THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 345/97

In the matter between

ABP 4X4 MOTOR DEALERS (PTY) LIMITED **Appellant**

and

IGI INSURANCE COMPANY LIMITED **Respondent**

CORAM: Smalberger, Grosskopf, Marais JJA, Melunsky *et* Madlanga AJJA

DATE HEARD: 23 March 1999

DATE DELIVERED: 27 May 1999

Prescription - delay in completion of - sec 13(1)(a) of the Prescription Act 68 of 1969 - "person under curatorship" - whether insurance company the whole of whose business is under curatorship in terms of sec 6 of Financial Institutions (Investment of Funds) Act 39 of 1984 is such.

JUDGMENT

MARAIS JA/

MARAIS JA: [1] The issue in the court *a quo* was whether the expression "a person under curatorship" in sec 13(1)(a) of the Prescription Act 68 of 1969 ("the Act") includes an insurance company placed under curatorship by order of court pursuant to the provisions of sec 6 of the Financial Institutions (Investment of Funds) Act 39 of 1984. It arose in this way.

[2] A special plea of prescription was raised by appellant in answer to a claim for the purchase price of the salvage value of certain vehicles. Respondent countered by replicating that the completion of the running of prescription had been delayed by virtue of its having been placed under curatorship in accordance with sec 6 of Act 39 of 1984. The trial judge (Stegmann J) ordered that the issue be determined separately from the other issues arising. It was common cause that if the answer to the question posed in para [1] was yea, the plea of prescription was bad; if nay, the plea was good. The conclusion reached by Stegmann J in a painstaking judgment was that the answer should be in the affirmative and that the plea of prescription should fail. An application to the court *a quo* for leave to appeal failed but leave to appeal was

subsequently granted by this Court.

[3] When argument commenced in this Court it became apparent that insufficient attention had been paid to the provisions of sec 6 of Act 39 of 1984 and to the terms of the court order made pursuant to it. Sec 6 provides for the appointment of a curator "to take control of and to manage the whole or any part of the business" of a financial institution and the order granted was that "The short term insurance business of IGI Insurance Company Limited (hereinafter referred to as 'the business') be placed under curatorship". The question arose whether such an order resulted in respondent company becoming "a person under curatorship", a question separate and distinct from the issue considered in the court *a quo*. We were informed from the bar that respondent company had no other business than its short term insurance business and that the curators thus controlled and managed the entire business of respondent, all other persons (including the directors of respondent) having been divested of any power to do so by order of the court.

[4] Counsel for the parties were at one in asking this Court to deal

with the question on that factual basis and argument was heard on the issue notwithstanding the fact that it had not been canvassed in the written heads of argument. In the result, this Court was not satisfied that the issue had been sufficiently thoroughly debated to enable it to render judgment on the point and counsel were required to provide further written argument on a number of questions arising. Those written submissions have been considered but I shall defer discussion until I have disposed of the issue which was debated before the court *a quo*, namely whether respondent company is a person within the meaning of that word in sec 13(1)(a) of the Act. In doing so, I shall assume that the effect of the court's order in terms of sec 6 of Act 39 of 1984 was to place respondent company under curatorship.

[5] The immediately relevant provisions of sec 13 of the Act read:

"(1) If -

(a) the creditor is a minor or insane or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1); or
(b) the debtor is outside the Republic; or
(c) the creditor and debtor are married to each other; or

(d) the creditor and debtor are partners and the debt is a debt which arose out of the partnership relationship; or
(e) the creditor is a juristic person and the debtor is a member of the governing body of such juristic person; or
(f) the debt is the object of a dispute subjected to arbitration; or
(g) the debt is the object of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation or against an applicant under the Agricultural Credit Act, 1966 (Act No 28 of 1966); or
(h) the creditor or the debtor is deceased and an executor of the estate in question has not yet been appointed; and
(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist,

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)."

