THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 888/10

In the matter between:

EXECUTIVE OFFICER OF THE
FINANCIAL SERVICES BOARD Appellant

In re the collective investment scheme, financial services and securities services business (excluding the collective investment scheme business conducted by virtue of a white label agreement) of

DYNAMIC WEALTH LTD First Respondent

DYNAMIC WEALTH MANAGEMENT
(PTY) LTD Second Respondent

DYNAMIC WEALTH STOCKBROKERS
(PTY) LTD Third Respondent

THE BRIDGING FACTORY (PTY) LTD Fourth Respondent

SPECIALIST INCOME LIMITED Fifth Respondent

and

ASSOCIATIONS known as **DYNAMIC WEALTH INVESTMENT ASSOCIATION, RETIREMENT FUND ASSOCIATION, MULTI MANAGER ASSOCIATION, KWANDA ASSOCIATION, MFI ASSOCIATION** and **SASEP ASSOCIATION**

Neutral citation: *Executive Officer: Financial Services Board v Dynamic Wealth Ltd & others* (888/10) [2011] ZASCA 193 (15 November 2011)

Coram: HARMS AP, VAN HEERDEN, MALAN and WALLIS JJA and PETSE AJA.

Heard: 31 October 2011

Delivered: 15 November 2011

Summary: Appointment of curators in terms of s 5(1) of Financial Institutions (Protection of Funds) Act 28 of 2001 – test for grant of order – admissibility of inspectors' report prepared under s 3 of the Inspection of Financial Institutions Act 80 of 1998 – whether application for curatorship should have been granted on the evidence – change of circumstances since application commenced – further evidence on appeal – whether curatorship should be ordered at time appeal heard – whether change in circumstances rendering the appeal moot.

ORDER

On appeal from: North Gauteng High Court, Pretoria (De Vos AJ sitting as court of first instance) the following order is made;

(a) The appeal is upheld with costs including the costs of two counsel.

(b) The order of the court below is set aside and replaced by an order that the respondents pay the applicant's costs, including the costs of two counsel.

(c) Both costs orders are joint and several, the one paying the others to be absolved.

JUDGMENT

WALLIS JA (HARMS AP, VAN HEERDEN and MALAN JJA and PETSE AJA concurring)

[1] Ever since the bursting of the South Sea Bubble in 1720 governments have recognised the need, in the interests of the investing public, for regulation of the financial services industry. The present appellant, the executive officer of the Financial Services Board (the FSB), in his capacity as registrar of various financial institutions (the registrar),[1] is the principal regulator of the financial industry in South Africa.[2] The various statutes regulating the industry vest in the registrar a range of powers of which two are relevant for the purposes of this appeal. They

[1] He or she is the registrar of pension funds, friendly societies, collective investment schemes, long and short-term insurance, financial services providers and securities services under the statutes governing those institutions.

[2] The only major participants in the financial services industry that are outside the Registrar's regulatory grasp are banks, which have their own registrar designated in terms of s 4 of the Banks Act 94 of 1990.

are the power to instruct inspectors in terms of s 3 of the Inspection of Financial Institutions Act 80 of 1998 (the Inspection Act) to inspect the affairs of a financial institution or associated institution and the power to apply to the high court for the appointment of a curator or curators to take control of and manage the whole or any part of the business of a financial institution in terms of s 5(1) of the Financial Institutions (Protection of Funds) Act 28 of 2001 ('the FI Act').

[2] On 9 April 2008 the registrar appointed a team of inspectors under the leadership of Mr Barend Bredenkamp to investigate the affairs of the first respondent, Dynamic Wealth Ltd (Dynamic Wealth) and its associated companies including the second to fifth respondents (the Dynamic Wealth group). The scope of the inspection was expanded in July 2008 and the inspectors produced their final report on 15 September 2009.[3] Thereafter, and on the basis of the contents of the report, the registrar applied to the North Gauteng High Court, Pretoria for the appointment of curators to the business of the present respondents and certain entities referred to in the report as associations. The application came before De Vos AJ who dismissed it on technical grounds relating to the admissibility of the evidence underlying the report, without considering the merits of the registrar's concerns about the operations of the Dynamic Wealth group. This appeal comes to us with the leave of the court below.

[3] A draft report had been prepared and made available for comment to Dynamic Wealth in July 2009. A lengthy comment was produced on 17 August 2009 and the report was then finalised. Dynamic Wealth's response to the draft covering some 202 pages (inclusive of 28 annexures) is the last annexure to the final report.

