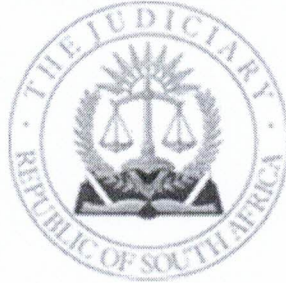


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 58950/2021

DELETE WHICHEVER IS NOT APPLICABLE

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


Judge Dippenaar

In the matter between:

THE PRUDENTIAL AUTHORITY

Applicant

And

3SIXTY LIFE LIMITED

First Respondent

NATIONAL UNION OF METAL WORKERS OF SOUTH
AFRICA

Second Respondent

RAM YASHODA

Third Respondent/Intervening Party

LEAVE TO APPEAL JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 07th of November 2022.

DIPPENAAR J:

[1] For ease of reference, the parties will be referred to as in the main application proceedings. The first respondent, as applicant, applies for leave to appeal against the whole of the judgment and order granted by me on 30 September 2022. In terms of the order I, *inter alia*, dismissed the second respondent's intervention application with costs, placed the business of the first respondent under final curatorship and appointed Mr Mashoko as final curator, together with ancillary orders.

[2] The first respondent delivered an application for leave to appeal dated 30 September 2022. On 20 October 2022 it delivered a supplementary notice of leave to appeal raising further grounds. Leave to appeal is sought to the Supreme Court of Appeal, alternatively the Full Court.

[3] The application is opposed by the applicant. The third respondent delivered a notice to abide and was represented at the proceedings.

[4] My judgment is comprehensive and I stand by the reasons set out therein.

[5] I have considered the papers filed of record and the grounds set out in the application for leave to appeal and supplementary notice as well as the parties' extensive arguments for and against the granting of leave to appeal. I have further considered the submissions made in their respective heads of argument and the authorities referred to by the respective parties.

[6] In its application for leave to appeal, the first respondent raised various grounds for leave to appeal in support of the contention that there are reasonable prospects of success that another court would grant a different order as envisaged by s 17(1)(a) of the Superior Courts Act¹. In its heads of argument, the first respondent also contended that there are compelling reasons to grant leave to appeal as envisaged by s 17(i)(a)(ii) of the Act, given the interests of justice and the importance of the matter.

[7] Leave to appeal may only be granted where a court is of the opinion that the appeal would have a reasonable prospect of success, which prospects are not too remote². An applicant for leave to appeal faces a higher threshold³ than under the repealed Supreme Court Act.⁴ A sound rational basis for the conclusion that there are prospects of success must be shown to exist⁵.

[8] During argument, emphasis was placed by the first respondent on the duty of good faith in *ex parte* applications. It was argued that a reasonable prospect exists of another court finding that the provisional order should have been set aside for want of compliance with the requirement to place all material facts before the court⁶ as the Internal Recapitalisation Plan and Joint Communication 1 of 2020 were not placed before the court and the applicant did not deal fairly with the first respondent's reasonably anticipated stance to the Internal Recapitalisation Plan.

[9] The other central pillars of the first respondent's argument were predicated on the contention that the applicant failed to discharge its onus of proving the two jurisdictional requirements envisaged by s 5(1) of the Financial Institutions (Protection of Funds) Act⁷,

¹ 10 of 2013

² Ramakatsa and Others v African National Congress and Another [2021] JOL 49993 (SCA) para [10]

³ S v Notshokovu Unreported SCA case no 157/15 dated 7 September 2016, para [2]

⁴ 59 of 1959

⁵ Smith v S [2011] ZASCA 15; MEC for Health, Eastern Cape v Mkhitha [2016] ZASCA 176, para [17]

⁶ South African Revenue Service v Tradex (Pty) Ltd and Others 2015 (3) SA 596 (WCC); the unreported judgment of Kubishi J in the Gauteng Division, Pretoria (87306/2014) in Commissioner for the South African Revenue Services v Bashir and Others (21 April 2016); and the cases cited in the first respondent's heads of argument.

