



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

**Reportable**

Case no: 346/2021

In the matter between:

**LEBASHE FINANCIAL SERVICES (PTY) LTD**

**APPELLANT**

and

**THE PRUDENTIAL AUTHORITY**

**FIRST RESPONDENT**

**BOPHELO LIFE INSURANCE COMPANY LIMITED**

**SECOND RESPONDENT**

**NZALO INSURANCE SERVICES LIMITED**

**THIRD RESPONDENT**

**TRUE SOUTH ACTUARIES AND CONSULTANTS  
(PTY) LTD**

**FOURTH RESPONDENT**

**FRANCOIS HUGO N.O.**

**FIFTH RESPONDENT**

**PAUL ZONDAGH N.O.**

**SIXTH RESPONDENT**

**THE FINANCIAL SECTOR CONDUCT AUTHORITY**

**SEVENTH RESPONDENT**

**THE TRANSPORT SECTOR RETIREMENT FUND**

**EIGHTH RESPONDENT**

*Lebashe Financial Services (Pty) Ltd v The Prudential Authority and Others* (346/2021) [2022] ZASCA 141 (24 October 2022)

PONNAN, VAN DER MERWE and MOTHLE JJA and BASSON and WINDELL AJJA

**Heard:** 15 September 2022

**Delivered:** 24 October 2022

**Summary:** Practice – standing on appeal – depends on directness and sufficiency of interest in relief claimed on appeal – creditor and shareholder of holding company of insolvent insurer has no locus standi to seek curatorship of insurer under s 54 of Insurance Act 18 of 2017 (Insurance Act) instead of liquidation.

Insurance Act – interpretation of s 54(5) – precludes commencement of business rescue or winding-up by resolution or court order – proceedings as such not prohibited and not void – nature of powers of curator under s 54(2) – to hold, investigate and report – no duty to seek rescue or recapitalisation of insurer.

## ORDER

**On appeal from:** Gauteng Local Division of the High Court, Johannesburg (Yacoob J), sitting as court of first instance:

The appeal is dismissed with costs, including the costs of two counsel.

## JUDGMENT

**Van der Merwe JA (Ponnan and Mothle JJA and Basson and Windell AJJA concurring):**

[1] In terms of s 32 of the Financial Sector Regulation Act 9 of 2017, the first respondent, the Prudential Authority, is a juristic person that operates within the administration of the South African Reserve Bank. On 6 November 2018, the Prudential Authority obtained orders in the Gauteng Local Division, Johannesburg (the high court) placing Bophelo Life Insurance Company Limited (Bophelo) and Nzalo Insurance Services Limited (Nzalo) under provisional curatorship in terms of s 54(1) of the Insurance Act 18 of 2017 (the Insurance Act). Whilst these orders were in force and, at the instance

of the Prudential Authority, the high court placed Bophelo and Nzalo under provisional winding-up. Eventually the high court discharged the provisional curatorship orders and made final liquidation orders in respect of both of them. The appellant, Lebashe Financial Services (Pty) Ltd (Lebashe), which had by agreement been granted leave to intervene in the liquidation applications, obtained leave from the high court to appeal to this court. Lebashe, in essence, seeks to have the liquidation orders overturned and the curatorships reinstated. The main issues are whether: firstly, Lebashe has standing to obtain that relief on appeal and, secondly, a proper case has been made out for such relief. Only Lebashe and the Prudential Authority took part in the appeal.

## **Background**

[2] Bophelo and Nzalo are public companies that were licensed to conduct insurance business under the Insurance Act. On 10 April 2014, Bophelo was licensed as a long-term insurer. Nzalo was licensed as a short-term insurer on 2 November 2016. Bophelo and Nzalo (jointly referred to as the insurers) are wholly owned by Bophelo Insurance Group Limited (BIG). Prior to the developments that I shall allude to, Vele Financial Group (Pty) Ltd (Vele) held a 70 per cent shareholding in BIG and the Public Investment Corporation (SOC) Limited held the remaining 30 per cent. Vele was also a shareholder in VBS Mutual Bank Limited (VBS).

