REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 679/2007

In the matter between:

JOSEPH ARTHUR WALTER BROWN	First Applicant
CARTER & KLOOF (PTY) LTD	Second Applicant
MARTIN JAMES VAN SCHALKWYK	Third Applicant
JAW BROWN FAMILY TRUST	Fourth Applicant
Z C BROWN FAMILY TRUST	Fifth Applicant
ANTHERU MANDATED INVEST	Sixth Applicant
BROWN BROTHERS HOLDING	Seventh Applicant

and

THE FINANCIAL SERVICES BOARD	First Respondent
FIDENTIA HOLDINGS (PTY) LIMITED	Second Respondent
FIDENTIA ASSET MANAGEMENT (PTY) LTD	Third Respondent
BRAMBER ALTERNATIVE INVESTMENTS (PTY) LTD	Fourth Respondent

DINES CHANDRA MANILAL GIHWALA *N.O.* First Intervening Respondent

GEORGE NICHOLAS PAPADAKIS *N.O.* Second Intervening Respondent

(in their capacities as the duly appointed Curators
of the Second, Third and Fourth Respondents)

Heard: 9 September 2013

Delivered: 20 September 2013

JUDGMENT

DAVIS AJ:

[1] On 27 March 2007 this Court granted a final order placing the financial services business of the Second to Fourth Respondents ("the Fidentia companies") under curatorship in terms of section 5 of the Financial Institutions (Protection of Funds) Act 28 of 2001 ("the Financial Institutions Act") at the instance of the Executive Officer of the first respondent, the Financial Services Board ("FSB") ("the curatorship order). The curatorship order was preceded by a provisional curatorship order granted on 1 February 2007, together with a *rule nisi* calling upon interested persons to show cause why the order should not be made final.

[2] The application for the provisional and final curatorship orders followed an inspection into the affairs of the third respondent ("FAM") and its associated

companies, which had been authorised by the Executive Officer of the FSB ("The Registrar") on 1 June 2006, in terms of section 3(1) of the Inspection of Financial Institutions Act 80 of 1998 ("the inspection" and "the Inspection Act").

[3] In terms of the curatorship order the first and second intervening respondents ("the curators") were finally appointed as curators to the Fidentia companies and authorised, *inter alia,* to alienate or dispose of any of the property of the Fidentia companies with a view to repaying investments made in or entrusted to FAM by persons or institutions ("investors"). The curators were also tasked, in terms of the curatorship order, with reporting to the Registrar on a monthly basis and with reporting to the Court on the status of the curatorship by 16 November 2007. Since that date, the curators have filed regular reports with this Court, as directed, on the progress of the curatorship.

[4] On or around 6 February 2012 the applicants launched the present application in terms whereof they seek orders:

4.1. setting aside the mandate and instructions issued by the Registrar in 2006 to inspect the affairs of the Fidentia Companies, together with all subpoenas issued by the inspectors and all draft and final reports produced by them pertaining to the Fidentia Companies (prayer 5 of the notice of motion);

4.2. setting aside the decision of the FSB to apply to Court to place the Fidentia companies under curatorship (prayer 6);

4.3. setting aside the curatorship order (prayer 7);

in the alternative

4.4. directing that the Fidentiacompanies be removed from the control of the curators, the curatorship ended and the Fidentia companies restored to the status of companies under the sole control of new directors to be appointed (prayer 8);

4.5. appointing new directors to the Fidentia Companies in the person of third applicant, Zacharias Christiaan Brown and Matthew Paul Machin (prayer 9);

4.6. directing that second applicant be appointed to assist with the administration of *"the company"*(prayer 10)*;*

4.7. directing that Fidentia investors not *(sic)* be paid a monthly stipend amounting to R 5 million per month as of the date of this order and that the capital be reduced accordingly until such time as the capital claim has been met (prayer 11).[1]

[5] The applicants were not legally represented in bringing the application. The notice of motion was signed by the first applicant ("Brown"), purportedly acting on behalf of second applicant, *"Per Carter and Kloof (Pty) Ltd".*[2]

[1] This relief, which is nowhere dealt with in the founding affidavit, makes no sense. It would appear that the inclusion of the word "not" is an error.

[2] The Notice of Motion is silent as regards the representation of the third to seventh applicants. It would appear that the applicants were assisted at some point by attorney June Marks, but she did not come on record formally as the attorney for the applicants in the matter.

