THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable

CASE NO 519/2007

In the matter between

OVATION PRESERVATION PENSION FUND First Appellant

OVATION PRESERVATON PROVIDENT FUND Second Appellant

OVATION PRESERVATION ANNUITY FUND Third Appellant

and

EXECUTIVE OFFICER OF THE FINANCIAL

SERVICES BOARD Respondent

Coram: Scott, Mlambo JJA and Hurt, Leach, Kgomo AJJA

Heard: 21 MAY 2008

Delivered: 02 JUNE 2008

Summary: Appointment of a curator to take control and management of an institution under s 5 of the Financial Institutions (Protection of Funds) Act 28 of 2001 – court having a wide discretion and entitled to order that the costs of curatorship be defrayed from the assets of investors held by the institution – court further entitled to restrict payments to investment beneficiaries and disinvestment from the institution under curatorship.

Neutral citation: Ovation v Executive Officer Financial Services Board (519/2007) [2008] ZASCA 82 (02 JUNE 2008)

JUDGMENT

LEACH AJA

[1] On 2 March 2007 the Cape High Court granted a provisional order in terms of s 5(2) of the Financial Institutions (Protection of Funds) Act 28 of 2001 (the "FI Act") placing the whole of the businesses of two companies known as Ovation Global Investment Services (Pty) Limited ("Ovation Services") and Ovation Global Investment Nominees (Pty) Limited ("Ovation Nominees") under curatorship. Despite a number of intervening parties, including the three appellants, having opposed certain aspects of the relief sought, the provisional order was confirmed on 14 June 2007, albeit with certain amendments suggested by counsel. That judgment is now reported as *Executive Officer Financial Services Board v Ovation Global Investment Services (Pty) Limited & Another (Ovation Preservation Pension Fund and Others Intervening)* 2008 (3) SA 69 (C). The appeal is with the leave of the court *a quo*.

[2] While not seeking to contest the decision to issue an order of curatorship, the three appellants contend that certain terms of the order had been beyond the authority of the court *a quo* and amount to a restriction on their rights not authorised by the FI Act.

[3] Ovation Services is what is known in the financial world as a "LISP",[1] which conducts business by investing moneys on behalf of its clients in various investment schemes and financial products. To the benefit of its clients, it "bulks" or aggregates the funds invested with it when buying or selling financial products. However, the investment of each client is administered separately with a detailed record of

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[1] An acronym for "Linked Investment Services Provider".

investments being maintained and regular investment statements being issued to the client.

[4] Investments made by a LISP are typically channeled through a nominee company. In the case of Ovation Services, its nominee was its fully owned subsidiary, Ovation Nominees. Both Ovation companies were closely associated with two asset management companies, Common Cents Investment Portfolio Strategists (Pty) Limited ("Common Cents") and Fidentia Asset Management (Pty) Limited ("Fidentia"). In particular, substantial cash investments made by clients of Ovation Services were placed through Ovation Nominees in a cash portfolio administered by Common Cents.

[5] It is unnecessary for present purposes to analyse precisely what went wrong. Suffice it to say the businesses of Common Cents and Fidentia were plagued by alleged administrative chaos, misappropriations and other irregularities which eventually led to them both being placed under curatorship in terms of section 5 of the FI Act. This had a negative effect on the Ovation companies, whose liquidity and accounting difficulties were further exacerbated by the resignation of key directors and personnel. This unhappy picture caused retirement funds which had invested in Ovation Services to threaten to place their business elsewhere and the underwriters of a post-retirement annuity product marketed by Ovation Services to instruct that no new living annuity business be concluded. This precipitated a cash crisis and a major shareholder in Ovation Services threatened to bring liquidation proceedings. Fortunately, a large insurance company was prepared to consider extending financial assistance to the Ovation companies and the respondent, the executive officer of the Financial Services Board, decided to apply for curators to be appointed to them under section 5 of the FI Act, which application was successful as already detailed above.

