



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

REPORTABLE

Case Number: **A41/2017**

Coram: HLOPHE JP et LE GRANGE J et DOLAMO J

In the matter between:

PIERRE DU PLESSIS KRIEL N.O.

Appellant

And

BORN FREE INVESTMENTS 247 (PTY) LTD

Respondent

Date of hearing: 04 August 2017

Date of judgment: 13 October 2017

JUDGMENT

DOLAMO, J

INTRODUCTION

[1] This appeal involves the interpretation of Court orders. The appellant raised a special plea to a claim against him on the basis that the action was instituted without first obtaining leave of the Court in contravention of a Court order to that effect and

that the action, as such, was of no legal force or effect. In terms of Uniform Rule 33(4) it was ordered that the special plea should be determined separate from the merits. The Court *a quo* (Mantame J) dismissed the special plea. This appeal is against that decision and is with leave of the Court *a quo*.

[2] While this appeal raises an intricate question of interpretation, the facts giving rise to the dispute between the parties are fairly straightforward. Rockland Asset Management and Consulting (Pty) Ltd, which is part of a group of associated legal entities (for purposes of this judgment I will collectively refer to these entities as "RAM"), was placed under provisional, and subsequently, final curatorship in terms of section 5 of the Financial Institutions (Protection of Funds) Act¹. The appellant was appointed its curator. Paragraph 4 of the interim order provided that: *"Pending the return date of this order, all actions, proceedings, the execution of all writs, summonses and other processes against [RAM] be stayed and not instituted or proceeded with, without the leave of the Court"*. A rule *nisi* was issued calling upon RAM or any other interested party to show cause why, *inter alia*, an order should not be granted that, whilst the curatorship existed, all claims, actions, proceedings, the execution of all writs, summonses and other processes against RAM be stayed and not instituted, or proceeded with, without the leave of the Court.²

¹ Act 28 of 2001.

² The full text of the interim order reads as follows:

- "1. **The whole of the collective investment scheme business and the business of providing financial services of ROCKLAND ASSET MANAGEMENT AND CONSULTING (PTY) LTD**
(Registration No. 2002/0176720/07)
ROCKLAND GROUP HOLDINGS (PTY) LTD
(Registration No.2003/031605/07)
and
ROCKLAND TARGETED DEVELOPMENT INVESTMENT FUND
(Registration No.IT 4321/2004
(hereinafter referred to as "the business")
Be placed provisionally under curatorship in accordance with the provision of section 5 of the Financial Institutions (Protection of Funds) Act, No.28 of 2001 ("the Act"), and in accordance with the provisions of this order.
2. **Mr Pierre du Plessis Kriel** be appointed curator ("the curator") of the business of the entities referred to in paragraph 1 (hereinafter referred to as "the entities") and, as such, be absolved from furnishing security.
3. The business be and is hereby placed provisionally under the curatorship and management of the curator, subject to the supervision of the Registrar of Collective Investment Schemes ("Registrar"), and any other person (including but