⁷ 28 of 2001

to wit: (i) good cause to provisionally appoint a curator under s5(2)(a) and (ii) that it was desirable to confirm the appointment of a curator under s 5(2)(a) of the Act. It was argued that as there was no good cause for the provisional curatorship in the first place and as the provisional curator in her reports found that curatorship was not appropriate, it was not desirable to confirm the appointment of a curator. Thus, it was argued, reasonable prospects existed on appeal.

[10] It was argued further that other than the applicant's reliance on the insolvency and solvency capital requirement ("SCR") issues, the remaining grounds relied upon by the applicant pertaining to the absence of audited financial statements for the 2020 year, the high executive staff turnover and fraudulent activities of the former Chief Executive Officer and complaints received about unwillingness or inability to pay claims, were not serious and did not justify the appointment of a curator, as appropriate remedies other than curatorship were available.

[11] The grounds advanced by the applicant in the ex parte application pertaining to the insolvency, SCR and minimum capital requirements ("MCR") issues, the various statutory transgressions by the first respondent of the Insurance Act and the embezzlement of funds by the first respondent's former Chief Executive Officer were common cause.

[12] It was also undisputed that there were no audited financial statements available for 2020⁸ and that the reliability of the first respondent's management accounts was in doubt. No countervailing evidence was presented to the applicant's evidence that the first respondent's management constructed evidence to address queries raised by its auditors and frustrated the audit process. The third respondent in her curator's report confirmed that the 2020 financial statements of the first respondent would have to be reconstructed.

⁸ And for the 2021 financial year

[13] The lack of reliable financial information and the absence of audited financial statements, also impacts on the proposed Internal Recapitalisation Plan and the accuracy of the figures reflected therein, which Plan formed the essence of the dispute between the parties.

[14] These undisputed facts in my view constitute “very cogent practical reasons”⁹ to have exercised the discretion afforded not to set aside the ex parte provisional order. I am further not persuaded that the first respondent has illustrated reasonable prospects of success that another court would set aside the provisional order on the basis of a material non-disclosure of material facts.

[15] In its heads of argument, the first respondent also for the first time relied on the contention that the second respondent should have joined the second respondent under the common law on grounds of convenience and equity. However, that was not relied on in the main application, nor was such a case made out on the application papers. That issue was thus not placed before me as an issue requiring determination.

[16] In applying the relevant principles to the grounds advanced in the notice of leave to appeal and in argument when measured against the facts, I conclude that the appeal would not have a reasonable prospect of success as contemplated in s17(1)(a)(i) of the Act. I am fortified in this view, based on the undisputed facts already referred to.


[17] I further conclude that on a consideration of all the facts, including the intricacies involved in relation to the third respondent’s resignation, the first respondent has not illustrated compelling reasons to grant leave to appeal as contemplated in s17(1)(a)(ii) of the Act.

⁹ As envisaged in *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 350B

[18] It follows that the application must fail. There is no basis to deviate from the normal principle that costs follow the result. Considering the nature of the matter, the employment of two counsel was warranted.

[19] I grant the following order:

The application for leave to appeal is dismissed with costs, including the costs of two counsel.



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

APPEARANCES

DATE OF HEARING	: 04 November 2022
DATE OF JUDGMENT	: 07 November 2022
APPLICANT'S COUNSEL	: Adv S Khumalo SC Adv. Y. Peer
APPLICANT'S ATTORNEYS	: Edward Nathan Sonnenbergs Inc
1st RESPONDENT'S COUNSEL	: Adv. R Bhana SC Adv MC Costa
1st RESPONDENT'S ATTORNEYS	: Malatji & Co. Attorneys
3rd RESPONDENT'S COUNSEL	: Adv. C. Shahim
3rd RESPONDENT'S ATTORNEYS	: Kern Armstrong & Du Plessis Inc.