IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: A133/2021

Case Number: 22504/2019

In the matter between:

ROCKLAND GROUP HOLDINGS (PTY) LIMITED Appellant

(Applicant *a quo*)

and

THE COMMISSIONER FOR THE FINANCIAL First Respondent

SECTOR CONDUCT AUTHORITY (First Respondent *a quo*)

PIERRE DU PLESSIS KRIEL *N.O.* Second Respondent

(Second Respondent *a quo*)

Coram: *Fortuin, Wille et Sher, JJ*

Heard: 19th of January 2022

Delivered: 11th February 2022

JUDGMENT

WILLE, J: (unanimous, *Fortuin et Sher JJ*, concurring)

INTRODUCTION

[1] This is an appeal about an application that was chartered in the court of first instance essentially for the removal of the second respondent as the curator of the 'business' of Rockland Asset Management and Consulting (Proprietary) Limited ('RAM'). The appeal is before us with leave from the Supreme Court of Appeal. The appellant in the initial application sought this urgent final relief in terms of the Financial Institutions (Protection of Funds) Act.[1] In addition, the appellant sought the removal of the second respondent from his duties, obligations and ultimate control of two trusts which were founded and managed by RAM. These two trusts are '*bewind'* beneficiary trusts that trade as the Rockland Targeted Development Investment Fund ('TDI') and the Rockland Property Investment Fund ('RIF').

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[1] In terms of section 5(9) of the Financial Institutions (Protection of Funds) Act 28 of 2001 (the 'Protection Act').

[2] In the court a *quo*, it was alleged that the sole director and controlling mind of RAM was involved in the misappropriation of significant amounts of money entrusted to his businesses by various employee and trade union pension and provident funds. It was further contended that RAM was but one of these vehicles utilized in the alleged misappropriation of these investor funds.

[3] In summary, the appellant's case on appeal before us is that the curator owes certain fiduciary duties to RAM and accordingly has a conflict of interest in acting both as the curator of the business of RAM and at the same time, to the beneficiary trusts. In addition, the appellant advances that RAM has no further business that falls to be controlled by the second respondent.

[4] The respondents' case is that the curator owes no fiduciary duties to RAM and those who benefit or benefited from its activities. Besides, it is advanced that the curator was appointed to take over the 'business' of the beneficiary trusts and RAM and, he is accordingly obliged to act in the interests of the investors whose monies were allegedly misappropriated through the activities of RAM. This, the respondents say is why, *inter alia*, the curator was appointed. By way of elaboration, it is argued that the curator was appointed to look after the interests of the investors who put money into the business of RAM, TDI and PIF and was appointed as the curator to this collective investment scheme 'business'.

[5] Finally, the appellant contends for the position that the curatorship should come to an end, as RAM has since become insolvent under the curatorship. To counter this, the respondents aver that RAM already faced severe solvency problems prior to the curatorship application in 2012. Besides, RAM has a pending claim against the appellant in the sum of approximately R32 million, which claim needs to be pursued to finality.

THE FACTUAL MATRIX

THE 'CONTROLLING MIND' AND STRUCTURE OF THE 'INVESTMENT' SCHEME

[6] In my view, central to the determination of some of the core issues in this appeal is the concern about the seemingly unbridled power which was vested in Mr Wentzel Lindsay Oaker ('WLO'). Undoubtedly, WLO was the 'controlling mind' behind this collective investment scheme. WLO is the sole director of RAM. WLO is the sole director of the appellant 'RGH'. In turn, the sole shareholder of RAM is RGH. The sole shareholder of RGH is the Johnny Bravo Trust ('JBT'). WLO is a trustee of the JBT with his wife as the other trustee. In summary, the allegation is that WLO was involved in the commingling and the misappropriation of investor funds.

[7] RAM is the founder of the *bewind* beneficiary trusts trading as TDI and PIF. Global Pact Trading 151 (Proprietary) Limited ('GPT') is the corporate trustee of TDI and PIF. WLO is the nominee trustee of GPT. This means that WLO is effectively in control of the two *bewind* beneficiary trusts. TDI and PIF concluded management agreements with RAM in terms of which very lucrative fees were charged by RAM to these beneficiary trusts. The sole investments made by PIF consisted of shareholdings into two private 'shelf' companies. WLO and his brother became the directors of these two 'shelf' companies. These two companies own a vast tract of, as yet, undeveloped land.[2]

[8] To complete the picture, the sole beneficiary of PIF is TDI. TDI's most substantial investment is in PIF. The beneficiaries of TDI are the pension funds. This because TDI and PIF are beneficiary trusts so the assets must of necessity vest in the pension funds. All of the corporate entities are subject to the overall control of WLO. This is and was a factual finding and is not the subject of any serious dispute or engagement by the appellant.