- not limited to the directors and/or trustees of the entities), now vested with the management of the business, be and is hereby divested thereof.
4. Pending the return day of this order, all actions, proceedings, the execution of all writs, summons and other processes against the entities be stayed and not instituted or proceeded with without the leave of the Court.
 5. Pending the return day referred to in paragraph 6 hereunder the curator be and is hereby-
 - 5.1 authorised to take immediate control of, manage and investigate the business and operations of and concerning the entities, 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 be pertaining thereto;
 - 5.2 vested with all executive powers which would ordinarily be vested in, and exercised by, the board of directors, trustees, members or managers of the entities, whether by law or in terms of their articles of association or trust deed, and the present directors members, trustees or managers of the entities shall 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 entities who have entrusted money to the entities or whose money have been invested with the entities, or is being managed, controlled or administered by or on instruction of the entities;
 - 5.4 directed to exercise the powers vested in him 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 entities or the business, save to the extent and for the purposes set out hereunder;
 - 5.5 authorised, in his discretion and depending on available resources, to make periodical payments to beneficiaries in identified hardship circumstances;
 - 5.6 directed to take custody of the cash, cash investments stocks, shares and other securities held or administered by the entities, and of other property or effects belonging to or held by or on instructions of the entities or any entity directly or indirectly controlled by, affiliated to or associated with the entities;
 - 5.7 authorised to conduct any investigation with a view to locating the assets belonging to and or administered and or controlled by the entities or the business, including such assets held by way of securities, in cash or liquid form;
 - 5.8 authorised to incur such reasonable expenses and costs as may be necessary or expedient for the curatorship and control of the entities and operations of the entities, and to pay same from the assets held, administered or under the control of the entities;
 - 5.9 permitted to engage, after consultation with the Registrar, and provided that those engaged are not members or employees of any professional practice in which the curator has a financial interest in any fees earned from acting on his behalf, such assistance of a legal, accounting, administrative, or other professional or technical nature, as he may reasonably deem necessary for the performance of his duties in terms of this order and to defray reasonable charges and expenses thus incurred from the assets held or under control of the entities;
 - 5.10 authorised to institute or prosecute any legal proceedings on behalf of the entities and to defend any litigation against the entities;
 - 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 entities and of their subsidiaries, holding or affiliated entities and of any director or official of the entities insofar as money entrusted to the entities 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 his term of office, to report to the Registrar should he deem it necessary or expedient that application be made to this court for the extension of his powers to any other company (including any holding company or subsidiary) or institution affiliated to or associated with the entities; or for the liquidation of the entities; or for any relief as envisaged by section 6 of the Act against the entities or any of their directors, trustees, members or managers;
 - 5.14 authorised to claim all costs, charges and other expenditure reasonably incurred by the curator in the execution of his duties in terms of this order, including his own remuneration, as administration costs, in the event of the liquidation of any of the entities ensuring;
 - 5.15 authorised to pay the applicant's costs as provided for in paragraph 6.3 below without requiring the applicant first to excuss any other party against whom an order for costs may have been granted by the court.
 6. A rule nisi is hereby issued calling upon the entities or any other interest party to show cause to this Honourable Court on Tuesday 9 October 2012 at 10:00 why-
 - 6.1 the appointment of the curator ordered in paragraphs 1,2 and 3 above should not be confirmed, with the powers and duties set out in paragraph 5 above;
 - 6.2 an order should not be granted that, whilst the curatorship exists, all claims actions, proceedings, the execution of all writs, summonses and other processes against any of the entities be stayed and not instituted or proceeded with, without the leave of the Court;
 - 6.3 the costs of these proceedings, as between attorney and own client, the costs of any investigation conducted into the affairs of the entities, the costs of the curatorship and remuneration of the curator, should not be payable by the entities, jointly and severally, alternatively from the assets held by or under the control of any of the entities.
 7. In the event of the entities or any interested party wishing to appear on the return date mentioned in paragraph 6, notice of such intention to oppose the confirmation of the aforesaid rule nisi, together with an affidavit or affidavits in support of such opposition, shall be lodged with the Registrar of this Honourable Court and copies thereof served on the applicant's attorneys, by not later than Tuesday 18 September 2012.
 8. The Curator is directed-
 - 8.1 to compile a statement reflecting the overall financial position of the individual entities and their financial soundness, and to report therein to this Honourable Court on the return day;

[3] On the return day the rule *nisi* was extended and subsequently by agreement, made a final order by Desai J. Paragraph 1 of the final order³ provided that:

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- 8.2 to prepare a reconciliation statement of investor funds received and not repaid by the entities and the liability of the entities to their present investors;
 - 8.3 to compile a register of the entities' investors reflecting where possible the profile of such investors and the identity of institutions or persons who may in turn have entrusted money to such investors, and on the return day to report to the Honourable Court on such particulars;
 - 8.4 to report to this Honourable Court on any irregularities committed by either of the entities, their directors, key individuals, members of management and the contravention of any laws, codes of conduct or mandates in the conduct of the business;
 - 8.5 to conduct a survey of the assets serving as security for investor funds (if any) including the soundness, integrity and viability of the underlying investors security and or assets, and to report thereon to the Honourable Court on the return day;
 - 8.6 to recommend to the Honourable Court on the return day what further or alternative steps should be taken and by whom, in order to protect the interests of investors in the entities and other creditors of the entities; and to furnish the Registrar with progress reports on the curatorship on a fortnightly basis, and to file his report to the Court with a copy served on the Registrar's office by not later than 28 September 2012.
 - 9. The curator shall be remunerated in accordance with the norms of the attorneys' profession, as agreed with the Registrar, or failing such agreement as taxed by the Cape Law Society, such remuneration to be paid from the assets of, held by or under the control of the entities on a preferential basis.
 - 10. This order together with a copy of the founding papers shall as soon as possible be served on the entities at their principal business addresses and be published in one issue of the Government Gazette, and the attached abbreviated version of the order published in one issue each of Business Day and Cape Times newspapers."

