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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THE PRUDENTIAL AUTHORITY'S WRITTEN ARGUMENT

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INTRODUCTION

1 On 21 December 2021, this Court, at the instance of the Prudential Authority ("Authority"), and acting in terms of section 54(1) of the Insurance Act 18 of 2017 ("the Insurance Act") read with section 5(1) of the Financial Institutions Protection of Funds Act 28 of 2001 ("FIA"):[1]

1.1 placed the business of 3Sixty Life Limited ("3Sixty") under provisional curatorship;[2] and

1.2 appointed Ms. Yashoda Ram ("the curator" or "Ms Ram") as the provisional curator and granted extensive powers to her.[3]

2 In granting the aforesaid provisional order, the Court further called upon 3Sixty and any other interested parties to show cause, on the return date of 12 April 2022, why the provisional order should not be made final.[4]

3 In terms of the provisional order, amongst other things 3Sixty's board of directors and management have been provisionally divested of all their powers and authority in relation to 3Sixty's affairs and the same vests in the provisional curator.[5]

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[1] P007-1 to 7 being the interim order.

[2] P007-2 par 3 of the interim order.

[3] P007-2 par 4 of the interim order.

[4] P007-5 par 8 of the interim order.

[5] P007-2 par 5 of the interim order.

4 3Sixty has through its board of directors purportedly anticipated the return date and enrolled the matter for hearing in the urgent court initially on 1 February 2022. NUMSA also applied for leave to join the proceedings in support of opposition to the curatorship of 3Sixty.

5 The matter stood down to 3 February 2022 at which hearing her ladyship Justice Dippenaar made an order to the effect that the parties exchange supplementary affidavits and heads of argument on truncated time periods and the matter be set down for special allocation on 22 March 2022.[6]

6 At the outset it must be noted that 3Sixty's purported deponent (and the board that allegedly authorized him) has no authority to act for or on behalf of 3Sixty. This is because the board of 3Sixty have been divested of their powers in terms of the curatorship. Accordingly, there is no competent opposition by 3Sixty. This point was pertinently raised in the Authority's replying affidavit[7] and is consistent with binding authority.[8]

7 Additionally, the Authority opposes NUMSA's application for leave to intervene.

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[6] P007-8 to 9.

[7] P019-12, RA, at par 43.

[8] See, Registrar of Medical schemes v Keyhealth Medical Scheme and others, unreported judgment of Kollapen J, dated 15 March 2021 at par [18]; Ex parte Executive Officer of the Financial Services Board ; In re Joint Municipal Pension Fund [2003] 4 All SA 603 (T) at paras [9] – [11].

8 We submit that the Authority has demonstrated, for a number of reasons, some of which are common cause, that it is desirable for 3Sixty to remain under curatorship and for the interim order to be confirmed.

9 While the papers in this matter have become uncontrollably proliferated, and it is easy to get caught up in the range of issues that are pleaded, 3Sixty cannot escape uncontested facts that:

9.1 it has over a period of over a year failed to maintain a financially sound condition as required by section 36 of the Insurance Act and is in serious financial trouble, so much so that it requires a bail out from its holding company (Doves);

9.2 in breach of sections 45 and 46 of the Insurance Act, it has still not submitted audited financial statements for the 2020 financial year;

9.3 its former CEO is accused of embezzling R14 million from the business and no criminal action was taken until very recently[9];

9.4 it used policy holder funds to pay for the birthday party of the general secretary of NUMSA and a laptop was purchased by 3Sixty to be used by his daughter[10];

[9] P010-64 AA, par 155.4.1.

[10] P019-53 AA, par 301.

9.5 its solvency position [minimum capital requirement (“MCR”) and solvency capital requirement (“SCR”)] were both below the required threshold for a considerable period of time and that it was not able to effect a recapitalization plan, despite several indulgences granted by the Authority to it[11];

9.6 it has not, in terms of section 36(6)–(10) of the Insurance Act, submitted a recapitalization strategy which has met with the approval of the Authority; and,

9.7 even on its own interpretation of its internal recapitalization plan, its SCR will still be below the minimum requirement.

10 On these common cause facts, we submit that it cannot be seriously contended that 3Sixty has shown good cause why the provisional order should be set aside and that it is not desirable for 3Sixty to remain under curatorship and for the rule nisi to be confirmed.

11 Instead of attempting to persuade the Authority that it will comply with statute, and instead of coming to this Court to show the Court that the Authority is now satisfied as to its compliance, 3Sixty has adopted a confrontational approach, where it seeks to convince the Court that the Authority is wrong and 3Sixty is right.

[11] See for example, 003-34 par 61 and 019-19 par 88.

12 We will submit in argument that the approach adopted by 3Sixty does not demonstrate good cause. It does no more than show that there is disagreement between itself and the Authority.

13 As we shall demonstrate below, that is not a ground for not confirming the provisional order.

LACK OF AUTHORITY

14 On 1 February 2022, the Authority delivered a notice in terms of Rule 7 disputing the authority of 3Sixty and Numsa's legal representatives to represent them and to file affidavits in this matter[12].

15 3Sixty's attorneys delivered a power of attorney purporting to authorize them to represent them in this matter[13]. The said power of attorney purports to have been issued pursuant to a resolution passed by 3Sixty's board of directors.

16 3Sixty's board of directors has been provisionally divested of its powers and authority to manage any of 3Sixty's affairs, including passing resolutions to authorize attorneys to act on its behalf in this matter. The provisional curator is the only person who is empowered to act on behalf

[12] P023-1 to 4.

[13] P025-1 to 5.

of 3Sixty and to pass resolutions relating to any of 3Sixty's affairs, including a resolution to participate in litigation such as the present.

17 In relevant parts, the provisional order provides that:[14]

> "*3. 3Sixty Life Limited's (3Sixty's) business, is placed under provisional curatorship in accordance with the provisions of this order.*
>
> *4. Yashoda Ram is provisionally appointed as curator of 3Sixty, and is absolved from furnishing security.*
>
> *5. Any other person (including but not limited to directors) now vested with management of 3Sixty, be and is hereby provisionally divested thereof.*" (emphasis added)

18 Moreover, the provisional curator is:[15]

18.1 authorized to take immediate control of, manage and investigate 3Sixty's business and to do so only subject to the control of the Prudential Authority ("the Authority");

18.2 vested with all executive powers which would ordinarily be vested in, and exercised by, the board of directors, members or 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;

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[14] P007-3 par 3 – 5.of interim order.

[15] P007-2 and 4, par 7.1, 7.2 and 7.10 of the interim order.

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

19 This case is different from one where a company is simply placed under provisional liquidation without the order expressly divesting the board of directors of the powers to litigate. In this case, the board of directors has been expressly divested of its powers to litigate on behalf of 3Sixty. That power now vests with the provisional curator. For this reason, there cannot be any talk of 3Sixty's board of directors having residual powers to litigate or to authorize litigation on its behalf, as it is sometimes said in liquidation cases, when that power has been expressly vested upon the provisional curator by a Court order (which is not usually the case when a company is liquidated).

20 The effect of the provisional order is that 3Sixty's board of directors has been provisionally divested of all of its powers, including the power to authorize the institution and opposition of "any litigation brought against 3Sixty[16]" such as this application. 3Sixty's board of directors cannot act as a board because it has been divested of powers to do so but its directors would be entitled personally to apply for leave to intervene to oppose confirmation of the provisional order if they have the necessary direct and substantial interest.

[16] P007-4 par 7.10.

21 In **Registrar of Medical Schemes v Keyhealth Medical Scheme and others**[17], the Gauteng Division placed KeyHealth Medical Scheme under provisional curatorship and vested the provisional curator with the same powers as those vested upon the provisional curator in this case. The board of trustees of KeyHealth then sought leave to intervene in its capacity as such to oppose confirmation of the provisional curatorship order. This was opposed and the Court, per Kollapen J, said the following, which is equally applicable here:

> "[*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 authorizes 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*." (emphasis added).

22 Justice Kollapen's decision in **Keyhealth** is binding on this Honourable Court, and this Honourable Court may only depart from it where it believes that the decision was clearly wrong; or that this matter is distinguishable.[18] Even then, this Court may only depart from it after anxious consideration.