[6] Omitting for the moment any elaboration, the argument of counsel for the appellant ran thus. The reference in sec 13(1)(a) of the Act to "a person under curatorship" is to a natural person and not to a juristic conception to which legal personality is artificially attributed by either the common law or

statute. Respondent company is an example of the latter category of person and therefore cannot call the provisions of sec 13(1)(a) in aid in resisting the plea of prescription. The further reference in sec 13(1)(i) of the Act to "the relevant impediment referred to in paragraph (a)" ceasing to exist, shows that curatorships which do not disable the subject of the curatorships or the curators from commencing legal proceedings to enforce claims are not the kind of curatorship envisaged in sec 13(1)(a). The placing of respondent company under curatorship did not disable the company from instituting legal proceedings while under curatorship for the curators had been expressly empowered by the court to do so on behalf of the company. The curatorship was therefore akin to judicial management of a company. Prescription continues to run against a company under judicial management and there is no good reason why the same should not apply to a company under curatorship. The legislature was unlikely to have intended to bestow upon a company under curatorship protection against the running of prescription while denying it to a company under judicial management.

[7] Counsel for respondent's response, again bare of elaboration,

was this. The expression "a person under curatorship" is not defined in the Act. The word "person" is defined in sec 2 of the Interpretation Act 33 of 1957 to include *inter alia* incorporated companies unless the language or context of the enactment or any other law indicates otherwise. There is nothing in the language or context of the Act nor is there any other law which indicates that the word "person" was not intended to bear its defined meaning. A company under curatorship is therefore covered by sec 13(1)(a) of the Act. No distinction is drawn in the Act between curatorships which owe their existence to the common law and those which owe their existence to the statutes creating them. Sec 13(1)(a) read with subsection (i) shows that a person under curatorship (and indeed any creditor to whom one or more of subsections (b) to (h) may relate) is deemed to suffer from an impediment which forestalls the institution of legal proceedings whether that be so in fact or not. Curatorship of the kind provided for by sec 6 of Act 39 of 1984 is not akin to judicial management. Not only is there recognition given by the legislature in this and other statutes to curatorship and judicial management as separate and distinct concepts, but an

analysis of the two concepts shows that they cannot be equated with one another.

[8] Before considering the competing contentions it would be as well to understand the fundamental import of sec 13 of the Act. It is a provision which provides for neither the interruption nor the suspension of the running of prescription in the normally understood sense. Yet traces of the elements of interruption and suspension are not entirely absent from it. They are present to a greater or lesser degree as will become apparent when some concrete examples of its field of application are considered.

[9] Thus, if a period of extinctive prescription of three years has commenced running against a creditor and he is placed under curatorship after two and a half years have run, but discharged from curatorship after three and a half years have run, he will have one more year (calculated from the date of his discharge) within which he can sue to recover the debt. If he is discharged from curatorship on the day when three years have run, the same applies. If he is discharged when two and three quarter years have run, the result is the same. In all three instances he will have another year (calculated from the date of

discharge) within which he can sue. However, if he is placed under curatorship after six months of the period of prescription have run, and discharged from curatorship six months later when two years of the original period of prescription of three years remain available to him to sue, no additional time to sue is given to him and the period he spent under curatorship will have had no effect whatsoever upon the running of prescription against him.

[10] It will be seen therefore that in some circumstances the existence of the curatorship (or for that matter any of the other "impediments" listed in subsections (a) to (h)) will have no effect at all upon the running of prescription; in others it will not only suspend the running of prescription for a time but also provide what amounts to a virtually new period of prescription (one year) the commencement of which is the date when the impediment ceases to exist. To that limited extent the provision may be said to have the effect of interrupting prescription. It does not of course interrupt it in the sense that the entire period of three years starts running afresh. (Cf sec 14 of the Act.)

[11] Next to be observed is that the use of the word "impediment"

in subsection (1)(i) is not to be taken too literally and interpreted as meaning an absolute bar to the institution of legal proceedings. While some of the circumstances set forth in subsections (1) (a) to (h) give rise to an absolute bar, others do not. An example of the former is subsection (h); an example of the latter is subsection (e). The word "impediment" therefore covers a wide spectrum of situations ranging from those in which it would not be possible in law for the creditor to sue to those in which it might be difficult or awkward, but not impossible, to sue. In short, the impediments range from the absolute to the relative.

