REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 234/2012

In the matter between:

1.1.1.1. **THE CHIEF EXECUTIVE OFFICER OF NAMIBIA** **1ST APPLICANT**

FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY **2ND APPLICANT**

and

FIS LIFE ASSURANCE COMPANY LTD **1ST RESPONDENT**

THE MINISTER OF FINANCE **2ND RESPONDENT**

THE MINISTER OF DEFENCE **3RD RESPONDENT**

THE MINISTER OF SAFETY AND SECURITY **4TH RESPONDENT**

Neutral citation: *The Chief Executive Officer of Namibia Financial Institutions Supervisory Authority v FIS Life Assurance Company Ltd (A 234/2012) [2012] NAHCMD 53 (7 November 2012)*

Coram: Smuts, J

Heard: 17 October 2012

Delivered: 7 November 2012

Flynote: Application by Registrar of Long-Term Insurance to place first respondent under provisional curatorship under s6 of Act 39 of 1984 – requirements referred to – jurisdictional facts to be established – opinion held by the Registrar to be reasonable and rationally held – CEO, Namfisa v Legal Shield 2005 NR 155 (HC) qualified.

ORDER

1. That the full and proper compliance with the Rules relating to service and time limits as set out in Rule 6(12) of the Rules of this Honourable Court, by reason of the urgency of the matter, is condoned
2. That the long-term insurance business of FIS Life Assurance Company Ltd (hereinafter referred to as "the business") is placed provisionally under curatorship in accordance with the provisions of section 6 of the Financial Institutions (Investment of Funds) Act, No. 39 of 1984 ("the Act"), and in accordance with the provisions of this order.
3. That Michael Leech is appointed curator ("the curator") of the business of FIS Life Assurance Company Ltd (hereinafter referred to as "the company") and, as such, is absolved from furnishing security.
4. That the business is placed provisionally under the curatorship and management, subject to the supervision of this court, of the curator, and any other person (including but not limited to the directors) now vested with the management of the business be divested thereof.
5. That pending the return day of the order granted herein, all actions, proceedings, the execution of all writs, summonses and other processes against the company, are stayed and be not instituted or proceeded with without leave of the court.
6. That the curator is, pending the return day referred to in paragraph 7 hereunder;

6.1 authorised to take immediate control of, manage and investigate, the business and operations of and concerning the company, together with all assets and interests relating to such business, such authority to be exercised subject to the control of this court in accordance with the provisions of s6 (5) of the Act, and with all such rights and obligations pertaining thereto;

6.2 vested with all executive powers with would ordinarily be vested in, and exercisable by, the board of directors or members of the company, whether by law or in terms of its articles of association, and the present directors, members or managers of the company shall be divested of all such powers;

6.3 directed to give consideration to the best interests of the policyholders and other creditors of the company;

6.4 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 company or the business provided that the curator may in his discretion suspend the issuing of new insurance policies during the curatorship. The curator, however, shall be entitled to sell movable assets in his discretion with the approval of the applicants in order to defray day-to-day running expenses and in order to keep the business of the company active pending his report to the court on the return day;

6.5 directed to take custody of the cash, cha investments, stocks, shares and other securiti8es held by the company or any entity directly or indirectly controlled by the company, and of other property or effects belonging to or held by the company or any entity directly or indirectly controlled by the company;

6.6 authorised to incur such reasonable expenses and costs as may be necessary or expedient for the curatorship and control of the business and operations of the company, and

to pay same from assets held or under the control of the company;

6.7 authorised to engage or dismiss or negotiate the severance and retrenchment packages with staff members and incur office expenses for the purpose of exercising this curatorship;

6.8 permitted to engage such assistance of a legal, accounting, administrative, actuarial or other professional nature as he may reasonably deem necessary for the performance of his duties in terms of this order of court, and to defray reasonable charges and expenses thus incurred from the assets held or under the control of the company;

6.9 authorised to institute or prosecute any legal proceedings on behalf of the company and to defend any actions against the company;

6.10 authorised to invest such funds as are not required for the immediate purpose of the business, with a registered bank;

6.11 authorised to operate existing banking accounts of the company and of its subsidiary companies, and to open and operate any new banking accounts for the purposes of the curatorship;

6.12 directed and authorised, at any time during his term of office, to report to the applicants should he deem it necessary or expedient that application should be made to this court for the extension of his powers to any other company (including any subsidiary) affiliated to or associated with the company or for the liquidation of the company;

6.13 authorised to claim all costs, charges and other expenditure reasonably required by the curator in the execution of his duties in terms of this order as administration costs in the liquidation of the company, in the event of liquidation ensuing;

6.14 authorised to pay the applicants' costs as provided for in

paragraph 7.2 below;

7. That the rule nisi is hereby issued calling upon the company to show cause to this honourable court on 16 January 2013 at 11h00 why:

   7.1 the appointment of the curator ordered in paragraphs 2, 3 and 4 above should not be confirmed, with the powers and duties set out in paragraph 6 above;

   7.2 the costs of these proceedings, as between attorney and client, as well as the costs of the curator and the cost of inspection conducted into the affairs of the company in terms of the inspection of Financial Institutions Act 38 of 1984, should not be payable by the company, alternatively, from the assets held by or under the control of the company;

8. That the rule nisi is hereby issued calling upon all interested parties to show cause to this honourable court on a date to be arranged with the Registrar why an order should not be granted that, whilst the curatorship exists, all actions, proceedings, the execution of all writs, summonses and other processes against the company is stayed and not instituted or proceeded with without the leave of the court.

9. In the event of the company or any interested party wishing to appear on the return date mentioned in paragraph 7 and 8, notice of such intention to oppose the confirmation of the aforesaid rule nisi, together with an affidavit in support of such opposition, shall be lodged with the Registrar of this Honourable Court and copies thereof served on the applicants' legal practitioners of record, Shikongo Law Chambers, Gosp Office Windhoek, by not later than a date to be determined by this Honourable Court.