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[17] 2020/35478, 25 March 2021.

[18] **Camps Bay Ratepayers' and Residents' Association v Harrison** 2011 (4) SA 42 (CC) at par 28; see also Patmar Explorations (Pty) Ltd and others v Limpopo Development Tribunal and others 2018 (4) SA 107 (SCA) at par [7] – [8].

23 As has already been said above, the curator in **Keyhealth** was given the same powers as the provisional curator in this matter. The two matters are not distinguishable.

24 There can be no contention that the decision in **KeyHealth** is clearly wrong. This Court cannot be satisfied that Mr Msibi or the board are duly authorized to act on behalf of 3Sixty. Holding otherwise would mean that there are now two centers of power at 3Sixty – one led by the provisional curator and the other led by 3Sixty's board of directors and that would be inconsistent with the terms of the provisional order. Such an interpretation of the provisional order would frustrate its purpose. **KeyHealth** was mindful of this in its *ratio* when considering the question in that matter.

25 In the circumstances, 3Sixty is not properly before this Court and there is no competent opposition by it.

26 If Mr Msibi or any other individual wanted to intervene in these proceedings in their personal capacities, they should have first brought an intervention application and sought the leave of the Court to intervene in their personally capacity. *Alternatively*, they ought to have made representations to the curator to oppose on 3Sixty's behalf. They have not done so. They are not properly before this Honourable Court. Their papers and opposition must be disregarded.

27 In the Authority's replying and supplementary papers it refers to "Mr Msibi" and not "3Sixty" as the opposing respondent party. This is not

done erroneously but reflective of the position that 3Sixty is not properly before this Court in its opposition.

28 Only to the extent that the board of 3Sixty is deemed to have authority, do these submissions deal with the merits of its opposition to curatorship. Only to that extent is “3Sixty” referred to as the opposing party rather than “Mr Msibi”.

NUMSA’S INTERVENTION

29 Numsa seeks leave to intervene as the second respondent in this application. Numsa, however, has not made out a proper case to be granted leave to intervene and such leave should be refused.

30 Numsa does not have a direct and substantial interest in the order which is sought to be confirmed in this application to justify it being granted leave to intervene. Numsa is not a shareholder of 3Sixty and the order which is sought to be confirmed will not in any way adversely affect it. For this reason, Numsa does not have to be heard before a decision is made in this matter.

31 In its founding affidavit, Numsa says that it “*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*” because 3Sixty is “*ultimately owned for the benefit of members of NUMSA through the NUMSA Investment*

Trust and NFS accounts for 26% of 3Sixty Life's policyholders in terms of premium income."[19]

32 It begs the question why the trustees of the Numsa Investment Trust have elected to stand on the sideline while Numsa takes up the cudgels on their behalf.

33 The facts alleged by NUMSA do not give Numsa the necessary direct and substantial interest in the order which is sought to be confirmed to justify it being granted leave to intervene. If it did, the next person to be granted leave to intervene would be someone who accounts for 30% of 3Sixty's premium income.

34 It is only if the confirmation of the provisional order would adversely affect Numsa that it would have been entitled to be granted leave to intervene. This is not so.

35 In **Amalgamated Engineering Union v Minister of Labour**[20] and in the context of a joinder of parties, the Court made it clear that it is only if the judgment or order sought will prejudicially affect a person that such a person must be a party to the proceedings.

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[19] Pp015-9 to 10, AA, par 26.

[20] 1949 (3) SA 637 (A).

36 In **Gordon v Department of Health**[21], the Court said that "if the order or judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interest of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined." In this case, the appointment of a curator will not prejudice the interests of Numsa and its members.

37 In **SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others**[22], the Constitutional Court said that permission to intervene must be granted if the applicant "has some right which is affected by the order issued." The Court said:

> "*[9] … What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought …*
>
> *[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a predecision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation*."

38 Numsa's voice is not going to be silenced by the confirmation of the provisional order. Numsa will continue to be entitled to speak on behalf of its members and its voice will be heard.

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[21] **2009 (1) BCLR 44 (SCA)** at page 50.

[22] 2017 (5) SA 1 (CC).

39 The order that is sought to be confirmed in this application is to place 3Sixty in final curatorship. That order and its implementation will not in any way prejudice the interests of Numsa and its members.

40 For the reasons stated above, Numsa's application for leave to intervene ought to be dismissed with costs.

41 Even if Numsa were granted leave to intervene, its opposition is of no value to these proceedings.

42 This is because Numsa's opposition to the final curatorship is premised on two grounds, namely:

42.1 That there is no risk to policy holders, an issue that does not fall within its knowledge and expertise;[23] and

42.2 That curatorship would cause instability and uncertainty[24].

43 The extent of Numsa's answering affidavit is then to demonstrate that claims have been paid.

44 However, NUMSA's deponent, Mr Jim, concedes that he has no knowledge of 3Sixty's financial position.[25] In fact it is common cause that 3Sixty was not meeting the minimum SCR and MCR, which Mr Jim is

[23] Pp015-15 to 24, AA, par 47 to 74.

[24] P015-24, AA par 76.

[25] P015-15, AA, par 47.

unable to dispute. He is unable to dispute that 3Sixty failed to submit audited financial statements and is guilty of other governance failures. Mr Jim is also unable to dispute that 3Sixty has failed to implement any recapitalization plan during 2021 despite numerous opportunities to do so.

45 Curiously, as “the voice of the workers” he is silent about, and fails to disclose that policy holder’s money was used to pay for his birthday party and for a laptop for his daughter. [26]

46 Therefore, even if Numsa’s averments were to be accepted, having regard to Mr Jim’s lack of knowledge of 3Sixty’s financial position and governance failures, Numsa’s opposition would not affect the desirability of the curatorship, as several grounds of concern are not addressed or he is unable to address them due to his obvious lack of knowledge.

47 Having dispensed with both 3Sixty’s authority as well as Numsa’s intervention and superficial opposition, we will now address the reasons why we submit the Authority has demonstrated that the *rule nisi* ought to be confirmed.

[26] P019-53, RA par 301.

THE REGULATORY FRAMEWORK AND POWERS OF THE AUTHORITY

48 3Sixty is a life insurance company which sells life insurance and funeral products to groups and individuals.[27] It insures its policy holders and their beneficiaries against the risk of loss and it is in law obliged to pay them in the event of a loss.

49 3Sixty is regulated in terms of, amongst others, the Insurance Act and the Financial Sector Regulation Act 9 of 2017 ("FSRA").[28]

50 The nature of 3Sixty's business is such that it is in law required to meet certain prescribed minimum capital and solvency requirements (i.e MCR and SCR) and the Prudential Authority is obliged to ensure that there is compliance with such requirements.[29]

51 Section 36(1) of the Insurance Act expressly states that an insurer **must at all times** maintain its business in a financially sound condition, by holding eligible own funds that are at least equal to the minimum capital requirement (MCR) or solvency capital requirement (SCR), as prescribed, whichever is the greater.

52 If there is no compliance with the prescribed minimum capital and solvency requirements, the Authority is entitled to take the prescribed

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[27] P010-5 AA par 2; 003-2 FA par 5.

[28] P003-2 FA par 6.

[29] P003-2, FA par 6 and 7.2.

regulatory steps available to it to protect the interests of policyholders. These are set out in sections 39 and 62 of the Insurance Act.