[3] Section 36(1) of the Insurance Act provides:

‘An insurer must at all times maintain its business in a financially sound condition, by holding eligible own funds that are at least equal to the minimum capital requirement or solvency capital requirement, as prescribed, whichever is the greater.’

The Prudential Authority prescribes these requirements under s 36(6). In addition, it was a condition of the registration of Bophelo as an insurer that it had to maintain a capital adequacy cover of 1.2. This meant that capital held by Bophelo at any given time had to amount to at least 1.2 times the aggregate of its obligations to policyholders and other liabilities.

[4] To comply with these requirements, Bophelo deposited an amount of approximately R114 million with VBS. That represented in the order of 68 per cent of Bophelo’s total assets. However, VBS was placed under curatorship in terms of the Banks Act 94 of 1990 during March 2015 and subsequently placed in final winding-up. Lebashe accepts that the deposit of Bophelo was ‘effectively lost’.

[5] This understandably caused the Prudential Authority to become concerned about the financial soundness of Bophelo. As Vele was a shareholder in both VBS and BIG, it also had concerns about the ability of BIG to continue to fund Nzalo. Therefore the Prudential Authority proceeded to engage with the insurers, as well as BIG. On 26 April 2018, the Prudential Authority notified the insurers that they were, with immediate effect, prohibited from writing new business.

[6] These engagements naturally raised the matter of the recapitalisation of the insurers. At a meeting held on 1 June 2018, the Prudential Authority informed these parties that it required proof that an amount of at least R100 million was immediately available to meet the capital requirements of the insurers. It required such proof by no later than 8h30 on 8 June 2018. The deadline was not met, but on 12 June 2018, the Prudential Authority received written confirmation that Lebashe had deposited R100 million into its attorneys' trust account. According to this document, R60 million would be paid to Bophelo and R40 million to Nzalo. The Prudential Authority insisted on proof that these funds had actually been paid to the insurers. On 28 June 2018, it eventually received confirmation thereof.

[7] The arrangements that led to these payments were as follows. Lebashe, who described itself as an investment holding company, was approached to recapitalise BIG. According to Lebashe, it obtained Vele's 70 per cent shareholding in BIG at around this time. After negotiations, Lebashe and BIG entered into a written loan agreement on 26 June 2018. In terms thereof, Lebashe lent and advanced the capital sum of R100 million to BIG. The loan agreement did not evidence a long-term commitment by Lebashe. The loan had to be repaid 30 calendar days after the 'Advancement Date'. That meant the first business day after the 'Effective Date'. That, in turn, referred to the date on which Lebashe confirmed in writing that the suspensive conditions to the loan agreement had been fulfilled or waived. But in terms of clause 2, the suspensive conditions had to be fulfilled by no later than 22 June 2018 (except if an extended date was mutually been agreed upon, which did not happen).

[8] The loan agreement provided that the capital received by BIG 'shall immediately be transferred in agreed proportions' to the insurers, in exchange for subscriptions by BIG for additional shares in each of the insurers. On 26 June 2018, Bophelo and BIG concluded a written share subscription agreement in terms of which Bophelo would issue and allot 100 ordinary shares in the name of BIG, in exchange for the subscription price of R60 million. On the same date, Nzalo and BIG concluded a similar agreement. It provided that BIG would pay the subscription price of R40 million

for 120 newly issued ordinary shares in Nzalo. Both these agreements were subject to suspensive conditions. Lebashe stated that these conditions were not fulfilled timeously or at all, as a result of 'the hasty manner in which the whole process was handled and due to the pressure' of the Prudential Authority. According to Lebashe, the result was that these monies were paid by BIG to the insurers respectively as shareholders' loans.

[9] On 31 July 2018, Vele was placed in winding-up at the instance of the curator of VBS. Meanwhile, so Lebashe said, a due diligence process exposed issues regarding the management of the insurers. In terms of a letter of demand dated 26 October 2018, Lebashe claimed repayment of the capital and interest under the loan (then amounting to approximately R106 million) from BIG. On the same day, BIG paid the sum of R87 million to Lebashe, leaving an outstanding balance of some R19 million.