[12] Lastly, it is worthy of note that the expression "a person under curatorship" and the word "impediment" also appear in sec 3(1) of the Act in the context of acquisitive prescription and that the general thrust of sec 3 is in broad principle similar to that of sec 13, namely, to postpone the completion of the running of prescription in some cases where certain statutorily delineated "impediments" exist, but to ignore the existence of those impediments in others, and to leave the running of prescription unaffected by them. As has been noted,

the statutorily ordained impediments in sec 3 range from the absolute to the relative. What seems to be beyond dispute is that the expression "a person under curatorship" must have been intended by the legislature to bear the same meaning in sec 3 as it does in sec 13.

[13] Further light is thrown upon the question when the Act is compared with its predecessor, the Prescription Act 18 of 1943. In the 1943 Act a distinction was drawn between the delaying of the commencement of the running of prescription and the suspension of the running of prescription after it had commenced running. Thus, sec 7 provided for the suspension of the running of prescription in prescribed circumstances (one of which was "during the period of disability of the creditor" - subsection (1)(b)) and its resumption on the date when suspension ceased. In the case of a suspension caused by a period of disability that would obviously be the date upon which the disability ceased to exist. Moreover, subsection (2) provided for the completion of the period of prescription by simply adding to the period of prescription which had already run before suspension occurred whatever period of time would be required to make

up the period of prescription prescribed by the Act for the prescription of the particular debt. For example, if the period of prescription was three years and a period of disability commenced after two and a half years had run but ended nine months later, another six months would have to elapse before prescription took its toll. To be noted, is that (unlike the present Act) the originally prescribed period of prescription would remain the same, namely, three years. There would be no extension of the period so as to give the creditor a full year within which to sue because the unexpired period of prescription was only six months. In other words, the 1943 Act provided only for the suspension of the running of prescription and did not provide any extra time over and above the originally applicable period of prescription for the bringing of proceedings by the creditor.

[14] Sec 9 and sec 10 of the 1943 Act dealt specifically with the delaying of the commencement of the running of prescription. Sec 9 read:

> "When the creditor is a person under disability, extinctive prescription shall not begin to run until the date upon which disability ceased."

Sec 10 read:

"When the debtor is absent from the Union extinctive prescription shall not begin to run until the date of his return."

The expression "person under disability" was defined in sec 1 of the 1943 Act as meaning -

"(i) a minor;

(ii) any person under curatorship;

(iii) in the case of an action between spouses, both the husband and the wife, unless they are living apart;

(iv) in the case of an action between partners in respect of rights arising out of the partnership, each partner for so long as he remains a member of such partnership;."

[15] What is striking in the present Act is that circumstances which would have delayed the commencement of the running of prescription in terms of secs 9 and 10 of the 1943 Act no longer have that effect. Nor, where such circumstances arise after prescription has commenced running, do they necessarily

result in the suspension of the running of prescription or a delay in the completion of the originally applicable period of prescription. For example, under the present Act the fact that the creditor is a minor or insane, or that the debtor is outside the Republic will neither prevent the commencement of the running of prescription nor suspend the running of prescription while such circumstances exist. The effect, if any, which such a circumstance will have will depend upon how much time remains available to the creditor to take action when the circumstance ceases to exist. If no time or less than a year remains available, the period of prescription is extended so as to make a full year available. If more than a year remains available, the existence of the circumstance postulated will have no effect at all on the running of prescription or its completion. All this emerges when sec 12 and sec 13 of the present Act are read together.