[6] The relief sought was opposed by the FSB, who gave notice of its intention to oppose the application on 13 February 2012 and delivered its answering affidavit on 15 May 2012.The relief sought was also opposed by the curators, who were not originally cited as respondents despite their manifest interest in the relief sought. They were put to the trouble and expense of having to apply for leave to intervene in the application, which leave was ultimately granted in terms of an order made by agreement between the parties on 25 May 2012. In terms of that order a timetable was laid down for the filing of answering affidavits by the curators and replying affidavits by the applicants.

[7] Full answering affidavits were filed by the FSB and the curators dealing with the allegations made in the founding affidavitdeposed to by Brown and supported by the other applicants. Heads of argument were duly filed by counsel for the FSB and the curators prior to the hearing of the application, which was set down for 9 September 2013 in terms of a notice of set down issued by the Registrar of the High Court on 11 June 2013.

[8] As appears from an affidavit of service filed of record, the attorneys representing the FSB saw to it that a copy of the notice of set down was served on Brown, third applicant, Zacharias Brown, Mr Heydenrych on behalf of the so-called Antheru Mandated Investors ("Antheru Investors")[3]and the seventh applicant.A number of attempts were made to serve on second applicant at

[3] A distinction must apparently be drawn between Antheru Mandated Investors ("Antherus Investors"), described by Brown as *"a group of individuals who include all the investors of Antheru who have invested in Fidentia"* and Antheru Beleggings Trust ("Antheru Trust").

various business addresses, which were unsuccessful as second applicant was found to have left the premises.

[9] When the matter came before me on 9 September 2013, the applicants had not delivered replying affidavits, or heads of argument as required in terms of court practice. There was no appearance for the second to seventh applicants at the hearing. I was informed by one Mr Abraham Nel ("Nel") that he was there to request a postponement for one week on behalf of Brown, who could not be present as he had an abscess in his mouth.

[10] I was further informed by one Mr Woodrow Christian ("Christian"), that he wished to seek a consolidationof the present application with an application broughtby Mr ThembalenkosiShibani ("Shibani") and Christian (undercase number 13532/2013) to have the curators removed from office and replaced with different curators ("the removal application").The papers in the removal application were not before me.

[11] Mr Mitchell, who appeared on behalf of the FSB, and Mr Goldberg, who appeared for the curators, opposed the oral applications for postponement and for consolidation.As regards the postponement, Mr Mitchell handed up from the bar copies of email correspondence exchanged between Brown and Mr Koen of Bisset Boehmke McBlain ("Bissets")[4] at 07h32 and 09h03 on 9 September 2013, which read as follows:

[4]Attorneys of record for the FSB.

"Dear Mr Koen

I have unfortunately taken ill. I request that the matter be postponed for a week as to allow me to recover and be in a position to argue the matter."

"Dear Mr Brown

You are not the only applicant in the matter, and our client is not the only respondent. None of the other parties appear to have been consulted about your request for a postponement.

Our client is adamant that the matter must proceed, and is not prepared to accept your email as sufficient motivation for a postponement. Our client will request the Court to hear the matter.

If you wish to apply for a postponement you will have to arrange for there to be an appearance on your behalf, for a proper written application for a postponement to be made, for it to be accompanied by at least an affidavit from a doctor."

[12] Mr Mitchell addressed me on the history of the matter and what he referred to as *"repeated attempts by Brown to hamper and delay matters to the detriment of the interests of the investors in Fidentia."*He argued that it was contrary to the interests of the Fidentia investors to delay finalisation of the application and that, in the event the Court saw fit to grant a postponement, payment of the wasted costs thereby occasioned should be secured inasmuch as Brown is an un-rehabilitated insolvent and a man of straw.

[13] I did not deem it fit, in the circumstances, to grant a postponement merely on the strength of an informal request made on behalf of Brown from the bar. I therefore stood the matter down until 14h15 and directed that Brown file a formal

application for a postponement by no later than 12h45, supported by an affidavit furnishing proof of his illness, failing which the matter would proceed on its merits at 14h15. I further directed that satisfactory security would have to be provided for payment of any wasted costs occasioned by the postponement. Mr Koen informed Brown of the situation in an email transmitted at 11h11, which read as follows:

> *"Dear Mr Brown*
>
> *Mr Nel advised the Court this morning that he appeared on your behalf.*
>
> *The judge directed that a written application for a postponement including sufficient medical proof of your illness be made by 12h45 at the latest, failing which the matter will proceed on its merits at 14h15.*
>
> *The judge also indicated that it would also be necessary for an indication to be included in any such application as to how the wasted costs occasioned by the postponement would be paid, or secured.*
>
> *Mr Nel, would not doubt have told you about this.*
>
> *The court is court 12."*