³ The full text of the final order reads as follows:

- "1. Subject to the terms of this order, the rule *nisi* is confirmed in respect of the business of the First and Third Respondents ("the Entities") and the appointment of the Curator is made final.
- 2. The curator is authorised to dispose of the shareholding in Nelco Furniture Manufacturers (Pty) Ltd on such terms and conditions as directed by a majority of the Investors' Committee.
- 3. The powers of the curator as set out in paragraph 5 of the provisional order are confirmed subject to the following:
 - 3.1 An Investors' Committee is appointed comprising of the curator and one dedicated representative appointed by each of the sic investors from time to time. The appointments of the investors' representatives shall take place by way of written nomination to the curator by the principal officers of the investors duly mandated by the respective retirement funds. The Investors' Committee shall represent the investors until this order is discharged or the curator and the investors otherwise agree.
 - 3.2 The Investors' Committee, taking legal advice where required, must consider the possibility of, inter alia, amending the TDIF trust deed, the management agreements with RIM, and the investors'..... agreement so as to remove provisions that may be inconsistent with the provisions of the Financial Institutions (Protection of Funds) Act, 2001, ("the FIA"), the Financial Advisory and Intermediary Services Act, 2002 ("the FAIS") and the Collective Investment Scheme Control Act, 2002 so as to impose good governance principles. The amendments must be acceptable to the Financial Services Board.
 - 3.3 The majority of the Investors' Committee must concur, either in a meeting or in such other manner as may accord with any procedural rules made for the time being by the Investors' Committee, before the Curator concludes any agreements, upon proposals made by the Curator or members of the Investors' Committee or otherwise, on behalf of the TDIF –
 - 3.3.1 Between the TDIF, on the one hand, and RIM, Rockland Holdings (Pty) Ltd, Global Pact (Pty) Ltd, the Johnny Bravo Trust, the Merlot 13 Trust, the Schuster River No.5 Trust, Wentzel Oaker, Clint Oaker and/or Darren Pillay, on the other, for the settlement of disputes between them;
 - 3.3.2 In terms of which TDIF assets are retained, developed, acquired or disposed of;
 - 3.3.3 In terms of which a new manager for the RDIF is appointed and remunerated; and
 - 3.3.4 In terms of which any consultants and experts are appointed or retained to advise on the retention, development or disposal of TDIF assets, or on the development of the Schaap Kraal property indirectly owned by the TDIF.
 - 3.4 Should the Investors' Committee unanimously authorise the curator to dispose of any asset of the TDIF, it shall not be necessary for him also to seek the leave of the Court to do so.
 - 3.5 If the majority of the Investors' Committee does not reach a decision, the curator may apply to court for an order granting him the permission sought.
- 4. The powers of the curator under paragraph 5 of the provisional court order are further subject to the following provisions in relation to the TDIF's shareholding in Blue Nightingale Trading 169 (Pty) Ltd:
 - 4.1 In this paragraph –
 - 4.1.1 'the Imithi shareholders agreement' means the shareholders agreement concluded on 16 March 2005 Imithi Investments (Pty) Ltd ("Imithi"), the shareholders in Imithi and Aspen Pharmacare Holdings Limited; and
 - 4.1.2 Terms placed in quotation marks are terms defined in clauses 1 and 18 of the Imithi shareholdings agreement and bear the meanings ascribed to them in that clause.
 - 4.2 The Curator shall not, prior to the expiry of the "lock-up period"-

- "1. Subject to the terms of this order, the rule nisi is confirmed in respect of the business of the First and Third Respondents ("the Entities") and the appointment of the curator is made final."*

[4] After RAM was placed under final curatorship the respondent sued the appellant, in his capacity as the duly appointed curator, for the sum of R2 896 165-69, being in respect of arrear rental. To this claim the appellant raised a special plea to the effect that the respondent did not obtain the leave of the Court, as it was enjoined to do so by the provisions of paragraph 6.2 of the interim order and paragraph 1 of the final order, respectively; and that the institution of the action was accordingly of no legal force or effect. In the alternative the appellant pleaded that the respondent was barred from taking any steps or any further steps in the action until such time it has been granted the leave of the Court to do so.

