IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE
CASE NO. 2197/2007

In the ex parte application of:

EXECUTIVE OFFICER OF THE FINANCIAL SERVICES BOARD APPLICANT

And

In re the business of:
OVATION GLOBAL INVESTMENT SERVICES (PTY) LTD 1ST RESPONDENT
(Registration No. 1998/00620/07)

OVATION GLOBAL INVESTMENT NOMINEES (PTY) LTD 2ND RESPONDENT
(Registration No. 1998/019798/07)

With the following applicants for leave to intervene:

OVATION RESERVATION PENSION FUND 1st Intervening Applicant

OVATION PRESERVATION PROVIDENT FUND 2nd Intervening Applicant

OVATION PRESERVATION ANNUITY FUND 3rd Intervening Applicant

METROPOLITAN LIFE LIMITED 4th Intervening Applicant

JUDGMENT DELIVERED ON 14 JUNE 2007

DLODLO, J

INTRODUCTION

[1] This is an application in terms of section 5 (1) of the Financial Institutions (Protection of Funds) Act 28 of 2001 ('The FI Act"). In terms of that section 'The registrar may, on good cause shown, 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."

The Applicant is the Executive Officer of the Financial Services Board appointed in terms of section 13 (1) of the Financial Services Board Act 97 of 1990 ('the Executive Officer' and 'The FSB Act'). He is thus 'the registrar' as defined in the FI Act. 'Registrar' is defined in section 1 of the (Protection of Funds Act) as meaning, amongst other things, the executive officer defined in section 1 of the FSB Act. Section 1 of the FSB Act in turn defines the 'executive officer' as meaning the person appointed as such in terms of section 13 of the FSB Act.

[2] The First and Second Respondents are Ovation Global Investment Services (Pty) Ltd ('Ovation Services') and Ovation Global Investment Nominees (Pty) Ltd ('Ovation Nominees'). With effect from 17 December 2004, Ovation Services has been licensed as financial services provider in terms of section 8 of the Financial Advisory and Intermediary Services Act ("the FAIS Act"). It is thus an 'institution as defined in the FI Act. 'Institution' is defined in section 1 of that Act as including 'a financial institution', which is in turn defined with reference to that expression in section 1 of the FSB Act. 'Financial institution' is defined in the FSB Act as including 'any authorized financial services provider ... as defined in section 1 (1) of the Financial Advisory and Intermediary Services Act, 2002'. 'Authorized financial services provider' is defined in section 1(1) of the FAIS Act as meaning 'a person who has been granted an

authorization as a financial services provider by the issue to that person of a licence under section 8'. Ovation Nominees is a wholly owned subsidiary of Ovation Services, and is therefore also an 'institution' as defined in the FI Act. 'Institution' is defined in the Protection of Funds Act as including '(b) any person, partnership, company or trust in which, or in the business of which, a financial institution or an unregistered person has or had a direct or indirect interest'.

[3] Save as set out hereunder, the application is unopposed. On 2 March 2007 this Court granted an order in terms of which the whole of the business of the Respondents was placed provisionally under curatorship in accordance with section 5 (2) of the FI Act ('the provisional order') coupled with a *rule nisi* calling upon the Respondents and other interested parties to show cause why the appointment of the curators should not be confirmed. On 2 May 2007, the curators appointed in terms of the provisional order, Mr. John Adrian Levin and Mr. Barend Petersen delivered a report in accordance with paragraph 8.7 of the provisional order. On the same day, the Ovation Preservation Pension Fund, the Ovation Preservation Provident Fund and the Ovation Retirement Annuity Fund ('the Ovation Retirement Funds') delivered a notice of intention to oppose, and notice that on the return day of the *rule nisi*, which was initially scheduled for hearing on 15 May 2007, they would seek leave to intervene. These notices were accompanied by an affidavit by William Herbert Hunter Thyne ("Mr. Thyne"), a duly appointed trustee of the Ovation Retirement Funds.

[4] On or about 8 May 2007 the Applicant delivered a notice of application with respect to the confirmation of the rule nisi and an affidavit in support thereof. On 15 May 2007, my brother,

Veldhuizen J granted an order by agreement between the parties, (with the leave of the Judge President), in terms of which the matter was postponed for hearing on 31 May 2007 and a timetable was provided for the filing of further affidavits by the Ovation Retirement Funds and the Applicant. On or about 17 May 2007 the Ovation Retirement Funds delivered a Replying Affidavit, and on 23 May 2007 the curators delivered a supplementary curators' report. Finally, on the evening of 25 May 2007 the Ovation Retirement Funds served a further affidavit on the Applicant's attorneys of record. On 30 May 2007 the Fourth Applicant to intervene (Metropolitan) delivered an application to intervene coupled with an application for condonation for late filing. This application was accompanied by an Affidavit deposed to by one Willem Abraham van Schalkwyk – the Group Officer of Metropolitan. Mr. Binns-Ward SC (with Ms Du Toit) appeared for the Applicant; Mr. Fine SC (with Mr. Goldman) appeared for the Ovation Retirement Funds; Mr. Oosthuizen SC (with Mr. Blumberg) appeared for Metropolitan. Mr. De Villiers watched brief on behalf of certain investors who also had money invested in the Ovation Pension Funds.

THE BASIS OF OPPOSITION (BY THE INTERVENING APPLICANTS)

[5] The Ovation Retirement Funds do not oppose the granting of a final order of curatorship. The Ovation Retirement Funds do, however, oppose certain aspects of the final relief which was sought on the return day. These aspects are the following:

(a) That 'investments in or administered by the business or companies shall not without prior approval of the Registrar be withdrawn, transferred or otherwise disinvested from the business or companies' and that the curators will continue to be authorized to do the following:

i) ‘*to take custody of the cash, cash investments, stocks, shares and other securities held or administered by the companies, and of other property or effects belonging to or held by or on the instructions of the companies or any entity directly or indirectly controlled by, affiliated to or associated with the companies’; and*

ii) ‘*to take control of and to operate or freeze existing banking accounts of the companies and of their subsidiaries, holding or affiliated companies and of any director or official of the companies insofar as money entrusted to the companies has been deposited into such latter banking account…’; and*

(b) That the curators will continue to be authorized to:

i) pay such reasonable expenses and costs as may be necessary or expedient for the curatorship and control of the business and operations of the Respondents from the assets held, administered or under the control of the companies, (although these parts of the provisional order are not expressly referred to, it is clear that the Ovation Retirement Funds oppose not only the payment of the remuneration of the curators from the assets held on behalf of its members, but also other costs associated with the curatorship).

ii) to defray reasonable charges and expenses incurred by the engagement of legal, accounting and administrative, or other professional or technical assistance as they may deem reasonably necessary for the performance of their duties from the assets held or under control of the companies; and

iii) to be remunerated from the assets of, held by or under the control of the companies.