[14] As regards Christian's informal application for consolidation, Mr Mitchell pointed out that the relief sought in the removal application – which aims to have the curators removed and replaced with different curators – is contradictory to the relief claimed in the present application, which aims to set aside the curatorship *ex tunc*, alternatively to set aside the curatorship *ex nunc*and place the Fidentia companies under the control of directors to be appointed by the Court. Furthermore, I was informed by Mr Goldberg that, as in the case of the present application, the removal application was not served on the curators, who

will therefore require an opportunity to apply for leave to intervene in and oppose the removal application. The removal application was launched recently on 20 August 2013. Answering and replying affidavits have not yet been filed, and the curators have not yet been granted leave to intervene. The matter is therefore not ripe for hearing,and will not be so for some time. The finalisation of this application would therefore be unduly delayed by the proposed consolidation.In all the circumstances I considered that it would not be appropriate to consolidate the two applications and I accordingly refused Christian's oral request in this regard.

[15] Shortly before 12h30, or thereabouts, a document signed by Brown and styled *"Notice of Withdrawal",* was hand delivered to my chambers. The notice read as follows:

> *"Be pleased to take notice that the Applicants herewith withdraw their action* [sic]*, proposed for hearing today the 9th September 2013."*

[16] When the matter resumed at 14h15, Mr Mitchell handed up a copy of an email sent by Brown to Mr Koen at 11h55 in response to the latter's email of 11h11, which read as follows:

> *"Dear Mr Koen*
>
> *Your email under reply refers. I understand that a group of investors have brought an application to replace the present curators.*
>
> *I further understand that the notice of motion in the application in which I am the applicant is requesting the cancellation of the curatorship all together. This was*

never my intention, and appears to be a strategy of my attorneys at the time. It is undesirable and impossible given my present status and clearly in conflict with the desires of the investors.

I don't want to waste costs of the curatorship and due to the notice of motion and the technical issues raised by yourself I have no alternative but to withdraw from the present application.

I have discussed the matter with the other applicants and they agree that it would be most prudent to withdraw.

I shall forward the medical certificate in a separate email for your insight.

I have no further intention of opposing the FSB in their endeavours, and will not bring any other applications. I trust that the matter is now closed." (Emphasis added)

[17] It is difficult to credit Brown's statement that it was never his intention to apply for the setting aside of the curatorship where this relief is plainlysought in terms of the notice of motion which Brown signed himself.Be that as it may, what is important, for present purposes, is that Brown conveyed a clear and unequivocal intentionto withdraw the application for the relief sought in this application.In so doing he purported to act on behalf of all the applicants.

[18] Rule 41(1) of the Uniform Rules of Court provides that once a matter has been set down for hearing, the proceedings may only be withdrawn by consent of the parties or with the leave of the Court. In the absence of such consent or leave, a purported notice of withdrawal is incompetent and invalid.[5]Mr Mitchell objected to Brown's purported notice of withdrawal on the grounds (a) that it did

[5]*Protea Assurance Co Ltd v Gamlase and Others* 1971 (1) 460 (E) at 465 G – H.

not embody a consent to pay costs and (b) that Brown was not duly authorised to act on behalf of the second to seventh applicants in withdrawing the application. Mr Goldberg associated himself with Mr Mitchell's stance in this regard.

[19] In the absence of consent to a withdrawal of proceedings after set down, the Court has a discretion whether or not to grant such leave.[6]The court may, in the exercise of its discretion, decline leave to withdraw proceedings after set down where justice requires that finality be reached, if possible,[7]and where the withdrawal amounts to an abuse of process.[8]

[20] In my view the circumstances in this matter are such that justice requires that finality be reached regarding the relief sought in this application, notwithstanding the belatedattempt by the applicants to withdraw the proceedings. The curatorship has been in place for longer than six years and has, according to the curators, all but run its course. It is undesirable, in my view, that the winding down of the curatorship be delayed by, or that the curators be put to further expense in opposing,[9]any application which might surface in the place of this application based on the very same allegations. Iam mindful, in this regard, that this application represents a "re-cycling" of many of the allegations which were raised in applications previously brought by Antheru Trust for the liquidation of the Fidentia companies ("the Antheru liquidations"), which

[6]Farlam *et al Erasmus Superior Court Practice* B1 – 304 and cases cited at footnote 6.