[16] I have prefaced the consideration of the narrow issue before us with these wider ranging observations for two reasons. First, because the question whether or not the expression "a person under curatorship" was intended to be restricted so as to mean only natural persons, should not be answered as if

it arose *in vacuo,* but in the context of the apparent purpose and scope of the provision. Secondly, because the shift in the legislature's approach to the subject of prescription which is so evident in 1969 show that the making *a priori* of assumptions as to legislative intent on the strength of one's familiarity with common law principles of the law of prescription and the 1943 Act, may lead to error. If one's premise is that it is only a creditor who is under such disability that the creditor is absolutely incapable in law of instituting legal proceedings who is to benefit from sec 13(1)(a), it is but a short step to the conclusion that "a person under curatorship" does not include a company such as respondent because its capacity to sue continues to exist in law, despite the company having been placed under curatorship, and the terms upon which it was so placed enable the curators to institute legal proceedings on its behalf. But if that premise is unsound and the expression includes persons who are only relatively disabled from suing, then respondent company may well be "a person under curatorship" within the meaning of sec 13(1)(a). Curators to whom what may turn out to be the complicated affairs of a company are a closed book when they assume office may

well be impeded in instituting legal proceedings on the company's behalf if the remaining time within which they must act before prescription of a claim sets in is too short to enable them to acquaint themselves with the existence of, and to assess the merits of, the claim. While not absolutely disabled from suing, they may well be said to be relatively disabled from suing. Sec 12(3) of the Act will provide no succour for prescription will have already commenced to run against debts which became due prior to the curators taking office.

[17] I turn now to the narrow issue. No odyssey into the wilderness of legislative intent can be undertaken without reference to the vade-mecum provided by the Interpretation Act. There can be no doubt that sec 2 of that Act requires the word "person" to be taken to include respondent company unless either the context in which it is used or other relevant legislation dictates otherwise. In referring to its context I do not confine that to the purely linguistic context of the provision or that of the Act as a whole. I include the whole gamut of factors referred to in **Canca v Mount Frere Municipality** 1984 (2) SA 830 (Tk) at 832 E-G. (Cited with approval in **Hoban v ABSA Bank Limited t/a**

United Bank & Others, Case No 275/1997, unreported judgment of this court delivered on 19 March 1999.)

[18] I am unable to find anything in the context which would justify a departure from the defined meaning of the word "person". Confinement of the meaning of the word to natural persons on the ground that only persons who are absolutely incapable in law of instituting legal proceedings are intended to be included within its purview would be permissible only if it appeared that the impediment referred to in sec 13(1)(i) of the Act was to be interpreted only in that absolute sense. As I have attempted to show, it is clearly not intended to be interpreted in so restricted a manner for it is used to describe both absolute and relative inability to sue.

[19] What is more, if appellant's contention was sound, one would have to exclude even some natural persons under curatorship from the purview of the expression. A prodigal under curatorship is not of unsound mind or otherwise inherently lacking in legal capacity. The limitations which exist upon his legal capacity are the consequence of, and not the reason for, the court's order placing

him under curatorship. Is one to say, by parity of reasoning, that a prodigal under curatorship is also not a person under curatorship within the meaning of the Act? Counsel for appellant was driven to contend for an affirmative answer. The extravagance of the submission and the violence which it does to the plain language of sec 13(1)(a) appear to me to be self-evident and require no further comment.

[20] I turn to the submission that artificial *personae* under curatorship are in substantially the same position as a company under judicial management and were therefore intended to be treated no differently in regard to prescription. A company under judicial management enjoys no protection against the running of prescription against it. There are at least two answers to the submission. First, judicial management is a creation of the legislature which has no counterpart in the common law. That it resembles a curatorship in some respects does not make it anything other than what it is: a concept which is *sui generis* and has its own legislatively determined field of application and its own special name. There is no more warrant for forcing the concept of judicial

management into the mould of curatorship than there is for forcing the concept of curatorship into the mould of judicial management. The fact that, when enacting statutes providing for the placing of certain institutions under curatorship, the legislature has sometimes made it possible for such curators to have the same powers as a judicial manager does not detract from the existence of the two phenomena as separate and distinct conceptions in law. Secondly, there are many instances to be found in South African statutes of the legislature referring to those phenomena by their respective names in a way which shows that it does not regard them as capable of being described by one and the same generic name. I content myself with referring to sec 4(2)(b) (ii) and (iii) of the Stock Exchanges Control Act 1 of 1985; sec 57(7)(c) and (d) of the Mutual Banks Act 124 of 1993; and sec 5(6)(a) (ii) and (iii) of the Financial Markets Control Act 55 of 1989. Stegmann J embarked upon a meticulous examination of the provisions of these and other statutes in order to demonstrate the correctness of the propositions set out above. There is no need to repeat it; I consider that it does indeed bear them out.