53 In **Prudential Authority v Bophelo Life Insurance Company Ltd and Others**, [30] the Court aptly summarized the regulatory framework and powers of the Authority in paragraphs [39] – [43] of its judgment as follows:

> "*[39] Chapter 9 of the Insurance Act sets out various steps that may be taken by the Authority, in addition to other action it is empowered to take, if an insurer does not comply with an approved plan, scheme or strategy or if it submits a plan, scheme or strategy that the authority considers to be inadequate. The Authority may appoint a statutory manager, a curator (in terms of section 5 of the [Protection of Funds act]), place the insurer in business rescue or apply for its winding up (in terms of the Companies Act).*
>
> *[40] Section 54(2) sets out the duties and powers of the curator, in addition to any which may be given to it by the court, and subject to section 5 of the [Protection of Funds Act]. Amongst others the curator must inform the Authority if the curator deems it necessary to apply for the winding up of the insurer. Section 54(5) provides that an insurer may not be wound up while under curatorship unless the curator applies for the winding up.*
>
> *[41] Section 5 of the Protection of Funds Act provides for the Authority to apply to Court for the appointment of a curator. It empowers the court to appoint the curator provisionally and to grant a rule nisi. In terms of section 5(4), the court may confirm the appointment of the curator if it is "satisfied that it is desirable to do so". Section 5(9) permits the court to cancel the appointment of the curator at any time on good cause shown.*
>
> *[42] The question which of the Chapter 9 remedies to apply for appears to be entirely in the discretion of the Authority. The decision must be informed by what the consequences of each*

[30] [2020] ZAGPJHC 7 (30 November 2020).

option are, and the powers of the person appointed as manager, curator, business rescue practitioner or liquidator.

[43] The powers of the statutory manager, curator and business rescue practitioner have some overlaps. The purpose of the statutory manager appears to be more geared to preserving the business and advising on steps to be taken to make the business sound. The curator's purpose is much broader, as the curator has the powers to take almost any decision. It is the powers set out in the court order that are most definitive of what the curator's purpose may be. The purpose of the business rescue practitioner is the same as in any other company, as is that of a liquidator."

(emphasis added)

54 We submit that the Authority has clearly acted in accordance with its statutory powers in this case.

PRUDENTIAL AUTHORITY'S PREROGATIVE TO APPROVE RECAPITALIZATION PLANS

55 Section 39 of the Insurance Act deals with a situation where an insurer has failed to maintain a financially sound condition. Sections 39(6) – (10) gives the Authority the power to require such an insurer to submit a recapitalization plan to the Authority for approval.

56 It will be seen from subsection (6) and (8) that it is the sole prerogative of the Authority to request that a recapitalization plan be submitted by an insurer.

57 An insurer does not approve its own recapitalization plan, and neither does the curator, who, in terms of section 5 of the FIA, merely steps into the shoes of the board.

58 We mention this point because we suspect that much of 3Sixty's argument will center around the fact that the board of 3Sixty and belatedly the provisional curator, believe in the recapitalization plan submitted on behalf of 3Sixty to the authority.

59 We submit that it is irrelevant whether the board and the curator believe in the recapitalization plan. It is the Authority that must be satisfied about the viability of the plan and it is the Authority that must approve it.

60 We submit further that unlike the Authority, which has all actuarial, accounting, tax, property valuation expertise in addition to its experience, this Court, with respect, is not possessed of those resources and cannot, on the papers, determine whether the recapitalization plan is viable or not.

61 That is the matter the Legislature has left to the Authority.

WHAT IS THE APPLICABLE LEGAL TEST AT THIS STAGE OF THE PROCEEDINGS?

62 Section 5(4) of the FIA answers this question in no uncertain terms. It provides 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*" (emphasis added)

63 This is contrasted with section 5(2)(a) of the FIA which requires good cause to be shown when applying for the provisional order.

64 In **Executive Officer, Financial Services Board v Dynamic Wealth And Others**[31] the SCA interpreted section 5 as follows:

> "[*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, or 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. ….*
>
> *[5] …*
>
> *[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. Take an institution that is unlicensed and not qualified to be licensed, because those responsible for its management are disqualified from obtaining a licence. It can hardly matter that it demonstrates that the funds invested with it are properly segregated and identified, invested in accordance with the mandates given by investors and entirely safe. 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 in order to safeguard the interests of investors to appoint a curator. In argument the example was put of the Registrar being furnished with an adverse report by inspectors where management disputes the factual contents and conclusions of that report. Both counsel accepted, and rightly so in my view, that it might be proper for a curator to be appointed notwithstanding the dispute. The existence of an adverse report by inspectors after conducting an inspection under the Inspection Act may of itself provide legitimate grounds for concern and found an application for an interim curatorship, even if its conclusions are disputed. When dealing with the*

[31] 2012 (1) SA 453 (SCA).

investment of the funds of the public, where considerable hardship will be suffered by ordinary people if things go wrong, 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." (emphasis added)

65 What is clear from the SCA's interpretation is that factual disputes are not a barrier to granting curatorship. What must be shown is:

65.1 the desirability of curatorship;

65.2 that the Authority's concerns are legitimate; and

65.3 that the appointment of a curator will assist in resolving these concerns.

66 The SCA in **Barnard And Others v Registrar of Medical Schemes**[32] applied the test as follows:

> *"[47] It has to be reiterated that the interest of the beneficiaries of the scheme is paramount when considering whether a curator should be appointed to the scheme. And it must be borne in mind that the aspects raised in the report of the provisional curator do not only paint an alarming picture with regard to the conduct of the business of the scheme by the BOT, but show that there are various matters that should be investigated without delay. The only practical solution that presents itself is the appointment of a curator to the scheme.*
>
> *[48] In view of the above, I am satisfied that there were sufficient grounds for the appointment of a curator to the scheme, both at the hearing of the ex parte application and when the rule nisi*

[32] 2015 (3) SA 204 (SCA).

was confirmed. With regard to the ex parte procedure followed by the registrar in launching the application, it should be borne in mind that s 5(1) of the FI Act permits this course to be followed. In any event, no prejudice resulted to the trustees who had more than ample opportunity, which they utilised, to file opposing affidavits.

[49] I should add that I have paid particular attention to the exchange of correspondence to which we have been referred by appellants' counsel, but my reading thereof rather strengthens the view that the BOT was not only unwilling to allow a proper investigation of the affairs of the scheme, but unjustifiably regarded the attempts of the council in relation thereto with suspicion and distrust.

[50] I therefore conclude that, in view of the material irregularities detailed above, it is in the interest of the beneficiaries of the scheme and desirable to appoint a curator to the scheme. The registrar has also shown that he has objective grounds to believe that it is desirable to appoint a curator. In the result Murphy J correctly exercised his discretion in confirming the rule nisi and granting a final order of curatorship." (emphasis added)

PRUDENTIAL AUTHORITY'S GROUNDS FOR APPLYING FOR CURATORSHIP

67 The Authority initially brought the application for curatorship on the following grounds:

67.1 3Sixty's management accounts, the accuracy of which the Authority doubts, reveal that 3Sixty is insolvent;[33]

[33] P003-10 FA par 33.1 read with 003-2 FA par 7.2. The issue of the accuracy of the management accounts is conveniently avoided in the answering affidavit, see 010-57 AA at par 142 in response to AD PARAGRAPHS 7 - 9.

67.2 There were liquidity challenges at 3Sixty and 3Sixty was unable to meet the requisite solvency requirements. Pursuant to this 3Sixty submitted an internal recapitalization plan which the Authority does not have confidence will resolve 3Sixty's challenges;[34]

67.3 As at the date of the application (which breach continued up to the return date as the well as the date of these submissions) 3Sixty's audited financial statements for the 2020 financial year had not been finalized (as well as reportable irregularities being raised by the independent auditors);[35]

67.4 There has been a high executive turnover at 3Sixty;[36]

67.5 Complaints about 3Sixty's inability or unwillingness to pay claims;[37]

68 Additionally through the course of these proceedings several governance failures have been identified[38].

[34] Pp003-10 FA, par 33.1 and 33.2 and p003-28, par 35.41 to 35.41.3.

[35] P003-11 FA par 33.3; P052-113 Auditors supplementary affidavit.

[36] P003-12 FA par 33.4.

[37] P003-12 FA par 33.5.

[38] See for example, P019-53, RA par 297.

69 The Authority accepts that these are motion proceedings and that ordinarily a motion court is not concerned in resolving *bona fide* material disputes of fact.[39]

70 However, as stated at the outset in the introductory submissions, it is common cause that 3Sixty has still not submitted audited financial statements for the 2020 financial year; that its former CEO allegedly embezzled R14 million and no criminal charges were laid until very recently; that 3Sixty has used policy holder funds to pay for Mr Jim's birthday party and that a laptop was purchased to be used by his daughter; that its minimum solvency and capital requirements were both below the required threshold for a considerable period of time; that it was not able to effect a recapitalization plan despite several opportunities to do so, and that, even on its own interpretation of its internal recapitalization plan, its SCR will still be below the minimum requirement.