10. That the curator is directed:

   10.1 to compile a statement reflecting the overall financial position of the company, with specific reference to its assets and liabilities and to any business conducted by the company or any of its subsidiaries, affiliated, or associated

companies, or any trusts in which the companies' directors or management have an interest, involving money received from policyholders and other parties in connection with insurance business and to report thereon to this Honourable Court on the return date;

10.2 to report this Honourable Court on any irregularities committed by the company, its directors, management or auditors and the contravention of any laws in the conduct of its business;

10.3 to recommend to the Honourable Court on the return day what further steps should be taken and by whom, in order to safeguard the interests of policyholders and other creditors of the company;

10.4 to furnish the applicants with progress reports on the curatorship on a monthly basis;

10.5 to report to the Honourable Court on the return day regarding the viability of the business and any other entity in which the company has a direct interest, and the ways to ensure the survival of the business in particular with regard to the protection of the interests of policyholders;

10.6 should the curator suggest that the business or the company be placed in liquidation, to make his suggestions with regard to the number of persons, their experience and training to be appointed as liquidators of the business or the company; and

10.7 should the curator propose that the rule be confirmed and his provisional appointment be made final, to give an indication of the term required for completion of the curatorship.

11. That the curator shall be entitled to reasonable remuneration based on an hourly rate in accordance with the norms of his profession, such remuneration to be paid for the assets of or under the control of the business or the company on a preferential basis.

12. That this order as well as a copy of the application shall be served on the company and publication of the order shall be effected in one issue of the Namibian newspaper and in one issue of the Government Gazette.

JUDGMENT

SMUTS, J

(b) The first applicant is the Chief Executive Officer ("CEO") of the Namibia Financial Institutions Supervisory Authority ("Namfisa"). Namfisa is established under section 5 of its empowering legislation, the Namibia Financial Institutions Supervisory Authority Act, 3 of 2001 (the "Namfisa Act"). Namfisa is the second applicant in this application. By virtue of the first applicant's position as Chief Executive Officer of Namfisa, he also serves as a registrar of various financial institutions as defined in s 1 of the Namfisa Act, read together with Schedule 2 of that Act. Of relevance for the present proceedings is his position as Registrar of Long-Term Insurance, a position which he occupies under section 4 of the Long-Term Insurance Act, 5 of 1998 ("the Long-Term Insurance Act").

(c)

(d) The applicants approached this Court on an *ex parte* basis as a matter of urgency to place the first respondent under curatorship. The latter is a public company and a registered insurer under the Long-Term Insurance Act. It is subject to supervision by Namfisa and by the first applicant by virtue of his capacity as a Registrar of Long-Term Insurance.

(e) The applicants' application to place the first respondent under curatorship was brought under s 6 of the Financial Institutions (Investment of Funds) Act, 39 of 1984 ("the Investment Act"). The application also seeks extensive ancillary relief related to the placing of the first respondent under curatorship.

(f) The provisions of s 6(1) of the Investment Act are thus pertinent to these proceedings. That sub-section provides, under the heading "Appointment of

Curator" as follows:

> "(1) If as a result of an inspection of the affairs of a financial institution under any law, the registrar of a financial institution is of the opinion that it is for any reason desirable to do so, he may without notice to the financial institution concerned apply to a division of the Supreme Court having jurisdiction (hereafter referred as 'the Court') for the appointment of a curator to take control of and to manage the whole or any part of the business of that financial institution."

(g) The applicants would appear to have approached this Court on the basis that s 6 entitled them to apply on an *ex parte* basis without the need to set out facts to justify the granting of an order of this nature without notice to the financial institution concerned. The first applicant stated in his affidavit that the wording of s 6 enabled the application to be brought *ex parte* and that opposition would then only arise on the return date or in an application for the anticipation of the return date and that applications of this nature would not require service upon the financial institution in question. When the matter was originally set down on this basis, I enquired from Mr Corbett, representing the applicants, whether he would want to address me on whether the facts raised in the papers justified an approach to this Court on an *ex parte* basis or whether s 6 entitled the applicants to do so without the need to raise such facts. In the meantime, the first respondent became aware of the application and the applicants agreed to serve the papers upon it. It was then no longer necessary for Mr Corbett to address the Court on those issues as there was then service of the application upon the respondents. It was also no longer necessary for me to deal with the issue I raised with Mr Corbett. As I have not had the benefit of argument on the matter and as it is no longer pertinent, I refrain from dealing with the issue as to whether s6 would entitle the applicants to bring an application of this nature on an *ex parte* basis without the need to set out facts to justify hearing the application without notice or service upon a respondent in the face of parties' right to a fair trial entrenched by art 12 of the Constitution. The matter then became postponed to 5 October 2012 for service on the respondents.

(h)

(i) On 5 October 2012, the application was further postponed by agreement to 17 October 2012 with the first respondent being required to file answering papers on or before 12 October 2012.

(j) The first respondent did not meet this deadline but filed an answering affidavit on the day before the hearing, 16 October 2012.

(k) Before dealing with what was stated in the answering affidavit, I first briefly refer to the basis for the relief set out in the founding papers which span several hundreds of pages. The Registrar initiated three investigations of the first respondent. These were conducted by the accounting firm PricewaterhouseCoopers in 2005, 2010 and 2011. The third investigation termed “the final inspection report” was completed on 11 November 2011. The first applicant also relies on several letters and directives addressed by Namfisa to the first respondent raising issues of non-compliance with legislation and with directives, requiring remedial action and information. A total seventeen such letters are referred to. There is also reference to meetings between Namfisa staff and the directors and management of the first respondent and a notice of 25 November 2011 of an intention to cancel the first respondent’s registration as a funeral insurer in terms s 17(11) of the Long-Term Insurance Act.

(l)

(m) There is ample evidence that several of the notices and letters addressed to the first respondent met with a hostile and at times obstructive attitude which included unsupported allegations of corruption levelled against Namfisa. The applicants also referred to a general failure of good corporate governance on the part of the first respondent with reference to internal disputes which resulted in two factions of shareholders and directors being at loggerheads with each other for an extended period. There were also serious allegations of fraud levelled by one faction against the other. It was also raised that the composition of the board was also in contravention of s 16 of the Long-Term Insurance Act (by reason of the fact that the majority of members were not Namibian citizens). There was also confusion concerning the number of shares issued in the first respondent, the failure on its part to relocate its offices as

directed by the Registrar and the continued interference in its operations by a certain Mr I Edward despite not being the principal officer and the related failure to appoint a fit and proper principal officer. There was also the failure to furnish Namfisa with financial statements and quarterly reports and finally misrepresentations made by the first respondent concerning the nature of business for which it is licensed.