[21] An attempt was made to invoke the *noscitur a sociis* rule in support of the proposed restriction of the word "person" to natural persons. As the learned judge in the court *a quo* pointed out, the contention rested upon the singling out of cases of minority or insanity (both of which could apply only to natural persons) as the *socii* and arbitrarily refusing to acknowledge as *socii* the cases of prevention by superior force including any law or order of court (which could apply to both natural and artificial persons). There was, in his view, no justification for that. I agree.

[22] Finally, there is the consideration that if the legislature had intended to restrict the ambit of the expression to natural persons it could have done so quite simply by inserting the word "natural" before the word "person" as it did, for example, in sec 32(8) of the Estate Agents Act 112 of 1976 which reads:

> "(8) The amount standing to the credit of the trust, savings or other interest-bearing account, referred to in subsection (2)(a), of any estate agent, shall not form part of the assets of such estate agent or, if he was a natural person and has died or has become insolvent, of his deceased or insolvent estate."

The legislature's omission to do so notwithstanding the definition of "person" in sec 2 of the Interpretation Act and its use of the unqualified expression "a person under curatorship" in the 1969 Act in a setting which does not lend itself to the application of the *noscitur a sociis* maxim, speaks volumes. That the legislature was alive to the need to distinguish between natural and juristic persons when appropriate is evident from sec 13(1)(e) in which the expression "juristic person" is specifically employed.

[23] That anomalies may arise if a person under curatorship is taken to include persons other than natural persons may be conceded but they fall far short of amounting to absurdities which would justify the confinement of the concept to natural persons. The exclusion of all artificial persons from the concept no doubt would also give rise to anomalies. In the end, the interpretation which sec 2 of the Interpretation Act requires to be given to the word "person" must prevail. I conclude therefore that Stegmann J was right in so holding.

[24] I return to the question of whether or not the court's order in terms of sec 6 of Act 39 of 1984 resulted in respondent becoming a person under

curatorship. Counsel for the appellant contended that it did not. He stressed that the court order did not purport to place respondent under curatorship and that only its short term insurance business was so placed. He pointed out that the application was made by the Registrar of Insurance and that in terms of sec 6(1) of Act 39 of 1984 it was not open to the Registrar to apply for anything other than the appointment of a curator to manage the whole or any part of respondent's business and that it was not open to the court to place respondent itself under curatorship. He drew attention to the fact that under legislation such as the Banking Act 38 of 1942; the Banks Act 23 of 1965; the Banks Act 94 of 1990; and the Mutual Banks Act 124 of 1993 it is a bank itself which can be placed under curatorship whereas under the Financial Institutions (Investment of Funds) Act it is the whole or part of the business of a banking institution which may be placed under curatorship by the court. This showed, so he argued, that they were not one and the same thing irrespective of whether the whole or only part of the business of a bank was placed under curatorship.

[25] The argument proceeded thus. In the Insurance Act 27 of

1943 (now, but for sec 60(1)(f), repealed by sec 73 of the Long Term Insurance Act 52 of 1998 but in operation when the relevant order was granted) a distinction was drawn between the registered insurer and its business and not all the business was necessarily insurance business. The latter proposition is borne out by sec 11(1)(c) of the Act which required a disclosure to be made to the Registrar of all business of the insurer including business other than insurance business. The decision in **Lindsay Keller & Partners v AA Mutual Insurance Association Ltd and another** 1988 (2) SA 519 (W) was cited to show that sections 30 to 32 of the Insurance Act provide for the placing under judicial management or the liquidation of the insurance business of an insurer and that the liquidation of the insurance business of that insurance company did not disable it from opposing an application for its own liquidation. In the Estate Agents Act 112 of 1976 provision is made in sec 32(6) for the placing of an estate agent's trust account and other interest bearing accounts under curatorship. That would not mean that the estate agent is under curatorship and would not be able to carry on with its ordinary business.