[9] It is so that RAM, TDI and PIF are discrete entities. Their 'business' however was operated together as one. This, so as to permit investor funds to be diverted for the benefit of WLO and JBT. This single business investment scheme was ultimately controlled by WLO. It was precisely this single business that was placed under curatorship

THE 'CURATORSHIP'

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[2] The 'immovable' properties.

[10] The collective investment scheme 'business' of RAM and the trusts was placed into curatorship by the first respondent during 2012 and 2013. The second respondent was appointed as the curator of the collective investment scheme 'business' of RAM and of the two *bewind* beneficiary trusts. One of the investors[3], lodged a complaint against RAM with the first respondent. A subsequent investigation exhibited a significant misappropriation of investor funds. These misappropriations were connected with the pension benefits of relatively low-paid working-class people.

[11] At the heart of the 'round-robin' money trail was the following stratagem, namely; that two shelf companies were utilized to purchase the immovable properties; that these immovable properties were purchased for approximately R36 million during early 2007; that the purchase price was paid for by utilizing certain of the investor funds; that thereafter the JBT received approximately R105 million for the latter's one-third shareholding in and to these two shelf companies; that a further sum of R159 million was paid for the remaining shares and finally the sum of approximately R264 million was paid to acquire all the shares housed in these two shelf companies. These two shelf companies had initially acquired these assets for the sum of R36 million.

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[3] The PPWAWU National Provident Fund.

[12] Furthermore, an option agreement was thereafter concluded so that JBT was permitted to again re-acquire these shares at certain stipulated prices and times suitable under this extremely 'friendly' trust structure. Most significantly, no consideration was ever payable for this option. Thereafter, an option cancellation agreement was concluded under and in terms of which PIF agreed to pay the JBT the sum of R150 million for the said cancellation of the option.

[13] Put in another way, this meant that the JBT effectively received R150 million to cancel an option for which it had paid nothing. In order to finance this simulated transaction, this now 'new debt' was financed by a 'sale share swop' effectively permitting the JBT to receive a further increased *aliquot* shareholding in the two shelf companies that owned the immovable properties. In order to increase the value of the JBT a further scheme was orchestrated in terms of which TDI paid exorbitant management fees to RAM. The profit on these fees filtered up through RGH to the JBT.

[14] As a direct result, the assets of JBT increased from approximately R2,5 million to R250 million. This, because of the unlawful conduct and the resultant abuse of the funds which had been invested in TDI by the pension funds. The investigation at the instance of the first respondent exhibited, *inter alia*, that the entire structure and methodology that was put into place, was orchestrated at benefitting RAM, RGH and the JBT and, not the investors.

[15] It was precisely this peculiarly orchestrated 'single business' which was subsequently placed under curatorship. The second respondent successfully pursued a number of claims against these various entities and other related parties for substantial amounts of money and, *inter alia*, for the return of the 'share-swop' shareholding. The total capital that was held to be payable to the curator in an action in this court before Ndita J was the sum of R107 906 037.42. This, excludes the value of the 'sale-swop' shareholding in the two shelf companies which the second respondent also seeks to have returned.

THE 'ISSUES' ON APPEAL

[16] The core issue on appeal is whether the court of first instance was correct to dismiss the appellant's application for final relief to remove the second respondent as the curator of the 'business' of RAM and the two *bewind* beneficiary trusts which were founded and managed by RAM. Further, an attack is piloted against the punitive costs order which was granted against the appellant in the court *a quo*.

[17] The second respondent argues; that the court of first instance correctly decided that in these peculiar circumstances, the curator does not owe any fiduciary duties to RAM or its owner; that the curator was not and is not conflicted; that the appellant did not show good cause, or indeed, any cause for the removal of the curator. Likewise, the insolvency of RAM is not sufficient or good cause to remove the second respondent as the curator.

THE 'LOCUS STANDI' CHALLENGE

[18] The second respondent contends that he is entitled to persist in advancing the submission that the appellant has no standing to bring a case to remove him in respect of TDI and PIF.[4] It is undoubtedly so that the appellant has less to do with any of these latter *bewind* beneficiary trusts as it is the sole shareholder in RAM, which in turn entered into management agreements with TDI and PIF, which agreements are now at an end. The appellant's counsel conceded that there was no direct nexus between the appellant and the two trusts.