[6] Each appellant is a registered pension fund as defined in the Pension Funds Act, 24 of 1956. They had each concluded an agreement with Ovation Services to administer its business and had invested substantial funds with it. Each had also entered into an agreement with Ovation Nominees which had undertaken to hold assets

on its behalf. The appellants viewed the terms of the provisional order to be an unjustified interference with their rights of ownership in their investments, and opposed the curators' entitlement to restrict both their right to disinvest and the payment of pension benefits to their members. They also opposed the curators' authority to defray the costs of the curatorship from their investments. Despite their opposition, the order granted on 14 June 2007 provided as follows (I quote only those portions of the order relevant to the present debate):

'4.2 Investments in or administered by the business or companies shall not without the prior approval of the Registrar be withdrawn, transferred or otherwise disinvested from the business or companies.

5. The curators are hereby:

5.1 authorised to maintain control of, and to manage and investigate the business and operations of and concerning the companies, together with all assets and interests relating to such business, such authority to be exercised subject to the control of the Registrar in accordance with the provisions of section 5(6) of the Act, and with all such rights and obligations as may pertain thereto;

5.2 vested with all executive powers which would ordinarily be vested in, and exercised by, the board of directors or members of the companies, whether by law or in terms of their articles of association, and the present directors, members or managers of the companies continue to be divested of all such powers in relation to the business;

5.3 …

5.4 …

5.5 authorised, in their discretion and depending on available resources, to maintain payments to annuitants, pensioners and other beneficiaries who receive regular payments;

5.6 directed to take custody of the cash, cash investments, stocks, shares and other securities held or administered by the companies, and of other property or effects belonging to or held by or on the instructions of the companies or any entity directly or indirectly controlled by, affiliated to or associated with the companies;

5.7 …

5.8 subject to paragraph 7 below authorised to incur such reasonable expenses and costs as may be necessary or expedient for the curatorship and control of the business and operations of the companies, and to pay same from the assets held, administered or under the control of the companies;

5.9 subject to paragraph 7 below permitted to engage such assistance of a legal, accounting, administrative, or other professional or technical nature, as they may reasonably deem necessary for the performance of their duties in terms of this order and to defray reasonable charges and expenses thus incurred from the assets held by or under control of the companies;

…

6. … (T)he costs of these proceedings, as between attorney and own client, and the costs and remuneration of the curators shall be payable by the companies, jointly and severally, and to the extent that the assets of the companies are insufficient for that purpose, and only to the extent of any such insufficiency, out of the assets or investments of investors administered by or under the control of the companies pro rata the value of such assets or investments of each investor in relation to the total value of investors' assets or investments administered by or under the control of the companies on 2 March 2007; ...

7. In funding the expenses and costs of curatorship referred to in paragraphs 5.8 and 5.9 above and the applicant's costs of this application … the curators shall first utilise the resources of the companies, jointly and severally, and only if those resources are insufficient for that purpose, and only to the extent of any such insufficiency, out of the assets or investments of investors administered by or under control of the companies pro rata the value of such assets or investments of each investor in relation to the total value of investors' assets or investments administered by or under the control of the companies on 2 March 2007...'.

[7] In this court, the appellants essentially seek to impugn the competency of the court *a quo* to grant the relief set out in paragraphs 4.2, 5.5 and 5.6 of the order (and certain of the ancillary terms related thereto) as well as those provisions (eg in paragraphs 5.8 ,6 and 7) entitling the curators to seek to recover costs from the assets and investments of investors. I interpose to mention that it is common cause that the

appellants' investments in the Ovation companies constituted "trust property" as defined in s 1 of the F1 Act, and were protected by s 4(5) which provides that "trust property" as so defined "invested, held, kept in safe custody, controlled or administered by a financial institution or nominee company under no circumstances forms part of the assets or funds of the financial institution or such nominee company". It was accepted by all parties that the appellants' investments therefore remained their property and were not assets in the Ovation companies. In the light of this, the appellants' first contention was that as their investments were not assets of the Ovation companies, the curators were not entitled to recover any costs from them. Secondly, the appellants argued that the curators' function was no more than to take control of and to manage the business of the companies. They therefore argued that the terms and conditions of the administration and nominee agreements remained of full force and effect, and that not only were the curators obliged to pay whatever benefits were due to them and their clients as and when they fell due under these agreements, but that they could withdraw their investments if they were contractually entitled to do so and that the court *a quo* had not been entitled to restrict any such payment or withdrawals.