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- 4.2.1 Sell or otherwise dispose of any shares held by the "Rockland Fund" in Blue Nightingale Trading 169 (Pty) Ltd to any person other than a "higher level shareholder" and/or "lower level shareholders";
 - 4.2.2 Sell or otherwise dispose of any shares held by the "Rockland Fund" in Blue Nightingale Trading 169 (Pty) Ltd to another "higher level shareholder" and/or "lower level shareholder", which sale or disposal results in the effective shareholding of the "Rockland Fund" in Imithi falling below 80% of its effective shareholding in Imithi as at the "subscription date" or, if already below 80% of its effective shareholding in Imithi at the "subscription date", reducing any further;
 - 4.2.3 Take any steps which result in the "Rockland Fund" ceasing to be managed by "Rockland Management";
 - 4.3 take any steps which result in "Rockland Management" ceasing to be controlled by black people as defined in the Broad Based Black Economic Empowerment Act No. 53 of 2003 unless (i) "Aspen" has in writing approved another entity controlled by black people to replace "Rockland Management" and (ii) the curator appoints the other entity to replace "Rockland Management" within 60 days after "Rockland Management" ceases to be by black people.
 - 5. The curator or any of the investors' right to approach the court for relief is not in any way diminished by any provision of this order.
 - 6. The curator shall furnish the Registrar with progress reports on the curatorship on a monthly basis.
 - 7. The curator shall file a further progress report to the Court by not later than 31 May 2013 dealing with the following:
 - 7.1 the status of the curatorship as at 30 April 2013;
 - 7.2 the disposal of the shareholding in Nelco Furniture Manufactures (Pty) Ltd.
 - 7.3 Irregularities committee by the entities, or their officers or management or by any other person prior to and after the date of curatorship;
 - 7.4 Details of civil actions which may have been instituted by or against the curator, including any arbitration proceedings involving Fifth Respondent;
 - 7.5 Any recommendation as to how the curatorship or any related matter should be dealt with further, including, but not limited to regularising the collective investment scheme business of the entities; and
 - 7.6 The costs of the curatorship.
 - 8. On receipt of the curator's report referred to in paragraph 6, the applicant shall within 15 days set the application down for consideration of the report.
 - 9. This order shall be served on the entities at their principal business addresses and be published in the Gazette and on the website of the Financial Services Board. Copies of the order must be provided to the investor funds and may be provided in electronic format by the applicant's attorney to the legal representatives of the investor funds,
 - 10. The applicant's costs of this application shall be costs in the curatorship and shall be paid by the curator in accordance with the provisions of paragraph 6.3 of the provisional order.
 - 11. The curator shall continue to be remunerated as set out in paragraph 9 of the provisional order.

[5] In its replication to the special plea the respondent admitted that it did not obtain the leave of the Court before instituting the action but averred that upon a proper construction of the orders it was not required of it to obtain such leave before instituting the action. In amplification it pleaded that the final order was expressly qualified by the words "*subject to the terms of this order*" which meant that all that was confirmed in paragraph 1 of the final order was the placing of RAM under curatorship and the final appointment of the curator. To substantiate its contention that the moratorium on legal proceedings had fallen away and was not incorporated into the final order, the respondent referred to paragraph 7.4 of the final order which requires the curator to file progress reports to the Court on the details of civil actions which may have been instituted by or against the curator, including any arbitration proceedings. This, according to respondent, was confirmation that the moratorium on legal proceedings had fallen away.

[6] The Court *a quo* rejected the appellant's argument that leave of the Court was required before instituting legal proceedings against the curator and consequently dismissed the special plea. The Learned Judge held that:

"[14] It often happens at times that the provisional order is the carbon copy of the final order, and the Court thereby uses the words "confirmed" or "granted" interchangeable when such orders are granted. The circumstances in the present matter are totally different as the Court called upon the entities or interested parties in the provisional order at 6.2 to show cause why:

"6.2 an order should not be granted that, whilst the curatorship exist, all claims, actions, proceedings, the execution of all writs,

summonses and other processes against any of the entities be stayed and not instituted or proceeded with, without the leave of the Court."

In responding to this call, all interested parties converged and agreed on a final order which practically came up with new provisions, excluding the moratorium as envisaged on legal proceedings.