Curatorship under the FI Act

[3] The statutory provisions in terms of which the registrar may apply for the appointment of a curator to a business falling within his regulatory jurisdiction are contained in s 5 of the FI Act and read, in material part, as follows:

'(1) The registrar may, on good cause shown, apply to a division of the High Court having jurisdiction for the appointment of a curator to take control of, and to manage the whole or any part of, the business of an institution.

(2) Upon an application in terms of subsection (1) the court may-

(a) provisionally appoint a curator to take control of, and to manage the whole or any part of, the business of the institution on such conditions and for such a period as the court deems fit; and

(b) simultaneously grant a rule *nisi* calling upon the institution and other interested parties to show cause on a day mentioned in the rule why the appointment of the curator should not be confirmed.

(3) On application by the institution the court may anticipate the return day if not less than 48 hours' notice of such application has been given to the registrar.

(4) If at the hearing pursuant to the rule *nisi* the court is satisfied that it is desirable to do so, it may confirm the appointment of the curator.

[4] The registrar must therefore satisfy the court that there is good cause to appoint a curator.[4] Reading sub-sec (1) together with sub-sec (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'.[5] 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

[4] The English text may suggest at first sight that it is the Registrar to whom good cause must be shown but any lack of clarity about this is resolved by reference to the Afrikaans text which reads: 'Die registrateur kan, by bewys van goeie gronde by 'n afdeling van die Hoë Hof wat oor regsbevoegheid beskik, aansoek doen om die aanstelling van 'n kurator om beheer te neem oor die geheel of enige gedeelte van die besigheid van 'n instelling en dit te bestuur.'

[5] *Shorter Oxford English Dictionary* (6 ed, 2002, 2007 (electronic)) sv 'desirable'.

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,[6] in regard to any attempt to define the content of the expression 'good cause', that:

'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.

[5] In the court below the respondents relied on the judgment in *Ex parte Executive Officer of the Financial Services Board: In re Joint Municipal Pension Fund*,[7] where it was held that s 5 'does not suggest a test which is more lenient than that set by the common law for the removal of trustees' and the court consequently applied in relation to s 5(1) of the FI Act the approach to the removal of trustees laid down by

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[6] *Cohen Brothers v Samuels* 1906 TS 221 at 224. In *Cairns' Executors v Gaarn* 1912 AD 181 at 186 (180 at 184 in the 1921 reprint) he said in relation to the similar expression 'sufficient cause' that 'It would be quite impossible to frame an exhaustive definition of what would constitute sufficient cause …' It is apparent that Mason J was incorrect in saying in *Mintz v Bloemhof Village Council* 1922 TPD 430 at 431 that Innes J drew a 'sharp distinction' between the concepts of 'good cause' and 'sufficient cause'.

[7] *Ex parte Executive Officer of the Financial Services Board: In re Joint Municipal Pension Fund* [2003] 4 All SA 603 (T) para 40.

this court in *Sackville West v Nourse & another*.[8] That test is broadly whether the trustees have endangered the trust property by their acts or omissions or shown a want of honesty, fidelity or capacity to perform their duties. Lack of honesty or capacity on the part of the financial institution and those responsible for managing its affairs will ordinarily justify the appointment of curators to manage its business under s 5(1) of the FI Act. To that extent it is correct to say that circumstances warranting the removal of trustees of a trust, whether testamentary or *inter vivos*,[9] would, if present in relation to a financial institution, ordinarily justify the grant of an order for the appointment of curators. However, it by no means follows that the power of a court to make such an order is limited to that class of case and in my view the analogy with the removal of trustees leads to an approach to s 5(1) that is too restrictive.

[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,[10] 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

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[8] *Sackville West v Nourse & another* 1925 AD 516 at 527.
[9] The description in the FI Act of the assets held by a financial institution as 'trust property' flows from the special definition of that expression in that Act and the duties imposed upon various persons representing financial institutions by ss 2 and 3 of the FI Act and not from the law relating to trusts.
[10] See by way of example s 2(2) of the Collective Investment Schemes Control Act 45 of 2002.

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.

Admissibility of report and its annexures in evidence

[7] The registrar sought the appointment of curators on the basis of a detailed report concerning the activities of the Dynamic Wealth group furnished by the inspectors. That report ran to 421 paragraphs and 169 pages and had annexed to it some 2000 pages of documents contained in 110 annexures. It set out a number of facts, based on those documents, in each instance identifying in the footnotes the source of those facts. It concluded that the Dynamic Wealth group was in material breach of no less than five regulatory statutes; that in administering the investments entrusted to it there was inadequate identification of the interests of the investors in those investments and no proper control by means of regular audits; that it had restructured one portfolio without consulting investors,

thereby altering the very basis of their investments; and that in certain respects the funds were at risk.

