information about the best way to proceed.

75. Once the curators have determined that the companies are insolvent and that they have little to no business, to confirm the curatorships only to allow investigations which could as well be carried out by the liquidator is an exercise in futility. Ordering the Authority to use “regulatory funds” to carry out these further investigations appears to me to require nothing other than wasteful expenditure.

76. In my view, therefore, it is not “desirable” to confirm the rule *nisi*.

SHOULD THE PROVISIONAL WINDINGS-UP BE CONFIRMED?

77. The Authority is entitled to apply for winding up of an insurer if it reasonably believes that it is in the interests of policyholders to do so. The Authority has alleged that winding up is in the interests of the few policy holders left to both Nzalo and Bophelo because it will provide certainty to them and any outstanding claims will be dealt with by the liquidator in accordance with the applicable law. Neither Lebashe nor the TSRF has denied this.

78. Neither Lebashe nor the TSRF has denied that the companies are insolvent.

79. The only basis on which the confirmation of the winding up is opposed is that it is incompetent in the context of the curatorship and that the curators have not done enough to source alternative funding for the companies.

80. I have already dealt with the question of whether the curatorship should be confirmed. If the curatorship is not confirmed, there is nothing else for me to consider that weighs against confirming the provisional winding up order.

81. Lebashe and the TSRF had sufficient time before the hearing to make concrete proposals and to follow up with the Authority, the curator and the liquidator if there was a serious intention to keep the businesses alive. They did not do so.

82. In circumstances where there are comparatively few policy holders, very little business, and no employees, and where allegations about recapitalisation and returning business appear to be more aimed at avoiding or delaying liquidation rather than a sincere intention or attempt to revive the businesses, I am satisfied that there is only one course to take, and that is to confirm the provisional winding up order.

CONCLUSION

83. I see no reason why Lebashe and the TSRF should not bear the costs occasioned by their opposition to the liquidations. In addition, although Lebashe was not formally joined as a respondent in the curatorship applications, it did oppose the

discharge of the rule *nisi* and entered notices of intention to oppose. It should bear the costs occasioned by the opposition.

84. For these reasons, I order as follows:

1. The rules *nisi* granted on 06 November 2018 in cases number 18/40682 and 18/40683 are discharged.
2. Lebashe Financial Services (Pty) Ltd is to bear the applicant's costs occasioned by its opposition to the discharge of the rules *nisi* in cases number 18/40682 and 18/40683
3. The rules *nisi* granted on 12 February 2019 in cases number 19/03666 and 19/03667 are confirmed.
4. Lebashe Financial Services (Pty) Ltd and the Transport Sector Retirement Fund are to bear the applicant's costs occasioned by their opposition of the liquidation application in case number 19/03666 jointly and severally.
5. Lebashe Financial Services (Pty) Ltd is to bear the applicant's costs occasioned by its opposition of the liquidation in case number 19/03667.

S. YACOOB

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Electronically delivered and therefore unsigned.

Appearances

Counsel for the applicant:	AE Bham SC and J Smit
Instructed by: Werksmans Attorneys	
Counsel for Lebashe:	B Bokaba SC and A McKenzie
Instructed by: Ramsden Small Inc	
Counsel for TSRF:	P Van Der Berg SC and H Drake
Instructed by: Shepstone & Wylie Attorneys	
Date of hearing:	06 November 2019
Date of judgment:	30 November 2020