[19] I remain unpersuaded that the appellant is possessed of the necessary *locus standi* to pursue this application in the style that it was formulated. I say this because the initial core relief contended for was for the removal of the second respondent as the curator of TDI and PIF. The appellant only has a financial interest in RAM as its shareholder, nothing more and nothing less.[5]

[20] Fortunately, this appeal does not fall to be decided on this discrete issue. In my view, because these various entities have been treated as having a 'single business' this may give some standing, or at the very least an interest to the appellant, to claim the relief it seeks in respect of these entities in which it has no direct interest. Thus, for the purposes of this

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[4] *SA Reserve Bank v Khumalo* 2010 (5) SA 449 (SCA) para 4.
[5] *Hlumisa Investment Shareholdings (RF) and another v Kirkinis and others* 2020 (5) SA 419 (SCA).

appeal, I accept that the appellant indeed demonstrated a sufficiently discernible interest that it could have had in obtaining the relief it contended for in this connection, and that it accordingly has the necessary *locus standi*.

CONSIDERATION

THE UNLAWFUL 'COLLECTIVE INVESTMENT' SCHEME

[21] The first respondent concluded that the business operated by RAM and TDI was a collective investment scheme and that it was being conducted unlawfully in that, *inter alia,* RAM was not licenced to operate such a scheme in terms of the Collective Investment Schemes Control Act.[6] In terms of the final curatorship order which was granted the 'collective investment business' of the appellant was placed under curatorship. Curiously, the appellant now for the first time, seeks to confront the averment, which was undisputed at the time when the curatorship order was obtained, that the 'business' of the appellant was indeed part of a collective investment scheme.

[22] Absent the papers is any material advanced in support of this issue and it was not meaningfully engaged with by the appellant during argument. Moreover, in the event that the

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[6] Act 45 of 2002.

relief sought by the appellant on this score, was to be granted, then in that event, the business of these various entities would in all probability once again be subject to the control of its former controlling mind and they could conceivably resume conducting an unlawful collective investment scheme. Henceforth, the object sought to be achieved by the initial curatorship orders could be rendered nugatory.

[23] Put in another way, RAM managed an unlawful collective investment scheme which it was not licenced to do. Therefore, it could not legally have earned fees from these unlawful activities. For this reason alone, it must be so that the second respondent cannot be subject to a fiduciary duty to have preserved this unlawful income stream for the benefit of its shareholder and director.

THE ALLEGED 'CONFLICT OF INTEREST' AND BREACH OF A FIDUCIARY DUTY

[24] The argument by the appellant on this score is that the alleged conflict between the second respondent's duty to the investors in TDI and his duty to RAM, is such that RAM should be released from curatorship, or that a different curator should be appointed. This argument is predicated on the contention that the curator owes a fiduciary duty to the company (RAM) and, does not take into account that it is the interests of the investors that is paramount.

[25] In *Volvo (SA)*[7] Nugent JA pointed out that whilst certain relationships have come to be accepted in our law as encompassing fiduciary duties[8], there is no closed list thereof, and whether a particular relationship should be characterized as one which involves such a duty will depend on the facts of a particular case. In this regard[9], Courts have commonly sought to identify certain features or characteristics which are considered to impart a fiduciary quality to a relationship, such as the discretion or power that one party may have in relation to the affairs of another, the influence that he/she is able to bring to bear on the relationship or the affairs of the other, and the vulnerability of one party or person to another, and the trust and reliance that is placed by them in the other.[10]

[26] But in each instance the court is required to carefully weigh these aspects, in the light of the relevant facts, and the context in terms of which the relationship came about. In addition, the court must surely take into consideration the legislative context in terms of which the appointment of a curator is made to a business,

[27] The appellant's counsel emphasised that in terms of the provisional order of court by means of which the curator was appointed (which was later confirmed), he was afforded vast discretionary powers of control over the affairs of RAM. Thus, he was vested with 'all the executive powers' that would ordinarily be vested in, and exercised by, the board of directors

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[7] *Volvo (SA) (Pty) Ltd v Yssel* 2009 (6) SA 531 (SCA), para 16

[8] Including for example those between a director and the company he is employed by, and trustees and the trust they are to administer.