[7]*Huggins v Ryan N. O. and Others* 1978 (1) 216 (R) at 218 E.

[8]*Levy v Levy* 1991 (3) SA 614 (A) at 619 F – 620D.

[9]To the prejudice of the Fidentia investors who ultimately bear these costs.

allegations were denied by the FSB and the curators in answering affidavits filed in those applications. At the hearing of the Antheru liquidation application in respect of FAM on 10 May 2011, Antheru Trust withdrew the application and tendered costs. It further withdrew all allegations of recklessness, fraud and dishonesty made against the curators. In a trustees' resolution passed by the trustees of Antheru Trust on 10 May 2011 it was recorded, *inter alia,* that:

> *"4) We the undersigned trustees hereby further withdraw all allegations against the Curators, D Gihwala and Mr Papadakis, which are set out in the court documents under case no 6657/2010 in respect of recklessness, fraudulent conduct, and any other expressed allegations or innuendos of alleged dishonesty by them.*
>
> *5) Our attorneys of record are instructed to obtain a letter from the curators confirming the withdrawal of the aforesaid allegations and that they accept the withdrawal and that no action will be taken against the trustees by the curators emanating from the withdrawal of the allegations against them."*

[21] The withdrawn allegations have, however, been resuscitated by the applicants in support of the relief sought in the present application.As in the case of the Antheru liquidations, reliance is placed on the views expressed in the "expert" report compiled by one Nicolaas Janse Van Rensburg ("Van Rensburg"). I deal further with this aspect below.

[22] The applicants have not shown any willingness to consent to a judgment on the merits so that there may be finality regarding the issues raised in the application. The serious and far-reaching allegations on which the application is founded have not been withdrawn.In the circumstances, and for the reasons given, I consider that the applicants should not be permitted to withdraw the application, and that the FSB and the curators are entitled to seek a final judgment on the merits.[10]It is apposite to refer to the following remarks of Beck J, who was confronted with a not dissimilar situation in *Huggins v Ryan N.O. and Others:* [11]

> *"Upon Mr Andersen's objection being voiced to a mere withdrawal of the motion proceedings that have now been repeated, the applicant was asked to clarify whether or not he was prepared to consent to judgment on the merits, so that there should be finality regarding the validity of the will. The applicant assured the Court that he had no further intention of ever initiating further proceedings to have the will declared void, <u>but I did not understand him to concede that the allegations of fraudulent conspiracy between the first and second respondents are unfounded, and he has not withdrawn them</u>. All of the respondents have stated specifically that they do not wish to object to the fact that the proceedings have once again been brought by way of notice of motion and not by way of a normal trial action. <u>They contend, correctly, that the Court is now seized with the matter and cannot be deprived of its discretion to proceed with the hearing by</u>*

[10]Cf Irish & Co Inc (Now Irish & Menell Rosenberg Inc) v Kritzas 1992 (2) SA 623 (W) at 632 I, where it was stated that, *"It has long been recognized that where in an ordinary action a party chooses not to appear at the trial the other party remaining need not content himself with an order for absolution from the instance but may elect to lead evidence in order to satisfy the Court that he is entitled to a judgment on the issues raised by those claims."*

[11]*Supra* n 7 at 218 B – E.

> <u>way of a belated withdrawal of the application</u>. *(Abramacos v Abramacos*1953(4) SA 474 (SR) at p 478 A; *Karroo Meat Exchange Ltd v Mtwazi*1967(3) SA 356 (C) at 359 A – H.)" (Emphasis added.)

[23] I turn then to deal with the merits of the application. The applicants have not filed replying affidavits taking issue with the allegations contained in the answering affidavits filed by the FSB and the curators. To the extent that factual disputes are raised on the founding and answering affidavits, they fall to be determined in accordance with the approach laid down in *Stellenbosch Farmer's Winery Ltd v Stellenvale Winery (Pty) Ltd*[12]andqualified in *Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd("Plascon Evans"),*[13]namelythat final relief on motion should only be granted where the it is justified on the basis of the facts as stated by the respondent together with the facts put up the applicant which are either admitted or cannot reasonably be denied. This is clearly not a case where it can be said that the allegations and denials raised by the respondents are *"so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers."*[14] The version put up in the affidavits deposed to on behalf of the FSB and by the curators must therefore be accepted as correct for purposes of deciding the matter. The question which must be asked is whether the admitted facts contained in the applicants' founding affidavit, read together with the facts set out in the answering affidavits, justifythe relief sought by the applicants.

