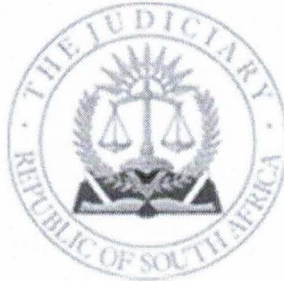


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 58950/2021

DELETE WHICHEVER IS NOT APPLICABLE

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


Judge Dippenaar

In the matter between:

THE PRUDENTIAL AUTHORITY

Applicant

And

3SIXTY LIFE LIMITED

First Respondent

NATIONAL UNION OF METAL WORKERS OF SOUTH
AFRICA

Second Respondent

RAM YASHODA

Third Respondent/Intervening Party

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 30th of September 2022.

DIPPENAAR J:

[1] This application concerns the anticipated return day under rule 6(8) of an *ex parte* provisional curatorship order granted *in camera* in the urgent court on 21 December 2021 at the behest of the Prudential Authority ("the Authority"). In terms of that order the first respondent ("3Sixty"), was placed under provisional curatorship and the third respondent ("Ms Ram") was appointed as provisional curator with certain specified powers. Ms Ram was an employee of BDO Advisory Services (Pty) Ltd ("BDO"), who provide support services for the curatorship. 3Sixty is a licenced life insurance company specialising in life and funeral products.

[2] 3Sixty adopted the stance that the provisional order should be discharged, together with a punitive costs order. Its affidavits are deposed to by its acting chief executive officer, Mr Msibi. The Authority in response, raised a challenge under rule 7 to the authority of 3Sixty's attorneys.

[3] The second respondent ("NUMSA"), similarly delivered a rule 6(8) notice and an application for leave to intervene in the proceedings in order to seek the discharge of the provisional curatorship order. The Authority opposed the intervention of NUMSA and raised an authority challenge under rule 7.

[4] On 15 February 2022, an urgent application was launched by the Authority for the variation of the *ex parte* order by the replacement of Ms Ram as provisional curator by Mr Mashoko. On 3 March 2022, Fisher J dismissed that application by way of a written judgment. The order states:

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

[5] Ms Ram provided an interim report and a final report. Ms Ram originally filed a notice of intention to abide. After the dismissal of the Authority's variation application, Ms Ram on 18 March 2022, launched an urgent application for leave to intervene in the main application. Although formally abiding the decision of the court, Ms Ram effectively supported the discharge of the curatorship order. BDO in response produced an affidavit which was introduced into evidence in the interests of justice so that the matter could be determined on its full facts, despite objection from Ms Ram. Ms Ram in her affidavit introduced the issues surrounding her suspension and employment disputes between her and BDO and her issues with the Authority. There are multiple disputes of fact pertaining to the versions raised by Ms Ram and BDO relating to her conduct and the level of co-operation and support between her and BDO. These disputes are not relevant to the present application and it is not necessary to make any findings on these issues, nor is it possible to do so on the papers.

[6] The bellicose attitude adopted by Ms Ram towards BDO and the Authority and the disputes between them regrettably dominated much of what followed, resulting in the filing of various supplementary affidavits and submissions and substantial delays in the finalisation of the matter.

[7] After judgment was reserved on 22 March 2022, the Authority notified this court on 16 May 2022 that a material event had occurred as the provisional curator had purported to resign by way of a letter dated 26 April 2022. In adherence to the principle of *audi alteram partem*, the parties were afforded the opportunity to deliver further affidavits and submissions on the issue.

[8] On 20 June 2022, 3Sixty launched a striking out application pertaining to certain averments made by the Authority regarding 3Sixty's solvency in response to an affidavit of Ms Ram delivered on 8 June 2022. A hearing date for that application was set for 18 July 2022 at which the parties could also make oral submissions regarding the affidavits

and submissions delivered after the hearing on 22 March 2022. Shortly before the hearing 3Sixty launched a postponement application as its two lead counsel were not available and it was thus prejudiced. The postponement was granted and costs were reserved. On 1 August 2022 the court was advised that the parties had agreed that the striking out application and the further issues which had arisen after the hearing could be determined on the papers.

The issues

[9] On the merits, the main issues which fall to be determined are first, whether the curatorship order should be confirmed or discharged and second, whether Ms Ram should be appointed as final curator.

[10] In addition to a determination of the merits, there were further various interlocutory applications, including two striking out applications launched by 3Sixty which must be determined as well as various reserved costs orders. They will be dealt with where appropriate.

NUMSA's intervention application.

[11] The nub of NUMSA's case was to dispute that there is any risk to policy holders as no claims were rejected during the Covid pandemic. It contended that a significant number of 3Sixty's policy holders are NUMSA members and are also indirect shareholders of 3Sixty. NUMSA's affidavits are deposed to by its general secretary, Mr Irwin Jim. Its case relies heavily on the interests of NUMSA Financial Services ("NFS"), a broker that sells policies that are underwritten by 3Sixty. 3Sixty is ultimately owned for the benefit of members of NUMSA through NUMSA's investment arm, the NUMSA Investment Trust ("NIT"). NIT owns Doves, which in turn owns 3Sixty. 3Sixty is an underwriter of life insurance and funeral policies which are sold and marketed by NFS to NUMSA members.

[12] The high water mark of NUMSA's case is pleaded thus:

"Since 3SixtyLife is ultimately owned for the benefit of members of NUMSA through the NUMSA Investment Trust; and NFS accounts for 26% of 3Sixty's policy holders in terms of premium income, therefore NFS and indeed NUMSA is an important voice when it comes to any potential or actual risk to policy holders that would be posed by the alleged insolvency of 3Sixty".

[13] NFS is however a legal entity separate to NUMSA, which did not seek to join the proceedings. Neither did the trustees of NIT. It is only if a judgment or order sought will prejudicially affect a party that such party must be a party to the proceedings.¹

[14] It is trite that a mere financial interest is not sufficient but that a direct and substantial interest in the subject matter of the case is required.² This is established where an applicant shows that it has some right which is affected by the order.

[15] In my view, NUMSA has not illustrated a direct and substantial interest as the interests contended for are those of different entities. It follows that NUMSA's application for leave to intervene must fail. I will later deal with the costs. In light of the conclusion reached it is not necessary to consider the Authority's rule 7 challenge.