[9] *Id*, para 16, citing the decision of the Supreme Court of Canada in *Hodgkinson v Simms* [1994] 3 SCR 377 (SCC).

[10] *Id, Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA) at 482C-D

and the directors were simultaneously divested of all such powers in relation to the business. In addition, he alone was authorised to institute or prosecute any legal proceedings on behalf of RAM.

[28] Consequently, the appellant's counsel contended that the curator has not only stepped into the shoes, but functions as, the one-man board of RAM and its current sole director is powerless and RGH is entirely reliant on the curator to manage the company. In the circumstances the curator stands in a relationship of trust, *vis a vis*, the company and has a fiduciary duty to act in its interests, which the second respondent has failed to do.

[29] In my view, as superficially attractive as the appellant's thesis might, at first blush, appear to be, it loses sight of the legislative context in terms of which the appointment was made, and has no regard for the statutory purposes which are sought to be achieved by it. The second respondent was appointed as curator to the collective investment scheme and financial service business, which was being rendered by RAM and the two trusts (and not as the curator of the company and the trusts), in terms of section 5 of Act 28 of 2001, the so-called Financial Institutions (Protection of Funds Act). As is evident from its title, as expanded upon in its preamble, the purpose of the Act is to provide for the legislative regulation of the investment, 'safe custody' and administration of funds and property held in trust by entities that function as financial institutions.

[30] In considering the provisions of section 5, Wallis JA held for the full court in the decision of the SCA in *Dynamic Wealth*[11] that in determining whether a curator should be appointed to a business run by such an institution the court must assess whether, in the light of the interests of actual or potential investors in the business, or investors who have entrusted or may entrust the management of their investments to it, it is desirable to appoint a curator. The court is required to determine whether appointing a curator will address problems in the business that have been identified, and whether such an appointment will have 'beneficial consequences' for investors.

[31] Thus, if there is any duty that is owed by a curator that is appointed to the business of a company that functions as a financial institution in terms of the Act, it is one which is owed to investors in the company, and not to the company *per se*, or its shareholders. To impose or construe a fiduciary duty on a curator, *vis a vis,* the company would in many instances be inimical to the curator's duty to act in the interests of investors, and would in many instances conflict with it.

[32] Thus, as is the case in this matter, where it is alleged that the company has served as a vehicle which has been operated by its directors to run a collective investment scheme business, albeit an unlawful one, for the benefit of its shareholders, the interests of the company would require the business to continue in order to generate profits for the shareholders, whereas the interests of hapless investors who had unwittingly invested in it

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[11] *Executive Officer of the Financial Services Board v Dynamic Wealth Ltd & Ors* 2012 (1) SA 453 (SCA), para 4.

would be to put an end or at least a halt to the business, so that any funds which had not yet been spent or lost could be protected, and any funds which had previously been expended should be recovered. Clearly, to expect a curator to act in the interests of the investors as well as the company in such circumstances would be to postulate the impossible.

[33] The appellant's suggestions to the contrary would mean that the court would be directing the curator to conserve and preserve the unlawful operation of the collective investment scheme to enable those who set up the unlawful scheme in the first place to continue benefitting from this operation at the expense of the investors.

[34] The second respondent was precisely appointed to take control of, and manage, the 'business' of RAM and the two trusts, which it was alleged were run as a single, unlicensed and thus unlawful, collective investment scheme.[12] The curator's allegiance can only be to the interests of the investors in such a scheme. A curator is appointed particularly where problems are identified in the 'business' of a financial institution. A curator's purpose is to address those problems, for the benefit of investors in the business.[13]

[35] As a matter of logic, a curator cannot acquire any obligations towards any of the entities that are controlled by parties who took investor funds in the first place, particularly

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[12] Section 5 (1) of the Protection Act.

[13] *Executive Officer: Financial Services Board v Dynamic Wealth Ltd and others* 2012 (1) SA 453 (SCA) para 4.

where those parties are the cause of the institution's problems. The second respondent is not obliged to look after the interests of persons who allegedly misappropriated money as this would of necessity thwart his ability to attend to the interests of the investors and the business under curatorship. The placing under curatorship of a business is totally different from the placing under curatorship of a specific entity.[14]

[36] The second respondent was appointed to take control of, and to manage, the 'business of an institution' and, in so doing, he is required to look after the best interests of the investors in that 'business'.[15] In my view, on the facts of this case, the second respondent does not owe any fiduciary duty towards RAM as a corporate entity or the trusts, who were entrusted with the 'investors' money in this collective investment scheme.