[15] *The fact that this was an operational order in the provisional period was never intended to operate post the coming into effect of the final order. This is evidenced by the fact that the terms of the final order were negotiated and reworked by the parties and came up with a totally different version in the final order. If one were to take the plain and or literal meaning of paragraph 6.2 above (provisional order) and paragraph 1 above (final order) without looking, at these two (2) documents holistically, defendant's interpretation would be correct. But if regard would be had to the spirit and purport of Endumeni (supra), defendant's interpretation cannot be correct as it turns to be selective in its approach. It lacks sensibility and practicality as it stand and has to fail."*

[7] Aggrieved by this decision the appellant sought and was granted leave to appeal. The main grounds of appeal were that the Court *a quo* erred in not attaching a proper interpretation to paragraph 1 of the final order, read within the context of the provisional order and that, had the Learned Judge correctly interpreted this paragraph, she would have found that the entire rule *nisi*, including paragraph 6.2, was confirmed. Secondly, it was submitted that the respondent's interpretation (that

the final order excluded the moratorium on legal proceedings), which was upheld by the Court *a quo*, was out of keeping with the apparent purpose to which the moratorium was directed, which was to put in place procedural checks to regulate conduct (such as the institution of legal proceedings against RAM) which could adversely affect it or its beneficiaries. The Learned Judge was said to have further erred in not finding that the requirement that Court approval be obtained for the institution of legal proceedings against the curator was sensible, businesslike and/or practical.

[8] The crisp legal question for determination therefore is whether the Court *a quo* placed a proper interpretation on the two orders, in particular, on the phrase "*subject to the terms of this order the rule nisi is confirmed in respect of the business of the first and second respondents and the appointment of a curator is made final*" in paragraph 1 of the final order.

[9] Before us Mr E Fagan SC, for the appellant, argued that paragraph 1 of the final order stated in express terms that the rule *nisi* was confirmed. As to the meaning to be attached to the phrase "*subject to the terms of this order*" he submitted that this meant nothing more than that where the final order contained a specific provision which is inconsistent with the terms of the rule *nisi*, the terms of the final order prevailed. He went further and submitted that where there is no inconsistency, the phrase is inoperative and may be disregarded. According to him, paragraph 5 of the provisional order continues to operate but that the provisions of paragraphs 3 and 4 of the final order prevail where they were inconsistent with paragraph 5. By confirming the rule *nisi*, but making it subject to the terms of the final

order, Desai J, he argued, necessarily intended the two orders to be read together for their full import.

[10] Mr Fagan disagreed with the Court *a quo*'s approach that the final order was a re-worked document that included all that which the parties had intended to include. This approach, he submitted would lead to absurd, or at least unbusinesslike results. He submitted, by way of example, that on this approach, since paragraph 6.3 of the interim order was not expressly confirmed in the final order, this meant that there was no provision for the costs of investigating the affairs of RAM and the costs of curatorship payable by RAM. Consequently the curator would be expected to bear these costs. On the respondent's argument, which the Court *a quo* endorsed, that the provision of paragraph 7.4 of the final order contemplated legal proceedings being taken against the curator without the necessity for the leave of the Court, Mr Fagan argued that the requirement that a litigation progress report should be filed cannot amount to a tacit or implied decision that litigation may be instituted against the curator without the leave of the Court.

[11] Mr Manca SC, for the respondent, submitted that it was too facile an approach to argue that confirmation of the rule *nisi* preserved the entire provisional order but that, on a detailed analysis, it was clear that only the provisions of the provisional order that dealt with the appointment of the curator and the placing of RAM into curatorship were preserved in the final order; that most of the terms of the provisional order, which were subject of the rule *nisi*, were reformulated and substituted with new provisions or were expressly confirmed, with the moratorium on legal proceedings being an exception.

[12] Mr Manca further submitted that there was a significant difference in the language used in paragraph 6.1 and 6.2 of the rule *nisi*, with 6.1 calling upon interested parties to show cause on the return day why the appointment of a curator should not be confirmed while 6.2 spoke of why “*an order should not be granted*”. The difference in terminology between the two paragraphs, according to Mr Manca, lies in the fact that the word “*confirm*” in paragraph 6.1 of the provisional order was intended to convey that, on the return day, the Court would (or would not) ratify that which has already been decided whereas, by contrast, the word “*granted*”, used in paragraph 6.2 implied that the Court intended the question of a moratorium on legal proceedings to be considered afresh rather than merely being ratified by the Court. He submitted that where there is a manifest change in phraseology it may be assumed that this imports a change in the intention on the part of the drafters; and that the question of the moratorium on legal proceedings was indeed considered afresh and, by agreement between the parties, not granted. This, according to Mr Manca, is reflected by the absence of any positive statement that such an order has been granted.