[10] On 29 October 2018, the Prudential Authority was advised that Lebashe had withdrawn its capital injection. As a result, the Prudential Authority *ex parte* approached the high court on an urgent basis for orders placing each of the insurers under provisional curatorship in terms of s 54(1)(a) of the Insurance Act. The high court granted the orders sought on 6 November 2018. The return date of each provisional order was 11 March 2019.

[11] These orders appointed True South Actuaries and Consultants (Pty) Ltd, represented by Mr Francois Hugo and Mr Paul Zondagh, as the provisional curator (the curator) of each of the insurers. Pending the return date, the curator was vested with all the powers and duties in s 54(2) of the Insurance Act. Paragraph 5 of the order in the Bophelo application provided:

'Pending the return day of this order, all actions, proceedings, the execution of all writs, summonses and other processes against Bophelo, including any proceedings before the Commission of Conciliation, Mediation and Arbitration, are hereby stayed and are not to be instituted or proceeded with, without the leave of this Court.'

The order in respect of Nzalo, of course, contained an identical provision.

[12] The provisional curatorship orders directed the curator to furnish a report to the high court (with a copy served on the Prudential Authority) by no later than 5 days prior to the return date, regarding the matters listed therein. For convenience, I again reproduce the relevant extract from the Bophelo order:

9.1 The overall financial position of Bophelo, with specific details of its financial soundness, assets, liabilities, Minimum Capital Requirements and Solvency Capital Requirements;

- 9.2 the status of any business conducted by Bophelo or any of its subsidiaries, holding companies, affiliated or associated companies, involving money received from policyholders and other parties in connection with insurance;
- 9.3 the number and value of policies issued by Bophelo in the various classes of insurance business;
- 9.4 any irregularities committed by Bophelo, its directors, management, officers, members, auditors, investors (including but not limited to Lebashe Financial Services (Proprietary) Limited) (“Lebashe”) and shareholders, and full details of the contravention of any laws in the conduct of its business;
- 9.5 what further steps should be taken and by whom in order to safeguard the interests of the policyholders and other creditors of Bophelo;
- 9.6 the viability of the business of Bophelo and any other entity in which the Bophelo has a direct interest, and set out the ways to ensure the survival of the business of Bophelo in particular with regard to the protection of the interests of its policyholders;
- 9.7 the curator’s opinion as to whether Lebashe was permitted to withdraw the funds invested by it in Bophelo (if indeed such funds have been withdrawn by Lebashe);
- 9.8 the curator’s opinion as to whether Bophelo should be placed in liquidation; and if so, the persons to be appointed as liquidators of Bophelo. This must include: the number of persons to be appointed as liquidators and details of their experience; and
- 9.9 the curator’s opinion as to whether the rule *nisi* should be confirmed, its provisional appointment should be made final, and if so, to give an indication of the term required for completion of the curatorship.’

[13] The high court also ordered the curator to furnish the Prudential Authority with progress reports on a weekly basis, the first to be submitted 30 days after acceptance by the curator of the provisional appointment. The curator, however, produced only one combined progress report, on 5 December 2018. The curator explained that it was unable to furnish other or further progress reports or a final report, because the insurers had insufficient funds. That was something that it could not fairly be criticised for.

[14] The progress report, nevertheless, told a woeful tale about the financial position and long-term business prospects of each of the insurers. The report demonstrated that, as at 30 November 2018, the liabilities of Bophelo exceeded its assets by R58 million. On the same date, Nzalo’s liabilities were R30 million in excess of its assets.