THERE IS 'NO LONGER' A BUSINESS

[37] The appellant takes the position that there is no longer a business in existence in RAM that should be the subject of a curatorship order and that, in consequence, the order should be discharged. The reasoning advanced by the appellant on this score is hard to discern. As a general proposition it must be so that if an institution no longer has a business, there is nothing to be *placed* under curatorship. It is common cause that at the time when the businesses of RAM and the trusts were placed under curatorship, they were functioning.

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[14] *Commissioner for Inland Revenue v Van der Merwe NO and others* 2001(3) SA 1 (SCA).
[15] *Dynamic Wealth* n 11.

[38] If an institution's business that was placed under curatorship merely changes during the course of the curatorship, this in itself, clearly does not support any 'hard-rule' that the curatorship should be discharged. The issue of whether there is still a business to be administered by a duly appointed curator, at all times remains and is a factual issue.

[39] On the facts of the current case, it cannot be contended that there is good cause to remove the curator from the 'single business' merely because he took steps to regularise RAM's position and ultimately cancelled the flow of exorbitant management fees which were earned by it and, which were somewhat central to the misappropriation.

[40] Most importantly, RAM still has 'unfinished' business. In this regard RAM has a claim against the appellant in the sum of about R32 million, based on an alleged loan which was made by RAM to RGH. This very claim formed the subject of some close scrutiny in a recent judgment by Binns-Ward J in this very division.[16] In this matter the following was indicated in connection with this loan claim, namely:

'...In his capacity as curator of RAM, the curator is the plaintiff in pending litigation against Rockland Group Holdings (Pty) Ltd ('RGH') in case no. 5417/2014, in which he is claiming the capital sum of R31 282 386,46 in repayment of a loan made by RAM to RGH. I shall refer to the action between RAM and RGH as 'the loan

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[16] *Kriel N O v Rocklands Group Holdings (Pty) Ltd and Another; Born Free Investments 247 (Pty) Ltd v Kriel N O* (5417/2014; 96109 /2014; 12862/2019) [2021] ZAWCHC 243 (24 November 2021) para 2.

claim action'. RGH's defence in that action is that the loan is not repayable on demand, but only out of dividends declared by RAM which RGH would become entitled to receive…'

[41] This is precisely the species of 'business' in the collective investment scheme which falls to be finalized by the second respondent. Furthermore, there is a significant judgment from this court in favour of the investors (which is on appeal), that also forms part of the 'business' of the collective investment scheme that was placed under curatorship.

[42] In this regard, the second respondent pursued claims against WLO, JBT and a number of additional parties for substantial sums of money and for a return of 20% of the 'share-swop' transaction. After a lengthy trial in this division the following findings were, inter alia, made against WLO, namely; that WLO attempted to mislead the pension funds; that WLO gave false information to the first respondent's inspectors; that WLO placed himself in a conflicted position with that of PIF and the JBT[17]; that WLO breached his fiduciary duties towards RAM and/or PIF and TDI and that his evidence was not credible and was unreliable in a number of respects.

[43] The total amount declared to be payable to the curator, after a lengthy trial (before interest), amounts to some R 107 906 037,42. In addition, the value of the *aliquot* shareholding that falls to be returned amounts to the sum of about R20 million. These claims as a matter of logic and necessity form part of the business of the curatorship that fall to be

[17] Curiously, a conflict of interest is the very complaint raised by the appellant against the second respondent.

recovered by the second respondent as part of the business of the collective investment scheme, for the benefit of the investors, with a view to recouping some of the losses which they suffered .

[44] The appellant contends that the '*investors committee*' can deal with these 'remaining' aspects of the business under curatorship. I disagree. Without the curator and the curatorship, this committee will have no legal authority. The prospect of a substantial recovery in the continuing litigation against RAM alone, is in my view a valid and very sound legal reason to continue with the curatorship over RAM.[18]

[45] In addition, a very real possibility exists that should RAM, TDI or PIF be discharged from the curatorship order, this will allow WLO to significantly derail or undo the recoveries made by the curator on behalf of the investors. This would be contrary to the very rationale why the curatorship order was granted in the first place. Moreover, when the FSCA described RAM and TDI as *'one , unified, collective investment scheme'* this was not the subject of any challenge. This brings me to the single business argument.