The opposition by the Ovation Retirement Funds can be summarized as relating to two broad classes of relief. The first is relief which is aimed at vesting the curators with control over the investments administered by the Respondents, subject to the Registrar's approval that these may be withdrawn or transferred. The second is relief which is aimed at ensuring that the costs of the curatorship, including the remuneration of the curators is payable out of the assets administered or held by the Respondents.

[6] The Ovation Retirement Funds' opposition to the first class of relief is only insofar as it 'is in conflict with the terms and conditions of the administration and nominee agreements …' and prevents 'the payment of benefits to members and/or other beneficiaries of the Ovation Retirement funds pursuant to the rules of the said Funds, the Pension Funds Act and the Financial Institutions Act, as and when such benefits fall due. In terms of the administration agreements Ovation Services was appointed as the administrator of the Funds and was required to 'administer on behalf of the Fund the investments of the Fund' to make investments 'in accordance with the request of the members'. It was also required to do the following: 'pay benefits to members or parties entitled thereto in terms of the rules and the Act' (Annexure **'A9'** and **'A11'**), 'determine the amount of the benefits' (Annexure **'A9'** and '**A11'**), 'ensure that all benefits are calculated accurately in accordance with the rules and in accordance with the records of the Fund maintained by Ovation' (Annexure **'A9'** and **'A11'**), 'pay the benefits due in

terms of the rules to the members or beneficiaries entitled to such benefits' (Annexure **'A9'** and **'A11'**). The nomination agreements provided that 'The business of the Nominee Company shall be to take title of immovable property, money or marketable securities in trust for and on behalf of clients as nominee for, or representative of, such clients and to hold and otherwise deal with such immovable property, money or marketable securities strictly in accordance with any directions given by the respective clients from time to time to the Nominee Company' (Annexures **'A12', 'A13' and 'A14'**). Ovation Nominees was also required to open one or more bank accounts in its name and to hold money in terms of the agreement in that account (Annexures **'A12', 'A13'** and **'A14'**). In other words, the Ovation Retirement Funds' stated intention is not to transfer the investments of their members off the Ovation platform to another Linked Investment Services Provider ('LISP'). What the Ovation Retirement Funds seemingly do want is for benefits to be paid to their members as and when they fall due in terms of the rules of the Funds and the Pension Funds Act 24 of 1956. The periodic annuities payable to retired members of the funds are, and have been, paid by the curators. The Pension Funds' opposition to the confirmation of the rule nisi in the form proposed is predicated on the concern that the trustees will not be able to pay matured capital savings to members on retirement.

[7] What is central to the opposition by the Ovation Retirement Funds is the fact that the assets administered and invested by Ovation Services and Ovation Nominees constitute 'trust property'. There is no dispute between the Applicant and the Ovation Retirement Funds on the proper characterization of the

assets under administration by the curators as trust property within the meaning of section 4 (5) of the FI Act. The effect of section 4 (5) is that ownership of the trust property does not vest in the financial institution to which it has been entrusted. The nature of the dispute between the parties goes to the powers that can competently be vested in curators in respect of dealing with trust property under the FI Act. In this respect, the Ovation Retirement Funds contended that the effect of section 4 (5) of the FI Act, which relates to the status of trust property, is 'irreconcilable with the conduct of the curators to the extent that the owners of the assets constituting the trust property are precluded from dealing with such funds which ought to be available to pay benefits to members of the Ovation Retirement Funds'. This is also the basis for the Ovation Retirement Funds' opposition to the second class of relief.

Section 4 (5) of the FI Act provides that '**Despite anything to the contrary in any law or the common law, trust property invested, held, kept in safe custody, controlled or administered by a financial institution or a nominee company under no circumstances forms part of the assets or funds of the financial institution or such nominee company'**.

[8] The Ovation Retirement Funds also argue that the powers conferred upon a court by section 5 of the FI Act are limited and that the relief sought in this application in the terms described above, if confirmed, would fall outside of the ambit of that section. They argue that *'...it is not competent for a court to confer a power upon the curators which falls outside the ambit of the Financial Institutions Act and which curtails or interferes with the rights and obligations of the Ovation*

Retirement Funds, Ovation Services and Ovation Nominees in terms of the administration and nominee agreements …'

Finally, the Ovation Retirement Funds argue that *"there is no basis to withhold the payment of benefits to members of the Ovation Retirement Funds as and when they fall due on account of the Common Cents losses when such losses ought to be factored in the value of benefits relating to those members of the said Funds who were invested in the Common Cents Portfolio as aforesaid. It therefore follows members of the Ovation Retirement Funds that are not invested in the Common Cents Portfolios are entitled to the payment of their full benefits as and when they fall due."* This argument, which is based on the premise that the losses should be borne where they fall, is also premised on there being a proper separation of assets and full information regarding the losses which have been incurred. This aspect will be dealt with further *infra.*