(n)

(o) On the strength of these contraventions of statutory provisions and directives of Namfisa as well as instances of very poor corporate governance - most of which were dealt with in the inspection reports, the first applicant expressed his opinion in the founding affidavit that it is desirable that a provisional curator be appointed to take control of and manage the business of the first respondent so that the necessary remedial action could be taken with a view to establishing a proper management system so that it can continue to operate in the insurance industry. In expressing this view, the first applicant acknowledged that placing the first respondent under curatorship would have far-reaching effects. But he considered that it was warranted in order to protect the interest of third parties, being primarily the policyholders, to the greatest extent possible. The inspection reports themselves set out a litany of contraventions of legislative provisions and Namfisa directives as well as the obstruction on the part of the first respondent of Namfisa in performing its important statutory mandate. The inspection reports had also resulted in remedial action being called for by the Registrar which had not been met.

(p) Following the final inspection report in November 2011, the Registrar gave notice of his intention to cancel the registration of the first respondent as a funeral insurer in terms of s 17(11) of the Long-Term Insurance Act – premised upon contraventions of the failure to comply with the provisions of that Act. There then followed meetings and correspondence between each faction and the regulator with, each seeking to deal with the regulator and in the process besmirching the other. The Registrar permitted an extension to furnish representations concerning the cancellation of the first respondent's registration. After receiving the representations from one of the factions in response to this issue, Namfisa requested further information from the first respondent. Further

correspondence was exchanged between Namfisa and the two separate factions as well as some meetings held.

(q)

(r) The first applicant reports in his founding affidavit that these meetings culminated in the first respondent submitting a progress report on 19 July 2012 in respect of the notice of intention to cancel its registration, referring to certain steps which had been taken with regard to issues raised by the regulator. The regulator acknowledged receipt of a letter of 31 July 2012 and informed the first respondent that it would need to revert in due course.

(s)

(t) The first applicant concluded his founding affidavit by referring to the continued non-compliance on the part of the first respondent. Reference is made to a general lack of co-operation on its part and to the internal disputes which had plagued its operations, particularly in 2012. Reference is also made to the composition of the board not being in compliance with the Long-Term Insurance Act, the shareholding of the first respondent remaining unclarified and in dispute, the statement by the first respondent that it would relocate its offices in March 2012 but which had not occurred over the ensuing months, the continued interference of Mr Edward in its operations, the failure to provide financial statements which should have been concluded by 31 August 2012. The first applicant also referred to the serious allegations of fraud levelled by the lawyers representing one of the factions against members of the other faction. The issue of the principal officer also remained unresolved. Questions were also raised concerning the management systems of the first respondent and misrepresentations concerning the nature of its insurance business.

(u)

(v) As is clear from the first applicant's affidavit and there is a wealth of documentation raised to support these serious allegations of non-compliance, a comprehensive failure of proper corporate governance and a failure to comply with Namfisa's directives.

(w)

(x) In the answering affidavit provided by the first respondent on the day before the hearing, these serious allegations were not addressed in any detail except to state that a significant contributing cause for them had been the

internal disputes which had characterised its operations since late year and which had culminated in an urgent application launched around the time of this application for curatorship. The answering affidavit reported that the internal disputes had been settled between the two factions and that a number of remedial steps had been taken by a newly constituted board and that the principal officer previously contemplated, Mr P Carlson, had been agreed upon and would conduct the operations with immediate effect. These and other issues were set out in detail in a letter by Metcalfe Attorneys to Namfisa on 9 October 2012. This letter was attached to the affidavit together with the response to it which had only been received on 15 October 2012. A reply to that response was then sent to Namfisa's legal practitioners on the following day. This correspondence is attached to the answering affidavit.

(y) In the answering affidavit, it is in essence contended that at the heart of several of the concerns raised by the first applicant about the first respondent, was an underlying dispute between the shareholders and various directors of the first respondent, chronicled in some detail in the applicants' founding affidavit. The statement was then made in the answering affidavit that those disputes have become settled and that the concerns raised by the applicants have been addressed. The letter of 9 October 2012 dealing with these issues was attached and confirmed under oath. In particular, it was stated on behalf of the first respondent that the various internal disputes had been settled and addressed during the preceding week and that advice was received on practical solutions and proposals being put in place in order to address the concerns of the applicant. These resulted in

- a new board of directors being appointed with the majority being Namibian citizens and none of them being shareholders;
- the appointment of Mr Carlson was confirmed as principal officer of the first respondent, subject to Namfisa's approval;
- a former Chief Executive Officer of Namfisa, Mr Ritter, was to be appointed as the first respondent's operations manager;
- a forensic audit would be conducted on the FIS Minors Trust by a firm of accountants, Deloittes;

- that same firm together with Garbodo would be appointed as forensic auditors in respect of the affairs of FIS Life and to report to the new board;
- all unclaimed beneficiary funds would be paid to the Master of the High Court, subject to Namfisa's directives;
- all outstanding management reports would be provided to Namfisa by no later than 16 November 2012;
- no shareholder of the first respondent would in any manner be involved with the day to day operations of the first respondent;
- the accounting firms PFK and Grand Namibia would be appointed jointly as auditors of the first respondent to prepare, complete and provide Namfisa with the outstanding financial statements;
- a certain Mr Nestory to whom the applicants had objected, would no longer be in the employ of the first respondent in any capacity;
- a public apology would be issued to Namfisa in respect of embarrassment occasion as a result of any misinformation;
- the outstanding financial statements for 2012 would be provided to Namfisa as soon as practically possible;
- all civil and criminal litigious disputes between the shareholders and directors would be withdrawn;
- Messrs Carlson and Ritter, subject to Namfisa's approval, would be authorised to sign cheques jointly on the claims account and administration account of the first respondent;
- Mr Nezar and Mr Metcalfe would be authorised to sign all other payments and documents apart from those already referred to;
- the first respondent would pursue its pending application for a full licence with the second application in respect of disability insurance;
- a meeting would be convened between Namfisa and first respondent together with the third and fourth respondents before 31 October 2012 to resolve the issue of multiple payments to beneficiaries in respect of funeral insurance;
- the applicant was relocating its principal place of business to another specified address;
- and that a new firm of attorneys was appointed as its legal practitioners

of record for the first respondent.