[26] Capital was sought to be made of suggested distinctions in the reasons which may lead to the appointment of a curator. It was said that in the case of a natural person curatorship is the consequence of the incapacity of the person to manage his or her own affairs for whatever reason. The case of a prodigal was said to be the only exception to the general rule in that the disability stems from the grant of the order of the court placing him or her under curatorship. In the case of juristic persons no such incapacity exists and the reason for placing such a person under curatorship must be found in the statutory enactment making provision for the appointment of a curator. In the present case the intervention of the Registrar of Financial Institutions and the court is the reason for the curatorship. Curatorship of natural persons is aimed at protecting the person's assets when a *curator bonis* is appointed and the person himself or herself when a curator to the person is appointed. The appointment of a curator in respect of a financial institution has as its aim the protection of the public and not the institution itself except in the case of a bank where the bank itself is placed under curatorship. The argument proceeded in this vein and culminated in the

proposition that although the court's order in this case had "certain effects on the administration of the affairs of" respondent, it related "in context to the short term insurance business . . .and not to all the business of" respondent and the respondent's directors were still its directors and its shareholders still its shareholders. The short term business of respondent having no legal personality, the placing of that business under curatorship "did not affect the status of" respondent and it did not become a person under curatorship within the meaning of sec 13(1)(a) of the Act.

[27] It was submitted for those reasons that there is a material difference in substance between a company which has been placed under curatorship and a company the entire business of which has been placed under curatorship. As for the position where a part only of an institution's business has been placed under curatorship, appellant contended that *a fortiori* it could not be a person under curatorship within the meaning of sec 13(1)(a).

[28] Those then were appellant's submissions. I turn to consider them. The fact that in the case of juristic persons some statutes make provision for the person *eo nomine* to be placed under curatorship while others make

provision for the placing under curatorship of the whole or any part of its business is not of great moment. It would be significant only if it justified the inference that these respective choices of language by the legislature provide the touchstone to enable one to decide whether or not the person concerned is to be regarded as a person under curatorship for the purposes of sec 13(1)(a) of the Act. That inference is difficult to sustain in the light of the legislature's use of the term in other legislation dealing with curators. To that I shall return.

[29] The legislature has not defined or explained in the Act what the words "a person under curatorship" are intended to comprehend. Nor are any examples given in the Act from which it might be possible to deduce it. One is thrown back upon the ordinary meaning of the words used with due regard to their context, the apparent purpose of the provision in which they are found, and of course to their setting in, and the object of, the statute as a whole. In the process one has to bear in mind that the concept of curatorship in present day South African law is no longer limited to its well-known manifestations in the common law but extends to a number of statutorily created curatorships, each with its own *raison d'etre*. The spectrum is wide indeed. Such curatorships sometimes apply

to both natural persons and juristic persons and sometimes to only one or other of those classes of persons. Their reach and effect is sometimes all embracing and disabling and sometimes narrowly confined with very little accompanying disablement. Their *raison d'etre* is sometimes the same as that in another statute; sometimes it is unique to the statute in which it is found. Herein lies the rub.

[30] The legislature must be taken to have been aware of its own creations when it employed the expression "a person under curatorship" in the Act. The question then is which (if any) of them is to be included and which (if any) to be excluded and, more specifically of course, whether the particular curatorship which exists in this case is to be included. If all are to be included some absurd results will ensue as I shall attempt to demonstrate in due course. If some are to be excluded the question of what criteria determine exclusion arises.