---

[12]1957 (4) SA 234 (C) at 235 E – G.

[13]1984 (3) SA 623 (A).

[14]*Plascon Evans supra* n 13 at 635 C.

The prayers to set aside the decisions to conduct the inspection and to apply to court for the curatorship order

[24] The prayers referred to in paragraphs 4.1 and 4.2 above are aimed at setting aside the Registrar's decision to inspect the affairs of the Fidentia companiesand his decision to apply to court to place the Fidentia companies under curatorship.

[25] The difficulty with this relief is that the inspection and the application for the curatorship are both *fait accompli* - they cannot be undone.The setting aside of the Registrar's instruction to conduct the inspection and the subpoenas and reports of the inspectors would not have any impact on the curatorship which was ordered by the court and is still in existence. The setting aside of the Registrar's decision to apply for the curatorship order would have no effect unless the curatorship order were also set aside, in which case the relief in this prayer would be superfluous.In my view the relief sought in prayers 5 and 6 of the notice of motion would have no practical effect and falls to be refused on this ground alone, since it is trite that theCourt will not make orders which are of academic interest only.[15]

The prayer to set aside the curatorship order

[26] The prayer to set aside the curatorship order is in essence an application to rescind the curatorship order *ex tunc*. The curatorship order was granted after

[15] *Rajah & Rajah (Pty) Ltd and Others v Ventersdorp Municipality and Others* 1961 (4) SA 402 (A) at 408A.

the merits of the matter had been determined and was not an order granted by default. It is a final judgment. At common law the power to rescind a final judgment is limited to instances where the judgment was obtained by fraud, or, exceptionally, *iustus error*.[16] Rescission of a final judgment on the basis of *iustus error* is confined to the situation of *instrumentum noviter repertum*, where relevant documents have come to light subsequent to the judgment,[17] which is not the case in this instance.

[27] In order to succeed in an application for rescission of a final judgment based on the ground of fraud, an applicant is required to prove that:

27.1. the successful litigant was a party to the fraud or perjury on the ground of which it is sought to set aside the judgment;[18]

27.2. the evidence was in fact incorrect;[19]

27.3. that the evidence was made fraudulently with intent to mislead;[20]

27.4. that the facts presented to the Court diverged from the truth to such an extent that the Court would have given a different judgment had it known the true state of affairs;[21]

---

[16] *Colyn v Tiger Food Industries Ltd t/a/ Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 6 A – B.

[17] *Childerley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163.

[18] *Makings v Makings* 1958 (1) SA 338 (A).

[19] *Swart v Wessels* 1924 OPD 187 at 189 – 190.

[20] *Ibid.*

[21] *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 166 I.

27.5. he or she was unaware of the alleged fraud until after judgment was delivered.[22]

[28] The founding affidavit is replete with far-reaching allegations of improper conduct on the part of the FSB and the curators. It is difficult to discern amidst the myriad of complaints a clear and competent basis for the relief sought by the applicants. Their case for the rescission of the curatorship order appears to rest on the contentions that:

28.1. the curatorship order was granted on the basis of the final inspection report which was an *"utter fabrication and distortion of the true facts";*

28.2. the Registrar alleged in the application for the curatorship order that an amount of R 680 million was unaccounted for or had been misappropriated by the officers of the Fidentia Group, whereas the inspectors had conceded that the funds unaccounted for might be closer to R 406 million;

28.3. the Registrar did not follow *"normal procedure"* in securing suitable candidates as curators and appointed the curators because of their *"long standing corrupt relationship with various senior officials of the FSB";*

[22] *Port Edward Town Board v Kay and Another* 1994 (1) SA 690 (D) at 705 C – 706 F.

28.4. the powers granted to the curators to dispose of the assets of the Fidentia companies are not powers contemplated by the Financial Institutions Act and the Court was not competent to grant them;

28.5. Brown was denied an opportunity to challenge the final inspection report or the granting of the curatorship order.

[29] Save for the first ground, which pertains to the contents of the inspection report, I consider that none of these complaints (assuming they could be established on the facts) would suffice to meet the requirements for rescinding a final judgment on the basis of fraud. In this regard I consider that:

29.1. it cannot seriously be thoughtthat the Court would not have granted the curatorship order had it been told that the unaccounted for funds amounted in fact to R 406 million or R 245 million as opposed to R 680 million;[23]

29.2. any impropriety surrounding the appointment of the curators could not have had any bearing on the Court's decision to grant the curatorship order and would not, therefore, constitute grounds for setting aside the curatorship order on the basis of fraud;

[23]Brown's affidavit contains contradictory versions in this regard. At paragraph 17 he alleges that the inspectors insisted that an amount of R 245 million was unaccounted for. At paragraph 28 he alleges that the inspectors conceded that the funds unaccounted for might be closer to R406 million than R 680 million.