71 Additionally, in relation to whether a curator would resolve the Authority's concerns, in the founding affidavit, the Authority says the following:[40]

> *"Although 3Sixty has so far proved unable to procure the funding it requires to restore its financial position, it is possible that appropriate funding arrangements could yet be made.*
>
> *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.*

[39] National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at par [26].

[40] Pp003-29 to 30, FA par 41 to 41.4.

Curatorship may therefore serve to forestall 3Sixty's ultimate liquidation (which at this stage is a real risk). The Authority wishes to avoid liquidation, the risk of value destruction and prejudice to policyholders that a liquidation entails, unless less restrictive measures do not have the desired effect.

Additionally, a curator will be able to properly and independently investigate 3Sixty's affairs, its past transactions and expenditure and its solvency and minimum capital requirements. This will facilitate an objective and comprehensive analysis of 3Sixty's affairs. It may also reveal other avenues of recourse and potential recovery for the business."

72 In its answering affidavit, 3Sixty does not respond to this. While it speaks of the undesirability of curatorship, these specific averments are not meaningfully challenged and not directly responded to. Respectfully, this Court must accept the above contentions to be correct.

73 It is trite that allegations in the founding affidavit, which are not denied in the answering affidavit, are taken to be admitted and common cause.[41]

74 In relation to the internal recapitalization plan, there is a divergence of views amongst the parties and their experts. The Authority has gone to great lengths, under oath, to explain its concerns.[42] As stated by the SCA in **Dynamic Wealth**, it is not for the Authority to resolve the factual disputes before this Court. It simply needs to show that its concerns are legitimate. It is the one that needs to approve the internal recapitalization

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[41] See, Swartz v K and Another (A5036/2021; 2015/8456) [2021] ZAGPJHC 816 (15 December 2021) at par [19]; Wightman t/a JW Construction v Headfour (Pty) Ltd and Another [2008] ZASCA 6; 2008 (3) SA 371 (SCA) ([2008] 2 All SA 512) par 12 and 13; Naidoo and another v Matlala NO and others 2012 (1) SA 143 (GNP) at p150 – 151.

[42] P052-10 – 19 Supp affidavit par 15– 49; P052-55 (BDO Actuarial Opinion).

plan.[43] It sets out a basis for not being satisfied. It exercises a discretion in this regard and there is no basis for concluding that the discretion was not dishonestly exercised. It must therefore be accepted that the Authority's concerns on this basis are legitimate.

75 Further, where there are material disputes of fact, largely on the viability of the recapitalization plan, it is submitted that notwithstanding this dispute regarding the said plan, based on the test and *dicta* set out in **Dynamic Wealth** above, that is sufficient, to confirm the rule nisi.

76 Having set out above the Authority's case as to why curatorship should be confirmed, we now turn to the details of the different grounds relied on by the Authority and which have come to light are set out below under separate headings.

Failure to submit audited financial statements

77 Section 6 of the FSRA reads as follows:

> ***"6 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."*

78 The board of 3Sixty thus had a statutory obligation to ensure that 3Sixty complies with its statutory obligations, including maintaining financial

[43] Section 39(5), (6) of the Insurance Act.

soundness at all times and submitting audited financial statements to the Authority.

79 3Sixty is required, in terms of sections 46 and 47 of the Insurance Act, to prepare annual financial statements in accordance with the Companies Act, 2008 and the International Financial Reporting Standards (IFRS), cause them to be audited and submit them to the Authority.[44]

80 It is common cause that 3Sixty has not submitted audited financial statements for the financial year ending December 2020.[45] Its board has therefore failed to fulfil its obligations in terms of section 6 of the FSRA.

81 The reasons for failing to submit audited financial statements are disputed. 3Sixty blames its auditor SNG and accuses the latter of being hostile to it,[46] while SNG blames 3Sixty management, going so far as to accuse it of trying to dictate to SNG regarding how it should perform its audit function. [47]

82 We point out that a board impeding the auditors from performing their duties is in serious breach of a statute. Failure to submit audited financial statements over a long period of time is a serious breach of statute.

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[44] P003-9 FA par 28.

[45] P010-63, AA par 155.2 and P010-20, par 39 to 41.

[46] P010-21 AA par 42.

[47] P052-114 SNG supporting affidavit, par 9 - 11.

83 Additionally, the auditors attach a letter to 3Sixty's audit committee dated 23 November 2021 where they state the following.[48]

> "*You will recall that we re-commenced the audit proper on 6 September 2021. We were, already, during the month of August auditing certain financial statement line items with staff that we were able to secure for the engagement during that month. On or around 30 August we shared with the Finance team the samples required for us to complete the audit. We also scheduled and had weekly meetings with the Finance team discussing the matters outstanding and what was still required for us to complete our evidence gathering procedure to support the audit opinion. These meetings continued throughout the months of September, October and early November.*
>
> *The audit was, however, impeded by the lack of support necessary for us to complete our evidence gathering procedure.*
>
> *You will understand that we perform our evidence gathering procedures to support the audit opinion on the financial statements and support not provided by management amounts to a scope limitation which naturally impacts the audit opinion on the financial statements."*

84 This letter was never responded to or disputed at the time. The chairperson of 3Sixty's audit and risk committee has not come before this Court on oath to dispute contents of this letter and SNG's affidavit. The contents of the letter and the affidavit must therefore be accepted as correct.

85 As stated above, 3Sixty does not deny the failure to submit audited financial statements within the prescribed time period.[49]

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[48] P052-116 SNG supporting affidavit.

[49] P010-63, AA par 155.2 and P010-20, par 39 to 41.

86 In summary, 3Sixty contends the following in relation to its failure to conclude its audited financial statements and other irregularities flagged by the external auditors SNG and the Authority:

86.1 this is not a sufficient ground for curatorship;

86.2 denies that the claim finalizing the audit of the financial statements was due to it failing to provide information;

86.3 the delays were caused by the auditor (its own chosen independent auditor);

86.4 this issue should be dealt with by issuing of warnings and a fine, and not curatorship.

86.5 the auditor's concerns have since been remedied which include:

86.5.1 in relation to the former CEO's alleged embezzlement of R 14 million, no criminal conduct was reported to the police. 3Sixty was still compiling evidence and only did so subsequently;

86.5.2 it accepts that the reduction in share capital without notification to the Authority did in fact take place. 3Sixty indicated that they regret such "oversight". However this contravention could be dealt with through a warning or a penalty.[50]

[50] PP010-63 - 64,AA par 155 to 155.5.

87 The requirement to submit audited financial statements is a statutory requirement as set out above. This is not a “nice to have” or something that can merely be scoffed over.

88 For a regulatory breach such as this 3Sixty simply indicates that it should be issued with a penalty or fine. One must ask, who must pay for this fine or penalty? The premium payers and policy holders?

89 3Sixty also concedes another regulatory breach, as a mere oversight – in reducing its share capital without following the correct procedure. Again, it suggests that a fine or penalty ought to be sufficient. Once again must the premium payers and policy holders fund this oversight?

90 In its answering papers, 3Sixty is tone deaf to this material regulatory breach reducing it to a failure to produce information.

91 It is the board that is responsible together with its CEO and other office bearers for ensuring that audited financial statements are submitted timeously. They have dismally failed to do so. In the same breath they tell this Court that curatorship is not appropriate and they should be left to their own devises to continue running this entity.

92 Clearly, this failure on its own, being a regulatory failure, over a prolonged period of time, ought to result in certain serious interventions in 3Sixty’s management and running.

93 In circumstances where there are serious concerns about 3Sixty’s liquidity, and unaudited management accounts are being relied on and

are interpreted differently, one would have expected 3Sixty's board to act with speed to ensure that the audit is finalized.

94 The Authority says that it is not comfortable with the management accounts and cannot rely on them.[51] It would be most prudent to ensure that these audited financial statements are now timeously completed. The intervention of a curator to ensure that all information is timeously provided to the auditors and that audited financial statements are subsequently produced makes it extremely desirable to have an outside independent party temporarily taking over the running of 3Sixty. Once this issue, and the many others highlighted above, have been resolved together with the other causes of complaint, one can then consider whether the curatorship order ought to be lifted at that stage.