The rule 7 challenge to 3Sixty's attorneys

[16] In response to the Authority's rule 7 notice, 3Sixty provided a power of attorney issued pursuant to a resolution passed by its board of directors. It argued that its board of directors retained a residual authority to oppose the confirmation of the provisional order, relying on the authorities applicable to winding up proceedings.³ It further argued that if the directors are denuded of the power to oppose the confirmation of the rule nisi

¹ Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637(A)

² SA Riding for the Disabled Association v Regional Land Claims Commissioner 2017 (5) SA 1 (CC)

³ O'Connell Manthe and Partners Inc v Vryheid Minerale (Edms) Bpk 1979 (1) SA 553 (T); Ex Parte G Pagan Enterprises (Pty) Ltd 1983 (3) All SA 400 (W) at 401; Koupis v Udumo Trading 225 CC t/a Pastic Rebuilders [2013] JOL 30379 (FB)

on the return date by virtue of a provisional order, it would infringe on 3Sixty's constitutional right in terms of s34 of the Constitution.⁴

[17] The Authority on the other hand argued that in terms of the provisional curatorship order, only the provisional curator could represent 3Sixty as its board of directors and management had been provisionally divested of all their power and authority in relation to its affairs. It further argued that the principles pertaining to residual authority in winding up proceedings were thus not applicable. Reliance was placed on the judgment of Kollapen J in *Registrar of Medical Schemes v Keyhealth Medical Scheme and Others*⁵ ("Keyhealth").

[18] In *Keyhealth*, the trustees of the respondent, collectively acting as its board and in the alternative in their personal capacities sought leave to intervene to seek the setting aside of a provisional curatorship order. Keyhealth, represented by its provisional curator, opposed the intervention application. Although granting the trustees leave to intervene in their personal capacities by virtue of the interest they had in the proceedings, leave was refused to the board to intervene. Kollapen J held⁶:

"[18] It is common cause that the current trustees of the respondent no longer exercise any control over the respondent, in particular in light of the order of this Court of 16 September 2020 which expressly authorises the curator to take immediate control and in the place of the board of trustees manage the business and operations of the respondent. They accordingly cannot seek to intervene as the board of the respondent as such a board does not exist for now or at the very least is not functional nor possessed of any power or authority. It is the curator who now manages the respondent and who has also assumed the powers of the board."

[19] The relevant portions of the provisional order of 21 December 2021 provide:

"5 Any other person (including but not limited to directors) now vested with management of 3Sixty, be and is hereby provisionally divested thereof."

⁴ Chief Lesapo v North West Agricultural Bank and Another 2001 (1) SA 409 (CC) para [16]

⁵ Registrar of Medical Schemes v Keyhealth Medical Scheme and Others Unreported judgment Gauteng Division Pretoria 25 March 2021

⁶ Para [18]

7 Pending the return date specified hereunder, the curator be and is hereby:

7.1 authorised to take immediate control of, manage and investigate 3Sixty's business, together with all assets and interests relating to such business, such authority to be exercised subject to the control of the applicant in accordance with the provisions of s5(6) of the Financial Institutions Act, and with all such rights and obligations as may be pertaining thereto;

7.2 vested with all executive powers which would ordinarily be vested in, and exercised by, the board of directors, members of managers of 3Sixty, whether by law or by virtue of its memorandum of incorporation, and the present directors, members or managers of 3Sixty are divested of all such powers in relation to 3Sixty;

7.10 authorised to institute or prosecute any legal proceedings on behalf of 3Sixty and to defend any litigation brought against 3Sixty.

8 A rule nisi is hereby issued calling upon 3Sixty or any other interested party to show cause ...why a final order should not be made in the following terms:

8.1 confirming and rendering final the orders referred to in paragraphs 3, 4 and 5 above and finally conferring on the curator the powers and duties set out in paragraph 7 above;

8.3 3Sixty shall pay, alternatively the curator shall pay from the assets held by or under the control of 3Sixty:

8.3.1 the costs of these proceedings only in the event of 3Sixty's opposition of this application;

11 In the event that 3Sixty or any other interested party wishes to oppose the confirmation of the rule, it must lodge such intention to oppose, together with an affidavit in support of such opposition, with the registrar..."

[20] The appointment of curators is regulated by section 5 of the Financial Institutions (Protection of Funds) Act⁷ ("FI Act").⁸ Section 5(8)(a) provides:

"Any person, on good cause shown, may make application to the court to set aside or alter any decision made, or any action taken, by the curator or the registrar with regard to any matter arising out of or in connection with, the control and management of the business of an institution which has been placed under curatorship"

⁷ 28 of 2001

⁸ As read with s54(1) of the Insurance Act 18 of 2017

[21] The Supreme Court of Appeal has held that the provision addresses the issue of *locus standi*, is in broad terms and requires only that good cause be shown for challenging the decision.⁹

[22] Section 5(2)(b) of the FI Act provides:

(2) Upon an application in terms of subsection (1), the court may-

(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".

[23] Section 5(5) of the FI Act in broad terms provides that a court may make an order with regard to the powers and duties of a curator. It does not expressly provide for the complete divestment of the board of an entity of their powers, including any residual power to represent an institution to oppose a rule nisi on its return date.

[24] In my view, *Keyhealth* is distinguishable. In *Keyhealth*, it was the entity under curatorship, represented by its provisional curator, who opposed the intervention application of the board of directors of Keyhealth, whereas in the present instance it is the Authority who oppose the 3Sixty board's opposition as 3Sixty and not the provisional curator, acting as representative of 3Sixty. It further does not appear from the judgment that the relevant provisions of the FI Act were raised or considered in the proceedings before Kollapen J.

[25] The provisional curatorship order in its terms is contradictory as it, whilst divesting the board of 3Sixty of its powers, simultaneously envisaged that 3Sixty would be entitled to oppose the application. The latter position accords with sections 5(2)(b) and 5(8)(a) of the FI Act.

⁹ Mostert and Others v Nash and Another [2018] ZASCA 62 par [23]

[26] If the Authority's interpretation is followed, the inimical position is created that if an order was obtained *ex parte*, (as it was), it would not be open to the board of 3Sixty to resolve to oppose the confirmation of the rule nisi, whereas it would have been entitled to do so if notice was given of the application.

[27] The anomaly in the order renders the principle enunciated by Bermann J in *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others*¹⁰ pertaining to the scheme of a rule nisi apposite¹¹:

"To hold that after the granting of a provisional liquidation order the directors of the company which has been provisionally liquidated by virtue of such order have lost their locus standi in judicio to oppose the granting of a final order would fly in the face of the very object and purpose of the rule nisi and it would, therefore, be quite wrong to emasculate such object and purpose by finding that the directors have lost their residual power to show cause why the company should not be wound up, for that matter to anticipate the return day of the rule nisi. It would be quite ludicrous to hold that a director, or a company acting through its directors, is not an interested party when it comes to deciding whether it and/or they have the right to be heard on the return day of the rule nisi."