[15] Bophelo’s main business was to provide risk policies to two group schemes, the Private Security Sector Provident Fund (PSSPF) and the Transport Sector Retirement Fund (TSRF). As at November 2018, Bophelo provided cover under roughly 272 000 policies. Roughly 200 000 of these

related to the PSSPF, which had given notice of the termination of its agreement with Bophelo at the end of December 2018. About 70 000 of these policies resorted under the TSRF. On the ground that Bophelo would be unable to pay claims under these policies, the curator urged the TSRF to arrange alternative cover from 1 January 2019, but no commitment to do so was forthcoming. At the end of November 2018, the curator consequently gave 90 days' notice of the termination of the contract between the TSRF and Bophelo. Thus, only some 2 000 policies remained extant. At the time almost all policies with Nzalo had been cancelled and moved to other insurers.

[16] In the respect of each insurer, their curator reported:

'After having settled all liabilities and adequately capitalised the business, it would also be akin to a new insurer (apart from the brand damage sustained), starting from having to sell the first policy and thus the reality of operational expense overruns until scale can be achieved in due course.'

It concluded:

'As set out through general reasoning above, both insurers are facing bleak longer-term prospects. At the date hereof, it seems that only substantial recapitalisation could possibly ensure the continued existence of the insurers over the longer-term.'

[17] In the light of this report, the Prudential Authority resolved to apply for the provisional liquidation of the insurers. On 4 February 2019, it launched such applications, which were set down for hearing on 12 February 2019. In the main, the grounds for winding-up were that both the insurers were 'hopelessly insolvent', had no directors and had ceased to be going concerns. The Prudential Authority also averred that in the event of the provisional winding-up of the insurers, the provisional curatorships would have served their purpose and indicated that it would seek their discharge.

[18] On 11 February 2019, Lebashe delivered an application for leave to intervene in the liquidation applications. In addition, on 7 March 2019, Lebashe filed what was described as a 'conditional answering affidavit', which so it stated, 'will become unconditional if and when Lebashe is granted leave to intervene in the winding-up application'. On 12 February 2019, however, the high court issued a provisional liquidation order in respect of each insurer, with the same return date as the provisional curatorship orders, namely 11 March 2019. It postponed Lebashe's intervention application to the same date.

[19] On 11 March 2019 and subsequently, the return date of the four provisional orders was extended. In the meantime, the high court granted leave to Lebashe to intervene in the liquidation

applications, by agreement between the relevant parties. Thus, Lebashe's earlier conditional answering affidavit was duly placed before the high court. The high court also granted leave to the TSRF to intervene in the Bophelo liquidation application. These were the only parties that opposed the relief sought. The curator filed affidavits confirming that the insurers were insolvent.

[20] In its answering affidavit, Lebashe rightly did not dispute that the insurers were insolvent. It contended, however, that s 54(5) of the Insurance Act precluded the provisional liquidation orders. I shall reproduce this subsection shortly. Lebashe also adequately foreshadowed an argument that para 5 of the provisional curatorship orders did the same. Alternatively it sought the setting aside or stay of the provisional liquidation orders on the ground that the curator had not reported on steps taken by it to recapitalise the insurers.

[21] All four applications eventually came before Yacoob J, who conveniently dealt with them in one judgment. The high court determined that the provisional curatorship orders should be discharged. It rejected Lebashe's contention that s 54(5) of the Insurance Act rendered the provisional liquidation orders incompetent and proceeded to confirm them.

### **Analysis**

[22] In the light of what I have said, there are three issues in the appeal, namely whether:

- (a) Lebashe has standing in the appeal;
- (b) Section 54(5) of the Insurance Act and/or para 5 of the provisional curatorship orders precluded final liquidation orders in respect of the insurers; and
- (c) The curator was in law required to seek - or effect - the recapitalisation of the insurers.

### **Standing**

[23] As I have said, Lebashe had been granted leave to intervene in the liquidation applications by agreement and obtained leave from the high court to appeal to this court. That, however, did not relieve Lebashe of the duty to satisfy this court that it has locus standi to obtain the relief that it seeks on appeal. That is so for two main reasons. The first is that the respective tests are not identical. Germane to the second, are the oft-repeated dicta that the scarce resources of this court should not be expended on deciding abstract or academic issues.