[9] On behalf of the Ovation Retirement Funds, Mr. Fine SC placed heavy reliance on ***Alpha Bank Ltd v Registrateur van Banke en Andere*** 1996 (1) SA 330 (A), a case which concerned a curatorship under section 40 (5) of the Banks Act. He submitted that there is congruity between an order for curatorship and an order for the judicial management of a company in that, in his submission, both are aimed at divesting existing management of control of the company and providing the company with a moratorium. It was pointed out to me that judicial management as dealt with in sections 428 to 437 of the Companies Act, 61 of 1973 circumscribes the ambit of an order which the Court is empowered to make. Relying on the authorities such as ***Lief v Western Credit (Africa) (Pty)Ltd*** 1966 (3) SA 344 (W) at 348, ***S v Cohen Ltd v Johnston*** 1970 (4) SA 332 (SWA) at 336

and ***Venter v Williams*** 1982 (2) SA 310 (N) at 315, the submission was made that the grant of a provisional judicial management order does not have the effect of instituting a *concursus creditorum*. I was also referred to ***Goodricke and Son v auto Protection Insurance Co. Ltd*** 1968 (1) SA 717 at 722-723. Mr. Fine SC referred me to ***Wire Steel Products & Engineering Co (Coastal) Ltd v Surtees NO and Heath NO*** 1953 (2) SA 531 (A) where the court was called upon to consider section 196 of the then Companies Act, 46 of 1926 which laid down what judicial management order shall contain and which included, amongst other matters, the following quote 'such other directions as to management of the company, or other matters incidental thereto, as the court may deem fit to give, which may include power to the judicial manager to raise money on debentures or otherwise without the authority of shareholders but subject to the right of creditors'. The section is in almost identical terms to the present section 427(C) of the present Companies Act. The court held that the power of the court to make order under sections 195 to 198 of Act 46 of 1926 (as amended) was limited to the express provisions; and it held further that a court had no power to grant an order to judicial managers of a company of building contractors restraining a building owner from paying directly to sub-contractors. The decision of the Court was that there was no express power conferred upon the court to interfere with legal rights or lawful interests of other persons.

[10] Mr. Fine SC submitted that a court is not entitled to ignore or avoid the provisions of the Companies Act by conferring authority on a judicial manager for which no provision is made in the Act. The **Wire Industries** judgment has been consistently

followed and applied (see ***Klopper en Andere NNO v die Meester en Andere NNO*** 1972 (2) SA 477 (T)). In his submission the same limitation applies to section 5 (1) of the FI Act and the court was not entitled to ignore or avoid the provisions of the section or to confer upon the curators powers for which no provision was made in the said Act. In his submission the FI Act does not confer any express authority on curators, nor can such authority be inferred from the wording of the section. Accordingly, in Mr. Fine SC's view, the claim for costs has no legal basis and the Court order should be modified. I undertake to deal exhaustively *infra* with these submissions. It suffices at this stage to mention without observations that I am concerned that Mr. Fine SC likened the scenario of curatorship to judicial management of companies.

[11] The issues raised by Metropolitan are three-fold, namely:

a) that the grant of the final order of curatorship in terms that arguably authorize (at least ostensibly) the pooling or aggregation of the trust property was an impermissible and unlawful practice;
b) the timing of withdrawals by investors of their investments placed with the companies; and
c) the liability of investors to contribute to the costs of the curatorship.

[12] The aggregation issue, in my understanding, is no longer an issue which Metropolitan is still pursuing. I was told Metropolitan's concerns in this respect may have arisen from its reading of the curators' report. Aggregation, as I am told, is not at all an option considered by the curators. On the contrary, I am led to understand that the curators intend to act in this

respect in accordance with the advice obtained by them from Advocates Manca and Pillay, which all the parties legally represented in these proceedings accept as correct. In any event in the unlikely event that the curators were to purport to deal with the trust property under their control on the basis of 'aggregation', the affected parties would be entitled to oppose such conduct by way of proceedings in terms of section 5 (8) of the FI Act.

[13] The Applicant takes issue with the contention by Metropolitan Life that the provisions of paragraphs 5.6 and 5.12 of the provisional order are susceptible of being read so as to authorize 'aggregation'. The Applicant contended that the fact that the curators are authorized thereby to take custody and control of the trust property for the purpose of the curatorship does not affect the character of the ownership of the trust property, nor the duty of the curators in the context of the other provisions of the provisional order and proposed final order to account for the trust property to the owners thereof. Paragraph 1 of the order, for example makes it plain that the curatorship is in terms of the FI Act. That necessarily also connotes recognition of the other provisions of the Act, including the definition of 'trust property' in section 1 thereof and the provisions of section 4 (5). Paragraph 5.3 of the provisional order enjoins the curators to give consideration to the best interests of the investors in the companies. Paragraph 8.2 of the provisional order directs the curators to compile a reconciliation statement of investor funds (an exercise directed to give effect in a curatorship context, to the obligation that the companies had in terms of section 19 of the FI Act in respect of trust property under their control or administration). Mr. Binns-Ward SC submitted that the proposed

final order confirms the duty of the curators to reconcile assets found in or under the control of the companies with the owners thereof. In his submission on this aspect, the provisional order and the proposed final order do not in any manner mandate the curators to take ownership of the trust property or to deal with trust property in the manner suggested by the term 'aggregation' in the sense it has been used by Metropolitan. The aggregation is clearly a non-issue between the parties and that must be the reason why Metropolitan in Mr. Oosthuizen SC's oral submissions appeared to have abandoned this aspect altogether.

[14] Metropolitan has approximately R1.4 billion invested with the Ovation companies, and that such investments are "in the nature of trust assets" is not disputed. Mr. Oosthuizen SC invited my attention to the definition of "trust property" in section 1 of the FI Act. "Trust property" is defined as meaning:

"*any corporeal, or incorporeal, movable or immovable asset invested, held, kept in safe custody, controlled, administered or alienated by any person, partnership, company or trust for, or on behalf, another person, partnership, company or trust, and such other person, partnership, company or trust is hereinafter referred to as the principal".*

Mr. Oosthuizen SC submitted that the powers which the court exercised in applications brought in terms of section 5 of the FI Act derive from the Act itself, and not from the court's inherent jurisdiction to regulate proceedings before it. In his submissions, it follows that the question of what costs orders may be made by the court must be answered, in the first place, by having regard to the empowering legislation. It is not for the court to usurp the legislature's function, in order to cure any lacuna in an Act, he argued. He referred to what was pointed out by De Villiers CJ in ***De Kock v Resident Magistrate of Caledon*** (1896) 13 SC 386 namely, ***"the safer course is …to observe the literal and grammatical sense of the***

words employed, and to leave it to the Legislature – which is always at hand for the purpose – to amend the law in case such a construction should not carry out its real intention".
(See also ***Boxall v Johannesburg City Council*** 1948 (1) SA 907 (T) at 914)