[28] It would be contrary to the interests of justice and the principle of *audi alteram partem*¹² to deprive an entity in the position of 3Sixty of the right to be heard in order to oppose the granting of a final curatorship order, where a provisional order had been granted on an *ex parte* basis. To deprive the board of that power and leave it vested in a curator who acts under the control of the Authority under section 5(6) of the FI Act, would render the express provisions of sections 5(2)(b) and 5(8)(a) nugatory.

[29] Insofar as *Keyhealth* may not be distinguishable, I respectfully disagree with Kollapen J for the reasons as set out above. In any event, on a proper interpretation of paragraphs 8 and 11 of the provisional order as well as sections 5(2)(b) and 5(8)(a) of the

¹⁰ 1993 (2) All SA 534 (C) p537

¹¹ Albeit in the context of winding up proceedings

¹² Under section 34 of the Constitution: *Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, where appropriate, another independent and impartial tribunal or forum*".

FI Act, it is my view that the board of directors of 3Sixty would have the residual power to oppose the confirmation of the provisional curatorship order.

[30] I conclude that the Authority's challenge under rule 7 must fail.

[31] As referred to earlier, Ms Ram launched an application for leave to intervene, to which the parties consented. That order will be granted by agreement. Ms Ram was afforded the opportunity to deliver affidavits and make submissions in the proceedings.

[32] 3Sixty launched two striking out applications. The first, an application launched on 21 March 2022, seeking to strike portions of the applicant's supplementary affidavit in which the Authority relied on various reports provided by the BDO support team members, appointed to assist Ms Ram, in support of their averment that the curatorship should continue. It was argued that the Authority was limited to the grounds raised in its founding affidavit. 3Sixty also delivered a supplementary affidavit in response to the Authority's averments, in the event that the offending portions of the supplementary replying affidavit are not struck out.

[33] I am not persuaded that the application has merit. An opportunity was afforded to 3Sixty to deal with the additional affidavit, which it did. The issues raised in the supplementary affidavit by the Authority expanded on the issues raised in the founding affidavit. In my view, the interests of justice favour the admission of both affidavits so that the application can be determined on all the available facts and in the best interests of the policy holders of 3Sixty. This approach will not prejudice 3Sixty.

[34] The striking out application is thus dismissed and the supplementary affidavit of 3Sixty is admitted into evidence. I will later deal with the costs.

[35] 3Sixty's second striking out application launched on 20 June 2022, objected to certain paragraphs and annexures containing financial information relating to 3Sixty in

the Authority's affidavit dated 9 June 2022. The averments in the Authority's affidavit were delivered in response to the contention made in Ms Ram's affidavit of 8 June 2022 that 3Sixty was solvent. 3Sixty did not however object to the contents of Ms Ram's affidavit.

[36] 3Sixty contended that the averments were scandalous, vexatious and irrelevant. It delivered a substantial affidavit of which only a few paragraphs were dedicated to the striking out application. Most of the affidavit was devoted to extraneous issues already canvassed at the hearing and constituted a re-arguing of 3Sixty's case on the merits. 3Sixty did not however meaningfully address the facts put up by the Authority and the fact that it was insolvent.

[37] The striking out application lacks merit. The challenged paragraphs are not scandalous, vexatious or irrelevant as envisaged in rule 6(15), nor has it been established that 3Sixty would be prejudiced if the offending paragraphs and annexures are not struck out. As such it has not met the applicable test for the striking out of portions of affidavits as enunciated by the Constitutional Court in *Helen Suzman Foundation v President of the Republic of South Africa*.¹³

[38] It follows that this application too must fail. I return later to deal with the costs.

The merits

[39] The application must be considered in context of the relevant statutory framework. 3Sixty is regulated in terms of *inter alia* the Insurance Act¹⁴, the FI Act and the Financial Sector Regulation Act ("FSR Act").¹⁵ Of particular relevance is section 54(2) of the Insurance Act, which sets out the duties and powers of a curator, subject to section 5 of

¹³ 2015 92) SA 1 (CC) paras [27]-[28]

¹⁴ 8 of 2017

¹⁵ 9 of 2017

the FI Act.¹⁶ The Authority is charged with oversight over institutions such as 3Sixty under the Insurance Act and the FSR Act.

[40] It is trite that the interest of the beneficiaries of a scheme is paramount when considering whether a curator should be appointed to a scheme.¹⁷ What ultimately has to be decided is whether the grounds, viewed objectively, constitute material irregularities justifying, in the interests of the policy holders, the appointment of a curator.¹⁸

[41] The Authority in its founding papers relied on s 54(1) of the Insurance Act¹⁹ read with s 5(1) of the FI Act to launch the application on an *ex parte* basis. The application was based on various grounds. These included the insolvency of 3Sixty, its Solvency Capital Requirement ("SCR")²⁰ and Minimum Capital Requirement ("MCR")²¹ being below the regulatory minimum, the audit of 3Sixty's results for the 2020 financial year not having been concluded, its high executive staff turnover rate and that the fact that the Authority had received complaints about 3Sixty's unwillingness or inability to pay claims.

[42] In sum, its case was that 3Sixty was guilty of various statutory transgressions of the Insurance Act, was not in a sound financial position and could not be restored into

¹⁶ The regulatory framework and powers of the Authority is usefully summarised by Yacoob J in *Prudential Authority v Bophelo Life Insurance Company Ltd and Others* [2020] ZAGPJHC 7 (30 November 2020) paras [39]-[43]

¹⁷ *Barnard and Others v Registrar of Medical Schemes* 2015 (3) SA 204 (SCA) para [47]-[50]

¹⁸ *Barnard supra* para [41]

¹⁹ It provides: "*Despite any other law-the court may, (a) 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*".

²⁰ The amount of money, as determined through the Prudential Authority's Standard Formula to Insurers that the shareholder must have in the business so that if the estimated most extreme risk events applying to insurers were to happen, the insurer would remain solvent after such event. It is the required capital that the insurer must have to ensure that it is solvent after being shocked by extreme risk, imagined to happen at a ratio of 1 in 200 years

²¹ The amount of money, determined through the Prudential Authority's standard formula to insurers that the shareholder must, at minimum have in the business, meant to cover 3 months' operational expenses and set to be at an absolute minimum of R15 million.

compliance with the regulatory regime. The Financial Sector Conduct Authority (“FSCA”) supported the application.