[8] The origin of the form of curatorship arising in cases of this nature appears to have been s 6 of the Financial Institution (Investment of Funds) Act 56 of 1964 which provided in certain circumstances for the appointment of a curator, acting under the control of the court, to take control of and to manage the whole or part of the business of a financial institution. That Act was replaced by the Financial Institution (Investment of Funds) Act 35 of 1984, s 6 of which was in similar terms to s 6 of the 1964 Act. In turn, the 1984 Act was in due course repealed and replaced by the current FI Act, s 5(5) of which reads as follows:

'The court may make an order with regard to –

(a) the suspension of legal proceedings against the institution for the duration of the curatorship;

(b) the powers and duties of the curator;

(c) the remuneration of a curator appointed provisionally under subsection (2) (a) or finally under subsection (4);

(d) the costs relating to any application made by the registrar

under subsection (1);

(e) the costs incurred by the registrar in respect of an inspection of the affairs of the institution concerned in terms of the Inspection of Financial Institutions Act, 1998 (Act 80 of 1998); or

(f) any other matter which the court deems necessary.'

[9] Sections (5)(b) and (f) are open ended and extend a wide discretion to the court. The reason for this is clear. A wide range of persons fall within the definition of an "institution" which may be placed under curatorship in terms of s 5. The definition in s 1 of the FI Act refers, *inter alia*, to a "financial institution" which is, in turn, defined as including not only a medical scheme but also any other person or institution referred to in the definition of a "financial institution" in s 1 of the Financial Services Board Act 97 of 1990. The latter definition includes pension funds, friendly societies, unit trust schemes, participation bond schemes, stock exchanges, registered insurers, insurance brokers and mutual banks (this list is not exhaustive).

[10] In the light of the array of "institutions" as defined which could be placed under curatorship, even the wisdom of Solomon would have been taxed in both anticipating what would arise and need to be addressed in every case and drafting an exhaustive list of powers that curators would require. In enacting s 5(5)(b) and (f) the legislature therefore granted the court a wide discretion to craft out an appropriate order to meet the exigencies of each individual case.

[11] The essential feature of an order in terms of s 5 is that it vests in the curator the management and control of the business of the institution. The order neither changes the nature of the trust assets held by the institution nor extinguishes the institution's contractual rights and obligations, and certainly does not vest ownership of the trust assets in the institution. But that does not mean that the enjoyment of the full rights of ownership in the trust assets will not be affected. By its very nature, the order impacts upon the institution and, for the institution to be steered through a crisis, drastic steps

might have to be taken, even if they impinge upon the rights of third parties. Cf. *Conze v Masterbond Participation Trust Managers (Pty) Ltd* 1996 (3) SA 786 (C) at 798A-C.

[12] Bearing that in mind, I turn now to consider the submission that the court was not authorised to order that any portion of the costs of the curatorship be defrayed from trust assets, this being the aspect of the appeal which attracted the most attention during argument. As I have said, simply put, it is the appellants' argument that as the trust assets vest in them and not in the Ovation companies, the curators should not be entitled to look to such assets for that purpose.

[13] While not necessarily axiomatic, it stands to reason that in many cases in which an order of curatorship is required, the institution concerned will be in poor financial shape. This the legislature must have appreciated, and it is significant that while s 6(8) of both the 1964 and the 1984 FI Acts provided for the curator to be remunerated out of the funds of the institution under curatorship, this provision was not carried over to the current FI Act and s 5(5) leaves it up to the court to make an order with regard to the curator's remuneration. As the funds of the institution under curatorship will often be insufficient to defray the costs and expenditure incurred in the curatorship, including the curator's renumeration, the question may be asked from what source did the legislature envisage the additional funds would be forthcoming?