95 For present purposes curatorship is indeed desirable.

High turnover of executives

96 The Authority has expressed concern about the recent high level of executive turnover, particularly in relation with the chief executive officer and the chief financial officer. Related to this is that the chief executive officer was dismissed as a result of committing fraudulent activities amounting to R14 million.[52]

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[51] P019-19,RA par 83.

[52] P003-12, FA par 33.4.

97 3Sixty does not dispute this level of executive turnover, including that its former CEO was appointed in 2019 only to be dismissed in 2021. It also admits that he was dismissed for fraud related conduct. However, it denies that this is a ground for curatorship.[53]

98 It is therefore common cause that 3Sixty had to have their newly appointed CEO (someone who was in office for only 2 years) dismissed as a result of misappropriating millions of rand.

99 Worse, the auditors raised as a reportable irregularity that no criminal action was pursued against the former CEO. 3Sixty admits that it did not do so until recently and indicated that it was still compiling evidence which caused the delay.

100 We submit that on the common cause facts, this is once again another instance indicating the desirability to confirm the provisional order and keep 3Sixty under curatorship.

101 The issue of the former CEO simply shows that 3Sixty did not have sufficient controls in place to prevent the said misappropriation from taking place. As a result, it suffered further instability by having to change a CEO within a 2 year period. The Authority states that it no longer has

[53] PP010-22, AA par 46 to 48.

confidence in the current management.[54] This is a concern the Court should not take very lightly.

102 This is another basis to confirm the curatorship.

Governance and regulatory issues

Increase of premiums irregularly

103 3Sixty admits that it adjusted premiums without first obtaining approval from the Authority and the FCSA as it is required to do. It only attempted to do so retrospectively which request was rejected by the Authority. This is another regulatory breach once again illustrating the desirability of the curatorship.[55]

Complaints from policy holders and failure to pay claims

104 The Authority has received complaints regarding 3Sixty's unwillingness or inability to pay claims. For example:

104.1 The Authority received a complaint from the Dignity Group Family Funeral Plan (Dignity) on 13 August 2021. Dignity advised the Authority that it holds a binder agreement with 3Sixty from 1 December 2020 and 3Sixty was unable or had refused to settle policy holders claims. Dignity confirmed that it had unpaid claims as from 3 August to

[54] P003-3 FA par 8.

[55] P010-13, AA par 22.4.

11 August 2021 which amounted to R1.7 million and that claimants and their families visited its offices crying and wanting the money to bury their loved ones. Despite engaging 3Sixty, Dignity had not received any response[56].

104.2 On or about 26 October 2021, a complaint addressed to the FSCA was sent to both the FSCA and the Authority by members of the Chemical Industries National Provident Fund ("CINPF"). The complaint related to non-payment of claims by 3Sixty and alleged that 3Sixty owed the fund members R36 million in unpaid Group Life Insurance and Permanent Disability Claims. The complaint letter also mentioned a number of market conduct related matters that the FSCA would need to look into[57].

105 In respect of the Dignity complaint, 3Sixty admits that the said claims had not been paid. 3Sixty then seeks to explain this by stating it does not relate to solvency but to some suspicions on the business conduct of Dignity which 3Sixty had to investigate.[58]

106 3Sixty disputes the CINPF allegations contained in the letter of complaint.[59]

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[56] P003-12 FA, par 33.5.1.

[57] P003-12, FA, par 33.5.2

[58] P010-23, AA par 51.

[59] P010-23 to 24, AA par 54 to 56.5.

107 Additionally, there has been the following issues in relation to non-payment of claims:

107.1 The office of the Ombudsman for Long Term Insurance (**Ombud**) requested a meeting with the provisional curator. The Ombud's office disclosed to the provisional curator that claims worth R1.2 million has not been paid and a significant portion of this dates back to the period prior to curatorship. The Ombud's office was of the view that the bulk of these claims have not been paid because of incompetence at 3Sixty. An example of a ruling by the Ombud against 3Sixty has been annexed to the papers.[60]

107.2 The provisional curator has requested the team at 3Sixty to investigate the reasons for non-payment of these claims and if the provisional curator forms the view that the claims ought to have been paid, she will arrange for them to be paid. [61]

107.3 The provisional curator had also identified that the teams that deal with claims at 3Sixty have been rejecting certain claims for illegitimate reasons. The provisional curator indicated previously that she was in the process of taking steps to remedy this situation.[62]

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[60] P019-70 (annexure PA7.1 to RA).

[61] P019-13, RA par 54 to 55.

[62] P019-14, RA par 56.

108 There is a case of at least one group of claims (i.e Dignity) not being paid. There are then serious questions on 3Sixty's payment of the other claims referred to above. The Ombud has also become involved.

109 This cannot be a tenable situation. This points clearly towards the desirability of continuing with the curatorship. Even if factually, 3Sixty is not to ultimately blame for all of this, one cannot run away from the inevitable conclusion that all is not well.

Deloitte report

110 The Deloitte report identified several irregularities committed by 3Sixty.[63] In that report certain transactions were flagged. Included was the fact that 3Sixty paid an amount of R40 431.00 for a surprise birthday party of Mr Jim, the secretary general of NUMSA.

111 Further, a laptop and software was purchased amounting to R15 578.00 for Irvin Jim's daughter.

112 There were also related party transactions that had no underlying agreement, the agreement was incomplete, or the agreement included terms that were not enforceable.

113 Loans were advanced from 3Sixty to the 3Sixty Group which partly funded the acquisition of shares in Salt EB. This loan was interest free

[63] P054-31 to 34, Supp AA par 85 to 91 where 3Sixty summarises these concerns and responds to them.

and repaid five months later. Deloitte indicated that the requirements of the Companies and Insurance Act as it related to financial assistance were not complied with.

114 3Sixty does not deny any of the above transactions. Astonishingly, in relation to sponsoring the personal birthday party of Mr Jim, 3Sixty suggests that this was some form of marketing. 3Sixty does not seem to appreciate the gravity of the birthday party of a trade union leader being paid for with policyholder's funds when the insurer is experiencing solvency difficulties. In addition NUMSA Investment Company owns Doves, which in turn owns 3Sixty. Therefore the need for 3Sixty to market to Doves makes no sense.

115 Similarly 3Sixty admits that it bought the laptop for Mr Jim's daughter, however it reasons that she used it while doing 3Sixty office work. There is, however, no indication that Ms Jim's daughter was employed by 3Sixty.

116 In relation to the latter irregularities, 3Sixty concedes what is stated by Deloitte. It states that it is acting in accordance with the recommendations made by Deloitte.[64]

[64] P054-31 to 34, Supp AA par 85.2 to 88.1.

117 We submit that this Court cannot overlook these irregularities. These are serious aspects that require intervention to arrest the continued breaches and irregularities.

118 Additionally, 3Sixty tries to downplay the importance of the findings by Deloitte and argues that they are not material.[65] The very fact that 3Sixty does not appreciate the seriousness of the issues raised in the Deloitte report is concerning.

119 The Deloitte report also highlighted internal governance failures at 3Sixty.[66] 3Sixty does not deny this in its papers. It says glibly that "*[it] believe(s) that most governance structure of companies should continuously be improving*".

120 This is a tacit, if not express admission that there were governance failures taking place at 3Sixty. Certainly curatorship would be most desirable where the very essence of running an organisation stands on governance.

121 The following additional governance issues have since also been identified:

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[65] P054-34, Supp AA par 92.

[66] P054-34, Supp AA par 91 to 91.1.

121.1 The provisional curator identified consistent and overwhelming delays in providing information in an organised manner, and that pointed to a lack of systems and controls, lack of governance structures and clarity of roles and responsibilities, as well as the potential lack of data integrity.[67] In this regard the provisional curator indicated that she would have to take steps to remedy the defects in processes and the lack of documented processes.[68]

121.2 The preliminary investigations conducted by the provisional curator's team, indicated that Numsa policyholders have not had to pay an increase in premiums for about 10 years. This was mentioned to the provisional curator by Mr Msibi, when she first met with him. The explanation provided to the provisional curator at the time suggested that there was no proper analysis done in regard to the Numsa book of business and therefore an increase in premiums was not easy to justify. The provisional curator's team need time to investigate this properly.[69]

122 We submit that the factual merits of these additional issues aside, one certainly gets the sense that all is not well, and outside intervention is

[67] P019-8, RA par 27.