[13] According to Mr Manca, the use of the phrase “*subject to the terms of this order*” in paragraph 1 of the final order was that, on a proper interpretation, all that was confirmed was that RAM was placed under curatorship and the curator’s appointment made final; and that legal proceedings against the curator were expressly contemplated being taken against the curator, without the necessity for leave of the Court, as expressed by the provisions of paragraph 7.4. Mr Manca also drew parallels with other orders granted in separate but related matters involving

RAM to emphasise the point that the moratorium on legal proceedings was not incorporated into the final order.

[14] The current state of our law with regard to the interpretation of documents was ably summarised by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁴ in the following terms:

“Interpretation is the process of attributing meaning to the words used in a document, [...] having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. [...] The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

[15] The argument by the respondent that it was too facile an approach to conclude that confirmation of the rule *nisi* preserved the entire provisional order but that a detailed analysis was called for is correct in so far as it calls for an in depth

⁴ 2012 (4) SA 593 (SCA) para 18.

analysis. This approach entails taking an objective view of all the circumstances of the case to determine whether the entire rule *nisi* was confirmed. This of course will depend on the meaning of the words used, paying particular attention to the rules of grammar and syntax and having regard to the context in which the words were used in the order, how the order came into existence and its apparent purpose.

[16] In doing the required analysis a useful starting point will be to look at the genesis of the final order. In this respect it is worth noting that when the proceedings were initiated and the rule *nisi* was granted the parties before Court were the Chief Executive Officer (CEO) of the Financial Services Board as the applicant, and the respondents were the associated legal entities constituting RAM. When the final order was made, the original parties had been joined by the Mine Employers Pension Fund and Sentinel Mining Industry Retirement Fund, as first and second intervening parties; and the appellant and Blue Nightingale Trading 169 (Pty) Ltd, as fourth and fifth respondents, respectively.

[17] While it is common cause that the final order was obtained by agreement between the parties, after the return day had been extended on a previous occasion and these other parties had joined the fray, there are no details, however, of what transpired, which led to the extension of the rule *nisi* on the return day or what led to the other parties joining the proceedings. All that we know is that it was after having heard counsel for the intervening parties and having read the documents filed of record that the order by agreement was granted. This leaves us with little background information to help with the interpretation process. Although there is insufficient background information to the final order sight must not be lost of the fact

that the application was brought within the purview of the Financial Institutions (Protection of Funds) Act, particularly in section 5(5) which provides for the powers of a Court to grant certain relief which may include the suspension of legal or foreclosure proceedings against the institution for the duration of the curatorship. The provision of a moratorium on legal proceedings against an institution under curatorship and for the duration of the curatorship in section 5(5), clearly provides guidance on how we are to approach the issue of interpretation in this matter.

[18] The language used in the opening part of paragraph 1 is not peculiar to this order but is one commonly used in legal documents. In *S v Marwane*⁵, in considering the meaning and effect of a similar phrase used in a statute, Rumpff CJ concluded that:

"The purpose of the phrase 'subject to' in such a context is to establish what is dominant and what subordinate or subservient; that to which a provision is 'subject', is dominant - in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be 'subject to' the other specified one."

[19] I am of the view that the phrase bears the same meaning in the context of the orders in *casu*. The phrase "*subject to*" merely subjected the provisions of the interim order to those of the final order, the provisions of the interim order continuing to be of

⁵ 1982 (3) SA 717 (A) at 747H – 748A.

force and effect unless they were in conflict with those of the final order, in which case the provisions of the final order would prevail. Where there is no conflict between the provisions of the interim and the final orders, as Mr Fagan submitted there was none, the moratorium on legal proceedings will continue to apply post the final order. The phrase does nothing. If there was an intention not to include the moratorium on legal proceedings in the final order the drafters would have expressly stated this in clear and unambiguous terms. Words such as “*notwithstanding any contrary provision of the interim order*”, for example, would have been employed to clearly show that the provision on moratorium on legal proceedings in the interim order had completely fallen away.