[15] Metropolitan proposes in paragraph 5 of the draft order, annexed as annexure A to its notice of application, that the restriction on withdrawals save with the leave of the Registrar apply only until the completion of a reconciliation in respect of the trust property previously administered by the companies. It was submitted on behalf of the Applicant that this proposal fails to acknowledge sufficiently that the efficiency and viability of the curatorship requires that the curators should be required to release investments only when it is appropriate to do so in the context of the management of the curatorship as a whole. The reality is that whereas one of the ultimate objects of the curatorship is to identify and restore the trust property to its rightful owners, the curators can only effectively achieve this object and the other if they are able to manage the business of the companies in a way that enables them to maintain the staffing requirements and operational infrastructure necessary for the tasks. The curators are undoubtedly heavily reliant in this respect on maintaining the income stream provided by the management fees on the existing investments. It is important that the curators, subject to the oversight of the Registrar, be able to manage the withdrawal of investments in accordance with the operational exigencies of the curatorship. The investors are assured a safeguard against unreasonable conduct in this respect by either the curators or the Registrar by the availability of a remedy in terms of s 5 (8) of the FI Act.

[16] In Mr. Oosthuizen SC's submission the power to recover curatorship costs from the owners of trust property would have to be conferred on the FSB expressly, or by necessary implication, in the enabling legislation. He dealt with the provisions of sections 4 (5) and 5 (5) of the FI Act and contended that in section 4 (5) the Legislature unequivocally spelt out that trust money does not form part of the assets of the financial institution holding such property, in order to ensure that such property is not linked to the fate of such financial institution and is not in any way imperiled by a downturn in the fortunes of such institution. This submission cannot indeed be assailed. It represents what I also accept to have been the expressed intention of the lawmaker in enacting section 4 (5). What concerns me though is that Mr. Oosthuizen SC went on to submit that it would make little sense, and defeat the very purpose for which the Legislature enacted section 4 (5) if the owners of trust property held by an institution were held liable for the curatorship costs of such institution.

[17] Justifying his submission that the investors should not bear the expense of curatorship, Mr. Oosthuizen SC advanced two (2) contentions, namely:

(a) "The framework created by the FI Act is intended for the benefit of investors generally, and the protection of the investment community. It serves a remedial purpose, by allowing for applications for curatorship in respect of specific financial institutions, where good cause is shown, and a preventative purpose by requiring financial institutions to deal with funds invested by them in a particular manner. There is thus, in principle, no reason why the costs of any shortfall in the curatorship

proceedings should not be borne by the investing public generally, rather than by those whose funds have been placed with the specific institution under curatorship (especially where the Legislature is at pains (in section 4 (5)) to provide that trust properties shall not form part of the assets of the institution under curatorship.

(b) In terms of section 16 of the Financial Services Board Act, No 97 of 1990, read with Section 15A thereof, the FSB is in any event funded by levies imposed on financial institutions. Any shortfall in the curatorship costs would therefore be borne ultimately by such financial institutions, and not by the tax paying public generally. This, it is submitted, would accord with the intention of the FI Act of regulating the manner in which financial institutions generally deal with funds."

These submissions will further be dealt with holistically *infra*.

SECTION 5 OF THE FI ACT

[18] Section 5 (2) of the FI Act makes provision for the provisional appointment of a curator 'to take control of, and to manage the whole or any part of, the business of the institution on such conditions and for such a period as the court deems fit'; and simultaneously to grant 'rule nisi calling upon the institution and other interested parties to show cause on a day mentioned in the rule why the appointment of the curator should not be confirmed'.

Section5 (4) provides that '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'.

Section 5 (5) provides the following:

'The court may make an order with regard to-

a) the suspension of legal proceedings against the institution for the duration of the curatorship;

b) the powers and duties of the curator;

c) the remuneration of the curator appointed provisionally under subsection 2 (a) or finally under subsection (4);

d) the costs relating to any application made by the registrar under subsection (1);

e) the costs incurred by the registrar in respect of an inspection of the affairs of the institution concerned in terms of the Inspection of Financial Institutions Act, 1998, …; or

f) any other matter which the court deems necessary'.

(underlining added)

[19] The FI Act repealed the Financial Institutions (Investment of Funds) Act 39 of 1984 (the '1984 Act'). The latter act was repealed by reason of section 11 of the FI Act with effect from 23 November 2001. Although the test was slightly different under the 1984 Act (the appointment of the curator had, in the opinion of the registrar to be 'desirable') and such application was designed to follow an inspection of the affairs of a financial institution, the 1984 Act also made provision for the 'appointment of a curator to take control of and to manage the whole or any part of the business of that financial institution' (section 6 (1)).

[20] In ***Conze v Masterbond Participation Trust Managers (Pty) Ltd and Others*** 1996 (3) SA 786 (C), a curatorship order made in the Masterbond matter in accordance with section 6 of the 1984 Act was characterized as being cast in the 'widest possible terms' (797I-J). In referring to an earlier decision by a differently constituted Full Bench that the Masterbond curatorship order did not affect the rights of debenture holders who had invested money through the company, Friedman JP, Brand and Farlam JJ (as they then were) held:

‘**There is … no warrant for construing the order in the narrow terms suggested in the Full Bench judgment. The Court was influenced in coming to the conclusion to which it did by its view that s 6 of the FI Act could not have been intended by the Legislature to permit an order with such far-reaching effects on the rights of third parties as, on our interpretation, the present curatorship order has. This view of s 6, which is also worded in the widest terms, fails, in our respectful opinion to afford sufficient weight to the fact that it was intended to enable the Director of Financial Institutions to approach the Court for an order which would protect the public from the potential consequences of a large-scale financial disaster involving a ‘financial institution’ as defined in the Act’** (798A-C).