[43] It was contended that the application was launched on an *ex parte* and *in camera* basis:

“..to avoid the risk of 3Sixty taking steps to misappropriate funds, or otherwise act improperly or unlawfully upon gaining knowledge that a curator is on her way. There may be records and other critical information also destroyed in order for the curator not to have sight of these”.

[44] A broad ground of opposition raised by 3Sixty was that the provisional curatorship order should be set aside as the Authority had not complied with the principles relevant to *ex parte* applications, had not made full disclosure of all relevant facts and had misled the court in various respects. It argued that each of the grounds relied on by the Authority was speculative, unreasonable or misleading and should be rejected. It was further argued that the Authority had failed to demonstrate any reasonable basis for not giving notice of the application to 3Sixty or bringing the application as one of urgency.

[45] It is trite that an applicant must, in an *ex parte* application, disclose all material facts which might influence a court in coming to its decision.²² The withholding or suppression of material facts entitles a court to set aside an order even if the non-disclosure was not wilful or *mala fide* and a court retains a discretion in this regard.²³ It is further well established that a court has a discretion to discharge a provisional order in circumstances where the use of *ex parte* proceedings was unjustified.²⁴

²² *Schlesinger v Schlesinger* [1979] 3 All SA 780 (W); *Logie v Priest* 1926 AD 312; *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) paras [42]-[52]

²³ *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) para [21]; *National Director of Public Prosecutions v Phillips* 2003 (6) SA 447 (SCA) para [29]

²⁴ *Recycling and Economic Development Initiative of South Africa v the Minister of Environmental Affairs* (1260/2017 and 188/2018) and *Kusaga Taka Consulting (Pty) Ltd v The Minister of Environmental Affairs* (1279/2017 and 187/2018) [2018] ZASCA 01 (24 January 2019) para [87]

[46] It was common cause that Ms Ram's qualifications were initially misstated in the Authority's founding papers. 3Sixty relied on this as constituting misleading evidence given in the *ex parte* application. It was this fact which gave rise to the Authority launching the urgent variation application on the basis that it had lost faith in the integrity of Ms Ram.

[47] Given the circumstances, I am not persuaded that the misstatement of Ms Ram's qualifications constitutes sufficient grounds to set aside the entire curatorship order.

[48] Whilst I agree with 3Sixty that there was no sound basis for the Authority's allegations that there was a risk of misappropriation of funds or destruction of documents and that they were specious, it cannot be concluded that such allegations materially influenced the court in granting the order on an *ex parte* basis. In any event section 5(1) of the FI Act expressly authorises the launching of the application on an *ex parte* basis.²⁵ Given that 3Sixty has been allowed to deliver affidavits and to fully oppose this application, no prejudice has ensued.²⁶

[49] The nature of the said allegations are also not such that they justify the setting aside of the curatorship order. Considering the totality of the evidence in the Authority's founding papers pertaining to 3Sixty's statutory transgressions and unsound financial position, which to a large extent have not been disputed or refuted by any countervailing evidence by 3Sixty, there were sufficient grounds to justify the application being brought on an *ex parte* basis. It can also not be concluded that the grounds advanced by the Authority were speculative, unreasonable or misleading, as contended by 3Sixty.

²⁵ It provides: *The registrar may, on an ex parte basis, apply to a division of the High Court having jurisdiction for the appointment of a curator to take control of, and to manage the whole or any part of, the business of an institution*".

²⁶ *Barnard and Others v Registrar of Medical Schemes* 2015 (3) SA 204 (SCA) para [47]

[50] Considering all the facts, I conclude that this ground of opposition must fail and that no proper case has been made out for the exercise of the discretion to set aside the provisional curatorship.

[51] 3Sixty's remaining grounds of opposition were predicated on the Authority's alleged failure to comply with an undertaking to apply for the discharge of the provisional curatorship order if certain conditions were met and the contention that based on the provisional curator's findings and recommendations and the contents of Ms Ram's latest affidavit dated 8 June 2022, the provisional order fell to be set aside.

[52] 3Sixty's case was that each of the conditions had been met and the Authority was obliged to comply with its undertaking.

[53] The Authority argued that its undertaking was stated in qualified terms being that it *"will consider applying for the discharge of the rule"* if the conditions were met. Its case was that it was not satisfied that the conditions had been met, irrespective of the contents of its replying affidavit and that it did not accept the provisional curator's reports. It placed reliance on reports provided by various members of the BDO support team who assisted Ms Ram in the curatorship.

[54] The central issue to determine is whether the provisional curatorship order should be confirmed. The test at this stage of the proceedings is stated in section 5(4) of the FI Act as follows:

"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"-

[55] At the provisional stage the applicable test is stated in section 5(2)(a):

“(2) Upon an application in terms of subsection (1)²⁷ 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...”

[56] Section 5 was interpreted by the Supreme Court of Appeal in *Executive Officer, Financial Services Board v Dynamic Wealth and Others*²⁸ thus:

“[4] Reading sub-sec (1) together with sub-sec (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, 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 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 upon the facts of that case...”

[6] The appointment of curators under s 5(1) may be appropriate even where the funds under administration are not shown to be at risk.....the inability or unwillingness of the institution to comply with regulatory requirements applicable to protected funds itself provides a reason for appointing a curator. Where there is uncertainty whether the funds of investors are at risk it may be desirable to safeguard the interests of investors to appoint a curator. ...The existence of an adverse report by inspectors may of itself provide legitimate grounds for concern and found an application for an interim curatorship even if its conclusions are disputed....The registrar cannot be expected to resolve factual disputes by litigation before obtaining an order appointing a curator. Provided the court is satisfied that the Registrar’s concerns are legitimate and that the appointment of a curator will assist in resolving those concerns it will ordinarily be appropriate to grant an order:...

Is curatorship required in order to address identified problems in the business of 3Sixty?

[57] One of the main bones of contention between the parties was 3Sixty’s proposed Internal Recapitalisation Plan (“IRP”). The IRP²⁹ is a property transaction between Doves and 3Sixty involving the disposal of 53 properties to 3Sixty by Doves in order to inject capital and to bolster 3Sixty’s liquidity for purposes of meeting regulatory solvency.

²⁷ Which provides: “(1) the registrar may, on an ex parte basis, apply to a division of the High Court having jurisdiction for the appointment of a curator to take control of, and to manage the whole or any part of, the business of an institution”.

²⁸ 2012 (1) SA 453 (SCA)

²⁹ Proposed to the Prudential Authority on 7 December 2021

[58] The stance adopted by the Authority was that the IRP would not result in 3Sixty achieving financial soundness. It further argued that based on the common cause facts it was desirable for 3Sixty to remain under curatorship and good cause has not been shown for the setting aside of the provisional order.

