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On 13 July 2021 and 9 November 2021 CDH reported on the judgment of the Supreme Court of Appeal (the SCA), which dealt with two similar judgments, of the Pretoria and Grahamstown High Courts respectively, dealing with the question of whether the High Court must entertain matters within its territorial jurisdiction that fall within the monetary jurisdiction of the Magistrates' courts.

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In an appeal from the Gauteng Local Division of the High Court, the SCA was called upon to decide the issue of whether a company which was placed under provisional curatorship in terms of section 54(5) of the Insurance Act is precluded from being placed under liquidation.

Background

Bophelo Life Insurance Company Limited (Bophelo) and Nzalo Insurance Services Limited (Nzalo) (collectively, the Insurers) were insurance companies wholly owned by Bophelo Insurance Group (BIG). BIG's majority shareholder (70%) was Vele Financial Group (Pty) Ltd (Vele), who was also a shareholder in VBS Mutual Bank Limited (VBS). Bophelo deposited about 68% of its total assets with VBS, and VBS being placed in final liquidation, resulted in Bophelo's funds being *"effectively lost"*. At that stage the Prudential Authority (a juristic person that operates within the administration of the South African Reserve Bank) became concerned about Bophelo's financial health. Naturally, the Prudential Authority also became concerned about BIG's ability to continue funding Nzalo because of its majority shareholder effectively losing its stake in VBS and its wholly owned subsidiary losing 68% of its assets.

Section 36(1) of the Insurance Act No.18 of 2017 (Insurance Act) provides 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 or solvency capital requirement, as prescribed, whichever is the greater.*' In light of this section and concerns around BIG's ability to fund the Insurers, the Prudential Authority informed BIG and the Insurers that it required them to show proof that an amount of at least R100 million was immediately available to meet the Insurers' capital

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requirements. Lebashe Financial Services (Pty) Ltd (Lebashe), an investment holding company, was approached to recapitalize BIG. Lebashe acquired Vele's 70% shareholding in BIG and entered into a loan agreement in terms of which Lebashe lent and advanced the capital sum of R100 million to BIG. Ultimately, the funding of R100 million was provided in the form of shareholder loans between BIG and the Insurers.

In October 2018, the Prudential Authority was informed that Lebashe had withdrawn its capital contribution because of various issues identified during a due diligence exercise. Consequently, the Prudential Authority approached the High Court on an urgent basis for orders placing the Insurers under provisional curatorship in terms of section 54(1)(a) of the Insurance Act. The High Court granted the orders sought.

Paragraph 5 of the order in the Bophelo application stated that (the Nzalo order contained an identical provision):

> *"Pending the return day of this order, all actions, proceedings, the execution of all writs, summonses and other processes against Bophelo, including any proceedings before the Commission of Conciliation, Mediation and Arbitration, are hereby stayed and are not to be instituted or proceeded with, without the leave of this Court."*

A report compiled by the curator, indicated that the Insurers were facing major financial difficulties and had bleak future prospects. It was on that basis that the Prudential Authority applied for the provisional liquidation of the Insurers. Lebashe applied for leave to intervene in the liquidation applications, which leave was granted by agreement between the parties.

Lebashe did not dispute that the Insurers were insolvent, instead it contended that section 54(5) of the Insurance Act precluded provisional liquidation orders to be granted against companies under curatorship. Lebashe also argued that paragraph 5 of the provisional curatorship orders also precluded applications for winding up.

Section 54(5) of the Insurance Act states that an insurer or controlling company may not "*begin or enter business rescue or be wound-up while under curatorship…unless the curator applies for the business rescue or winding-up*".

The High Court rejected Lebashe's contention that section 54(5) of the Insurance Act rendered provisional liquidation orders incompetent and proceeded to confirm the orders.

Lebashe was granted leave to appeal to the Supreme Court of Appeal (SCA) by the High Court.

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Lebashe's *locus standi*

The first issue that the SCA considered was Lebashe's locus standi. Lebashe was a creditor and majority shareholder of BIG, the holding company of the Insurers, there was no legal relationship between Lebashe and the Insurers. The SCA held that Lebashe's commercial/financial interest was too indirect to give it the requisite *locus standi* in the appeal. The SCA held that the leave to intervene in the liquidation application and leave to appeal the High Court judgment should have never been granted.

Despite the adverse finding in respect of *locus standi*, the SCA was of the view that it was in the interests of justice to determine the remaining issues.

Was final liquidation precluded by the curatorship?

The SCA rejected the assertion of the court a quo that section 54(5) did not refer to the commencement of winding-up but rather to the process of winding-up. It would not make sense to only allow the commencement of winding up process but prohibit the actual process of winding up.

Additionally, the SCA held that if a company is placed under curatorship in terms of section 54(5) of the Insurance Act, only the curator may apply for a winding-up order, which meant the Prudential Authority did not have locus standi to apply for the Insurers' winding up.

The SCA also noted that the powers and duties of curators and liquidators cannot co-exist as there would be uncertainty as to who has the duty to take control of the assets of the company if the company is simultaneously under curatorship and liquidation. It follows that by the curator applying for liquidation of the company, the curator also voluntarily relinquishes their powers, which would not be the case if a third party applied for the liquidation of the company under curatorship.

