

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

CASE NO: 40043/2009

DATE: 3 September 2009

In the matter between:

**EXECUTIVE OFFICER OF THE FINANCIAL SERVICES
BOARD** Applicant

and

NEW ERA LIFE INSURANCE COMPANY LIMITED	1 st Respondent
SANDI MAJALI	2 nd Respondent
KRUMCHUND HARIPARSHAD	3 rd Respondent
NDABAZINHE CECIL LLOYD MTSHALI	4 th Respondent
PERMIT GROUP 2 (PROPRIETARY) LIMITED	5 th Respondent

With

HENDRIK AUGUSTYN NO	Curator/Interested Party
OCTAVIA MATLOA NO	Curator/Interested Party

JUDGMENT

HARTZENBERG J

The applicant, acting in terms of section 5(1) of the Financial Institutions (Protection of Funds) Act, No. 28 of 2001 ("the FI Act") applied *ex parte* for the appointment of curators to take control of and to manage the whole of the

business of the first respondent ("New Era"). On 7 July 2009 an order for the provisional appointment of Mr. H Augustyn and Ms. O Matloa, as curators and the removal of New Era's directors from authority was granted, with a return day. 1 September 2009. The provisional order, with interim effect, authorized the curators to take control of and manage the business of New Era and set out their powers. The court granting the judgment *mero motu* made orders in terms of sections 416 and 417 of the Companies Act, paragraphs 11 to 19 of the order. The applicants does not persist with those orders and only proceed to have paragraphs 1 - 10 of the order confirmed.

New Era is a long-term insurer in terms of the Long Term Insurance Act ("the LTIA Act") Act No. 52 of 1998 and a financial institution in terms of the Financial Boards Act, No. 97 of 1990, as well as the FI Act. The main portion of its business consist of funeral policies. It has provided insurance products to members of the lower income groups for approximately 30 years. 5% of the shares of New Era are owned by Limpopo Economic Development Enterprise ("Limdev"), which is owned by the Limpopo government. The other 95% of the shares are owned by Permit Group 2 (Pty.) Ltd (Permit Group), a wholly owned subsidiary of Invume Resources (Pty.) Ltd ("Invume Resources"). The second respondent, Mr. Sandi Majali, is the non executive chairman of the board of directors of New Era. The third respondent, Mr. Hariparshad, and the fourth respondent, Mr. Mtshali, are both directors of New Era.

The applicant relied on an inspection report to persuade the court that good cause existed to grant the *ex parte* order. The report is dated 29 June 2009. Preceding the report there was a letter, dated 16 September 2008, written by the applicant to New Era and addressed to the second respondent in which certain concerns were raised. It referred to an on-site visit to New Era's offices, dated 9 April 2008. The applicant required a capital injection in New Era of at least R15 million. There was a requirement that a cession of an African Life policy to Absa Bank in an amount of R15 million be cancelled and that the cancellation be confirmed. There was a request for the financial statements of Invume Resources for the last three years. There were a number of other requests.

There was interaction between the applicant and the directors of New Era, after the letter of 16 September 2008. and before the application was lodged. The directors had succeeded by April 2009 to have the cession of the policy in the amount of R15 million in favour of Absa Bank and five subsequent cession of further amounts cancelled. The directors tried to comply with the requirements of the applicant.

When the application was brought on 7 July 2009, on an urgent basis, the main concerns raised by the applicant were: That the second respondent effectively controls 95% of the shares in New Era, and that that constitutes a contravention of section 26 of the LTI Act. (It provides that no one person will be entitled to acquire or hold shares that will give it control over a long term insurer, without the approval of the applicant). That the second respondent ceded a Liberty Life policy and a Sanlam policy, some of the main assets of New Era, to Absa as security for overdraft facilities of Invume Resources and in the papers represented that he was the sole owner of 95% of the shares in New era. That New Era declared dividends in amounts of R33 million. R7 million during the 2007 tax year, and a third dividend of R7 million during the 2008 tax year and that the amounts ended up in the pocket of Invume and not of Permit Group and Limdev. It was alleged that there were no meetings of directors authorizing the payment of the dividends.

The second to the fourth respondents became aware of the order of 7 July 2009 on 8 July 2009 when the curators turned up at New Era headquarters and took over the administration. The period between the provisional order and the return day was approximately 8 weeks. On 14 August 2009 the respondents gave notice that they intended to approach the court on 17 August to have the provisional order reconsidered in terms of Rule 6 (12). They filed bulky papers and complained bitterly that the provisional order was obtained without notice to them and that the application was not urgent. The court refused to entertain the application and postponed it *sine die*. Thereafter and on the same papers the respondents on 25 August 2009 attempted to anticipate the return day. It was arranged with the Deputy Judge President that the matter would be heard by me on 1 and 2 September 2009.