[20] I am fortified in my view, that the moratorium on legal proceedings remained in place post the final order by the fact that not all the provisions of the interim order which, out of necessity, would have had to be carried over into the final order were expressly repeated, as would have been the case, on the approach suggested by Mr Manca. Paragraph 3 of the interim order, for example, expressly stipulated that RAM was provisionally placed under curatorship and its management placed in the hands of the curator, subject to the supervision of the Registrar of Collective Investment Schemes. This paragraph went on to provide that the directors and/or trustees of RAM, who were vested with its management, were divested thereof. No such corresponding provision can be found in the final order. This surely does not mean that the provision of the interim order divesting the directors/trustees of the management of the business of RAM has fallen away. It is inconceivable that the final order would provide for the final appointment of the curator yet leave the directors/trustees of RAM vested with the management of its business without

expressly stating so. Such a situation would be counter-productive to the purpose of placing RAM under curatorship. An interpretation that permits such a situation would lead to unbusinesslike and illogical consequences. Viewed objectively therefore the provisions of paragraph 3 of the interim order have implicitly been carried over into the final order. Moreover there is no clash between paragraph 3 and any of the provisions of the final order.

[21] I also agree with Mr Fagan's submission that it would be absurd or unbusinesslike, to hold that the latter paragraph was not included in the final order if one considers that paragraph 10 of the final order is silent on the other costs referred to in paragraph 6.3 of the interim order. There would be no provision for the costs of investigation into the affairs of RAM, the costs of the curatorship and the remuneration of the curator unless one follows a sensible interpretation which follows the plain language of the order that confirmation of the rule *nisi* applied to the entire provisional order.

[22] With this background to the final order and consistent with the principles on interpretation of documents, as set out by Wallis JA in *Endumeni*, I deem it appropriate to also look at the apparent purpose of putting in place a moratorium on legal proceedings against a curator where an entity, such as RAM, is placed under curatorship. It is common cause between the parties that the moratorium on legal proceedings in these circumstances was used by the Court as a *sift* to ensure the orderly management of the affairs of the entity under curatorship for the benefit of its beneficiaries. A moratorium on legal proceedings will assist with the administration of the entity under curatorship, which to rehabilitate back to financial soundness without

the added burden of having to ward off frivolous or vexatious litigation which may derail the process. There is also no indication, from the available information, that the parties reached an agreement, which was incorporated into the final order, to exclude the moratorium on legal proceedings. On the other hand, there is no apparent reason why such a useful measure would have been left out of the final order.

[23] Reliance by the respondents on paragraph 7.4 of the final order to shore the argument that it was contemplated that post the final order legal action may be instituted against the curator as proof that the moratorium on legal action has fallen off is, in my view, unsustainable. The moratorium does not prohibit the institution of legal action against the curator: what is prohibited is the institution of such legal action without the leave of the Court. Paragraph 7.4 is therefore not conclusive proof that the moratorium on legal proceedings has fallen away. The Court does not have to give consent to action being instituted by the curator in the discharge of his duty. The Court, however, needs to be kept abreast of all of the actions against the curator, which have been instituted with the leave of the Court. The Court, exercising its oversight duty of the curatorship process would naturally require reports on any legal action taken against the curator with its consent. Hence the provision of paragraph 7.4 calling on reports with details of civil actions which may have been instituted by or against the curator by 31 May 2013.

[24] The argument that the final order was a re-worked document which the parties agreed will contain all the terms upon which the parties have agreed, does not stroke with the proven facts. I have already pointed out, with reference to the

omission of certain provisions of paragraph 3 of the interim order from the final order, that the final order was not an expressly re-worked document which contained everything upon which the parties had agreed but incorporate some clauses of the interim order for it to have a sensible or businesslike meaning so as to promote the purpose of the entire order. Had this been a re-worked document, all the essential paragraphs which had to be part of the final order for it to be sensible, would have been expressly stated.

[25] The argument by the respondent that the two orders granted during July 2013 and September 2013, respectively, in matters under the same case number, are instructive on the interpretation of the final order is not helpful. It was submitted that these orders were not taken by agreement between the parties and that the curator was not obstructed by any resistance to a further moratorium on legal proceedings against the newly joined respondent yet the moratorium on legal proceedings found its way into the final order by means of an express discrete provision. Reference to these orders was intended to emphasise the point that, unlike the final order in *casu*, the moratorium on legal proceedings was expressly included in the final order. In other words the omission to mention the moratorium on legal proceedings in the final order was an express exclusion thereof. I am not persuaded by this argument. In the first place these latter orders were made by different judges and although they involved entities which were part of RAM it related to different set of circumstances, secondly, there is no evidence that when these orders were made, the material known to those responsible for their production was the same as in *casu*. On the contrary, such paragraphs as preserving the moratorium in legal action may have

been inserted *ex abundante cautela*. Reference to these orders will not assist much in the interpretation process the Court is seized with in *casu*.