Notwithstanding the above, the SCA still had to deal with the conflict between section 54(5) and 57(1) of the Insurance Act. Section 57(1) of the Insurance Act provides, inter alia, that the Prudential Authority is deemed to be a person authorised under the Companies Act to make an application to court for the winding-up of an insurer or a controlling company. The SCA held that in this instance the special provision will limit the general provision. Therefore, although the Prudential Authority is empowered

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to apply for the liquidation of an insurer in terms of the Companies Act, in instances where the insurer is under curatorship only the curator is permitted to apply to court for a liquidation order.

The SCA therefore held that in terms of section 54(5) and paragraph 5 of the provisional curatorship orders, the provisional liquidation orders should not have been granted. However, the SCA also found that paragraph 5 of the provisional curatorship orders and section 54(5) of the Insurance Act did not prohibit the institution of liquidation proceedings but rather the commencement of business rescue or winding-up by resolution or a court order. As a result, the application for liquidation was not null and void, rather the proceedings were stayed by operation of law while the curatorship orders were in place.

Duty on the curator to effect recapitalisation

The SCA held that the curatorship orders did not place any obligation on the curator to obtain capital injections or long-term financing for the Insurers. Their obligation was merely to take control of the Insurers, investigate the business and report to the High Court on various issues. The curator therefore had no duty to affect any recapitalisation of the Insurers.

Finally, the SCA held that curatorship was only a means to an end and should not be viewed as a tool to rescue the businesses of the Insurers.

The SCA therefore dismissed the appeal with costs.

In summary, it appears that while an insurer is under curatorship, liquidation proceedings may be instituted, however, the proceedings will automatically be stayed by operation of law until such time as the curatorship is discharged.

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Fish cannot sometimes be fowl: The Constitutional Court has the final say

On 13 July 2021 and 9 November 2021 CDH reported on the judgment of the Supreme Court of Appeal (the SCA), which dealt with two similar judgments, of the Pretoria and Grahamstown High Courts respectively, dealing with the question of whether the High Court must entertain matters within its territorial jurisdiction that fall within the monetary jurisdiction of the Magistrates' courts.

There were some fifteen matters where the banks had instituted actions in the high court's seeking to repossess motor vehicles, or have immovable property declared executable.

On 25 June 2021 the full bench of the SCA upheld the appeals of *The Standard Bank of SA Ltd and Others v Thobejane and Others* (38/2019 & 47/2019) and *The Standard Bank of SA Ltd v Gqirana N.O and another* (999/2019) [2021] ZASCA 92 (25 June 2021), and it upheld the appeals by The Standard Bank and Nedbank in the Grahamstown matter. The SCA ordered that the High Court must entertain matters within its territorial jurisdiction that fall within the jurisdiction of the Magistrates' Court, if brought before it, because it has concurrent jurisdiction.

Not satisfied with the judgment of the SCA, the South African Human Rights Commission (SAHRC), a friend of the court in the two appeals before the SCA, lodged an application for leave to appeal with the Constitutional Court on 17 September 2021, but not as a friend of the court this time around, but as the applicant seeking leave to appeal. The SAHRC was not a party to the initial matter that came before the Grahamstown High Court, but it was a party to the matter that came before the Pretoria High Court. Consequently, the SAHRC only sought leave to appeal the judgment of the SCA in so far as it overturned the decision of the Pretoria High Court.

On 9 December 2022, the Constitutional Court (the Court) handed down its judgment, weighing in on the debate whether fish cannot sometimes be fowl.

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The Court was of the view that the SAHRC had the requisite interest to bring the application, noting however, that none of the defaulting debtors had participated in any of the proceedings since inception. The Court granted the SAHRC leave to appeal the SCA judgement.

In argument, the SAHRC sought to distance itself from the High Court's reasoning that it is an automatic abuse of court process to litigate in the High Court matters that fall within the monetary jurisdiction of the Magistrate's Court. Instead, the SAHRC considered it an abuse if a litigant routinely litigated in the High Court, matters that fall within the jurisdiction of the Magistrate's Court, and argued that the right of access to court, enshrined in the Constitution, dictates that there should be a default rule that where the High Court and Magistrate's Courts have concurrent jurisdiction, the matter must be litigated out of the Magistrate's Court.

In attempting to persuade the Court to uphold its appeal, the SAHRC relied on section 169 of the Constitution that says that the High Court may decide "*...any matter not assigned to another court...*". The Court, in addressing the SAHRC's section 169 argument, concluded that on the SAHRC's interpretation of section 169, the High Court was at liberty not to entertain matters falling within its jurisdiction. This argument, the Court said, was imponderable.

The Court, having granted the SAHRC leave to appeal, dismissed the appeal. It therefore seems that the Court agrees with the SCA that fish cannot sometimes be foul.

However, this is not the end of the debate. The Court, in its judgement, referred to the Lower Courts Bill circulated for public comment in April 2022, and particularly section 22(4). This section stipulates that if a plaintiff wants to issue a summons in the High Court because the plaintiff is of the view that it would be more appropriate for the High Court to hear the matter, but the amount of the claim falls within the monetary jurisdiction of a lower court, the plaintiff must apply to the High Court and set out reasonable grounds why the action should be heard in the High Court. This will not only increase the cost of litigation, but it will most certainly slow down an already very sluggish process.

Eugene Bester and Alpha Zungu

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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