[31] By way of illustration, here are some examples chosen because they represent opposite ends of the spectrum of statutory curatorships. In both sec 266 of the Companies Act 61 of 1973 and sec 41 of the Sectional Titles Act 95 of 1986 provision is made for the appointment of a *curator ad litem* "for" the company or the body corporate solely for the purpose of enabling legal

action to be taken on behalf of the juristic person concerned in circumstances in which those who control it refuse to do so. Save in that limited respect, there is no interference with the legal capacity of the company or the body corporate nor is there any assumption of control over its assets or its management or business. The appointment of the curator is for a specific and confined purpose and will terminate upon achievement of the purpose. In my view it would be grossly misleading to describe such a juristic person as a person under curatorship and there would be no point in straining to do so in order to bring the case within the ambit of sec 13(1)(a) of the Act, because the obvious mischief which the provision is intended to prevent does not exist in such a situation. It would be absurd to provide blanket protection against the running of either extinctive or acquisitive prescription in such a case. By way of contrast, sec 69 of the Banks Act 94 of 1990 provides for the appointment of a curator "to" any bank in financial difficulties. The effect is profound: those who had been managing the bank are divested of control and the management of the bank is vested in the curator (subject to the supervision of the Registrar of Banks); the curator must recover and take possession of all the assets of the bank; the curator may be

empowered to do a variety of far-reaching acts in the exercise of his or her discretion which the erstwhile managers of the bank would not have been empowered to do. There are also references in that Act (sec 69(6A) and (8)) to such a bank being "under curatorship". There can be no doubt that in ordinary parlance such a characterization of the position of such a bank is justified. Nor can there be any doubt that such a bank is "a person under curatorship" within the ordinary meaning of those words in their context in sec 13(1)(a) of the Act.

[32] Between those two ends of the spectrum are some troublesome cases. Sec 44 of the Drugs and Drug Trafficking Act 140 of 1992 authorises a superior court which has made a restraint order under that Act "to appoint a *curator bonis* to do . . . on behalf of the person against whom the restraint order has been made" any one or more of a number of acts in respect of "any of or all the property to which the restraint order relates" including the ordering of the person concerned to surrender any such property into the custody of the *curator bonis*. Where the property is "a business or undertaking" the curator is empowered "to carry on" with it with due regard to any law which may be applicable. Here the terminology of the common law is employed to describe

the curator *("curator bonis")* but the legislation makes no provision for a declaration that the person concerned is unable to manage his or her affairs because that is manifestly irrelevant in the context of the mischief at which it is aimed. Such a declaration or a declaration of prodigality is a necessary concomitant of the appointment of a *curator bonis* at common law.

[33] Sec 32 of The Estate Agents Act 112 of 1976 requires estate agents (be they natural or juristic persons) to open one or more separate trust accounts with a bank or building society and to deposit monies held or received in that capacity on behalf of any person. Sec 32(6) empowers the court to "prohibit any estate agent to operate in any way on his trust . . .account . . . and may appoint a *curator bonis* to control and administer such trust . . . account, with such rights, duties and powers as the court may deem fit". The comments made in the preceding paragraph seem to be equally applicable here.

[34] Sec 14(7) of the Stock Exchanges Control Act 1 of 1985 enables the High Court to prohibit a member of the stock exchange from operating the trust account required to be opened and maintained by the Act and to "appoint a curator to control and administer the trust account with such rights, duties and

necessary". Sec 12(2)(g) vests "the management of the business or affairs of the person involved in the harmful business practice" in the curator, subject to the supervision of the Master, divests any other person of the power to manage the affairs of that person, and requires the curator to recover and take possession of all that person's assets.