[24] As Harms JA said in *Gross & Others v Pentz* 1996 (4) SA 617 (A) at 632C:



'The question of *locus standi* is in a sense a procedural matter, but it is also a matter of substance. It concerns the sufficiency and directness of interest in the litigation in order to be accepted as a litigating party.'

See also *Sandton Civic Precinct (Pty) Ltd v City of Johannesburg & Another* [2008] ZASCA 104; 2009 (1) SA 317 (SCA) para 19. Although there are no hard and fast rules in this regard, the general rule is that a direct and existing interest in the relief is required. A direct interest is one that is not too far removed and an existing interest is one that is not abstract, academic or hypothetical. See *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) at 388B-H; *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 534A-E and *Public Protector v Mail & Guardian Ltd & Others* [2011] ZASCA 108; 2011 (4) SA 420 (SCA) para 29.

[25] The winding-up orders in respect of the insurers do not, of course, operate against Lebashe. What then is Lebashe's interest in having the liquidation orders overturned? Lebashe is a creditor of BIG. I accept that it is also the majority shareholder of BIG, which holds the shares in the insurers. These were the only factors referred to by counsel for Lebashe when this court raised this issue during argument. On this basis, however, Lebashe is only a creditor and shareholder of the holding company of the insurers. As such, there are no legal relationships between Lebashe and the insurers. Lebashe has no rights to a preferred legal process of dealing with the undisputed insolvency of the insurers, even though it may have an indirect financial or commercial interest therein. In my view, Lebashe's interest is too indirect and insufficient to clothe it with *locus standi* in the appeal.

[26] The high court ought to have considered these matters in determining whether leave to appeal should be granted. And, quite frankly, that should have resulted in a refusal of leave to appeal. It follows that the appeal must fail for this reason alone. Ordinarily that would have been the end of the matter. However, the remaining issues have been fully argued, are novel and are likely to arise in the future. In the circumstances, I regard it in the interests of justice to determine the remaining issues.

### **Statutory context of s 54 of the Insurance Act**

[27] Chapter 9 (ss 52-59) of the Insurance Act is entitled 'Resolution'. It consists of four parts that provides powers to the Prudential Authority to deal with non-compliant insurers and controlling companies (as defined). It is not necessary to make further reference to controlling companies. Part 1 (s 53) provides that the Prudential Authority may appoint a statutory manager in terms of s 5A of the Financial Institutions (Protection of Funds) Act 28 of 2001 (FIPF) in respect of an insurer. Part 2 (s

54) deals with curatorship. In terms of Part 3 (ss 55-56) provision is made for the Prudential Authority to apply to a court for an order placing an insurer under business rescue in terms of the Companies Act 71 of 2008 (the Companies Act).

[28] Part 4 (ss 57-59) provides for the winding-up of an insurer at the instance of the Prudential Authority, in these terms:

‘Despite any other law under which an insurer is incorporated, sections 79 to 81 of, and item 9 of Schedule 5 to, the Companies Act shall, subject to this section and with the necessary changes, apply in relation to the winding-up of an insurer or a controlling company, and to the exclusion of any similar provisions under the Co-operatives Act or any other law under which an insurer or controlling company is established or incorporated, and in such application the Prudential Authority is deemed to be a person authorised under the Companies Act to make an application to the court for the winding-up thereof.’

Section 57(2) gives particulars as to how these provisions of the Companies Act should be applied to the winding-up of an insurer in terms of this section.

[29] Section 54(1) of the Insurance Act reads:

‘(1) Despite any other law–

(a) the court may, on application by the Prudential Authority; or

(b) the Prudential Authority may by agreement with an insurer or controlling company and without the intervention of the court,

appoint a curator in terms of section 5 of the Financial Institutions (Protection of Funds) Act in respect of any insurer or controlling company.