[68] P019-10, RA par 35.

[69] P019-41 to 42, RA par 231.

necessary. The Authority has exercised its discretion in opting for curatorship as the desirable outside intervention.

123 Considering the common cause facts that are prevalent, it is submitted that these are sufficient for this Court to confirm the interim order and direct that 3Sixty remains under curatorship.

Internal recapitalization plan and liquidity challenges

124 At the outset, 3Sixty concedes that it breached its MCR in December 2020 and SCR even earlier in November 2020.[70] This is a breach of section 36(1) of the Insurance Act.

125 Having breached these minimum requirements, without getting into the detail of the other concerns regarding 3Sixty's liquidity (which they now dispute), it is therefore common cause that 3Sixty has been for a period well over a year, experiencing solvency and liquidity issues.

126 As stated above, there is a difference in opinion regarding the viability of 3Sixty's internal recapitalization plan amongst the authority, 3Sixty and the provisional curator as well as the respective experts.

127 In December 2020 when the recapitalization plan was first presented, the Authority's concerns were as follows:[71]

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[70] P010-66, AA par 159.3 and 4.

[71] P003-28, FA par 35.41.

"*The transfer of immovable property will not assist 3Sixty's liquidity crisis;*

3Sixty proposes that the properties will be transferred by the end of January 2022. Given that it is mid-December, it seems highly improbably that transfer by 31 January 2022 will be realised; and

Most of the properties are commercial properties, the values of which have decreased since March 2020. The Authority is therefore not convinced that the values of the properties provided by 3Sixty are an accurate reflection of their current true value."

128 Further the Authority stated in its replying affidavit: that:[72]

"*It is also telling that 3Sixty's actuary does not set out whether or not SCR will, be as is required, above 1. In fact, if a property portfolio of R122 000 000 is properly taken into account, together with other factors such as operating expenses in relation to the properties, and how market will the properties are, the SCR of 3Sixty at the time was less than 1, and this is acknowledged in the 7 December 2021 letter from 3Sixty to the applicant*."

129 We submit that these concerns are genuine, legitimate and reasonable.

130 BDO's conclusions and recommendations on the recapitalization plan also raise concerns on the plan and opine that, amongst other things, it is not a suitable measure to address the Authority's concerns.[73]

131 3Sixty disputes BDO's standing and authority to be opining on the recapitalization plan. However this is a non-starter as 3Sixty itself in its

[72] P019-25, RA, par 123

[73] P052-55.

supplementary answering affidavit confirms its understanding that BDO is the firm assisting the provisional curator.[74]

132 3Sixty of course contends that its plan is viable, and an appropriate measure. It disagrees with the Authority's assessment of the plan. [75] However it accepts that there may be areas of uncertainty from a legal and accounting perspective, but suggests this can be resolved between 3Sixty and the Authority without the need for curatorship[76]:

132.1 This means that 3Sixty accepts that there are legitimate questions that need to be resolved on this plan. It therefore cannot say that the Authority's concerns are not legitimate.

133 In her interim report dated 21 February 2022, dealing only with the recapitalization plan, the curator astonishingly reaches the following conclusions[77]:

> "1. *The facts presented in this report, as well as the expert opinions sourced, 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 have not been appropriate*

[74] P054-20, par 51.

[75] P010-18 to 20, par 37 to 38.

[76] P054-12, Supp RA, par 20 to 28.

[77] P045-19, curator's interim report.

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 and future prosperity 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*…."

134 The curator's conclusions require further consideration. This is because, as is demonstrated under the heading "Identity of Curator" below, she reached these conclusions regarding the recapitalization plan only after the Authority brought an application to have her removed, and questioned her integrity. It would appear that these conclusions were conjured up in order to obfuscate from her own misrepresentations. The specific detail of this is not repeated here as it is dealt with under its own heading below, but should be considered when examining the curator's above conclusions.

135 In any event, what is demonstrated above is that there is clearly a divergence of opinion regarding the suitability and effectiveness of the recapitalization plan. This is on the back of (on the common cause facts) 3Sixty failing to meet the minimum requirements for capital and solvency entitling the Authority to take regulatory action.

136 As confirmed by the SCA in **Dynamic Wealth**, the Authority does not have to resolve the factual disputes before this Court. What is set out above is sufficient to show that there is a cause for concern. A curator can ensure that the plan ultimately adopted is one that is prudent, and in the best interest of 3Sixty and its policy holders.

THE APPROPRIATENESS OF EX PARTE PROCEEDINGS

137 3Sixty criticizes and appears to challenge the Authority's decision to apply for the *rule nisi* through *ex parte* proceedings.

138 We point out that section 5(1) of FIA expressly provides that the Authority may proceed by way of an *ex-parte* application.

139 Section 5(1) of the FIA states that:

> "*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.*" (emphasis added)

140 The SCA in **Barnard** *supra* confirmed the competency of this approach.[78]

141 There is therefore no merit in the complaint by 3Sixty.

ALLEGATIONS OF NON-DISCLOSURE OF MATERIAL FACTS BY THE PA

142 There are allegations that the Authority failed to disclose material facts when it obtained the provisional curatorship order.

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[78] See paragraph 48 of **Barnard** above.

143 Primarily 3Sixty alleges various aspects were not disclosed which would have illustrated that there was no apprehension of any misappropriation of funds, and resultantly no need to bring the application on an *ex parte* basis. It also presents certain facts which it says would have placed it in a favorable light in respect of its financial position.

144 The other point which 3Sixty has taken in the variation application, and no doubt will be raised on the return date is that the Authority purportedly misled the Court as to the credentials of the curator.

145 It is contended that on this basis, the *rule nisi* must be discharged.

146 It is the correct legal position that in an *ex parte* application, an applicant must disclose all material facts which might influence a Court in coming to its decision and that the withholding or suppression of material facts by itself entitles a Court to set aside an order even if the non-disclosure or suppression was not willful or *mala fide*[79].

147 In this case, on both scores there was no non-disclosure of material facts which might have influenced this Court in coming to its decision.

148 Even if there was, which is denied, in **Phillips v National Director of Public Prosecutions**[80], the Court said that it has a discretion to set aside or confirm an interim order even where material facts were not disclosed.

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[79] **National Director of Public Prosecutions v Basson** 2002 (1) SA 419 (SCA).

[80] 2003 (6) SA 447 (SCA).

But that discretion is exercised after having regard to, amongst others, the reasons for non-disclosure, the extent of the non-disclosure and whether the first Court might have been influenced by proper disclosure.

Non-disclosure allegations in 3Sixty's answering affidavit

149 It is necessary to consider the facts which 3Sixty says were not disclosed, then ask whether such facts were in fact not disclosed, and if so, whether they are so material that they might have influenced this Court when it granted the provisional curatorship order.

149.1 3Sixty says that the Authority had information that "*there is no predilection by me or 3Sixty's management to misappropriate assets*[81]" and that it misled the Court in seeking a provisional order by following the extraordinary route of *ex parte* proceedings.

149.2 We submit that there is no merit in this contention. Section 5 of the FIA, under which this application was brought, expressly provides for this application to be brought on an *ex parte* basis. The fact that 3Sixty's management has no predilection to misappropriate funds is not relevant to the Authority's entitlement to the order sought by it.

149.3 3Sixty further contends that the Authority had in its possession information "*that disprove*" its suspicion that 3Sixty management and

[81] P010-11 AA, par 19.

board have the propensity to conceal and act in a criminal manner. For this contention, 3Sixty relies on the contents of paragraphs 22.1 to 22.6 of its answering affidavit.[82] The contents of these paragraphs are not so material to such an extent that they might have influenced this Court when it granted the provisional order. Such allegations do not in any way constitute evidence to demonstrate that 3Sixty is in a sound financial position or that it is compliant with its regulatory obligations. In any event, an analysis of the documents which are attached to the Authority's founding affidavit clearly shows the extent to which the Authority has gone out of its way to give 3Sixty a reasonable opportunity to resolve its financial difficulties.