THE 'SINGLE BUSINESS' ARGUMENT

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[18] *Registrar of Pension Funds v SACCAWU National Provident Fund and Another*

[46] The appellant's complaint now is that RAM was placed under curatorship together with the two *bewind* beneficiary trusts. This, notwithstanding that the curatorship application was not challenged on this or any other ground. Factually, these three entities were carrying on one, unified, collective investment scheme without being so registered. Moreover, RAM was carrying on this 'business' unlawfully and unregulated.

[47] Significantly, it was the management of the assets acquired by the collective investment scheme that enabled this misappropriation and enrichment at the expense of the investors to take place. The shield raised by the appellant that RAM no longer has any business cannot now be raised. This, particularly in the peculiar circumstances, when on the facts, RAM has unfinished 'business' in the form, *inter alia*, of pending litigation in that an asset is sought to be recovered.

[48] Besides, WLO remains the central figure in the misappropriation of significant amounts of money entrusted to this 'business' by the investors and the pension funds. RAM was a crucial cogwheel in this collective investment scheme, *inter alia,* because it levied excessive fees for the managing of the TDI and PIF investments and diverted a corporate opportunity which should have been made available to the pension funds for the ultimate benefit of the investors.

[49] Because of the corporate structure put into place by WLO, the funds misappropriated through and by RAM accrued to WLO and to the benefit of his family at the expense of the

investors. The argument that this was not a single business is simply untenable on the facts taking into account also the peculiar investment structure engineered and orchestrated by WLO.

THE ALLEGATIONS REGARDING THE 'CONDUCT' OF THE CURATOR

[50] The second respondent's primary duty is to report to the court. He has done so on an annual basis since his appointment. His reports have since been accepted by the court and the regulatory authority. In the discharge of his duties, the curator acted in consultation with an 'investors committee' which was representative of the investor classes and groups and indeed, it is the interests of the investors, that the curatorship order seeks to protect and preserve.

[51] It is accordingly not understood on what basis any highly speculative averments and complaints regarding the extent of the supervision of the conduct of the curator, could or would assist the appellant in any material manner, when same relates to the relevant core issues in this appeal. There are other options open to the appellant under the provisions of the Protection Act.

THE 'INSOLVENCY' OF RAM

[52] The appellant contends that the curator was the cause of RAM's insolvency. There is not an iota of evidence to support this assertion. This, because the total value of assets attributed to RAM at the time of the curatorship amounted only to R33 466 879,00.

[53] Further, RAM has been held liable for the amounts unlawfully taken from the investors in the sum of R61 million and R22 million respectively. This, with the strong possibility of further amounts in due course. Of significance is that these claims arose prior to the date of the curatorship order.

THE AVERMENT THAT THE CURATORSHIP HAS 'RUN IT'S COURSE'

[54] The curator has realised certain of the assets that were held in the collective investment scheme, and has returned a large percentage of the investments made by the pension funds to them. What remains under the control of the curator are the investments in the immovable properties registered in the names of the two shelf companies whose shares are in turn held by the JBT. Some of these immovable properties are yet to be developed and realized. In addition, these immovable properties are the subject of ongoing litigation regarding certain 'developmental rights', which could materially affect the value of these assets.

[55] The second respondent's argument is that until all these assets have all been realised and the pension funds receive their *aliquot* shares, the 'business' continues. Besides, all the

current and ongoing litigation needs to be finalized by the curator and in the interim the administration of these properties should not be returned to those who have caused the losses to the investors. Needless to say, I am in agreement with this argument advanced by the second respondent.

THE 'LITIGATION' CONDUCTED BY THE CURATOR

[56] It was precisely the 'controlling-mind' structure that enabled the funds invested to be misappropriated and unlawfully diverted from the various pension funds. In addition, this structure allowed for exorbitant management fees to be levied and for certain 'share-swop' transactions to be manipulated to the prejudice of the pension funds. Again, these issues are not engaged with, save by way of a general denial.

[57] It is against this factual canvass that the appellant's contention that the investors' committee established in terms of the curatorship order is able to continue with the litigation and other proceedings, must be measured. The life of the investors' committee will expire upon the discharge of the curatorship. The committee is there to consult with a curator, not to conduct litigation or institute execution proceedings in his stead.

[58] Neither by force of law, nor in terms of the order of court by means of which the committee was established, does the committee have the authority or power to assume and

discharge the powers and duties which were conferred upon the curator in terms of his appointment. In the circumstances, as a matter of logic and law, it would be premature and contrary to the interests of the investors for the curatorship to be discharged at this stage with all the current pending litigation.

