

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

Case No: 58950/2021

In the matter between:

**THE PRUDENTIAL AUTHORITY**

Applicant

And:

**3SIXTY LIFE LIMITED**

First respondent

**NATIONAL UNION OF METAL WORKERS OF SOUTH  
AFRICA**

Second respondent

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**CONFIRMATORY REPLYING AFFIDAVIT**

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I, the undersigned

**KUBEN NAIDOO**

state under oath that:



1. I am a major male and currently a deputy governor of the South African Reserve Bank as well as the CEO of the Prudential Authority, the applicant in this matter ("the Authority").
2. Unless the context indicates otherwise, I have personal knowledge of the facts set out in this affidavit and they are, to the best of my belief, true and correct.
3. I have read the supplementary answering affidavit purportedly filed on behalf of the first respondent ("3Sixty").
4. I have also read the supplementary replying affidavit of the Authority and confirm the contents therein which are set out below to be true and correct.
5. Specifically, the facts pertaining to the placing of 3Sixty under curatorship was a decision that I had to ultimately take as the CEO of the Authority.
6. Some of the themes that are expressed by 3Sixty are that:
  - 6.1. the curatorship application was made in haste;
  - 6.2. the Authority has acted in bad faith or with malice; and
  - 6.3. the curatorship application is primarily focused on capital or the lack thereof;
7. At the outset let me say this: the issue of taking regulatory action against 3Sixty was considered on three occasions as will be detailed below. Only on the third occasion was the recommendation made to apply to the court for curatorship. There is therefore no basis for the allegations of haste or even mala fides. If we were so intent on placing 3Sixty under curatorship, we would have done so at the earliest opportunity.
8. I explain this below in more detail.

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9. The Financial Sector Regulation Act. 9 of 2017 (“FSR”) establishes the Authority.
10. Section 34 (4) of the FSR states that *“when performing its functions, the Prudential Authority must —  
  
“take into account the need for a primarily pre-emptive, outcomes focused and risk-based approach, and prioritise the use of its resources in accordance with the significance of risks to the achievement of its objective.”*
11. Section 34(5) states that the Prudential Authority must perform its functions without fear, favour or prejudice.
12. The application to put 3Sixty into curatorship was ultimately aimed at protecting policy holders and the integrity of the financial system. It was a decision not made in haste or with malice. It was a rational decision based on concerns from almost three years of intensive supervision of the entity.
13. The issue regarding capital is but one of the concerns. This however is a symptom, following years of concern about governance, the risk culture and the lack of prudence in the entity.
14. The Authority’s forward-looking approach to supervision highlighted weaknesses in the governance of 3Sixty. In most cases, speaking generally, weak governance leads to capital and liquidity stresses down the line. Poor governance and weak management are almost always leading indicators of capital and liquidity stresses.
15. This is precisely what has happened at 3Sixty.
16. 3Sixty has been on the Authority’s watch list for almost three years. The reason for this includes prudential and market conduct related matters. At its heart, these are matters initially related to governance failures.



17. Being on the watch list means that:
  - 17.1. the entity is under intensive supervision;
  - 17.2. as CEO of the Prudential Authority, I am updated monthly regarding developments in the entity;
  - 17.3. the governors of the South African Reserve Bank ("SARB") sitting as the board of the Authority, in the form of the Prudential Committee, chaired by the governor of the SARB, receive monthly updates on the entity.
  - 17.4. I have personally attended meetings with members of 3Sixty's board, management and trade union officials to raise and address concerns with 3Sixty's governance and sustainability.
18. Following significant concerns over the 3sixty's governance, the Authority instituted an independent investigation into the affairs of 3Sixty. Deloitte were commissioned to conduct the investigation.
19. In summary, the findings of Deloitte showed that there were significant gaps in governance and the risk culture and that there was a blurring of the lines of expenditures between entities in the group and between the group and Numsa Investment Company and Numsa.
20. Over the course of the past two years, the Authority sought to get 3Sixty to attend to the recommendations in the Deloitte report. There was some progress in doing so, though this progress was slow.
21. The Authority works closely with the Financial Sector Conduct Authority ("FSCA"). There were significant concerns at the FSCA about 3Sixty's market conduct practices.

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22. A combination of poor management and Covid-19 severely impacted 3Sixty's financial sustainability.
23. The Authority understood that Covid-19 would have a significant detrimental effect on many insurers, especially insurers that were reliant on a narrow business model. In other words, on firms that lacked a diverse income stream. There were several smaller life insurers that saw their Solvency Capital Ratios (SCRs) decline to below the required regulatory minimum. In each case, the supervisor would work closely with the entity to 'nurse the entity back to adequate financial health'.
24. With 3Sixty too, the frontline supervision team at the Authority attempted to work with it to remedy the weak capital and solvency position. Following the third wave of Covid-19 infections (in about the middle of 2021), the Authority was of the view that 3Sixty's solvency position had deteriorated, it was in a critical state and that it required more capital to remain sustainable.
25. It was not just that its SCR coverage ratio had dropped below the minimum requirement, but that there was a legitimate concern that the firm could become insolvent. It's Minimum Capital Requirements Coverage Ratio ("MCR") was dropping to a point where it became negative and was projected to drop further.
26. The Authority's first concern is the policy holders, not shareholders or other internal stakeholders. We were concerned that if we do not act, we could jeopardise the welfare of policy holders.
27. The SARB has a committee called the Prudential Authority Regulatory Action Committee (PARAC). PARAC is chaired by different deputy governors (a person other than the CEO of the Authority) of SARB. PARAC makes recommendations to the CEO of the Authority on all regulatory or enforcement actions under various pieces of



legislation including the FIC Act, the Banks Act, Mutual Banks Act and the Insurance Act.