The curators have filed an interim and a further report in terms of the provisional order. I shall deal with what is relevant therein for the purposes of this judgment, after I have outlined the respondents' stance. The respondents have a number of arguments:

1. They say that if the applicant had given notice to them of the application on 7 July 2009, as he should have, they would have opposed the application and the order would not have been granted.
2. The say that the matter was not urgent and that the applicant was not entitled to employ other periods of time as those prescribed by the Rules, and should have served in terms of the Rules.

3. It is their contention that there was information available to the applicant, which if disclosed to the court, would have led to the application being dismissed.
4. There were other remedies available to the applicant such as to direct New Era in terms of section 22 of the LTI Act to remove the second defendant from the board of directors.
5. They deny that the corporate governance of New Era is not conducted properly.
6. They allege that they co-operated in every respect with the applicant and that whatever requirements he imposed they complied with.
7. One of their big concerns is that the curators cannot conduct the business of New Era as well as they can, and that the goodwill of the company diminishes as a result of the order.
8. The costs of the curators are high, and an unnecessary burden on the company.
9. They have produced evidence that if the curatorship is set aside New Era will gain business from the SOUTH AFRICAN FUNERAL PRACTITIONER'S ASSOCIATION ("SAFPA'*) of approximately R130 million per year.

In my view it is important to look at the whole course of events that led to the bringing of the urgent application. There is evidence that it was at all times a source of concern of the applicant exactly what the shareholding of Permit Group 2 was. The applicant by letter during 2004 granted permission to Invume to obtain 33% of the shares in Permit group. The acquisition of 66% of the shares by Neotel. I was contemplated. It is so that the respondents' attorney wrote to the applicant, during 2007, that Invume held a majority share of 57% but there is no indication that that was ever approved and there is certainly no shred of evidence of approval by the applicant of the acquisition of 100% of the shares.

It was evident to the applicant that the second respondent had encumbered the major asset of New Era by ceding it to Absa, holding out that he is the sole share holder of New Era. The available evidence indicated that there were very few directors' board meetings and minutes thereof. The financial statements of New Era for 2008 were in

draft form only. The auditors were not prepared to give unqualified statements. It is so that there was a cancellation of the cessions of the Liberty Life and Sanlam policies.

That was the position when the applicant received the inspection report on 29 June 2009. The most disturbing information evidencing itself was that it is impossible to get reliable information about Invume. There are until today not any audited financial statements. The information supplied the inspectors was that Invume is involved in a tax dispute with the Receiver of Revenue and that it is impossible for the auditors to certify the financial statements. What is more disturbing is that the dividends of R47 million ended up in the pockets of Invume. It was known that the second respondent, who seems to own Invume, did not have any problem earlier to indicate to Absa that he was the sole shareholder of New Era. Even if he owns all the shares in Permit Group 2 it was still a misrepresentation as it is common cause that Limdev at all relevant times owned 5% of the shares. Although dividends of R47 million were channelled to Invume the 5% shareholder was not paid its proportionate share of the dividends.

It is clear from the relevant legislation that the applicant has an important function to monitor the governance and assets of financial institutions for the protection and benefit of investors and in this case policy holders. In my view the applicant would have failed in his duty if he did not approach the court as early as possible after 29 June with an application like this one. It is clear that section 5 of the FI Act contemplates an *ex parte* application, hence the provision for anticipation of the return day. At least the applicant had reason to suspect the respondents of strange if not dishonest dealings. In the circumstances I reject the emotional attack against the bringing of the application, *ex parte* and the argument that it was not urgent at the time. Until the applicant had the inspection report it may have encountered opposition on the basis that the application is based on speculation.

It is difficult to understand why the respondents waited for six week before it attempted to have the order reconsidered or the return day anticipated. If they were prejudiced one would have expected an approach to this court within a week or two after the order was made. The position is that the applicant was concerned about the position of New Era but that it was doubtful if it could persuade a court to intervene. Moreover it afforded an opportunity to the respondents to meet with his requirements. When the inspection report became available it had a duty to act. I cannot fault the conduct of the applicant on that score.