[21] It is clear then that the legislation which preceded the FI Act has been interpreted to confer wide powers upon a court in the public interest. The provisions of the 1984 Act pertaining to the appointment of a curator were in very similar terms to those in the FI Act. The FI Act, however, spells out what the powers which the courts may exercise in relation to the appointment of a curator in greater detail, while pragmatically not confining them to the categories expressly listed. The provisions of section 5 (5) (f) of the FI Act are consistent with the postulate that the Court may grant whatever order it deems necessary to assist in the achievement of the objects of a curatorship. Subject to what is stated below, there was no equivalent in the 1984 Act of paragraph 5 (5) in the FI Act.

The only part of section 5 (5) of the FI Act which had an expressly equivalent provision in the 1984 Act is section 5 (5)

(c). In this regard section 6 (8) of the 1984 Act provided that 'The curator is entitled to receive such remuneration *out of the funds of the financial institution* concerned as the court may direct' (emphasis added). It is clear that section 5 (5) (c) of the FI Act is cast in much wider terms than section 6 (8) of the Investment of Funds Act. Whereas the latter restricts the source of the remuneration of the curator to the 'funds of the financial institution' the current Act leaves the court's discretion entirely open with regard to the remuneration of the curator. In the draft order which was handed up as a proposed court order the court is asked to direct that the curators first utilize the resources of the Respondents, jointly and severally, to pay the expenses and costs of the curatorship, including the costs of the application and the fees of the curators, and only if those resources are not sufficient, to utilize the assets or investments of investors administered by or under the control of the Respondents (emphasis added).

[22] In my view, the Court is empowered to make an order which may affect the rights of third parties and also to make any direction as to the remuneration of the curators as it deems necessary. Given that in all likelihood the assets of the Respondents will not be sufficient to cover the remuneration of the curators and the costs of the curatorship (a situation, which inherent probability suggests would not be uncommon where maladministration of a financial institution necessitates the intervention of a curatorship), this Court would, in my view, be justified in making an order in terms of which these costs are to be paid out of the assets held in trust on behalf of the Ovation Retirement Funds and Metropolitan. The remedy of curatorship of a financial institution is after all primarily for the benefit and

protection of investors in the institution; cf. ***Financial Services Board and another v De Wet NO and other*** 2002 (3) SA 523 (C) at para [176]; p. 590, where the Registrar is described in the context of both the Pension Funds Act and the FI Act as 'the guardian of the interests of members of pension funds'.

[23] Contrary to what the Ovation Retirement Funds argue, section 4 (5) of the FI Act has no bearing on the question, as the Court's powers in respect of the administration of a curatorship are not limited to defraying the costs associated with such curatorship from *'assets or funds of the financial institution or … nominee company'*. Nor does the fact that property comprises 'trust property' mean that losses should not be borne by the investors whose investments are affected by negligent or fraudulent activity giving rise to the necessity of a curatorship. In a situation where the extent and incidence of the loss has not yet been established, that property constitutes trust property cannot justify members receiving their benefits as and when they fall due to the potential prejudice, not only of other investors, but of other members. That the loss should be borne where it falls appears to be common cause. In my understanding, it is not the Applicant's argument that losses sustained by other investors should be spread among members of the Ovation Retirement Funds. The administration of the curatorship is intended to redound to the benefit of all the investors. It is reported in the curator's report that the operational expenses of Ovation Services exceed its monthly income. The difficulty of profitably operating a business such as that of the Respondents is explained in the curators' report. The curators will not be able to discharge their functions in terms of those provisions of the order to which the Ovation Retirement

Funds have no objection effectively if the substratum of the operational income of the business under curatorship is diminished by reason of investors withdrawal of investments with the attendant diminution of the basis to maintain the level of administration fees. It is apparent from the curators' report that much administrative work needs to be done to achieve the objects of the curatorship. They point out that they need to retain and deploy staff to render the requisite services. They would also need to maintain the requisite systems to manage the business in the interest of investors until the discharge of the curatorship.

[24] As pointed out by Mr. Binns-Ward SC with regard to costs associated with the curatorship, that all of the funds under the control of the Respondents are trust property as defined in section 1 of the FI Act. If the expenses of the curatorship, including the remuneration of the curators were not to be paid from the trust property, it is not at all apparent how most curatorships in terms of the FI Act could ever effectively operate save where the institutions under curatorship were sufficiently solvent to meet these charges from their own resources. The Financial Services Board Act 97 of 1990 closely defines the use to which funds of the Financial Services Board may be put (section 16), and there is no reason that the expense of a curatorship under the FI Act should be borne by the general public as opposed to those investors whose interests are most directly served by it.

[25] The FSB is there to ensure that the interests of the public are protected. The section of the public affected and on whose interests the curatorship came to existence is the investors. It is

only common sense that they are called upon to contribute (if necessary) should the funds of the Financial Institution prove to be insufficient for the purpose. Having regard to the total sum under administration by the Respondents (an amount of nearly R4,5 billion), the individual contributions likely to be required from investors should, on a pro rated basis, not be large. The proposed order permits capital withdrawals with the permission of the Registrar. The Ovation Retirement Funds have not given instances of actual cases where capital payments have fallen due under the rules of the respective funds. They do not give any indication that they have sought the permission of the Registrar (who is also the Registrar of Pension Funds). They also give no indication of what amount in this respect is expected to fall due within the next few months. The papers do not afford any basis to determine the effect on the effectiveness of the curatorship of permitting any withdrawals on the basis postulated by the Ovation Retirement Funds, nor do they contain any indication of an appreciation by the trustees that terms of withdrawal could notionally be structured to make provision for the costs issues discussed above. Any unreasonable refusal by the Registrar to reach agreement with the trustees in any given case would be amenable to challenge in terms of section 5 (8) of the FI Act.

[26] The reliance by the Ovation Retirement Funds on the obligations of the trustees in terms of the rules of the respective funds and the provisions of the Pension Funds Act 24 of 1956 construed in isolation of the curatorship is artificial. The reality is that the trustees' ability to meet the funds' obligations to members is affected by the unfortunate fact that investments have been made by the funds with institutions that were being

mismanaged and have consequently been placed under curatorship. The trustees' obligations to affected members fall to be determined with regard to the incidence of the curatorship and not on the basis that the Pension Funds Act or the rules of the respective Funds exempt the trustees or the membership of the Funds from the consequences of the curatorship.