[30] Section 5(1) of the FIPF provides for an application, on an *ex parte* basis, for the appointment of a curator. Section 5(2) reads:

‘(2) Upon an application in terms of subsection (1) the court may–

(a) on good cause shown, provisionally appoint a curator to take control of, and to manage the whole or any part of, the business of the institution on such conditions and for such a period as the court deems fit; and

(b) simultaneously grant a rule *nisi* calling upon the institution and other interested parties to show cause on a day mentioned in the rule why the appointment of the curator should not be confirmed.’

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 (s 5(4) of the FIPF).

[31] In terms of s 5(5), a court may for the purposes of a provisional appointment under s 5(2) (a) and a final appointment under s 5(4), make an order with regard to *inter alia*: the suspension of legal

proceedings against the institution for the duration of the curatorship; the authority of the curator to investigate the affairs of the institution; and the powers and duties of the curator. Section 5(9) provides that the court may, on good cause shown, cancel the appointment of a curator at any time.

### **Final liquidation precluded?**

[32] Section 54(5) of the Insurance Act reads:

‘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.’

[33] In rejecting Lebashe’s argument that s 54(5) precluded the provisional liquidation orders, the court a quo essentially reasoned that the expression ‘be wound-up’ did not refer to the commencement of a winding-up, but to the process of winding-up. See *GCC Engineering & Others v Maroos* [2018] ZASCA 178; 2019 (2) SA 379 (SCA) para 17. For the reasons that follow, this interpretation is not tenable.

[34] First, it fails to have regard to the full text of s 54(5). The phrase ‘An insurer may not begin or enter business rescue . . .’, clearly refers to the adoption and filing of a resolution to begin business rescue in terms of s 129 and a court order placing a company under business rescue in terms of s 131 of the Companies Act. Thus, unlike s 53(2) of the Insurance Act (which provides that no business rescue or winding-up proceedings may be commenced whilst a statutory manager holds office), s 54(5) has to do with the effecting of business rescue or winding-up. Winding-up of a solvent company is effected either by the adoption and filing of a special resolution in terms of s 80 or a court order under s 81 of the Companies Act. The same applies to an insolvent company in terms of s 343, s 344 and s 349 of the Companies Act 61 of 1973 (which continues in force by reason of item 9 of Schedule 5 to the Companies Act). Thus, it would make no sense to prohibit the coming into effect of business rescue whilst a curatorship is in place, but not the commencement of liquidation, which would have far more drastic consequences.

[35] The process of winding-up (the realisation of assets) is, of course, not itself something that one can apply for in a court. A curator can only apply for a winding-up order. The phrase: ‘An insurer may not be wound-up . . . unless the curator applies for the . . . winding-up’, must therefore mean that in these circumstances a liquidation may not be ordered unless the curator applies for it.

[36] In the second place, having regard to the powers and duties of curators and liquidators respectively, curatorship and liquidation cannot co-exist. Who, one might ask, would have the duty to take custody and control of the assets of the insurer and to safeguard them, should it simultaneously be under curatorship and in liquidation? This is a powerful indicator that a liquidation order may not be issued in respect of an insurer that is under curatorship.

[37] On this basis, there is conflict between the provisions of s 54(5) and those of s 57(1). Should the latter mean that the Prudential Authority may, irrespective of an existing curatorship, at any time obtain a winding-up order, s 54(5) (and s 53(2)) would be rendered nugatory. That could clearly not have been intended. In my view, the answer lies in the maxim *generalia specialibus non derogant*. See *Sunny South Cannery (Pty) Ltd v Mbangxa & Others NNO* 2001 (2) SA 49 (SCA) para 27. The special provision (s 54(5)) limits the application of the general one (s 57(1)).

[38] It follows that by reason of s 54(5), the provisional liquidation orders in respect of the insurers should not have been granted. That result should also have flowed from the provisions of para 5 of the provisional curatorship orders. It will be recalled that it provided, *inter alia*, that pending the return date of the order, proceedings against the insurer 'are hereby stayed and are not to be instituted or proceeded with, without the leave of the Court'. That leave had not been obtained.