In this connection it is important to bear in mind that the respondent accuse the applicant of *mala fides* and ask for punitive cost order against the applicant. I have invited Mr. Nowitz to indicate to me the ulterior motive which caused the applicant to act *mala fide*. None was proffered. The applicant says that he brings this application to safeguard the rights of policy holders. It is one of his duties. I am at a loss to perceive any *mala fide* conduct on the part of the applicant.

The submission that the applicant should have resorted to less drastic action is also without merit. The applicant afforded the respondent ample time to get their house in order. They failed to do so. When the inspection report became available the applicant was compelled to act. The action that he took was specifically provided for in the FI Act.

I am satisfied that the books of New Era indicate that the management did not apply proper corporate governance. To mention a few aspects: There were a mere six board meetings of the board of directors over a period of more than three years. There was never an annual general meeting. Dividends according to the articles of association have to be approved on an annual general meeting. The respondents' explanation of directors' meetings on a round robin basis cannot possibly rectify this serious defect in the governance of New Era. What is most disturbing in this connection is the payment of the dividends. The respondent refers to New Era's statements ending June 2007 and to an actuarial recommendation that a dividend of R44 million can be declared but that for sake of safety it should be restricted to R40 million. It indicates that the recommendation can even be interpreted to justify a dividend of as much as R48 million. The argument is that the dividends of R33 million and R7 million paid out during the 2007 tax year, as well as the dividend of R7 million paid out in the 2008 tax year fell within the recommendation.

There are a number of Haws in the argument. It is a fact that dividends of R 47 million were paid to 95% of the shareholders. 100% of the dividends would be an amount in excess of R49.35 million. That is higher than even the respondents' fanciful interpretation of the actuarial recommendation. It cannot be argued that R7 million was only paid out in the subsequent tax year because the uncertified statements for that year indicate a nett loss of R1 1,4 million which eliminates a suggestion that the last R7 million was paid out of profits of the 2008 tax year. Moreover the payment of dividends was never approved by an annual general meeting. As to the last R7 million there is absolutely no evidence of any resolution sanctioning the payment. More than R5 million of that R7 million was paid to the Receiver

of Revenue on behalf of Invune.

It is possible that New Era will draw more business if it is not under curatorship. Unfortunately it has only itself to blame if that business does not come its way. Bearing in mind that the 2008 tax year indicates a loss of over R11 million one wonders what the nett result of the extra R130 million turnover will be. Will it be administered on a profitable or a loss basis?

In my view the applicant's reservations about the shareholding is well founded. The respondents did not try to indicate who or what Invune is and what assets it has. It is clear that it regarded New Era as its asset with which it could do as it pleased by encumbering the policies and by paying dividends to itself forgetting about Limdev. It is clear that there must be a change in the shareholding of Permit Group 2 to the satisfaction of the applicant with the guidelines of section 26 in mind. The applicant must be satisfied that the shareholding is such that there will not be a situation where one shareholder can deal with the assets of the company to the detriment of other shareholders or without the approval of the other shareholders to the detriment of the policy holders. In my view the request for an extension of the curatorship for six months is in order, to enable the respondents to get their house in order.

The second, third and fourth respondent were not justified with their scathing attack upon the *bona fides* of the applicant. He is after all a public officer with a public duty which he has done to the best of his ability. The request for costs against him on the attorney and client scale was, to say the least, outrageous. As a mark of my disapproval I shall order them to pay the applicant's cost on that scale. New Era is not to be mulcted with those costs.

The applicant complied with the directions of service of the order of 7 July 2009, as contained therein.

The following order issues:

1. Paragraphs 1 - 10 of the order of 7 July 2009 are confirmed
2. Paragraphs 11 - 19 of the order of 7 July 2009 are set aside.
3. The matter is postponed to 2 March 2010 so that the respondents can comply with what has been suggested in this judgment.

4. The curators are to file a report on or before 16 February 2010 reporting to the court what the position in the company is and what steps had been taken to achieve an acceptable holding of shares in the company.
5. The second, third and fourth respondents are ordered, jointly and severally to pay all the applicant's costs of the application, to date, on the scale as between attorney and client.

W J HARTZENBERG

HEARD ON : 1 September 2009

ON BEHALF OF THE APPLICANT

Counsel : DAPREIS(SC) KKORF

Instructed by : ROTH WESSELS MOTLA CONRADIE INCORPORATED

ON BEHALF OF THE RESPONDENTS

Counsel : M NOWITZ
 E B CLAVIER

Instructed by : BARRY AARON & ASSOCIATES