THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 24 October 2022

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

***Lebashe Financial Services (Pty) Ltd v The Prudential Authority and Others* (346/2021) [2022] ZASCA 141 (24 October 2022)**

The Supreme Court of Appeal (SCA) today dismissed an appeal from the Gauteng Division of the High Court, Johannesburg (high court). On 6 November 2018, the Prudential Authority, a juristic person that operates within the administration of the South African Reserve Bank, obtained orders in the high court placing Bophelo Life Insurance Company Limited (Bophelo) and Nzalo Insurance Services Limited (Nzalo) (the Insurers) under provisional curatorship in terms of s 54(1) of the Insurance Act 18 of 2017 (the Insurance Act). The Insurers are wholly owned by Bophelo Insurance Group Limited (BIG). While these orders were in force, and at the insistence of the Prudential Authority, both were also placed under provisional winding-up. Eventually, final liquidation orders were made in respect of both Bophelo and Nzalo. Lebashe Financial Services (Pty) Ltd (Lebashe), an intervening party in the high court, appealed to this court seeking to have the liquidation orders overturned and the curatorships reinstated. This appeal revolved around whether Lebashe had standing in the appeal, and if it could satisfy this Court that it did, whether s 54(5) of the Act and the provisional curatorship orders precluded final liquidation orders in respect of the Insurers. Lastly, was the curator required to seek or effect the recapitalisation of the Insurers?

The SCA found that Lebashe failed to satisfy the Court that it had sufficient interest in the matter to clothe it with the required locus standi. This Court accepted that Lebashe was a creditor and majority shareholder of BIG, but this was insufficient to establish a legal relationship between itself and the Insurers. Lebashe had no rights to a preferred legal process of dealing with undisputed insolvency of

the Insurers. The appeal ought to have failed for this reason alone, but as the other reasons were novel and likely to arise in future, the SCA provided further clarity on the other two issues.

With regards to whether the provisional curatorship orders precluded final liquidation orders in respect of the insurers, the SCA held that the Insurance Act provided powers to the Prudential Authority to, in conjunction with the Financial Institutions (Protection of Funds) Act 28 of 2001 and the Companies Act 71 of 2008 (Companies Act), deal with non-compliant insurers. Similar to business rescue, winding-up of a solvent company is effected either by the adoption and filing of a special resolution in terms of s 80 or a court order under s 81 of the Companies Act. The same applies to an insolvent company in terms of s 343, s 344 and s 349 of the Companies Act. Since section 54(5) clearly prohibited the effecting of business rescue, it would make no sense to prohibit the coming into effect of business rescue whilst a curatorship is in place, but not the commencement of liquidation, which would have far more drastic consequences. Moreover, curatorship and liquidation cannot co-exist. It followed that by reason of s 54(5) and the terms of the provisional curatorship orders, the provisional liquidation orders in respect of the insurers should not have been granted. The SCA found, however, that the liquidation applications were not themselves rendered null and void. The provisional liquidation orders were incompetent, but the applications for liquidation not. By operation of law, they were stayed whilst the curatorships were in place. The liquidation applications could have been proceeded with once the curatorships came to an end and that, in effect, was what happened in the high court.

Lastly, Lebashe complained that the liquidation orders of the insurers were premature, as the curator had not yet reported on the steps taken to recapitalise them. The provisional curatorship orders conveyed that the curator had to take control of the businesses of the insurers, investigate their affairs and report to the high court. Nothing was required regarding seeking or obtaining capital injections or long-term financing for the insurers. The curator was not required to do anything of the sort. This accorded with the provisions of the Insurance Act which provided the curator with wide powers to manage and investigate. Thus, the curatorship of the insurer was only a means to an end; by its nature it would have been only a temporary measure and its purpose was never to rescue the business of the insurer. Had rescue proceedings been contemplated, the Prudential Authority could have followed that route.

In the result, the SCA dismissed the appeal.

--------oOo--------