[27] The judgment of the SCA in ***Louw NO and Others v Coetzee and Others*** 2003 (3) SA 329 (SCA) should not be misconstrued to hold that the owner of trust property within the meaning of section 4 (5) of the FI Act is entitled to demand its property from the curators of the financial institution holding it in the face of a provision in the curatorship order forbidding such withdrawal. The issue which is raised by the Ovation Retirement Funds in this matter did not arise in ***Louw's*** case. On the contrary it appears from the judgment that the issue in ***Louw's*** case followed upon an application in terms of section 5 (8) (a) of the FI Act.

[28] The connection sought to be drawn by the Ovation Pension Funds, relying on ***Alpha Bank Bpk en ander v Registrateur van Banke en andere*** 1996 (1) SA 330 (A), at 351-352, between certain aspects of a curatorship in terms of section 40 (1) of the (long since repealed) Banks Act 23 of 1965 and the concept of curatorship in terms of section 5 of the FI Act must be approached with extreme caution. The connection described by the Ovation Pension Funds provides the platform for the argument advanced on behalf of these entities. The provisions of section 40 of the old Banks Act, quoted at page 351E of the judgment in **Alpha Bank**, expressly made the provisions of sections 433, 434(2), 436, 437 and 440 of the Companies Act

(all of which pertain to judicial management) applicable to a curatorship established in terms of section 40 of the Banks Act. There is no equivalent provision to section 40 of the old Banks Act in this respect in the FI Act. I would agree with Mr. Binns-Ward SC that this is not surprising having regard to the fundamental difference between a curatorship under the FI Act and a judicial management of a company. The essential object of a judicial management is the protection of the company; whereas the essential object of a curatorship of a financial institution under the FI Act is the protection of the interests of investors and the promotion of a safe investment environment in the public interest.

[29] The fallacy coupled with the danger of equating judicial management with a curatorship under the Financial Institutions (Investment of Funds) Act 39 of 1984 was forcefully expressed by Marais JA in ***ABP 4x4 Motor Dealers (Pty) Ltd v IGI Ins Co Ltd*** 1999 (3) SA 924 (SCA). At 930 A-B the learned judge of appeal (in whose judgment Smalberger JA, Grosskopf JA, Meleunsky AJA and Madlanga AJA concurred) held:

"**Curatorship of the kind provided for by s 6 of Act 39 of 1984 is not akin to judicial management. Not only is there recognition given by the Legislature in this and other statutes to curatorship and judicial management as separate and distinct concepts, but an analysis of the two concepts shows that they cannot be equated with one another."**

And at 934A-E of the judgment, Marais JA stated:

"**First, judicial management is a creation of the Legislature which has no counterpart in the common law.**

That it resembles a curatorship in some respects does not make it anything other than what it is: a concept which is sui generis and has its own legislatively determined field of application and its own special name. There is no more warrant for forcing the concept of judicial management into the mould of curatorship than there is for forcing the concept of curatorship into the mould of judicial management. The fact that, when enacting statutes providing for the placing of certain institutions under curatorship, the Legislature has sometimes made it possible for such curators to have the same powers as a judicial manager does not detract from the existence of the two phenomena as separate and distinct conceptions in law. Secondly, there are many instances to be found in South African statutes of the Legislature referring to those phenomena by their respective names in a way which shows that it does not regard them as capable of being described by one and the same generic name. I content myself with referring to ss 4 (2) (b) (ii) and (iii) of the Stock Exchanges Control Act 1 of 1985; ss 57 (7) (c) and (d) of the Mutual Banks Act 124 of 1993; and ss 5 (6) (a) (ii) and (iii) of the Financial Markets Control Act 55 of 1989."

[30] What is striking when comparing section 40 of the old Banks Act and the provisions of the FI Act is that whereas section 40 of the old Banks Act defined the powers and functions of a curator appointed in terms of the Act with reference to certain of the provisions dealing with judicial managers under the Companies Act, the FI Act provides that the powers of a curator appointed in terms of section 5 of the FI Act fall to be defined by the court in

terms of its order. There appears to be is no statutory restriction on the ambit of the powers that might be confirmed. See: ***Conze*** case *supra.* The current provisions in section 5 of the FI Act are expressly wider than those that pertained when ***Conze*** was decided.

[31] The argument advanced by the Ovation Pension Funds that the court has no authority to confer powers on a curator which curtail the rights of third parties is premised on a line of authority which deals with the powers that may be given to a judicial manager. Those authorities, founded on the judgment of the Appellate Division in ***Wire Industries Steel Products & Engineering****supra*, are premised on an interpretation of the Companies Act. The provisions of section 5 of the FI Act in respect of curatorship orders are materially different to the provisions of the Companies Act pertaining to the content of a judicial management order. Whereas the provisions of section 5 (5) (f) of the FI Act are unrestricted in their ambit, the provisions of section 428 (2) (c) and 433 (3) (c) of the companies Act are restricted to the matters referred to in those paragraphs; viz. **"directions as to the management of the company, or any matter incidental thereto, including directions conferring upon the final judicial manager the power, subject to the rights of the creditors of the company, to raise money in any way without the authority of shareholders."**

[32] Therefore, in terms of the FI Act it is the Registrar, not the Court, which is expressly empowered to give the curator "instructions with regard to any matter arising out of, or in connection with, the control and management of the business of the institution"

(under curatorship). See: section 5 (6) of the FI Act. A judicial manager obtains such directions from the Court in terms of the Companies Act. I am in agreement with Mr. Binns-Ward SC that this highlights the different and much wider character of the matters to which a Court may give attention in terms of any order issued in terms of section 5 (2) (a) or section 5 (5) of the FI Act. The argument by the Ovation Pension Funds, in my view, indeed begs the question why there is an institution of curatorship for financial institutions and why a curatorship is a remedy additional to and distinguishable from the remedies of the judicial management and winding up. The submission that the curators are obliged to give effect to the administration and nominee agreements is, in my view, rather simplistic. The proper position is that they are obliged to give effect to those agreements within the exigencies of the curatorship. The curatorship is an incident which is statutorily provided and which supervenes on the administration of the assets in question in terms of the administration and nominee agreements.