(z) The first respondent also tendered the applicants' costs in launching the curatorship application.

(aa) It was further pointed out that the first respondent has a successful business and would comply with the directives of Namfisa and would comply with the legislation governing its operations. It was submitted that it would be highly prejudicial to the first respondent to be placed under curatorship and leave was sought to file further affidavits to address issues raised by the applicants if required and for a postponement of the curatorship application for the purposes of implementing the measures specified in this affidavit and for them to be verified. The issues themselves were spelt out further in correspondence exchanged between the parties and curriculum vitae was attached in respect of Mr Carlson from which it appears that he is a duly qualified chartered accountant with certain further qualifications.

(bb) The first respondent's application to postpone the proceedings for the purposes of affording it the opportunity to implement the proposals and address aspects of non-compliance with the directives of the applicants was however opposed on behalf of the applicants in an affidavit also deposed to on 16 October 2012. This affidavit was deposed to by the Acting Chief Executive Officer of Namfisa with reference to the same correspondence which had been exchanged between Namfisa and legal practitioners representing the first respondent attached to both affidavits, save for the first respondent's reply of 16 October 2012. The Acting Chief Executive Officer referred to and confirmed the letter of 15 October 2012 sent in response to the first respondent's legal practitioner's letter of 9 October 2012 and dealing with its proposals. The Acting Chief Executive Officer pointed out that the letter of 15 October 2012 accorded with the applicants' instructions and, for the reasons specified in that letter the applicants would not accept the proposals contained in the letter of 9 October 2012 and would move for the curatorship of the first respondent and the further ancillary relief set out in the notice of motion.

(cc) In order to deal with this application, it is necessary to refer to what is stated in that letter in response to the proposals. In response to the appointment of a new board, the applicants expressed their "serious reservations about the legitimacy of the board". Despite this statement, the reservations would rather relate to documentation showing compliance with the formalities of the Companies Act in calling for and convening a shareholders' meeting and minutes reflecting the resolutions and indicating who had been in attendance at that meeting. The applicants referred to the long-standing dispute that had existed between the shareholders and required these issues to be fully addressed in order for the applicants to assess the position.

(dd) Whilst it is entirely understandable for the applicants to require proof of compliance with statutory provisions with regard to the appointment of directors and to be satisfied that this issue had been resolved because of a long-standing dispute, these issues would in my view in the face of an affidavit as well as the correspondence in question hardly give rise to what were termed "serious reservations of the legitimacy" but rather for the regulator to be satisfied that the directors had been duly appointed.

(ee) The applicants also were not satisfied that the shareholding issues between shareholders would be addressed internally given the history of animosity. The applicants also took issue with the statement in the letter concerning the appointment of Mr Carlson which had stated that he would in "all probability" be appointed subject to the applicants' confirmation. These are also aspects which in my view could be clarified between the first respondent and the applicants.

(ff) With regard to certain of the other issues raised by the applicants, the undertakings given by the first respondent were rightly questioned because of the failure to provide a timeframe. The statement that no shareholder would be involved was questioned by the applicants "as less than convincing" because of the continuous involvement of shareholders previously. The undertaking to appoint auditors to attend to the financial statements for 2012 was also queried

because again no date was given when the auditors would be appointed. The withdrawing of civil and criminal litigious internal disputes was also queried because no dates were given. The statement that an application for a full licence for disability insurance was pending was pointed out to be a mis-statement of the factual position as the application which had long since previously been provided was defective and had not as yet been re-submitted.

(gg) As to the proposal to convene a meeting between Namfisa and the Ministries in question, it was pointed out that the applicants had no confidence that the matter would be resolved and that a "complete re-formulation" of the manner of payment of benefits would need to be addressed. It was also pointed out by the applicants that no date was given for the relocation of offices.

(hh) Most importantly for present purposes, it was further stated that the applicants would not agree to withdrawing the curatorship application or even agree to its postponement and that the issues raised in the letter could be verified and addressed by the curator after his appointment.

(ii) When the matter was called in Court on 17 October 2012, I enquired from Mr Corbett whether the applicants would still wish to proceed with an order for curatorship in view of the affidavit made on behalf of the first respondent and the application for a postponement in order to address issues raised by the undertakings given and proposals made in the correspondence and confirmed in the affidavit. Mr Corbett stated that the applicants nonetheless persisted with the application for curatorship.

(jj) Mr Heathcote SC, who together with Mr van Vuuren, appeared for the first respondent, proposed that the application should be postponed to afford the first respondent the opportunity to address outstanding issues. Mr Corbett however resisted this application on behalf of the applicants. He referred to the first respondent's history of non-compliance, spanning some 5 years and pointed out that the regulator, in the supplementary affidavit, had not accepted the proposal to postpone the application but had rather sought to persist with the application to place the first respondent under curatorship. He pointed out that

the regulator did not have sufficient confidence in the undertakings given as had been set out in the letter of 15 October 2012 and referred to the fact that the first respondent continued to provide disability insurance without being registered to do so and that this aspect had not been properly addressed in the correspondence or in the further affidavit filed on behalf of the first respondent. He pointed out that, after the defective application had been referred back to the first respondent, there had been no application for registration for this form of insurance on its part and that this issue had not been addressed in the letter of 9 October 2012. Nor in the days since or in the supplementary affidavit. Mr Heathcote responded by stating that the first respondent would file the necessary application forthwith and on the day of hearing.

(kk) Mr Corbett however still moved for an order in terms of the notice of motion to place the first respondent under curatorship. He submitted that the requisites of s 6 had been met, given manifold non-compliance with various statutory provisions as set out in the founding affidavit and supported by the vast number of annexures to it. He submitted that there had been an inspection of the affairs of the first respondent and that the Registrar had in the founding affidavit expressed the opinion that it is desirable to place the first respondent under curatorship for the reasons set out in the founding affidavit.