29.3. were it indeed so that the Court acted *ultra vires* the provisions of the Financial Institutions Act in conferring power on the curators to dispose of the assets of the Fidentia companies, the remedy would lie in an appeal against the curatorship order and not an application for its rescission;

29.4. Brown's alleged lack of opportunity to challenge the inspection report and the curatorship order would not constitute grounds for setting aside on the basis of fraud a final judgment which was granted not by default but with the full knowledge of Brown.

[30] As regards the complaint that the curatorship order was granted on the basis of an inspection report filled with fabrications and falsehoods, it should be noted that the attorneys then representing the Fidentia companies were furnished with a draft of the inspection report on 18 December 2006 and given an opportunity to comment thereon prior to the bringing of the application for a provisional curatorship order. Brown himself was furnished with a copy of the draft inspection report on 19 December 2006.

[31] On Brown's own version, when application was made for the provisional curatorship order on 1 February 2007, the directors of the Fidentia companies exercised a conscious choice not to oppose the relief sought. He states as follows in this regard in the founding affidavit:[24]

[24]Record p 2596, para 110.

> *"On legal advice of Mckinnel and in an attempt to "win hearts and minds" at the Financial Services Board the other Directors of Fidentia in a majority decision elected not to actively oppose the FSB application for provisional curatorship. The Directors of Fidentia at the time were of the view that in working with duly qualified Curators the same objective of an orderly winding up of the portfolio and repayment in full of all the clients could be achieved."*

[32] Furthermore, neither Brown nor the other directors of the Fidentia companies opposed the confirmation of the *rule nisi* in respect of the provisional curatorship order, despite having had ample opportunity to do so. The answering affidavit on behalf of the FSB reveals that Brown was represented by an attorney and senior counsel who was briefed to oppose the granting of a final curatorship order on 27 March 2007, but that Brown elected at the last minute not to oppose:[25]

> *"On 26 March 2007 a notice of intention to oppose the confirmation of the rule nisi was delivered to the attorneys for the FSB. Adv R Stockwell SC of the Johannesburg Bar was briefed on behalf of Brown. On the afternoon of 16 March 2007, Adv Stockwell SC advised counsel for the FSB (Adv A G Binns-Ward SC) that Brown would no longer oppose the granting of the final order in the amended terms sought. I attach the confirmation email from the FSB's attorneys to Mr Hunter marked 'GA8'."*

[33] Assuming, for purposes of argument, that Brown could show that the inspection report contains false or inaccurate information, he faces the difficulty

[25] Record 3743, para 143.2.2.

that he was well aware of the contents of the inspection report but voiced no complaints regarding its veracity or accuracy at the time when application was made for the curatorship order. To my mind this precludes him from seeking to rescind the curatorship order on the basis of alleged fraud and untruths in the inspection report. As was held by Thirion J in *Port Edward Town Board v Kay and Another:*[26]

> *"In my view, if a litigant, knowing that the evidence adduced against him in the course of a case is perjured or that a fraudulent concealment of evidence which is relevant to the decision of the case has occurred, deliberately omits before judgment to challenge or refute the evidence when he is in a position to do so, he cannot afterwards claim restitution in integrum in respect of the judgment obtained against him on account of the fraud."*

[34] On this basis alone I consider that the application for the rescission of the curatorship order must fail. But in my view there is yet a further obstacle to the rescission of the curatorship order on the basis of alleged untruths in the inspection report, namely that the inspectors continue to stand by the contents of their report, and their averments in this regard must be accepted as correct for present purposes.

[35] Furthermore, and in any event, there are material, undisputedfindings in the inspection report, which would, in my view, constitute good cause for the granting of the curatorship order as contemplated in section 5(1) of the Financial Institutions Act, namely that:

---

[26] *Supra* n 22, at 706 E – F.