[59] It is clear that there is disagreement between the Authority on the one hand and 3Sixty and Ms Ram on the other regarding the IRP. Normally the cogency of an expert opinion must be determined based on the cogency of the reasoning.³⁰

[60] In her interim report, Ms Ram concluded:

"1 The facts presented in this report, as well as the expert opinions outsources, show that had the PA 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.

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 not have 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 and livelihood of the provisional curator, the Board and the 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 expert 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."

[61] Ms Ram based her interim report mainly on the report of Millman, a special actuarial consultant ("the Millman report"). Her findings were based on information provided to her and the specialists commissioned by 3Sixty. The report focused on the IRP and the other issues raised by the Authority in their founding affidavit were not fully considered. She concluded that if the transaction was implemented or was considered as

³⁰ Buthelezi v Ndaba (575/2012) [2013] ZASCA 72 (29 May 2013) para [14].

early as 7 December 2021, when it was presented to the Authority, 3Sixty would be solvent considering the MCR.³¹

[62] Ms Ram's conclusion in her final report was:

"Had a due diligence been undertaken by the PA on receipt of the plan and the authority worked with the license to iron out fine creases in the overall proposal, curatorship could have been avoided....I maintain that the IRP should it be permitted will restore the minimum amount of capital required to be held to be considered to meet regulatory capital requirements to continue operating as an insurance license".

[63] Ms Ram further concluded that:

"3sixty has presented an internal recapitalisation plan that will restore the MRC to the regulatory required level; the matters relating to the unaudited financial accounts can be resolved with cooperation of external auditor of choice and increased focus on accounting and finance function within 3Sixty; the alleged misappropriation of funds cannot be proven or justified; matters relating to governance risk management control functions are required as per GOIs and soundness of board of directors are noted however the onus of the approval of appointment of these individuals has and will continue to rest with the authority themselves any concerns does not constitute grounds for curatorship there have been no findings that justify the provisional curatorship continuing...include BDO conclusions I do not condone any of these conclusions of BDO."

[64] In Ms Ram's affidavit of 8 June 2022, she stated:

"I maintain that the First Respondent is solvent and ought not to be under curatorship. I submit this court ought not confirm the rule nisi."

[65] One of the concerns raised by the Authority pertains to the lack of evidence that the properties are not encumbered. That would impact on the full value of the assets, given that the properties are leased back to Doves. Its concerns were that the Millman report has numerous disclaimers and qualifications, including whether the properties are potentially encumbered. 3Sixty cannot use encumbered assets as part of its solvency calculation, without prior approval from the Authority.

³¹ Regulated by FSI's Prudential Standard as published by the Prudential Authority Framework for Financial Soundness of Insurers

[66] The Millman report identified this as a risk as:

"The lease of the properties to Doves, 3Sixty's parent, could be viewed as a limitation on the use or disposal of the properties. As Doves controls 3Sixty, Doves has a clear operational need to operate from the properties involved. The lease proposed in the disposal agreement is a month by month lease, which means that a sale of the property to a third party could easily result in termination of the lease."

[67] The opinions drawn by BDO's actuarial, accounting and tax teams relating to the IRP did not support Ms Ram's findings in her interim report of 21 February 2022. Ms Ram received the reports prepared by the BDO support teams but did not explain the differences or the reasons for her disagreement in her interim report. She also did not do so in her final report.

[68] The BDO support team's three actuaries, relied on by the Authority concluded, conversely to Ms Ram's opinions, that the issues identified in the Authority's founding papers remain. In the report by the BDO representatives, recommendations were made supporting the retention of the curatorship.

[69] In their view, the financial results provided by 3Sixty could not necessarily be relied upon and no opinion was given regarding their accuracy or reliability as verification was required. Their view was that the proposed IRP was merely part of the required process and on its own was not a suitable measure to resolve the issues raised by the Authority in its entirety. Any impact of the IRP on 3Sixty's liquidity would be limited. Even if the properties were considered unencumbered as proposed by 3Sixty, the MCR cover would increase to well above 1.9X but its SCR cover would remain below 1.0X and thus not in accordance with the guidelines. It was concluded that the IRP was therefore ineffective even to render 3Sixty into a financially sound solvency position and the IRP did not achieve the objectives for which the order was issued.

[70] It must be borne in mind that it remains within the prerogative of the Authority to consider and approve a recapitalisation plan under sections 39(6) to 39(10) of the Insurance Act. As stated, there are numerous issues surrounding the IRP on which the

various experts have expressed differing views. It is at least common cause there may be areas of uncertainty from legal and accounting perspectives.

[71] It is not for this court to determine the viability of the IRP and this is not a review application regarding the exercise by the Authority of its discretion on this issue. Moreover, as stated in *Dynamic Wealth*, the Authority need not resolve the factual disputes by litigation, but must illustrate that its concerns are legitimate and that the appointment of a curator will assist in resolving its concerns. It is thus not necessary for this court to resolve the factual disputes or make a definitive determination on the IRP.

[72] Despite the various disputes on the papers, the following emerges from the undisputed facts.

[73] 3Sixty is obliged to prepare annual financial statements in accordance with the Companies Act, 2008 and the International Financial Reporting Standards ("IFRS"), have them audited and submitted to the Authority under sections 46 and 47 of the Insurance Act. Under section 6³² of the FSRA, the board of 3Sixty was obliged to ensure that 3Sixty complies with its statutory duties. It is undisputed that the 2020 financial statements have still not been audited.³³

[74] Although 3Sixty sought to blame its auditors and the Authority for the failure to have the 2020³⁴ financial statements audited and submitted, the criticism does not bear scrutiny, given that they should have been submitted even before the provisional curatorship order was granted. If its auditors were hostile, as 3Sixty alleges, no bar

³² It provides: "Financial institutions that are juristic persons

Where a financial sector law imposes an obligation to be complied with by an entity that is a juristic person, the members of the governing body of that juristic person must ensure that the obligation is complied with".

³³ The same pertains to the 2021 financial statements

³⁴ Financial year ending December 2020

existed to 3Sixty employing an alternative firm of auditors to perform the necessary audit functions timeously.

[75] The auditors involved in the audit blamed the 3Sixty board for dictating how the audit should be performed and for not providing them with the necessary support, thus impeding the audit. No countervailing evidence was presented by 3Sixty on this issue.

[76] Many of the reportable irregularities which were identified by the 3Sixty auditors in 2020, have not been addressed, including the admitted reduction of share capital without Authority approval contrary to section 38 of the Insurance Act. 3Sixty termed this “an oversight”. A belated application for approval to the Prudential Authority was refused.