THE LOSS (POSTULATED IN THE PAPERS)

[33] The papers reveal that the extent and incidence of loss has not as a matter of fact been finally established by the curators. What follows hereinafter is what in brief represents the content of the Affidavits filed by the applicant and the curators' reports. Some 143 912 un-reconciled clearing entries were found in the accounting records of the Respondents. The risks inherent in the fact that the reconciliations in respect of the asset accounts, bank accounts and the clearing accounts were not kept up to date include that there are undisclosed losses and receipts in respect of which no investments were made. As at 2 may 2007 the curators were in the process of obtaining direct confirmation

from individual investors of their investment balances.

[34] As at 2 May 2007 the curators had ascertained that cash in the amount of R147 972 810 paid into the Common Cents cash pool had been misappropriated. A further amount of R42 558 609 in cash had been disinvested from the Common Cents cash pool but not paid to Ovation Nominees. A further amount of R19 000 000 which passed through the Ovation Nominees bank account may have been lost. It does not appear from the curators' report which investors this loss was associated with. Apart from the aforementioned losses, most of the assets held by the various asset managers through whom investors' money was invested, had been accounted for 'subject to the final reconciliations being performed'.

[35] The reconciliation of the clearing accounts and the client asset accounts might result in further losses being identified and as at 2 May 2007 the curators were accordingly not in a position to express themselves with regard to the losses incurred. As at 8 May 2007 *"the reconciliation process to match investor assets with liabilities to investors [had] not been completed"*; and as at 21 May 2007 the curators had not yet completed the process of checking that *there is an asset for every investment reflected in the Ovation books as being owed (sic) by an investor' and were not in a position to say positively that 'particular assets belong to particular investors, including the Retirement Funds".*

[36] The ovation Retirement Funds appear to rely for their argument that this reconciliation process has been completed on the fact that a 'finding by Advocates Manca and Pillay that *"detailed records of the identity of the investors and the amount of their*

investment as well as the units purchased on their behalf by Nominees are kept by Nominees" and that "[s} uch records accordingly identify the owners of the assets held by the Nominees". This was in fact not a 'finding' which was made by the counsel referred to in an opinion which they furnished to the curators, but clearly an assumption which they were instructed to make for the purposes of the opinion sought.

[37] The Ovation Retirement Funds have subsequently sought to show that contrary to what the curators say in their reports, they have in fact completed the reconciliation process. They do this by placing reliance upon a document which Mr. Vincent Vermaak, the managing director of the Respondents had furnished to Mr. Thyne on 7 May 2007, entitled 'Ovation Global Investment Services (Pty) Ltd Key Deliverables – Finance Project', and a document which was apparently furnished by Ovation Services to the principal officer of the Ovation Retirement Funds entitled 'Retirement Funding' ('the schedule'). A cursory glance at these documents and the affidavit to which they are attached reveals the following:

(i) Although by 7 May 2007, statements had been obtained from asset houses and had been summarized and totaled (independently), a third item referred to as 'independent check' had not yet been completed. (The statement that 'the assets held by Ovation Services and Ovation Nominees were verified by the task team appointed by the curators by 15 March 2007' appears to be incorrect and not supported by Annexure A to the supplementary affidavit of Mr. Thyne);

(ii) As at 30 march 2007 Ovation Services, and apparently the curators, were in possession of a schedule which listed the

> Ovation Retirement Funds, the asset management company through which their investments were managed, the fund in which their investments were invested and 'the market value as at 30 March 2007 associated with each investor <u>according to the fund</u> on the Ovation Platform in which the aforesaid assets are invested' (emphasis supplied).

Nothing in the schedule or the affidavit to which it is attached suggests that the reconciliation process has been completed. On the contrary, the schedule includes as items on pages 6, 12, 13 and 20 of the schedule the values of the Common Cents portfolios, which are rather overstated, given that these monies have been misappropriated. The schedule also contains funds managed by Fidentia Ayanda Collective Investments.

[38] Accordingly, even if I have wrongly accepted the argument put forth by the Applicant, in my view, the opposition by the Ovation Retirement Funds must fail. Metropolitan's contentions, well reasoned and articulated as they were, must similarly fail. The dictates of justice demand that the costs of curatorship in this matter must be borne by the investors (including those involved in the Ovation Retirement Funds as well as Metropolitan).

[39] To the extent that the terms of a curatorship order render performance according to the strict tenor of an agreement impossible, the result in the contractual context is indistinguishable in conceptual terms from any other supervening partial impossibility of performance. (See eg. **RH Christie – The Law of contract in South Africa** 5th ed. At 473 in fine - 475). In this regard it is important to emphasise

that the proposed final order does not, act to prevent the curators, with the leave of the Registrar, from substantially performing in terms of the relevant contracts where it would be reasonable to do so in the context of the overall administration of the curatorship. It is also important to recognize that the fact that the effect of the curatorship might result in some trust property being applied to defray costs does not result in the owners of the trust property forfeiting their claims against the companies for the value of any trust property not returned to them.

[40] Having read all the documentation filed of record and having heard all Advocates involved in this matter and for the reasons set out *supra*, I make the following order as proposed by the Applicant:

1. The order made on 2 March 2007 placing the whole of the business of **OVATION GLOBAL INVESTMENT SERVICES (PROPRIETARY) LIMITED** (Registration No. 1998/006620/07); and

   OVATION GLOBAL INVESTMENT NOMINEES (PROPRIETARY) LIMITED (Registration No. 1998/019798/07) ('the business') under curatorship in accordance with the provisions of section 5 of the Financial Institutions (Protection of Funds) Act 28 of 2001 ('the Act'), is confirmed on the terms further provided below.

2. The appointment of Mr John Adrian Levin and Mr Barend Petersen ('the curators') as curators of the whole of the business of the companies referred to in paragraph The order made on 2 March 2007 placing the whole of the business of above ('the companies') is

confirmed and the curators are absolved from furnishing security.

3. The business is hereby confirmed to be under the curatorship and management of the curators, subject to the supervision of the Registrar of Financial Services Providers ('the Registrar'), and it is confirmed that any other person (including, but not limited to, the directors of the companies) vested with the management of the business prior to the order of 2 March 2007 remains divested thereof.