(ll) Mr Corbett relied upon a judgment of this Court in the interpretation of the provisions of s 6, CEO, Namibia Financial Institutions Authority v Legal Shield. [1] In that matter, Manyarara AJ had accepted a submission on the nature of the enquiry to be held under s 6 in these terms:

> "The applicant submits that once the Court has found the jurisdictional facts as prescribed by s 6 of the Financial Institutions (Investment of Funds) Act 39 of 1984 to apply, i.e. that the Registrar has for any reason as a result of an inspection into the affairs of the respondent formed an opinion that it is desirable to place the respondent under curatorship, and that such opinion has been reached on a reasonable and rational basis, then the Court must grant an order

[1] 2005 NR 155 (HC) at 164-166

placing the respondent under provisional curatorship, unless there are exceptional circumstances why this should not be done. Once the jurisdictional grounds entitling the Registrar to approach the Court are found to exist, the scope for the exercise of a discretion by the Court to refuse to grant an order placing the respondent under provisional curatorship is limited. It is clear that the test envisaged by the Legislature for the provisional appointment of a curator in terms of s 6(2) is different to that laid down in s 6(4) when the Court is asked to confirm the appointment of the curator. At the stage of provisional appointment of a curator the jurisdictional requirements are those set out in s 6(1), whereas when a confirmation of the appointment is sought, the jurisdictional requirement is that "the Court is satisfied that it is desirable to do so". No satisfaction of the Court is required in terms of s 6(2), the question being whether the Registrar is of the opinion "that it is for any reason desirable to do so".”

(mm)

(nn) Despite approving of this submission premised upon the opinion being reached on a rational and reasonable basis, Manyarara AJ, in dealing with the requisite opinion, however in essence held that the court could not interfere with the decision to bring the application even if it were unreasonable. He did so by stating the following:

“In the matter of North-west Townships (Pty) Ltd v Administrator Transvaal and Another 1975 (4) SA 1 (T) the Court, with reference to provisions in a statute that 'wherever the Administrator is satisfied that it is desirable to do so', held the following at 8C-F:

'It is well settled that when, by statute, a public official has been vested with jurisdiction to decide a matter affecting members of the public in the light of his own opinion of the relevant facts, or in the exercise of his own discretion, a Court is not entitled to interfere with that decision merely because it considers it to be wrong, or even if, in its view, the decision was an unreasonable one.

Of the many cases which discuss and apply the rules of administrative law relating to the right of the Courts to overrule quasi-judicial or administrative decisions, a number were cited to us. I do not think, however, that I need go beyond the terms in which the relevant principle

> was formulated by Stratford JA in Union Government v Union Steel Corporation (South Africa) Ltd 1928 AD 220 at 237, a formulation which has been reiterated on many occasions since. A fairly recent application of it by the Appellate Division is to be found in The Administrator Transvaal and the First Investments (Pty) Ltd v Johannesburg City Council 1971 (1) SA 56 (A) at 80. What the learned Judge of appeal said was that interference on the ground of unreasonableness was justified only if the unreasonableness was so gross that there could be inferred from it, mala fides or ulterior motive, or a failure by the person vested with the discretion to apply his mind to the matter.
>
> The last-mentioned possibility has been held, in other English and South African cases, to include capriciousness, a failure, on the part of the person enjoined to make the decision, to appreciate the nature and limits of the discretion to be exercised, a failure to direct his thoughts to the relevant data or the relevant principles, reliance on irrelevant considerations, an arbitrary approach, and an application of wrong principles.' (Per Colman J.)

I have set out and considered the relevant facts and issues in this matter, none of which can be disputed. At the end of my inquiry I have not found any ground for accusing the applicant of any of the faults listed in the above passage. In my view, applicant has bent over backwards to accommodate the respondent, to no avail.

As Mr Maritz submitted:

> 'Applying the test as laid down in the Hurley case (Minister of Law and Order v Hurley and Another 1986 (3) SA 568 (A) at 578F-G) to the present matter, the question for the decision of the Court is accordingly whether the applicant had reasonable grounds for his opinion "that it is desirable to appoint a curator to take control of and to manage the business of the respondent". Furthermore, the Court is entitled and obliged to decide the factual question whether there was an inspection of the affairs of the respondent and whether the opinion formed by the applicant was a result of such inspection. If these questions are answered in the affirmative, as it is submitted they should be, the Court

> is not entitled to disregard the Registrar's opinion merely because the Court itself might have come to a different opinion on the same fact. Therefore, should the Court find that an inspection was conducted into the affairs of the respondent (which is common cause) and that as a result thereof the Registrar formed the opinion which he did (which is common cause) and that the Registrar could reasonably and rationally reach the opinion he did as a result of the inspection which was conducted, then the Court should grant the order for the appointment of a provisional curator and its discretion to refuse to do so is limited.'

In case, as in Northwest Townships (Pty) Ltd v Administrator, Transvaal and Another 1975 (2) SA 288 (W) the respondent placed emphasis on the word 'may' in s 6 and submitted that, even if all the jurisdictional facts are established, the Court nevertheless has a discretion to refuse to appoint a provisional curator.

But, as we have seen, this argument was rejected on appeal, reported at 1975 (4) SA 1 (T). The submission is unassailable and must be upheld."

[31] As is correctly pointed out in subsequent written submissions by counsel for the first respondent, the Manyarara AJ's reading of both the a quo judgment and that of the appeal in the Northwest Townships matter was, with respect incorrect. The argument characterised as rejected was, with respect, wrongly so described. On the contrary, the court of appeal said as follows:

> "It cannot be said, therefore, that the "may" in sec. 4(3) means "shall", either as a matter of interpretation, or necessarily and invariably as a matter of practical application. The administrator, even when what I have called the jurisdictional facts exist (as in my judgment they do in the present case) has a true discretion to impose or not to impose the condition provided for in the sub-section. Almost invariably his duty will be to exercise his discretion in favour of the objector who will suffer financial prejudice in consequence of the interference with his rights. But there may be special circumstances justifying a departure from that norm. I would stress the view that they would be unusual circumstances of great cogency. And, of course, it would be necessary that the objector's attention be directed to them, and to the possible reliance upon them as a basis for the denial of compensation, in order that he might, if he wished, produce evidence

and make representations in that regard."