THE 'PLASCON-EVANS' RULE

[59] It is trite that in motion proceedings for final relief, an applicant can only obtain an order where the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent, justify such order, unless the respondent's version consists of uncreditworthy denials or are implausible, far-fetched or clearly untenable.[19]

[60] It is submitted that the appellant's arguments ignore the crucial facts contained in the affidavits of the curator and of the first respondent, which indicate why there is no good cause for removing the curator or otherwise ending the curatorship over the business of the entities. These relevant facts were meticulously substantiated by the respondents and it cannot seriously be contended that this version by the respondents, is implausible or untenable. Accordingly, I hold the view that the respondents' version must be preferred as a matter of procedural law.

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[19] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

[61] I say this also because (7) years have passed since the curatorship order was granted before the subject application was launched in the court *a quo*. No answering affidavits were filed in opposition to the first respondent's application which led to the curator's appointment. This despite the grant of an interim order in this connection.

[62] The validity of the curatorship order cannot now form the subject of any legitimate belated attack as it regrettably did in the court *a quo.* A number of other remedies were open to the appellant which were not explored at all. These remedies appear from various provisions in the Protection Act.[20] This also weighs heavily with me in deciding whether the facts put up by the respondents may be legitimately characterized as being implausible or untenable.

THE 'SUBSTITUTE' CURATOR ARGUMENT

[63] The curator's primary motivation for continuing with the curatorship over the business is to ensure that the misappropriated monies of the investors are recovered. By contrast, the appellant advances a variety of reasons for why it seeks to have the curator's appointment cancelled. The stratagem of the appellant on this score becomes more apparent

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[20] Act 28 of 2001.

when analysing and interrogating the effect of the relief sought in the initial application and in this appeal.

[64] If the curator was to be removed from the business of the collective investment scheme, then in that event, the controlling mind of the business would simply again control the 'business' and the various entities which conducted it, to the prejudice and ultimate detriment of the investors. In my view, the appellant has also failed to show any cause, let alone good cause, for the curator's removal and for the substitution of the curator with another person.

[65] This, precisely also because the curator has diligently complied with all his obligations in terms of the curatorship order. The litigation he has undertaken has been successful and appointing an alternative curator would be detrimental to the investors and would be at their expense. In addition, it would make no commercial sense to retain the current curator to TDI and PIF and appoint an entirely different curator to RAM in these peculiar circumstances. All these entities formed part of the 'business' of the collective investment scheme that was initially placed under the curatorship order.

COSTS

[66] The court of first instance ordered that the appellant be liable for the respondents' costs on the scale as between attorney and client. In the exercise of its discretion in this connection it found, *inter alia*, that the investors should not be saddled with the costs of the application *a quo* in circumstances where the curator has not been found wanting and the allegations made by the appellant were found to be lacking in substance. This ruling in my view, cannot be faulted and accordingly there is no room to interfere with this order on appeal and to interfere with the discretion so judicially exercised in this connection.

[67] Costs on the attorney and client scale are awarded when a court decides to mark its disapproval of the conduct of a litigant.[21] The respondents' take the position that the appeal is misconceived and is a desperate stratagem designed by the appellant and its connected role players in an attempt to re-acquire control over the scheme so as to avoid the consequences of the serious financial misconduct and misappropriation within the scheme. I do not agree that the facts of this case, as a racing certainty, demonstrate that any inference of bad faith may justifiably be drawn against the appellant. I say this because the appeal process was largely connected with the respective parties' differences in the interpretations of the numerous court orders and their understanding of their respective divergent legal positions.

CONCLUSION AND ORDER

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[21] *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) para 223.

[68] The judgment by the court *a quo* was largely based on facts. Most of the arguments advanced by the appellant were so underwhelming to the point of vanishing. The grounds of appeal contended for were also mostly defined by numerous logical fallacies. In my view, this appeal has no basis in law or in fact and falls to be dismissed with costs, including the costs of two counsel. In the circumstances, I propose the following order, namely:

1. That the appeal is dismissed.

2. That the appellant shall be liable for the costs of and incidental to the appeal, including the costs of two counsel (where so employed), on the scale as between party and party, as taxed or agreed.

SIGNED

WILLE, J

I agree and, it is so ordered.

SIGNED

FORTUIN, J

I agree.

SIGNED

SHER, J