28. On three occasions (6 October 2021, 4 November 2021 and 8 December 2021), the frontline supervision team supervising 3Sixty approached PARAC with the view of taking firmer regulatory action to compel the entity to raise its level of capital.
29. 3Sixty was given several deadlines to inject additional capital. After missing all of the deadlines, the entity came up with the idea of transferring some of the properties in their group to recapitalise the business.
30. The Authority's founding affidavit and subsequent affidavits deal in detail with why the Authority did not think that this was a sustainable solution.
31. I confirm the undesirability of this plan. In short:

31.1. Firstly, the information provided to the Authority in early December 2021 lacked sufficient detail to reasonably satisfy the Authority of the viability thereof. As a matter of fact, the structure of the proposed disposal agreement was not made known to the Authority until after the provisional curatorship order was granted on 21 December 2021.

31.2. Secondly, there was considerable uncertainty as to the value and the degree of encumbrance of the properties;

Thirdly, and contrary to Mr Msibi's view that a large portion of the properties could be "easily" sold in about 3 to 6 months, the Authority was concerned that the time to sell the properties in the present market would be lengthy, compromising any attempt to protect policy holders were something to go wrong. A period of 3 to 6 months, especially in relation to solvency concerns, can by no stretch of the imagination be seen as a short period of time.

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32. Even if this property plan were a viable plan, 3Sixty had already missed numerous deadlines to recapitalise and the previous plans to recapitalise it, did not come to fruition.
33. In late September 2021, the Authority became concerned at the liquidity position of 3Sixty. It also came to our attention (via the FSCA) that 3Sixty was slow to pay certain claims.
34. Once an insurance company becomes illiquid and its capital position is very weak, it is only a matter of time before the insurance company would collapse.
35. One of the more difficult judgements for a regulator is when to act to put a firm into curatorship. Too early and the shareholders complain of prejudice, too late and policy holders lose out. It is our legal mandate to prioritise the policy holders (or depositors in the case of a bank) in our decision-making.
36. Only on the third occasion (which was on 8 December 2021 and after the previous two occasions on 6 October 2021 and 4 November 2021), or third visit to PARAC, did PARAC resolve to recommend to the CEO of the Authority to apply to the courts for curatorship on an ex parte basis. I consulted with the other governors of the SARB before approving the commencement of the regulatory action. It was decided to approach the court on an urgent and ex parte basis to put 3Sixty into curatorship to protect the interests of policyholders as a last resort, only once all other avenues were exhausted. It was not a decision made by the frontline supervisors but a decision made after following a rigorous governance process.
37. The role of the court is not to determine whether the regulator acted too early or too late. The court should assess whether the regulator had reasonable ground to put 3Sixty into curatorship.

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38. Curatorship is designed to save a company if it can be saved. We have several examples in South Africa of successful curatorships. These include Resolution Life that were placed under curatorship in 2012 and African Bank Limited which was placed under curatorship in 2014. Both of these entities are no longer under curatorship and are still operating in the financial services sector in South Africa.
39. Contrary to the supplementary answering affidavit by Mr Msibi, there is no evidence that the Authority has acted in bad faith or mala fides. There is no evidence that the Authority acted in a prejudicial manner. Neither did it act in a hasty manner. The Authority gave 3Sixty ample opportunities to remedy its solvency position for over a year.
40. Let us assume that the court decides that the Authority should not have put 3Sixty into curatorship. If the firm then collapses, what legal remedy will policy holders have in this regard? It is our legislative mandate to protect policy holders. We do not always succeed. We acknowledge that sometimes we fail to protect all policy holders to the full extent.
41. We acted rationally and fairly. We gave 3Sixty several years to remedy its governance shortcomings. We gave 3Sixty many months to inject the required capital. The board in a regulated sector have obligations under the law and to their policy holders. The board and management of 3Sixty came up short in this regard.
42. In the circumstances, it cannot be said that the Authority acted with haste, when the decision to take regulatory action was deferred on two occasions and when 3Sixty was given every opportunity for more than a year to resolve its liquidity and solvency challenges and to recapitalise.

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43. It cannot be that the Authority's only concern was solvency and liquidity, when this was a symptom of systematic governance failures over a period of time – such time preceding Covid-19.

44. In the circumstances, I submit that the Rule Nisi ought to be confirmed, and that the various challenges identified be resolved under the guide and eye of a curator.

  
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**DEPONENT**

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at ROSEBANK on this 14<sup>th</sup> day of MARCH 2022, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

  
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**COMMISSIONER OF OATHS**

Full names:

Address:

Capacity:

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The Central, 96 Rivonia Road  
Sandton, Johannesburg, 2196

Commissioner of Oaths  
**Ex-Officio / Practising Attorney R.S.A.**