[36] The powers with which the Minister may clothe the curator are extensive and make substantial inroads upon the autonomy of the person involved in a harmful business practice but they do not have the far-reaching effects which a declaration by a court appointing a *curator bonis* of inability to manage own affairs would have. What is significant is that despite the fact that, unlike the Banks Act 94 of 1990 where a curator is appointed "to" a bank, this Act does not provide for the appointment of a curator "to" the person involved in a harmful business practice, it is considered appropriate in both Acts to describe the resultant situation as one in which both the bank and the person are persons under curatorship. Thus, sec 69 (6A) and (8) of the Banks Act speaks of a "bank under curatorship". Sec 12(2)(h) of the Harmful Business Practices Act commences with the words "While such person is under curatorship" and

subsection (i) refers to "the person placed under curatorship". While these references to curatorship are obviously references to the form of curatorship created by each of the two Acts, the fact remains that in each instance the legislature regarded them as resulting in persons (juristic in one case and juristic or natural in the other) being under curatorship.

[37] A further indication that the legislature did not intend the words "person under curatorship" to have an unduly narrow field of application exists in statutes in which the same or substantially similar expressions are used in situations in which it could not have been intended to exclude a case like the one before us from the ambit of their applicability. For example, the Financial Markets Control Act 55 of 1989 prohibits, as a regular feature of business, the management of investments for reward on behalf of another person unless certain conditions are satisfied. An exemption provision exists in sec 5(6)(a) in terms of which it is deemed that the management of investments is not a regular feature of the business of any person if such investments form part of the assets of, *inter alia*, "any person under curatorship". The Mutual Banks Act 124 of 1993 places limitations upon the redemption of certain shares in a mutual bank but

in terms of sec 57(7)(c) some of the limitations are relaxed where, *inter alia*, "the shareholder has been placed under curatorship". It would be strange if the curator to a bank were able to avail himself or herself of these provisions but a curator of the whole of the business of another financial institution were not. Their needs in those particular respects may be identical.

[38] All this shows how difficult it is to discern exactly what criteria the legislature intended should be employed in order to distinguish those curatorships which do result in persons being under curatorship within the meaning of sec 13(1)(a) of the Act from those which do not. However, two things seem clear. One is that in at least one statute the legislature does not regard the fact that the curator is not appointed "to" the person as *per se* sufficient to make it inappropriate to speak of that person as being under curatorship. The other is that the fact that a curator has been appointed for a particular and limited purpose does not necessarily result in a person being under curatorship either within the meaning of sec 13(1)(a) or at all.

[39] Any attempt to fashion a simple litmus test to provide an answer to the cases falling in between these two poles is doomed to failure. It

would be inadvisable in the absence of full argument to attempt to decide which of the other statutory curatorships to which I have drawn attention would fall within the purview of sec 13(1)(a) of the Act and which would not. However difficult that may be to decide in some of those instances, I think that it is reasonably plain that the present case does indeed fall within its purview.

[40] Respondent is a registered insurer whose only business is short term insurance. That is common cause. The whole of its short term business has been placed under curatorship. Those who were empowered to manage the business are no longer empowered to do so. The curators are now vested with the power of management and "with all powers which would ordinarily be vested in, and exercisable by, the board of directors" and the directors were correspondingly "divested of all such powers". Amongst the panoply of further powers given to the curators by the relevant order of the court is the power to institute or prosecute any legal proceedings on behalf of the company and to defend any actions against the company. There was also a stay of all legal proceedings and a prohibition against the institution of proceedings against the company without the leave of the court. It is not easy to see what

greater assumption of control over the company by a curator there could be. And if assumption of total control by a curator is an (even if not the only) underlying rationale for the inclusion of persons under curatorship in sec 13(1)(a), as I think is the case, I see no good reason for concluding that respondent is not a person under curatorship within the meaning of the provision. It is as much a person under curatorship as a company which has been placed under curatorship *eo nomine*. In my view, there is no material difference. Had only part of its business been placed under curatorship, it may be that it could not be so regarded. It is unnecessary to speculate further in that regard. It is common cause that short term insurance is its only business. In substance therefore (if not in form) the whole of its business was placed under curatorship.

[41] The appeal is dismissed with costs, including the costs of two counsel.

R M MARAIS

SMALBERGER JA)
GROSSKOPF JA) **CONCUR**
MELUNSKY AJA)
MADLANGA AJA)