[14] In seeking to answer this question, it was argued by the appellants that the respondent is to be held responsible for whatever expenditure the institution under curatorship could not meet, particularly as the curator acts under the control of the respondent and may have to apply to him for instructions in regard to any matter arising out of or in connection with the control and management of the institution's business.[2] This argument was founded on s 3 of the Financial Services Board Act 97 of 1990 ("the FSB Act") which provides that one of the respondent's functions is to supervise compliance with laws regulating financial institutions and the provision of financial

[2] S 5(6) of the FI Act.

services. It was argued that the costs of the curatorship were incidental to this function and that, as s 16(1)(b) of the FSB Act entitles the board to raise money, *inter alia*, by way of levies imposed on financial institutions, and as s 16(3) of the FSB Act obliged the board to utilize its funds for the "defrayal of expenses incurred by the board in the performance of its functions", the respondent could use those funds to pay the costs of curatorship.

[15] In my view, this argument cannot be upheld. It is clear that the funds obtained by the Financial Services Board by way of levies are to be used by the board in the performance of its functions, and while those functions involve the supervision of compliance with laws regulating financial institutions and the provision of financial services, they do not include the running of an institution under curatorship. While the respondent, as executive officer of the board, is entitled to apply for an order appointing a curator, the curator and not the respondent, thereafter administers the institution. The costs and expenses incurred in running an institution under curatorship are a product of that curatorship. They cannot be construed as being expenses incurred by the board in the performance of its functions, and a court cannot order the board to bear them.

[16] The answer to the question who should bear the costs of the curatorship should the institution's own funds be insufficient for that purpose, is, I think, clear. The curatorship is there to protect the assets of investors, and I can see no reason why, when necessary, those investors should not bear any costs in respect of the curatorship intended to benefit them. Indeed, I can see no reason why any person other than the persons in whose favour the curatorship was granted should bear any costs related thereto in the event of the institution's funds being insufficient. I therefore have no difficulty in concluding that the court *a quo* was entitled to grant the order it did in respect of the costs of the curatorship.

[17] I turn to deal with paragraph 4.2 of the court's order. As I have said, the court was endowed with a wide discretion under s 5(5)(f) to make an order regarding "any other matter which (it) deems necessary". Drastic times require drastic measures, as

was recognized by the legislature in s 5(5)(a) which specifically authorises the issue of an order suspending legal proceedings against an institution for the duration of its curatorship, a moratorium which would render it impossible for a third party to seek to enforce a right to disinvest. I can therefore see no reason why an order authorizing a restriction on disinvestment could not have been countenanced.

[18] There are also sound policy reasons justifying a restriction on disinvestment. Common experience teaches us that even a vague suggestion of financial instability on the part of an institution will inevitably result in it being flooded with investors seeking to withdraw their investments, thereby threatening its very existence. Of this the legislature must have been aware, and must have

envisaged a court, granting an order of curatorship, taking steps to guard against such an outcome. Bearing that in mind, I have no difficulty in concluding that the court *a quo* was entitled to impose restrictions upon disinvestment during the period of curatorship.

[19] By a process of similar reasoning, I conclude that s 5 also entitled the court *a* quo to place restrictions upon the payment of pension benefits to members of the appellants' pension funds. Even if the members are paid less than what they are entitled to receive, their contractual rights remain extant and are not extinghuished by the order of curatorship which will allow them to claim any unpaid balance after it has been lifted. But in preserving the trust assets of an institution in financial distress, it might at times be necessary to place restrictions on an outflow of funds to avoid the institution's demise. This conclusion is reinforced by the specifically authorised moratorium in respect of legal proceedings. If the legislature contemplated that a person entitled to a benefit could not sue to recover benefits, it must also have envisaged a court placing a temporary restriction on payment of those benefits.

[20] Accordingly, I am unpersuaded that any of the provisions of the order of the court *a quo* were either beyond the court's powers or inappropriate. The appeal must fail, with costs.

[21] I make the following order:

The appeal is dismissed with costs, such costs to include the costs of two counsel.

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L E LEACH
ACTING JUDGE OF APPEAL

CONCUR:) SCOTT JA
) MLAMBO JA
) HURT AJA
) KGOMO AJA