[77] It is thus undisputed that 3Sixty is in breach of sections 45 and 46 of the Insurance Act, and has still not submitted financial statements for the 2020 financial year.

[78] It was undisputed that 3Sixty’s minimum capital requirement and solvency capital requirement were both below the required threshold for a considerable period of time and it was not able to effect a recapitalisation plan, despite several indulgences granted to it by the Authority. It was undisputed that since November 2020, 3Sixty’s SCR cover requirements fell below the minimum and shortly thereafter the MCR cover requirements followed suit. The high water mark of 3Sixty’s contentions is that the position has improved and will be substantially improved if the IRP were to be approved. However, even on its own interpretation of the IRP, the SCR requirement would not be met and thus not meet the statutory requirements.

[79] It was not disputed that 3Sixty has for more than a year failed to maintain a financially sound condition as required by section 36 of the Insurance Act and it is in financial difficulty to the extent that it requires a bail out from Doves. No countervailing evidence was presented by 3Sixty to the Authority’s evidence that it is insolvent.

[80] 3Sixty experienced certain governance issues, which existed for at least 2 years before the provisional curatorship order was granted, which resulted in the Authority commissioning an independent investigation by Deloitte of the affairs of 3Sixty for the period 2017 to 2019. It was undisputed that the Deloitte report highlighted various internal governance failures and revealed that 3Sixty used policy holder funds to pay for the birthday party of the general secretary of NUMSA, Mr Jim and a laptop and software was purchased to be used by Mr Jim's daughter.

[81] It was further not disputed that 3Sixty's former CEO was accused of embezzling R14 million from its business in respect of irregularly incurred expenses, although action was only taken in relation thereto substantially later and during August 2021.

[82] During the course of the proceedings certain further governance issues were identified and referred to in the Authority's affidavits. 3Sixty did not put up any countervailing evidence, despite filing a substantial affidavit in response. For present purposes it is not necessary to particularise such governance issues in any detail. Suffice it to state that the concerns raised cannot be rejected as fanciful or untenable and by and large appear to reasonable and undisputed. The additional facts simply make the position worse for 3Sixty.

[83] 3Sixty has not in terms of sections 36(6) to 36(10) of the Insurance Act submitted a recapitalisation strategy which has met with the approval of the Authority.

[84] These concerns cannot be rejected as frivolous or untenable. Rather, I am persuaded that the Authority has illustrated that its concerns are legitimate.

[85] Considering all the regulatory breaches, it would of itself be sufficient to justify a curatorship order. That, combined with the governance issues and the liquidity issues that appear not to have been rectified, seen cumulatively, lead me to the conclusion that there are identified problems in the business of 3Sixty and that the concerns raised by the

Prudential Authority are legitimate, considering the interests of the 3Sixty policy holders and that curatorship is required to address these issues.

Will a curatorship resolve the issues and have beneficial consequences for policy holders?

[86] According to 3Sixty continued curatorship would prejudice it and its policy holders. Reliance was placed on the conclusions and recommendations made by Ms Ram, already referred to.

[87] The Authority's case was that a curatorship would preserve the current financial position of 3Sixty and provide an opportunity to source funding whilst preventing further erosion of its solvency capital cover and to avoid liquidation.

[88] Despite Ms Ram's bald statement in her affidavit of 8 June 2022 that 3Sixty is solvent, that statement is not supported by any objective evidence. It is also in conflict with her own earlier version that 3Sixty would be solvent if the IRP was implemented. The objective evidence however indicates that 3Sixty is insolvent and the MCR and SCR values are still under the statutory minimum values, given the latest financial information provided by the Authority.

[89] I conclude that confirmation of the curatorship may well avoid liquidation and the risk of value destruction and prejudice. That would have beneficial consequences to the 3Sixty policy holders.

Are there preferable alternatives to curatorship to resolve the problems?

[90] Ms Ram's recommendations in her final report essentially leave it to the management of 3Sixty to resolve their own problems. Ms Ram did not investigate nor fully report on the issues raised by the Authority pertaining to regulatory breaches and

governance issues. Ms Ram's views are not supported by objective evidence and are of limited assistance to the court. There is essentially no countervailing evidence produced by either 3Sixty or Ms Ram to counter the facts presented by the Authority. In material respects, those facts are admitted by 3Sixty.

[91] Considering the undisputed facts, 3Sixty has not meaningfully addressed the statutory breaches or governance issues since the time they arose. I am persuaded that there are no preferable alternatives to curatorship.

[92] Having met all the criteria, I conclude that the curatorship order should be confirmed in the best interests of the 3Sixty policy holders.

Should Ms Ram's appointment as provisional curator be confirmed?

[93] It was undisputed that the appointment or removal of a particular curator is an issue entirely separate from the curatorship and its confirmation.³⁵

[94] The Authority's unsuccessful variation application and Ms Ram's purported resignation on 26 April 2022 dominated the debate between the parties.

[95] At the hearing on 22 March 2022, the Authority simply left it in court's hands to determine whether Ms Ram should remain or be removed. It baldly stated that it abided the decision of the court but that it did not recommend that Ms Ram be confirmed as final curator. It was argued that if Ms Ram's appointment was not confirmed, Mr Mashoko would be a suitable candidate to be appointed as final curator. Mr Mashoko was also the individual recommended by the Authority in the unsuccessful urgent variation application. Pursuant to Ms Ram's purported resignation, it adopted the stance that the confirmation

³⁵ Maxwell v Khosana and Others; Registrar of Medical Schemes v SAMWUMED Medical Scheme and Others [2018] ZAWCHC 151 (9 October 2018) para [24]

of Ms Ram's appointment would be untenable, given that she no longer wanted to act as curator.

[96] 3Sixty challenged the appointment of a replacement curator on the basis that the Authority was attempting to appeal the unsuccessful variation application and the order and judgment of Fisher J and that Ms Ram had not sought the court's leave to resign and this question not before the court. It further argued that it was not open to the court to accept Ms Ram's resignation.

[97] Ms Ram held the view that her resignation was irrelevant. In her affidavit of 8 June 2022 she stated:

"I submit in conclusion that it is for this court to decide whether to confirm curatorship of the First Respondent and that my "resignation" has no bearing on that decision because I have continued to substantially comply with my fiduciary duties."

[98] Significantly, Ms Ram did not in her affidavit state any willingness to act as final curator if the provisional curatorship order was not discharged.