35.1. FAM failed to submit audited financial statements for the 2005 and 2006 financial years as required by section 19 (2) of the Financial Advisory and Intermediary Services Act 37 of 2002 ("the FAIS Act") for the reason, as appears from an affidavit deposed to by the auditors of FAM, that the auditors had not obtained a satisfactory breakdown and reconciliation of client monies, and it did not appear that client funds were separately identifiable from those of FAM;

35.2. client funds were not being kept separately from funds belonging to the Fidentia companies and were being used to defray operating expenses and to purchase assets for seventh applicant and other companies within the Fidentia Group;

35.3. client funds were not being invested in accordance with the behests of section 4 of the Financial Institutions Act inasmuch as they were not held separately in the names of individual clients, but in the names of "*Fidentia related companies"*.

[36] The proper investment of funds in the name of the client and the separation of trust property from the assets of the business are fundamental requirements laid down by section 4 of the Financial Institutions Act for the protection of trust property. There can be no doubt, to my mind, that indications of non-compliance with these requirements would justify the granting of a

curatorship order. As was pointed out in *Executive Officer, Financial Services Board v Dynamic Wealth and Others:*[27]

> *"The inability or unwillingness of the institution to comply with regulatory requirements applicable to protect funds itself provides a reason for appointing a curator."*

[37] Given that the curatorship order was warranted on the basis of these findings in the inspection report – findings which have never been challenged by the applicants –I consider that the curatorship would have been granted in any event, notwithstanding the alleged fabrications and falsehoods complained of by the applicants. In my view the applicants have not shown that the curatorship would not have been granted but for the alleged untruths in the inspection report, and on this ground, too, the application for the rescission of the curatorship order must fail.

<u>The alternative relief pertaining to the removal of the Fidentia Companies from curatorship</u>

[38] In the alternative to the rescission of the curatorship order, the applicants seek to have the Fidentia companies removed from curatorship*ex nunc*, the curatorship terminated, and the Fidentia companies restored to the status of companies under the control of directors sought to be appointed by the Court.

[27] 2012 (1) SA 453 (SCA) at 458 H.

[39] As regards the prayer that the Court should appoint third applicant, Zacharias Brown and Paul Machin as directors of the Fidentia companies, there is simply no basis in law for this relief.

[40] Section 5 (9) of the Financial Institutions Act provides that the Court may, on good cause shown, cancel the appointment of the curator at any time.

[41] In support of their case that the curators ought to be removed the applicants allege that the curators mismanaged the affairs of the Fidentia companies and were guilty of fraudulent and dishonest conduct. Their chief complaint is that the curators disposed of assets for less than their true value, thereby occasioning loss to Fidentia investors.

[42] It is not necessary, for present purposes, to deal in detail with the many serious allegations advanced in the founding affidavit. Suffice it to say that allsuch allegations were comprehensively dealt with and satisfactorily answered by the curators, both in the present application and in the Antheru liquidations where the self-same allegations first surfaced prior to being withdrawn unconditionally by the Antheru Trust in the circumstances which I have already mentioned. On the basis of the rule in *Plascon Evans*, the curators' averments must carry the day.

[43] To the extent that complaints against the curators are based on the contents of a so-called forensic report prepared by Van Rensburg,[28] the

[28]Van Rensburg's qualifications do not appear from his report. No basis is laid for his alleged expertise.

conclusions drawn in the report, which is largely based on the *ipse dixit* of Brown, have been roundly refuted by Mr Pappadakis on behalf of the curators, both in the present application and in the Antheru liquidations. Janse Van Rensburg has not seen fit to depose to an affidavit dealing with the criticisms advanced by Mr Pappadakis and I think it can safely be inferred that he is unable to explain away the deficiencies exposed in his report. Again, on the basis of the rule in *Plascon Evans*, no reliance can be placed on the contents of the Van Rensburg report in substantiation of the allegations of misconduct and mismanagement on the part of the curators, and the curators' answers in this regard must be accepted as definitive as regards these claims.

[44] It is also relevant, in this regard, that the curators have exercised their functions subject to the control of the Registrar and the supervision of the Court, to whom the curators have made regular reports on the progress of the curatorship. Neither the Registrar nor this Court has hitherto found any basis for questioning the conduct of the curators.

[45] I am therefore unable to find any basis for concluding that there is good cause to cancel the appointment of the curators in terms of section 5(9) of the Financial Services Act.

[46] It follows that, in my view, the applicants have failed to make out a case for this relief sought on any ground, and that the application falls to be dismissed on its merits.