149.3.1 The long and short of it, however, is that it cannot be seriously disputed that 3Sixty remains non-compliant with the prescribed solvency requirements.

149.4 Reliance is placed on annexures "KM4" and "KM5" of 3Sixty's answering affidavit. They are irrelevant. KM5 only served to inform the Authority that no "*further loan from the WP Fund appears necessary, and no further loan has been drawn*[83]." The Authority sought the provisional curatorship order due to the fact that 3Sixty was not compliant and remains non-compliant with its prescribed regulatory

[82] P010-11 to 13, AA par 22.1 to 22.6.

[83] P010-97

requirements. The application was not brought because it was thought that 3Sixty would seek a "*further loan from the WP Fund*" or that a "*further loan has been drawn*."

150 Under the same heading there are various other examples that 3Sixty provides, which it argues demonstrate that its management was not one prone to act improperly. However, these examples and the inferences that can be drawn from them are disputed. If on the Authority's version it legitimately does not believe that this enhances 3Sixty's management, then the Authority would have no reason to disclose it.

151 Additionally, none of those in fact assist 3Sixty. For instance, 3Sixty alleges that the Deloitte report made no adverse findings against it.[84] Flagging payment for a private birthday party of a trade union leader and paying for a laptop for his daughter can hardly be said to be non-material. Similarly the failure to timeously report the misappropriation of funds by the directors to the Directorate for Priority Crimes is a serious matter and could constitute a criminal offence.

Misrepresentations on curator

152 The Authority relied on BDO to provide it with the proposed curator's credentials.

[84] P010-12, AA par 22.3.

153 It obtained same from Ms Ram. Included in her CV was that she was a Certified Enterprise Risk Actuary ("CERA"). It also stated that she was a member of the Actuarial Society of South Africa ("ASSA").

154 It later transpired that she was still completing courses towards her CERA qualification and that she was a student member of ASSA and not a full member.

155 Additionally, Ms Ram, on the Authority's version and that of about 5 witnesses who were present, informed the Authority's attorneys that she was a qualified actuary, having qualified in 2005 at the University of Pretoria[85].

156 Once all of the above was appreciated by the Authority it questioned Ms Ram's integrity. It immediately brought these facts to the Court's attention and applied for her to be replaced, on an urgent basis. This was not granted on the basis of lack of urgency.[86]

157 3Sixty opportunistically argues that the entire *rule nisi* ought to be discharged on the basis that the Authority misrepresented facts to the Court.

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[85] P035-11, RA, par 38

[86] P053-10, judgment, par 35.

158 As the Court pointed out in **Maxwell v Khosana and Others; Registrar of Medical Schemes v SAMWUMED Medical Scheme and Others**, [87] the removal of an individual curator is a separate issue from the curatorship itself. An individual curator can be removed while the curatorship remains intact.

159 There was only one fact that was truly incorrect before the above Court. That was that the curator was not CERA qualified. The issue of ASSA required more from the curator or clarity- the Authority believes it was misled in this regard. However, this may have been of no moment to the Court. The integrity issues arose more seriously through the curator's positive representations that were made to it directly, that she was a qualified actuary when in truth she was not.

160 3Sixty cannot seriously seek to profit from this by arguing that the entire *rule nisi* should be discharged on this basis.

161 The *rule nisi* contains two distinct aspects. One is placing 3Sixty under curatorship. The second is the identity of the curator. If there has to be any discharge due to misrepresentation, at best this would only affect the identity of the curator.

[87] (1306-2018; 16996-2018) [2018] ZAWCHC 151 (9 October 2018) at par 24.

162 However, it is submitted that even if there were misrepresentations, this was not at the Authority's door and this Court ought to apply its discretion in this regard.

163 This is because it was the Authority itself that was given incorrect information. This in turn resulted in incorrect submissions regarding Ms Ram's CERA qualifications being presented to the Court. However, being CERA qualified and even being an actuary, are not requirements to be a curator. Therefore, while this may have prompted some discussion on the curator, it would unlikely have resulted in the *rule nisi* not being granted.

164 At worse, if this issue was to influence the *rule nisi* it would have done no more than affect the identity of the curator and not the actual placing of 3Sixty under curatorship.

165 For this reason, 3Sixty's latching onto purported misrepresentations cannot assist it.

THE IDENTITY OF THE CURATOR

166 In the founding affidavit, the Authority recommended Ms Ram as the provisional curator[88].

[88] P003-30 FA par 43 to 45.

167 However, at the stage of launching the urgent variation application, the Authority lost faith in her integrity and withdrew its recommendation.

168 Since the hearing before the Honourable Justice Fisher on 22 February 2022, further events have come to light which has only served to intensify the Authority's concerns regarding Ms Ram's integrity. These issues relate firstly to Ms Ram's reluctance to continue working with the BDO support teams and secondly, to various contradictions in Ms Ram's views on pertinent issues relating to the business of 3Sixty, since the urgent variation application was instituted. Evidently this about turn by Ms Ram has cast doubt on the integrity of her interim report.[89]

169 Firstly: [90]

169.1 There are extensive email exchanges reflected in the papers illustrating Ms Ram's reluctance to work with the BDO team.

169.2 Shortly after the variation application was launched, Ms Ram sent an email indicating that she would be offline for the next few days and another member of the team would be dealing with the report.

169.3 Additionally, contrary to what she says in her conclusion regarding omitting input from the BDO team, the correspondence shows that the BDO team reached out to her, requested meetings with her and

[89] Pp055-8 to 9, Supp RA par 18 to 22.

[90] Pp055-9 to 13, Supp RA par 23 to 48.

submitted their draft reports to her. She was non-responsive to them, and ignored the input submitted by them.

170 Further, after the variation application was brought, Ms Ram took steps to remove the BDO teams' access to 3Sixty's Vox email servers, VPN, Payroll system and the Secure File Transfer Protocol (SFTP) Servers. These systems were required by the BDO support team to properly carry out their duties as the teams supporting the provisional curator. Despite requests to reinstate access, this has still not been resolved.

171 Secondly, Ms Ram's conclusions that the Authority ought not to have been placed under curatorship in the first place (both in her report and her explanatory affidavit in the variation application), has been shown to be seriously contradicted by her own correspondence sent out prior to the Authority brining the variation application [91]and the affidavits she deposed to prior to the urgent variation application.

171.1 For instance, she speaks about the disposal agreement which forms the basis of the recapitalization plan being "lawfully unsound" and "flawed". No reference is made of this in her report.

171.2 There are also examples of her actively supporting the Authority's opposition of the respondent's application to discharge the *rule nisi* and

[91] Pp 055-14 to 21, Supp RA par 49 to 72.

she indicated at the time that 3Sixty was not solvent. This is at odds with her current position.

171.3 She also referred to purported criminal conduct at 3Sixty, which she indicated she would take up further with the SAPS. Ms Ram also recorded in writing that there may have been misappropriation of funds, as well as forging of whatsapp messages in her name. None of this is referred to in her report or alluded to.

172 Thirdly, it also appears that Ms Ram has been leaking information to an investigative journalist from amaBhungane.[92]

173 Fourthly, it has now transpired that she has been booked off sick until 31 March 2022. Therefore, her credibility issues aside, she may be incapacitated from continuing as the curator.

174 In the answering affidavit, Mr Msibi stated that he does not believe that Ms Ram is a suitable candidate for the role of provisional curator. This is repeated in the supplementary answering affidavit.

175 The Authority now agrees with Mr Msibi that she is not suitable to remain as curator. The Authority has concerns about both Ms Ram's integrity and her competence. The Authority no longer defends her suitability and expressly submits that it is of the position she is not suitable to continue with this role.

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[92] Pp055-21 to 24, Supp RA par 73 to 85.

176 Aside from Mr Msibi's contentions and concerns on her suitability, this Court ought to carefully consider the suitability of an individual who has conducted herself in the manner outlined above, and has caste into doubt the credibility of the curator's report. This may be an untenable situation to permit to perpetuate.