[99] Ms Ram accused the Authority of "pen-palling" with the court in advising it of her resignation on 16 May 2022, rather than launching a formal application to adduce further evidence pertaining to her purported resignation. It was argued that the Authority should be mulcted with a punitive costs order for placing new evidence before the court in this manner. Ms Ram adopted the position that the evidence of her resignation has no legal effect and should have no bearing on the main issues for the court to determine.

[100] Ultimately, the parties were in agreement that Ms Ram's purported resignation was irregular as she had been appointed in terms of a court order, a position Ms Ram herself

belatedly accepted. Her letter of resignation however did not reflect that she appreciated that at the time.³⁶

[101] The stance adopted by Ms Ram is misconceived, given her obligations under the provisional curatorship order. Curiously, Ms Ram did not advance any reasons why she did not herself launch proceedings for her release as curator or at least advise the court of her purported resignation at the time as it clearly has a bearing on the relief sought in this application.

[102] Ms Ram's statement that she "*is substantially complying with her fiduciary obligations as curator*" is the subject matter of substantial disputes of fact between her and the Authority, each of which blame the other of being obstructive. It is not necessary or possible to resolve all these factual disputes on the papers. Suffice it to state that it is clear from the undisputed facts that there is a breakdown in reporting and communication pertaining to 3Sixty between the Authority and Ms Ram and between Ms Ram and BDO. Such a state of affairs is untenable.

[103] The approach adopted by the Prudential Authority, by simply abiding the court's decision in the face of its unsuccessful urgent application, is flawed. On the other hand, the approach adopted by 3Sixty is opportunistic, technical and places form over substance. The true question is not whether Ms Ram must be removed as provisional curator, rather it is whether Ms Ram's appointment must be confirmed and she must be appointed as final curator.

³⁶ Ms Ram's letter of resignation of 26 April 2022 addressed to the Prudential Authority stated: "*I hereby confirm that I tender my resignation as the curator of 3 Sixty Life Limited with immediate effect. I furthermore confirm that I have also resigned from BDO Advisory Services (Pty) Ltd with immediate effect. All my rights remain strictly reserved.*"

[104] Ms Ram's unwillingness to continue acting as curator in my view of itself renders it undesirable for her to be confirmed as curator as it would force her to remain in that position against her will, a concept difficult to reconcile with our constitutional values.³⁷

[105] Considering Ms Ram's conduct in relation to this matter and the level of hostility which currently prevails between her and the Authority it would not be in the interests of the policy holders of 3Sixty if her appointment as curator is confirmed. Her conduct can best be described as prejudicial, belligerent and erratic. It appears that in numerous respects, Ms Ram has acted in her own interests, rather than in the interests of the policy holders of 3 Sixty in this litigation.

[106] In Ms Ram's reports and affidavits, she has not provided a cogent factual basis or proper logical motivation for her views or her fluctuating opinions. Considering all the facts, it is not desirable that Ms Ram's appointment as curator be confirmed.

[107] A court cannot simply confirm the curatorship order without appointing a curator, thereby leaving the curatorship to limp on rudderless. Such an order would not comply with section 5 of the FI Act. A court has wide powers under section 5(5)(f) of the FI Act, which provides:

"The court may, for the purpose of a provisional appointment in terms of subsection (2)(a) or a final appointment in terms of subsection (4) make an order with regard to...(f) any other matter which the court deems necessary".

[108] It is in my view necessary to make an order appointing a curator other than Ms Ram. Section 5(5)(f) of the FI Act entitles me to make such an order.

[109] 3Sixty did not suggest an alternative candidate for appointment as curator and argued that a curator should be appointed by agreement between it and the Authority in

³⁷ Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others (2016) 37 ILJ 313 (CC) para [184]

terms of section 54(10) of the Insurance Act. It objected to the appointment of Mr Mashoko on the basis that he lacked independence, having given an affidavit supporting the confirmation of the curatorship order and that his appointment would be detrimental. No other reasons were advanced why Mr Mashoko would not be a suitable candidate.

[110] The appointment of Ms Mashoko was already raised in the Authority's papers, prior to the hearing of 22 March 2022. His credentials identify him as a person with the necessary qualifications for appointment. It would also be sensible to retain continuity in as much as Mr Mashoko has been part of the support team for the curatorship to alleviate any prejudice caused by Ms Ram's actions. 3Sixty's contention that Mr Mashoko is biased as he furnished an affidavit supporting the granting of a final order does not make him the Authority's lackey as alleged. Mr Mashoko provided an opinion on what he considered the investigations into 3Sixty's business revealed.

[111] I conclude that it is not desirable that Ms Ram's appointment as curator be confirmed and that Mr Mashoko should be appointed as final curator.

Costs

[112] When the application was postponed in the urgent court on 4 February 2022 to be heard as a special motion on 22 March 2022, costs were reserved. Given the circumstances, it would be appropriate to direct those costs to be costs in the cause.

[113] In relation to the various interlocutory applications, the general principle is that costs follow the result. There is no reason to deviate from that principle and it is appropriate to grant such orders in relation to NUMSA's unsuccessful intervention application and 3Sixty's unsuccessful striking out application dated 21 March 2022.

[114] In relation to 3Sixty's second striking out application of 20 June 2022, I agree with the Authority that the application constituted an abuse of process³⁸ devoid of merit and that a punitive costs order is warranted.³⁹ For those reasons, 3Sixty is to pay the costs on the scale as between attorney and client.

[115] The costs of the postponement application on 18 July 2022 were reserved. Although the application was ultimately granted to afford 3Sixty the opportunity of having its lead counsel present oral argument in the interests of justice, it was granted an indulgence to do so, albeit that the parties later agreed to rely on written submissions only. The postponement application was only launched on Friday 15 July 2022, a day before the hearing and no proper explanation was tendered for the delay or its failure to raise the issue when the hearing date was allocated on 30 June 2022.

[116] Considering the postponement application papers and the facts, they justify a departure from the normal principle that costs follow the result, given that 3Sixty was granted an indulgence. 3Sixty should in the circumstances be held liable for the costs of the postponement. Given the facts, and the prejudice suffered by the other parties as a result of the postponement, it would be appropriate to grant costs on the scale as between attorney and client so that the other parties are not left out of pocket for the expenses incurred.⁴⁰

[117] The costs of the urgent proceedings before Fisher J were reserved to be determined in these proceedings. Fisher J was of the view that this court would be in a better position to determine whether a punitive costs order was warranted. The Authority argued that there should be no order as to costs as both 3Sixty and Ms Ram formally abided the court's decision and delivered explanatory affidavits only. 3Sixty and Ms Ram

³⁸ *Beinash v Wixley* 1997 (3) SA 721 (SCA)

³⁹ *Tjiroze v Appeal Board of the Financial Services Board* (CCT271/19) [2020] ZACC 18 para [23]; *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) paras [221]-[223]; *Ferreiras (Pty) Ltd v Naidoo and Another* 2022 (1) SA 201 (GJ) para [22]; *In Re Alluvial Creek* 1929 CPD 532 at 535

⁴⁰ *Nel v Waterberg Landbouers Ko-operatiewe Vereeniging* 1946 AD 597 at 607

on the other hand sought punitive costs orders on the scale as between attorney and client.