Delay and *locus standi*

[47] In view of the fact that I have dealt with the application on its merits, it is unnecessary for me to deal with the points *in limine* raised regarding *locus standi* and undue delay.Suffice it to state that, in my view, the objection that the first to sixth applicants lack *locus standi* is well founded.I should also record, for the sake of completeness, that I would be inclined to dismiss the application on the grounds of undue delay in circumstances where the curatorship order was granted over six years ago, the majority of the assets of the Fidentia companies have already been sold, monies have been distributed to investors, the curatorship is in its very last stages, and no explanation whatsoever has been put up for the applicants' failure to take action earlier.

Costs

[48] I was requested, in the event that I dismissed the application, to make a punitive costs order against the applicants on the scale of attorney and client on the basis that the application is vexatious and an abuse of process.It is trite that a punitive costs order may be warranted in circumstances where litigation is patently unfounded and puts a party to needless trouble and expense in opposing, or where the conduct of the litigant is reprehensible in some way.

[49] In my view a punitive costs order is indeed justified in this case on the following grounds, to name but a few.First, I consider it an abuse that the applicants saw fit in this application to resuscitate allegations against of

misconduct on the part of the curators which had been withdrawn by the Antheru Trust. It matters nought, in my view, that the allegations were withdrawn by the Antheru Trust and not the applicants. It cannot be ignored that Brown was no impartial observer in the Antheru applications - indeed Bozalek J found that if Antheru did not at least indirectly represent Brown's interests, he was*"an important source of information to (Antheru Trust) in this matter regarding the views which it expresses concerning the value of the assets and businesses sold."*[29]Brown was clearly the driving force behind the present application. In my view it was unscrupulous and vexatious for him "recycle" the withdrawn allegations and present them as the basis for this application. The curators have been put to the trouble and expense of answering the same allegations twice – costs which ultimately diminish the amount to be distributed to investors. The other applicants, by associating themselves with Brown in this application, have made themselves party to what I consider to be improper conduct on the part of Brown.

[50] Second, the application was, in my view, misconceived and doomed from the outset on the grounds of undue delay alone. Given the advanced stage of the curatorship, and the fact that the sales of the assets of the Fidentia companies cannot be undone, the relief sought by the applicants was quite plainly an exercise in futility. The following remarks made by Bozalek J with reference to Antheru Trust are equally apposite to the present applicants:[30]

---

[29] Unreported judgment of Bozalek J delivered on 15 March 2011 in the matter of *The Trustees for the Time Being of Antheru Beleggings Trust v Fidentia Asset Management (Pty) Ltd* (WCC Case No 6657/10) ("Antheru security for costs application")

[30] *Ibid*.

> *"If, as it seems clear, it has been unhappy for years with the manner in which the (curators) have been discharging their duties in terms of the curatorship orders, it could at a much earlier stage have either interdicted them from disposing of (FAM's) assets or businesses or it could have approached the court in terms of section 5(8) or 5(9) of the FI Act to cancel the appointment of the curators or set aside or alter any decisions made or action taken by the curators with regard to the management or control (FAM's) business. The applicant has not furnished any good reasons why these steps were not taken and why there has been such a lengthy delay in taking any action at all."*

[51] Third, the far-reaching allegations levelled against the curators were purportedly substantiated by the Van Rensburg report which had already been roundly refuted in the context of the Antheru liquidations. In my view it was frivolous and irresponsible to put up a discredited report in support of these serious allegations. For this reason, too, the application can rightly be viewed as vexatious.

[52] In all the circumstances, I consider it appropriate to mark the Court's disapproval of the applicants' conduct by way of a costs order on a punitive scale.

[53] In addition, having particular regard to the fact that the costs incurred by the curators have to be borne by the Fidentia investors, albeit indirectly, I consider it fair and just that the costs order made should afford the fullest possible indemnity.

Conclusion

[54] I therefore make the following order:

(i) The application is refused with costs, such costs to include the costs occasioned by the employment of two counsel, where applicable.

(ii) The applicants are ordered jointly and severally to pay the costs of the first respondent and the first and second intervening respondents, i.e., the curators, on the scale as between attorney and client.

_____

D.M. DAVIS, AJ

Acting High Court Judge

FOR FINANCIAL SERVICES BOARD: Adv. D Mitchell SC and A Du Toit

INSTRUCTING ATTORNEYS: Bisset Boehmke McBlain
FOR RESPONDENT: Adv. D Goldberg
INSTRUCTING ATTORNEYS: Cliffe Dekker Hofmeyr Inc