177 Ms Ram was appointed on the strength of the Authority's recommendation to the above Honourable Court when the *rule nisi* was issued. It was also on the strength of the understanding that she would be working with the full BDO team. The Authority no longer persists with its recommendation to the above Honourable Court that Ms Ram be retained as curator. She has isolated herself from the BDO team, ignored their recommendations, and discarded the array of issues that she herself had flagged, in order to reach a conclusion that would serve her improper motives. She has also conducted herself in an abhorrent and unprofessional manner.

178 Ms Ram has leaked information about 3Sixty to an investigative journalist at Amabhungane and in so doing she breached the fiduciary duties she owed to 3Sixty and she also breach her obligations to the Authority.

179 The Authority leaves it to the above Honourable Court, which would have regard to Ms Ram's breach of fiduciary duties and her contradictory conduct referred to above, to determine whether Ms Ram should remain the curator or whether she ought to be removed from her position, and abides by this decision. If the above Honourable Court is minded to

remove Ms Ram as curator, the Authority recommends that Tinashe Mashoko be appointed as the curator.

COSTS

180 In the founding affidavit the Authority indicated that the application was necessitated by the conduct and failures of 3Sixty. However, to protect policy holders, the Authority would bear the costs of this application unless any party opposes the relief sought, in which event the Authority would seek costs against them.[93]

181 Mr Msibi has no authority to oppose or anticipate the *rule nisi* on behalf of 3Sixty. The reasons for this have been addressed above. Therefore, he in reality comes to court in his personal capacity. However, he has failed to apply to be joined and therefore cannot participate in that capacity. Despite this he has proliferated the papers with lengthy repetitive affidavits, and made reckless and unsubstantiated comments, rather than confining himself to what was before this Court. Subject to what is said about Numsa below, together with Numsa, he should be mulcted with costs in his personal capacity in this regard.

182 Numsa seeks leave to join, and if joined to oppose the confirmation of the *rule nisi.* On both counts they should not be successful. They too should be ordered to pay the costs of this application.

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[93] P003-37, FA par 80 to 82.

183 The Authority initially brought this application with one junior counsel. However, on account of particularly 3Sixty's proliferated (purported) opposition, the Authority had to employ two counsel, one being senior. Accordingly, it should be indemnified for the costs of doing so- i.e the costs of two counsel, one being a senior counsel, where two counsel were employed.

184 In the circumstances it is appropriate that Numsa and Mr Msibi pay the Authority's costs, on a punitive scale, alternatively party and party scale, jointly and severally.

185 3Sixty has sought a personal costs order against Ms Vogelsang, Mr Naidoo and Mr Peter from the Authority. Even if costs were granted against the Authority, personal costs would not be appropriate for the following reasons:

185.1 The aforesaid three individuals have not been joined to these proceedings, and in the absence of that, cannot have relief granted against them in their personal capacity. This is distinguishable from Mr Msibi who comes here effectively in his personal capacity as he has no authority to act on behalf of 3Sixty;

185.2 Even if the three individuals were joined, there is nothing to suggest that they conducted themselves in a manner that warrants a personal costs order. They duly performed their official duties diligently and in the best interest of policy holders as well as 3Sixty itself. Evident from the above, even if the above Honourable Court is not minded to confirm

curatorship, is that there were serious concerns regarding 3Sixty, and the Authority as well as the individual officers cannot be faulted for opting to turn to a statutory remedy being curatorship.

186 Lastly, on the question of costs regarding the variation application, it is submitted that there should be no order as to costs. This is because:

186.1 In relation to Ms Ram, she filed a notice to abide and two explanatory affidavits. She did not file a notice of opposition or opposing affidavit. Therefore, in the absence of opposing the relief, she cannot competently be granted costs.

186.2 In relation to 3Sixty, it filed no notice of opposition, and indicated that it is not necessary to oppose the application. it also filed no opposing affidavit but rather an explanatory affidavit. Therefore, it too was not properly opposing the relief sought and cannot be granted costs in such circumstances.

186.3 Both parties cannot sit on the fence- not expressly oppose – and then when the application is not successful jump for a bite at costs.

186.4 Additionally, 3Sixty had no business opposing the variation application, as they are the ones that first raised the non-suitability of Ms Ram[94]. While they inexplicably did not support the relief being granted in that application on the one hand, and at the same time did not support Ms

[94] P010-50 AA, par 134.

Ram being a curator on the other, their real interest and purpose of their presence at the variation proceedings was to try and have the entire *rule nisi* discharged. It based this on the Authority obtaining the *rule nisi* through misrepresenting Ms Ram's credentials. They were not successful in this. Therefore, not being successful in their relief sought, they should not be awarded any costs. They left with empty hands.

186.5 In relation to Ms Ram, on the common cause facts, her credentials were misrepresented in relation to her CERA qualifications. She blamed others for this. However, this was on her resume which was attached to the founding affidavit, and which she confirmed on oath through a confirmatory affidavit. Therefore, she cannot be rewarded for, at best, her poor attention to detail regarding the representations of her qualifications. Additionally, the court in the variation application did not ultimately find on the merits of Ms Ram's conduct but did not grant the variation for want of urgency. If one considers the various correspondence set out above, one can see that the Authority was not wrong in its contentions regarding her credibility. Ms Ram again should not be rewarded with costs having compromised the credibility of her report and herself as curator.

186.6 Lastly, once the Authority became aware of the misrepresentation, and questions on Ms Ram's credibility, it had a duty to come before court to bring this to the court's attention and seek the relief that it sought- and to do so urgently at the earliest opportunity. If it failed to do so it would have been severely criticised and chastised. Therefore, bearing

in mind that there was no formal opposition, the Authority ought not to pay the costs for acting responsibly and fulfilling this obligation.

CONCLUSION

187 It is respectfully submitted, that based on the common cause facts, curatorship is competent and should be confirmed.

188 It is further submitted that based on the nature and extent of the disputes regarding the internal recapitalization plan, this is sufficient to accept the Authority's concerns in relation to the plan and 3Sixty's solvency, and to confirm curatorship on this basis.

189 3Sixty does not dispute the various irregularities flagged. However, everyone else is to blame – its own independent auditors, the Authority, the Authority's officers, Ms Ram (although they are now in her corner since she has compromised herself) and BDO. Only they are innocent and ought to be left to their own devices. This cannot be so.

190 The Authority leaves it in the hands of the court to determine if Ms Ram ought to continue as curator. It has however placed before the court serious issues that the court ought to consider in this regard regarding Ms Ram's competency and integrity.

191 Accordingly, it is submitted that a case has been made showing that the continued curatorship of 3Sixty is desirable.

S Khumalo SC

Y Peer

14 March 2022

Chambers, Sandton

LIST OF AUTHORITIES

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

2. **Barnard And Others v Registrar of Medical Schemes** 2015 (3) SA 204 (SCA);

3. **Executive Officer, Financial Services Board v Dynamic Wealth And Others** 2012 (1) SA 453 (SCA);

4. **Gordon v Department of Health** 2009 (1) BCLR 44 (SCA);

5. **Maxwell v Khosana and Others; Registrar of Medical Schemes v SAMWUMED Medical Scheme and Others** (1306-2018; 16996-2018) [2018] ZAWCHC 151 (9 October 2018);

6. **Naidoo and another v Matlala NO and others** 2012 (1) SA 143 (GNP);

7. **National Director of Public Prosecutions v Basson** 2002 (1) SA 419 (SCA).

8. **Patmar Explorations (Pty) Ltd and others v Limpopo Development Tribunal and others** 2018 (4) SA 107 (SCA);

9. **Phillips v National Director of Public Prosecutions** 2003 (6) SA 447 (SCA);

10. **Prudential Authority v Bophelo Life Insurance Company Ltd and Others** [2020] ZAGPJHC 7 (30 November 2020);

11. **Registrar of Medical Schemes v Key Health Medical Schemes and others** 2020/35478, 25 March 2021;

12. **SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others** 2017 (5) SA 1 (CC);

13. **Swartz v K and Another** (A5036/2021); 2015/8456) [2021] ZAGPJHC 816 (15 December 2021);

14. **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another** [2008] ZASCA 6; 2008 (3) SA 371 (SCA) ([2008] 2 All SA 512).