[26] It remains to deal with the submission that the use of the words “confirm” in paragraph 6.1 and “granted” 6.2 was deliberate and was intended to convey that on the return day, in the case where “confirm” was used in the rule *nisi* the Court simply ratify that which has already been decided whereas in the case of “granted” the Court intended, in particular the question of a moratorium on legal proceedings, to be considered afresh. The distinction sought to be drawn between the use of these two verbs is tenuous and fails to appreciate the purpose of a rule *nisi*. A rule *nisi* is an order by court issued at the instance of the applicant and calling upon another party to show cause before the Court, on a particular day, why the relief applied for should not be granted.⁶ By evolution a practice arose of asking the Court for a rule *nisi*, returnable on a certain date, but in the meantime operating as a temporary interdict.⁷

[27] It is clear that on the return day the Court would have to interrogate the issues to determine whether the relief prayed for should be granted: this is irrespective of whether the word “confirm” or “grant” was used in the rule *nisi*. The submission that the word “confirm”, when used in an interim order means that on the return day the Court would simply ratify that which has already been decided is clearly wrong. What is in the interim order is provisional and subject to confirmation⁸ or discharge on the return day. From this exposition it is clear that “confirm” and “grant” are used

⁶ Per Corbett CJ in *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg and Others* 1995 (4) SA 1 (A) at 18J – 19B.

⁷ *Ibid.*

⁸ *Development Bank of Southern Africa Ltd v Van Rensburg NO and Others* 2002 (5) SA 425 (SCA) at 444C.

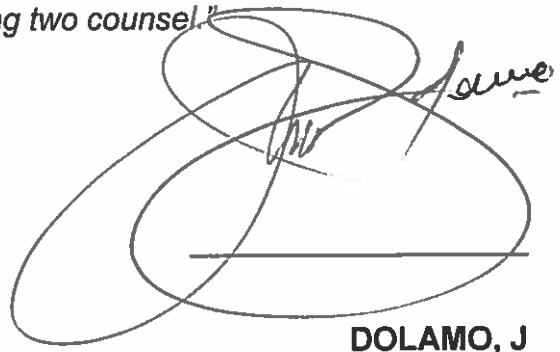
interchangeably. Notwithstanding the use of the word "*confirm*" in paragraph 1 of the final order, Desai J granted the order after considering all the facts. I am bold to go further and state that Desai J granted the final order, bearing in mind the powers which the Court has, in terms of section 5(5) of the Financial Institutions (Protection of Funds) Act, to regulate curatorship of financial institutions in this circumstances.

[28] In his heads of argument Mr Fagan dealt with further aspects of the judgment of the Court *a quo* in support of his contention that the Learned Judge erred in dismissing the special plea. I deem it unnecessary to traverse these aspects due to the conclusion I have reached based on the reasons set out *supra*. In the circumstance I am constrained to conclude, respectfully, that the Court *a quo* erred in finding that the final order was a re-worked document which contained everything the parties have agreed upon and that the moratorium on legal proceedings was not part of the final order. It ought to have found that the moratorium on legal proceedings was confirmed as part of the final order, and uphold the special plea.

[29] What would then be the effect of upholding the special plea on the current legal proceedings? In terms of this moratorium on legal proceedings either an action must be instituted with the leave of the Court or, where the action has already been instituted before coming into operation of the interim order, it may not be proceeded with without the leave of the Court. It is common cause that the action in *casu* was not instituted before the moratorium on legal proceedings was put in place. It goes without saying that the action could only have been instituted with the leave of Court. The absence of the leave of Court renders the proceedings null and void. In the circumstances upholding the special plea puts an end to the proceedings.

[30] In all circumstances I would uphold the appeal against the dismissal of the special plea and make the following order:

- "1. The appeal is upheld.
2. The judgment and order of the Court a quo is set aside and substituted with the following:
"Defendant's special plea is upheld and the plaintiff's claim is dismissed with costs".
3. The respondent is ordered to pay the costs of the appeal, which costs shall include the costs of employing two counsel."



DOLAMO, J

I agree.



LE GRANGE, J

I agree it is so ordered.



HLOPHE, JP