[39] In *Born Free Investments 247 (Pty) Ltd v Pierre du Plessis Kriel NO* [2019] ZASCA 21, this court was called upon to determine the legal effect of an order that was materially the same as para 5 of the provisional curatorship orders. It reasoned as follows:

'Although paragraph 6.2 is clumsily worded, it does not state that non-compliance with its provisions would result in a nullity. To accept that failure to obtain leave of the court prior to instituting legal proceedings leads to nullity would, in my view, lead to injustice. It would also lead to inconsistency, because existing actions would be stayed, but an action instituted without prior leave would be dismissed, which seems an extreme and unnecessary result. It would be contrary to s 34 of the Constitution which provides that "everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court". Suppose a creditor, oblivious to the moratorium, issued summons without obtaining the leave of the court, it would mean that it would be precluded from proceeding with its claim because its summons was a nullity for want of prior leave of the court. Such a construction, in my view, would be unjust. It seems to me that a sensible interpretation of paragraph 6.2 is that an action may not be instituted without the leave of the court, and where it has been instituted, such action should be stayed until leave is obtained.'

[40] In my view, this reasoning is not only applicable to para 5 of the provisional curatorship orders, but also to non-compliance with s 54(5). As I have demonstrated, it does not seek to prohibit the institution of proceedings, but the commencement of business rescue or winding-up by a resolution or court order. If anything, therefore, there is a clearer indication in s 54(5) that the liquidation applications were not themselves rendered null and void. The provisional liquidation orders were incompetent, but the applications for liquidation not. By operation of law, they were stayed whilst the curatorships were in place.

[41] It follows that the liquidation applications could be proceeded with once the curatorships came to an end. That, in effect, was what happened in the court a quo. The court firstly considered whether it was desirable (in terms of s 5(4) of the FIPF) to confirm the provisional curatorship orders and concluded that they should be discharged. It then proceeded to hold that final winding-up orders should be issued.

[42] While a final winding-up order is usually preceded by a provisional order and a rule *nisi*, calling upon interested parties to show cause why on the return date a final winding-up order should not be made, that is not invariably so and valid provisional liquidation orders are not prerequisites for final winding-up orders. Thus, the issuance of the final winding-up orders were not precluded by s 54 (5) of the Insurance Act, nor by para 5 of the provisional curatorship orders.

#### **Duty on curator to effect recapitalisation?**

[43] Lebashe complained that the liquidation of the insurers was premature, as the curator had not yet reported on the steps taken by it to recapitalise them. This contention implied that the curator had a duty to do so. As I shall show, however, this contention is refuted by the text, context and purpose of the provisional curatorship orders.

[44] These orders, in essence, conveyed that the curator had to take control of the businesses of the insurers, investigate their affairs and report to the high court on the stipulated topics. They said nothing about seeking or obtaining capital injections or long-term financing for the insurers. The stipulated topics themselves demonstrated that the curator was not required to do anything of the sort.

[45] This accorded with the provisions of s 54(2) which, as I have said, were incorporated in these orders. It is not necessary to reproduce this lengthy subsection. It suffices to say that it provided the curator with wide powers to manage and investigate. In terms of s 54(2)(e), the powers vested in the curator had to be exercised 'with a view to conserving the business'. And in terms of s 54(2)(e)(iii), it could only raise funding on behalf of the insurer with the prior approval of the Prudential Authority to provide security over the assets of the insurer.

[46] Thus, the curatorship of the insurer was only a means to an end. By its nature it would be of temporary duration. And its purpose was not to rescue the business of the insurer. That option, as I have said, was available to the Prudential Authority under Part 3 of Chapter 9. It follows that this argument cannot be sustained.

[47] The appeal is dismissed with costs, including the costs of two counsel.

---

C H G VAN DER MERWE  
JUDGE OF APPEAL

Appearances:

For appellant: T J B Bokaba SC and A C McKenzie  
Instructed by: Rams Attorneys, Sandton  
Honey Attorneys, Bloemfontein.

For first respondent: A E Bham SC and J E Smit  
Instructed by: Werksmans Attorneys, Sandton  
Symington & De Kok, Bloemfontein.