(oo) [32] Despite adopting both passages of the quoted submissions which would indicate that the opinion of the Registrar should be reasonably and rationally held as an objectively justifiable fact, Manyarara AJ instead adopted his own with respect, imperfect understanding of the Northwest Townships decision and proceeded to rule out a discretion upon the court to refuse to appoint a curator and effectively considering that the decision to bring the application as one which would not be reviewable on the grounds of unreasonableness and by implication approaching the jurisdictional fact of the required opinion being one which need not need to be reasonably or rationally held. I enquired from counsel whether the approach the court in *Legal Shield* was correct. I invited their submissions on the issue as to whether the opinion of the Registrar would need to be an objectively justifiable fact (tested against reasonableness and rationality) or whether the Court merely needs to be satisfied that he has reached such an opinion following an inspection and whether the Court would retain any discretion as to thus whether or not to place the first respondent under curatorship. Counsel sought and were granted leave to file such further written argument by 26 October 2012.

(pp)

[33] Both sets of counsel, filed heads of argument on the issue on 26 and 29 October 2012 respectively. Mr Corbett submitted, with reference to authority, that the opinion in question involves the exercise of a subjective discretion which the Court would not be entitled to query. He relied upon Minister of Law and Order v Hurley and another [2] and further submitted that the Registrar, in the context of the words employed in the statute, has a free discretion with reference to Shifidi v Administrator General for SWA and others. [3] He further submitted that the use of the term "for any reason" in the context of whether it is desirable to do so would vest in the Registrar a free discretion as opposed to where a statute is formulated on the basis that the repository of a power should have "reason to believe" in order to form an opinion. Mr Corbett however conceded that, following the adoption of the Constitution and Article 18 in

[2] 1986(3) SA 568 (A) at 571 A – 579 G.

[3] 1989(4) SA 631 (SWA) at 651 F-G

particular, objective justifiability would be read into s 6(1), despite the subjective free discretion he contended for as being bestowed upon the Registrar. In my view this concession is correctly made. I would however consider that it should be differently stated. Mr Heathcote, as I have said, submitted that the appeal in *Northwest Townships* was upheld upon a different basis than that referred to by Manyarara AJ. He submitted that this court retains a discretion whether or not to place an institution under curatorship.

[34] Manyarara, AJ with reference to the Northwest Townships decision, would appear to have accepted that all the regulator would need to establish in an application would be the jurisdictional facts of an inspection and that his opinion (that it was desirable to place an institution under curatorship) was formed as a result of that inspection. He also found, relying upon Northwest Townships that it would not be open to this court to interfere with the regulator's approach if a court were to consider it to be unreasonable. Quite apart from the misreading of the decision in question, I respectfully differ that it is even apposite. Whilst Northwest Townships would in my view, with respect, on the facts before it, appear to correctly reflect the state of the common law at the time, it would seem to me that the reliance upon it in the context of a s6 (1) enquiry is, with all due respect unsound and misplaced. That approach would, after the advent of Art 18 of the Constitution, give way to the need for decision making by administrative officials to be fair and reasonable. Although this requirement would appear to be implicit in counsel's submissions correctly approved of by Manyarara, AJ in referring to the need for the opinion to have a rational and reasonable basis, Manyarara, AJ however appeared to approach the matter on the basis that the opinion of the Registrar would not be objectively justifiable on the basis of reasonableness or being rational.

[35] To that extent, I respectfully disagree with his approach which would in any event appear to be contradicted by his approval of quoted portions if counsel's submissions where counsel correctly appeared to accept that the court would be entitled to consider whether the opinion was rationally and reasonably held.

[36] The reference to the regulator having a "free discretion" upon reliance upon the Shifidi matter would also not in my view be apt or helpful in view of Art 18 adopted subsequent to it. The lucid and careful analysis in Shifidi, with respect, also correctly reflected the state of the common law at that time but the notion of a free discretion in the sense employed there would also in my view now give way to the requirement of reasonableness posited by Art 18.

[37] The opinion held by the Registrar would thus in my view need to be reasonably and rationally held in order for that jurisdictional fact to exist. Once this and the other jurisdictional fact (of the preceding inspection) exist, then the court would ordinarily grant an application of this nature unless exceptional circumstances exist which would in the court's discretion lead to the refusal of the application. This would accord with Manyarara, AJ's adoption of the submission quoted above to this effect, although not fully reflected in his approach to the application.

[38] I thus agree with the quoted portion he adopted to the effect that a court would have a limited basis to refuse an application once those jurisdictional facts are found to exist. As was, with respect correctly accepted by Manyarara, AJ, the enquiry would broaden upon the return date when the court would need to be satisfied that it is desirable place the first respondent under curatorship.

(qq) [39] It would accordingly seem to me that at this initial stage a court would be entitled to consider whether there is a rational and reasonable basis for the opinion so held by the Registrar before granting the order. As I have indicated, this was also explicit in the submissions Manyarara AJ but not reflected in his approach to the application, given the way he relied upon Northwest Townships. To this extent I respectfully differ with and qualify the approach of Manyarara, AJ in that matter.