[118] Considering the stance adopted by 3Sixty and Ms Ram, who, despite not formally opposing the application effectively opposed it, I am not persuaded that a punitive costs order should be granted. As the application was however unsuccessful, there is no reason to deviate from the normal principle that costs follow the result. It follows that the Authority should be liable for the costs of the urgent application.

[119] The costs of Ms Ram's intervention application were contentious, albeit that the parties consented to her intervention. Ms Ram sought an order directing the Authority to pay her costs, given that she was obliged to enter the fray pursuant to the reservation of the costs of the urgent application. There is no merit in that argument. Ms Ram did not limit her intervention to the costs of the urgent application. Instead she fully entered into the fray and introduced issues pertaining to her disputes with BDO and the Authority on various fronts. Ms Ram did not simply rely on the extensive papers filed in the urgent application to argue the issue of costs, but delivered affidavits raising substantial additional facts and issues. In so doing, she was primarily advancing her own interests, adopting the position that she was protecting her career and professional reputation.

[120] The conduct of Ms Ram in relation to the matter has had a substantial impact on the delays and the additional costs which were incurred by both the Authority and 3Sixty after the hearing of the matter on 22 March 2022. It was her purported resignation on 26 April 2022 which resulted in extensive delays and substantial additional costs being incurred by the parties.

[121] By way of example, when the parties were afforded an opportunity to make further submissions pertaining to Ms Ram's resignation, Ms Ram only did so after the designated date by way of an affidavit containing redactions. An unredacted version of Ms Ram's affidavit was inexplicably sent via email to the court only. The parties were notified that the court would not read that affidavit and a case management meeting was convened

between the parties on 1 June 2022, pursuant to which directives were issued by agreement between the parties that the unredacted affidavit should be ignored. Ms Ram would provide an affidavit to the parties on a confidential basis, pursuant to which the parties would convey their views to the court, after which further directions would be given, if necessary. An affidavit was eventually produced by Ms Ram on 8 June 2022, without any condonation application, albeit that the affidavit was delivered late. Ms Ram then abandoned her claim to confidentiality of the affidavit by way of correspondence.

[122] Ms Ram could have abided the court's decision and simply delivered her reports and affidavits, which would have been considered. Instead, Ms Ram's conduct belied that position and she adopted an adversarial stance to the Authority and effectively opposed it at every turn.⁴¹ That stance did not facilitate the determination of the real issues in this application but were rather primarily aimed at Ms Ram's own interests rather than those of the curatorship. Having regard to the facts, Ms Ram should be held liable for her own costs.

[123] In relation to the main application, there is no reason to deviate from the normal principle that costs follow the result. As the Authority has been substantially successful, it is entitled to costs against 3Sixty.

[124] Considering the issues which arose in these proceedings, the employment of two counsel was justified.

Order

[125] I grant the following order:

⁴¹ King Pie Holdings (Pty) Ltd v King Pie (Durban)(Pty) Ltd 1998 (4) SA 1240 (D&C LD) at 1250 F-J

[1] The second respondent's intervention application is dismissed with costs, including the costs of two counsel where employed;

[2] Ms Ram is granted leave to intervene as the third respondent;

[3] Paragraphs 3, 5, 7, 8.1, 8.2 and 8.3 of the provisional order of 21 December 2021 are confirmed and rendered final and the business of the first respondent is placed under final curatorship;

[4] Paragraph 4 of the provisional order of 21 December 2021 appointing Ms Ram as provisional curator is not confirmed and her appointment as curator is cancelled with effect from the date of this order;

[5] Mr Tinashe Mshoko is appointed as final curator of the first respondent with effect from the date of this order with the powers contained in paragraph 7 of the provisional order of 21 December 2021;

[6] The affidavits of BDO Advisory Services (Pty) Ltd are accepted into evidence;

[7] The condonation applications of the applicant and the first respondent for the delivery of supplementary affidavits are granted;

[8] The first respondent's first striking out application dated 21 March 2022 is dismissed with costs, including the costs of two counsel, where employed;

[9] The first respondent's second striking out application dated 20 June 2022 is dismissed with costs on the scale as between attorney and client, including the costs of two counsel where employed;

[10] The costs of the postponement application granted on 18 July 2022 are to be borne by the first respondent on the scale as between attorney and client, including the costs of two counsel, where employed;

[11] The costs of the urgent application before Fisher J are to be borne by the applicant, including the costs of two counsel where employed;

[12] The costs of the proceedings in the urgent court in week of 1 and 4 February 2022 are to be costs in the cause;

[13] The third respondent, Ms Ram, is to bear her own legal costs;

[14] The costs of the application are to be borne by the first respondent, including the costs of two counsel where employed.



**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 22 March 2022, 18 July 2022
CASE MANAGEMENT MEETING	: 1 June 2022
SUPPLEMENTARY AFFIDAVITS	: 30 May, 8, 9, 20, 24, 27 June 2022
STRIKING OUT APPLICATION FIRST RESPONDENT	: 20 June 2022

SUPPLEMENTARY SUBMISSIONS	: 25 May, 30 May, 29 July, 1 August 2022
DATE OF JUDGMENT	: 30 September 2022
APPLICANT'S COUNSEL	: Adv S Khumalo SC Adv. Y. Peer
APPLICANT'S ATTORNEYS	: Edward Nathan Sonnenbergs Inc
1st RESPONDENT'S COUNSEL	: Adv. V. Ngalwana SC Adv F Karachi : Adv. T. Makola
1st RESPONDENT'S ATTORNEYS	: Malatji & Co. Attorneys
2nd RESPONDENT'S COUNSEL	: Adv. Tshetlo Adv B Lekokotla
2nd RESPONDENT'S ATTORNEYS	: Ditsela Incorporated Attorneys
3rd RESPONDENT'S COUNSEL	: Adv. C. Shahim
3rd RESPONDENT'S ATTORNEYS	: Kern Armstrong & Du Plessis Inc.
BDO'S COUNSEL	: Adv. T. Dalrymple
BDO'S ATTORNEYS	: Webber Wentzel Attorneys