4. *4.1* All actions, proceedings, the execution of all writs, summonses and other processes against the companies are stayed for the duration of the curatorship and shall not be instituted or proceeded with without the leave of the Court.

4.2 Investments in or administered by the business or companies shall not without the prior approval of the Registrar be withdrawn, transferred or otherwise disinvested from the business or companies.

5. The curators are hereby:

5.1. authorised to maintain control of, and to manage and investigate the business and operations of and concerning the companies, together with all assets and interests relating to such business, such authority to be exercised subject to the control of the Registrar in accordance with the provisions of section 5(6) of the Act, and with all such

rights and obligations as may pertain thereto;

5.2. vested with all executive powers which would ordinarily be vested in, and exercised by, the board of directors or members of the companies, whether by law or in terms of their articles of association, and the present directors, members or managers of the companies continue to be divested of all such powers in relation to the business;

5.3. directed to give consideration to the best interests of the investors in the companies who have entrusted money to the companies or whose money has been invested with the companies, or is being managed or administered by or on the instruction of the companies;

5.4. directed to exercise the powers vested in them with a view to conserving the business and not without the leave of the Court to alienate or dispose of any of the property of the companies or the business, save to the extent and for the purposes set out hereunder;

5.5. authorised, in their discretion and depending on available resources, to maintain payments to annuitants, pensioners and other beneficiaries who receive regular payments;

5.6. directed to take custody of the cash, cash investments, stocks, shares and other securities held or administered by the companies, and of other property or effects belonging

to or held by or on the instructions of the companies or any entity directly or indirectly controlled by, affiliated to or associated with the companies;

5.7. authorised to conduct any investigation with a view to locating the assets belonging to and or administered and or controlled by the companies or the business, including such assets held by way of securities, in cash or liquid form, and assets which may have been acquired with funds stolen or otherwise unlawfully diverted from the companies or the business, and for the purpose of the investigation the curators:

5.7.1. shall have the powers conferred by sections 5, 6 and 7 of the Inspection of Financial Institutions Act, Act No. 80 of 1998, on an inspector appointed under that Act;

5.7.2. may in addition to the said powers obtain the issue by the Registrar of this Court of any subpoena in order to procure the attendance of any person or to obtain access to and possession of relevant documents, including records of banking accounts, from any person, if they have reason to believe that such person has, or such documents may contain, information relating to the investigation;

5.8. subject to paragraph In funding the expenses and costs of the curatorship referred to in paragraphs subject to paragraph In funding the

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5.10. authorised to institute or prosecute any legal proceedings on behalf of the companies and to defend any litigation against the companies;

5.11. authorised to invest such funds as are not required for the immediate purposes of the business, with a registered bank;

5.12. authorised to take control of and to operate or freeze existing banking accounts of the companies and of their subsidiaries, holding or affiliated companies and of any director or official of the companies insofar as money entrusted to the companies has been deposited into such latter banking account; and to open and operate any new banking accounts for the purposes of the curatorship;

5.13. directed and authorised, at any time during their term of office, to report to the Registrar should they deem it necessary or expedient that application be made to this

court for the extension of their powers to any other company (including any holding company or subsidiary) or other institution affiliated to or associated with the companies; or for the liquidation of the companies; or for any relief as envisaged by s 6 of the Act against the companies or any of their directors, members or managers;

5.14. authorised to claim all costs, charges and other expenditure reasonably incurred by the curators in the execution of their duties in terms of this order, including their own remuneration, as administration costs, in the event of the liquidation of any of the companies ensuing;

5.15. subject to paragraph In funding the expenses and costs of the curatorship referred to in paragraphs subject to paragraph In funding the expenses and costs of the curatorship referred to in paragraphs subject to paragraph In funding the expenses and costs of the curatorship referred to in paragraphs subject to paragraph In funding the expenses and costs of the curatorship referred to in paragraphs subject to paragraph below authorised to incur such reasonable expenses and costs as may be necessary or expedient for the curatorship and control of the business and operations of the companies, and to pay same from the assets held, administered or under the control of the companies; and subject to paragraph below permitted to engage such assistance of a legal, accounting, administrative, or other professional or technical nature, as they may reasonably deem necessary for the performance of their duties in terms of this order and to defray reasonable charges and expenses thus incurred from the assets held by or under control of the companies; above

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8. The curators shall be remunerated in accordance with the norms of the attorneys and auditors profession respectively, as agreed with the Registrar.

9. The curators are directed -

9.1. to furnish the Registrar with progress reports relating to the curatorship on a monthly basis; and

9.2. to deliver a further report to the Court by no later than 15 October 2007 in which the following aspects are addressed:

9.2.1. the status of the curatorship as at 30 September 2007;

9.2.2. a reconciliation statement of investor funds and assets held by the companies and the liabilities of

the companies to their current investors;

9.2.3. any shortfall detected in the holding of investment assets;

9.2.4. any irregularities committed by the companies, their directors, key individuals, shareholders or management, and the contravention of any codes, law or mandates in the conduct of the business;

9.2.5. details of civil actions which may have been instituted by or against the curators, and the status of any relevant prosecution which may be pending;

9.2.6. the progress made with respect to the transfer of the administration of investments off the Ovation platform;

9.2.7. how the funding of the costs of the curatorship, including the remuneration of the curators, has been provided for or is intended to be provided for;

9.2.8. recommendations with regard to the further conduct of the curatorship and any matter arising from the curatorship.

10. On receipt of the curators' report referred to in paragraph above, the applicant shall set the application down for consideration

within ten days by the Court.

11. The Applicant's costs of suit occasioned by the opposition by Ovation Preservation Fund, Ovation Preservation Provident Fund and Ovation Retirement Annuity Fund, including the costs of two counsel, be paid by the Ovation Retirement Funds and Metropolitan jointly and severally, on the scale as between party and party.

12. Copies of this order shall, as soon as possible, be served on the companies at their principal place of business in Cape Town and be published in one issue of the Government Gazette. An abbreviated version of this order, shall be published in one issue of the Cape Argus and Business Day newspapers.

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DLODLO, J