(rr) [40] Mr Corbett also referred to a recent judgment of the South African Supreme Court of Appeal in Executive Officer, Financial Services Board v Dynamic Wealth Ltd and others. [4] This matter dealt with the equivalent

[4] 2012(1) SA 453 (SCA)

provision currently applicable in South Africa. The equivalent provision in the South African legislation had however undergone a significant change from the earlier formulation in s6 of the Funds Investment Act. The legislature in South Africa has provided for a different test in the current Financial Institutions (Protection of Funds) Act, 28 of 2001. An application by the regulator for curatorship would need to meet the requirement of showing good cause in support of such an application. The Court in the Dynamic Wealth matter, per Wallis JA, however dealt with the test on the return date when, as in the Investment Act, a court would need to satisfy itself that good cause existed, setting the test at that stage in the following terms:

> "[4] The registrar must therefore satisfy the court that there is good cause to appoint a curator. Reading ss (1) together with ss (4), that means that the court must be satisfied on the basis of the evidence placed before it that it is desirable to appoint a curator. Something is desirable if it is 'worth having, or wishing for'. The court must assess whether curatorship is required in order to address identified problems in the business of the financial institution. It assesses this in the light of the interests of actual or potential investors in the financial institution, or investors who have entrusted or may entrust the management of their investments to it. It must determine whether appointing a curator will address those problems and have beneficial consequences for investors. It must also consider whether there are preferable alternatives to resolve the problems. Ultimately what will constitute good cause in any particular case will depend upon the facts of that case. I take heed of what Innes CJ said, in regard to any attempt to define the content of the expression 'good cause', that: Wallis JA (Harms AP, Van Heerden JA, Malan JA and Petse AJA concurring)
>
> > 'In the nature of things it is hardly possible, and certainly undesirable, for the court to attempt to do so. No general rule which the wit of man could devise would be likely to cover all the varying circumstances which may arise in applications of this nature. We can only deal with each application on its merits, and decide in each case whether good cause has been shown.'
>
> The potentially complex circumstances that may exist in regard to the operations of a financial institution render it undesirable to try and define further

what will constitute good cause for the grant of such an order.

…….

[6] The appointment of curators under s 5(1) may be appropriate even where the funds under administration are not shown to be at risk. Take an institution that is unlicensed and not qualified to be licensed, because those responsible for its management are disqualified from obtaining a licence. It can hardly matter that it demonstrates that the funds invested with it are properly segregated and identified, invested in accordance with the mandates given by investors and entirely safe. The inability or unwillingness of the institution to comply with regulatory requirements applicable to protected funds itself provides a reason for appointing a curator. Where there is uncertainty whether the funds of investors are at risk it may be desirable in order to safeguard the interests of investors to appoint a curator. In argument the example was put of the registrar being furnished with an adverse report by inspectors where management disputes the factual contents and conclusions of that report. Both counsel accepted, and rightly so in my view, that it might be proper for a curator to be appointed notwithstanding the dispute. The existence of an adverse report by inspectors after conducting an inspection under the Inspection Act may of itself provide legitimate grounds for concern and found an application for an interim curatorship, even if its conclusions are disputed. When dealing with the investment of the funds of the public, where considerable hardship will be suffered by ordinary people if things go wrong, the registrar cannot be expected to resolve factual disputes by litigation before obtaining an order appointing a curator. Provided the court is satisfied that the registrar's concerns are legitimate and that the appointment of a curator will assist in resolving those concerns it will ordinarily be appropriate to grant an order."

(ss) [41] Much of that judgment concerned the evidential value to be placed upon the preceding inspection report and the annexures to it with the Court concluding, contrary to the Court *a quo*, that the evidence contained in the annexures was admissible. The Court concluded that the Court *a quo* could on the basis of the admissible facts contained in the report decide for itself whether the conclusions reached by the Registrar, in support of the criterion of "good cause shown" were justified.

(tt) [42] Although the wording of the legislation in question is different, it would seem to me that this should also be the approach of a Court in Namibia on the return date when satisfying itself that the opinion held by the Registrar, of it being desirable to place a financial institution under curatorship, was justified. But it would not be of much assistance to this stage of the enquiry.
(uu)
(vv) [43] Turning to the facts of this matter, it is not disputed that inspections were held, culminating in the final inspection of November 2011. That jurisdictional fact is established. It would also seem to me that the opinion formed by the Registrar that, arising from that report and the continued failure thereafter by the first respondent to address non-compliance with statutory provisions, directives and good corporate governance, it would desirable to place the first respondent under curatorship was reasonably and rationally held at the time the application was brought.

[44] Did the subsequent developments outlined in the answering and further affidavits and correspondence materially alter the position? The answering affidavit states that the internal dispute between shareholders and directors had, in essence, caused and compounded several of the instances of non-compliance with statutory provisions and good corporate governance, and had now been resolved. This had resulted in very recent significant decisions taken concerning the management of the first respondent, not least by finally agreeing upon the appointment of a qualified principal officer, Mr Carson, who would readily appear to be a fit and proper person together with another suitably qualified person in its management. I have already referred to the undertakings given and a fundamental change in attitude in addressing the regulator – which was certainly required. But despite this, the Acting Registrar resisted an application to postpone the application to demonstrate and show evidence of compliance and to meet the undertakings.

[45] Had the only questions been the composition of the board and the appointment of a principal officer, the Registrar's position to persist with the application in the absence of proof of resolutions and the like would not in my

view be reasonable in the context of an application to postpone the application for that purpose. But there were other aspects of non compliance not properly addressed in the answering affidavit and in the correspondence such as the continuing failure to apply for registration for disability insurance and yet continuing to do such business in the absence of a licence to do so. That is in my view a serious matter in the context of the Long Term Insurance Act This factor coupled with the cumulative effect of other issues where no time frames had been provided for compliance, would in my view further tend to show that there was a reasonable and rational basis to the opinion of the part of the Registrar that it was desirable to place the first respondent under curatorship, despite the progress made to address several areas of non-compliance.

[46] It would follow that the applicants have in my view established the second jurisdictional fact posited by s6. Even though a clear intention has been expressed to attend to areas of non-compliance and to seek time to do so, (together some manifestation of progress in doing so), the Registrar has established his opinion that it is desirable to place the first respondent under curatorship in the context of the history of the matter, the lack of time frames for certain of the action and more importantly in view of serious non-compliance not addressed. Despite the progress made, there is insufficient material before me to exercise my discretion to refuse the application in the face of the applicants establishing the jurisdictional facts for it.

[47] I accordingly grant the following order:

1. That the full and proper compliance with the Rules relating to service and time limits as set out in Rule 6(12) of the Rules of this Honourable Court, by reason of the urgency of the matter, is condoned
2. That the long-term insurance business of FIS Life Assurance Company Ltd (hereinafter referred to as “the business”) is placed provisionally under curatorship in accordance with the provisions of section 6 of the Financial Institutions (Investment of Funds) Act, No. 39 of 1984 (“the Act”), and in accordance with the provisions of this order.

3. That Michael Leech is appointed curator (“the curator”) of the business of FIS Life Assurance Company Ltd (hereinafter referred to as “the company”) and, as such, is absolved from furnishing security.

4. That the business is placed provisionally under the curatorship and management, subject to the supervision of this court, of the curator, and any other person (including but not limited to the directors) now vested with the management of the business be divested thereof.

5. That pending the return day of the order granted herein, all actions, proceedings, the execution of all writs, summonses and other processes against the company, are stayed and be not instituted or proceeded with without leave of the court.

6. That the curator is, pending the return day referred to in paragraph 7 hereunder;

6.1 authorised to take immediate control of, manage and investigate, the business and operations of and concerning the company, together with all assets and interests relating to such business, such authority to be exercised subject to the control of this court in accordance with the provisions of s6 (5) of the Act, and with all such rights and obligations pertaining thereto;

6.2 vested with all executive powers with would ordinarily be vested in, and exercisable by, the board of directors or members of the company, whether by law or in terms of its articles of association, and the present directors, members or managers of the company shall be divested of all such powers;

6.3 directed to give consideration to the best interests of the policyholders and other creditors of the company;

6.4 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 company or the business provided that the curator may in his discretion suspend the issuing of new insurance

policies during the curatorship. The curator, however, shall be entitled to sell movable assets in his discretion with the approval of the applicants in order to defray day-to-day running expenses and in order to keep the business of the company active pending his report to the court on the return day;

6.5 directed to take custody of the cash, cha investments, stocks, shares and other securiti8es held by the company or any entity directly or indirectly controlled by the company, and of other property or effects belonging to or held by the company or any entity directly or indirectly controlled by the company;

6.6 authorised to incur such reasonable expenses and costs as may be necessary or expedient for the curatorship and control of the business and operations of the company, and to pay same from assets held or under the control of the company;

6.7 authorised to engage or dismiss or negotiate the severance and retrenchment packages with staff members and incur office expenses for the purpose of exercising this curatorship;

6.8 permitted to engage such assistance of a legal, accounting, administrative, actuarial or other professional nature as he may reasonably deem necessary for the performance of his duties in terms of this order of court, and to defray reasonable charges and expenses thus incurred from the assets held or under the control of the company;

6.9 authorised to institute or prosecute any legal proceedings on behalf of the company and to defend any actions against the company;

6.10 authorised to invest such funds as are not required for the immediate purpose of the business, with a registered bank;

6.11 authorised to operate existing banking accounts of the company and of its subsidiary companies, and to open and

operate any new banking accounts for the purposes of the curatorship;

6.12 directed and authorised, at any time during his term of office, to report to the applicants should he deem it necessary or expedient that application should be made to this court for the extension of his powers to any other company (including any subsidiary) affiliated to or associated with the company or for the liquidation of the company;

6.13 authorised to claim all costs, charges and other expenditure reasonably required by the curator in the execution of his duties in terms of this order as administration costs in the liquidation of the company, in the event of liquidation ensuing;

6.14 authorised to pay the applicants' costs as provided for in paragraph 7.2 below;

7. That the rule nisi is hereby issued calling upon the company to show cause to this honourable court pm 16 January 2013 at 11h00 why:

7.1 the appointment of the curator ordered in paragraphs 2, 3 and 4 above should not be confirmed, with the powers and duties set out in paragraph 6 above;

7.2 the costs of these proceedings, as between attorney and client, as well as the costs of the curator and the cost of inspection conducted into the affairs of the company in terms of the inspection of Financial Institutions Act 38 of 1984, should not be payable by the company, alternatively, from the assets held by or under the control of the company;

8. That the rule nisi is hereby issued calling upon all interested parties to show cause to this honourable court on a date to be arranged with the Registrar why an order should not be granted that, whilst the curatorship exists, all actions, proceedings, the execution of all writs, summonses and other processes against

the company is stayed and not instituted or proceeded with without the leave of the court.

9. In the event of the company or any interested party wishing to appear on the return date mentioned in paragraph 7 and 8, notice of such intention to oppose the confirmation of the aforesaid rule nisi, together with an affidavit in support of such opposition, shall be lodged with the Registrar of this Honourable Court and copies thereof served on the applicants' legal practitioners of record, Shikongo Law Chambers, Gosp Office Windhoek, by not later than a date to be determined by this Honourable Court.

10. That the curator is directed:

10.1 to compile a statement reflecting the overall financial position of the company, with specific reference to its assets and liabilities and to any business conducted by the company or any of its subsidiaries, affiliated, or associated companies, or any trusts in which the companies' directors or management have an a=interest, involving money received from policyholders and other parties in connection with insurance business and to report thereon to this Honourable Court on the return date;

10.2 to report this Honourable Court on any irregularities committed by the company, its directors, management or auditors and the contravention of any laws in the conduct of its business;

10.3 to recommend to the Honourable Court on the return day what further steps should be taken and by whom, in order to safeguard the interests of policyholders and other creditors of the company;

10.4 to furnish the applicants with progress reports on the curatorship on a monthly basis;

10.5 to report to the Honourable Court on the return day regarding the viability of the business and any other entity in which the company has a direct interest, and the ways to ensure the survival of the business in particular with regard

to the protection of the interests of policyholders;

10.6 should the curator suggest that the business or the company be placed in liquidation, to make his suggestions with regard to the number of persons, their experience and training to be appointed as liquidators of the business or the company; and

10.7 should the curator propose that the rule be confirmed and his provisional appointment be made final, to give an indication of the term required for completion of the curatorship.

11. That the curator shall be entitled to reasonable remuneration based on an hourly rate in accordance with the norms of his profession, such remuneration to be paid for the assets of or under the control of the business or the company on a preferential basis.

12. That this order as well as a copy of the application shall be served on the company and publication of the order shall be effected in one issue of the Namibian newspaper and in one issue of the Government Gazette.

(ww)

_____

DF SMUTS

Judge

APPEARANCES

FIRST APPLICANT:	A. Corbett Instructed by Shikongo Law Chambers
FIRST RESPONDENT:	R. Heathcote SC, (with him A. Van Vuuren) Instructed by Fisher, Quarmby & Pfeifer