[8] After considering the report the registrar brought the present application in relation to the business of the Dynamic Wealth group and the associations, whose funds it administered. The value of the investments involved in this business was approximately R1 billion. He excluded that part of the business that consisted of unit trust schemes operated on a white label basis[11] through another financial institution, Metropolitan Life, where Standard Bank held the investments as trustee. These amounted to some R2 billion.

[9] Despite a claim to personal knowledge of matters relating to the Dynamic Wealth group, in the founding affidavit deposed to by Mr Chanetsa, the deputy registrar, reliance was placed exclusively on the inspection report. He annexed a copy of the report together with 'a verifying affidavit' by Mr Bredenkamp. He then said:

'10.2 For the sake of brevity, and for no other reason, the attachments to the report have been omitted from these papers. However, they will be available in Court in a separately paginated bundle when the matter is heard and must be regarded as forming part of the report as they in fact do. Reference to the annexures is made by way of footnotes in the main report and in addition they have been indexed and described from p16 of the report onwards.'

The bundle of annexures was served on Dynamic Wealth together with the application papers and its deponent, Mr van Wyk, made use of some of its contents in seeking to rebut the registrar's case. It was also made available to the judge.

[11] A white label product is a product provided by one financial institution in terms of its licence and for which it is responsible, but branded to appear as if it is the product of another financial institution that may lack the requisite licence.

[10] The deputy registrar then set out 'to capture in this affidavit the salient findings of the inspectors' on the basis of the report. He did so in 42 subparagraphs containing a mixture of facts and conclusions detailing the conduct on the part of the respondents that caused him to bring the application. Reliance was placed on the findings and recommendations of the inspectors by cross referencing each factual statement and each conclusion relied on to the relevant page and paragraph of the report. In turn reference to the identified passages enables the reader, by having regard to the footnotes, to identify the particular documents from which those facts have been drawn. All this was prefaced by the following statement:

'11.3 However, the whole report must be deemed incorporated in this affidavit as the report in its entirety is relevant to this application despite the fact that an aspect may not have been highlighted in this affidavit.'

[11] In the answering affidavit on behalf of the respondents Mr van Wyk adopted an ambivalent approach to the report. He said that he had studied it closely and that in some respects it contained incorrect information. He then complained that:

'It is obviously impossible for DW to deal with these attachments and to speculate on which parts of the attachments the Applicant might rely and which not. Consequently DW reserves the right to move, at the hearing of this application, for an order to strike out the attachments from the papers, inasmuch as the Applicant may want to rely upon the attachments at the hearing of this application.'

However in the later portions of the affidavit a vigorous assault was launched on the inspectors and the report, which was said to contain 'sweeping and unfounded' statements that were 'grossly inaccurate'. The judge was urged to study the entire report and the opposing affidavit and the deponent added 'I trust then that justice will be done.' In other words the respondents sought a decision on the merits of the application.

[12] The challenge to the annexures to the report attracted the following response from the registrar:

'59.1 The reason why the annexures to the inspection report were excluded from the papers and compiled and paginated in a separate bundle, is set out in full in paragraph 10.2 of my founding affidavit.

59.2 The factual statements in the inspection report are supported by the annexures, properly referenced by way of footnotes. The annexures provide proof of the factual statements in the report.

59.3 An application to strike out any of the annexures can, with respect, not succeed unless the respondents have placed the correctness of the factual statements in the report in dispute with specific reference to the particular statement and motivation why it is incorrect. Such an approach I have not been able to discern from the respondents' answering affidavit.'

[13] In the court below the respondents built their arguments around the admissibility of the report and its contents. They contended that the annexures were not properly before the court; that the passages in the report and its annexures relied on by the registrar were not identified and that there was accordingly no admissible direct evidence of the facts relied on by the registrar in bringing the application. They argued that in relying on the report the registrar was seeking to substitute the judgment of the inspectors for that of the court and relied on *Society of Advocates of South Africa (Witwatersrand Division) v Rottanburg*[12] where Boshoff JP said:

'Despite the very responsible and competent way in which complaints are investigated by the committee of the Bar Council or the Bar Council itself, these bodies are not judicial bodies in the ordinary sense and their findings cannot be equated with that of a court of law. Furthermore, the acceptance of evidence of their

[12] *Society of Advocates of South Africa (Witwatersrand Division) v Rottanburg* 1984 (4) SA 35 (T) at 40C-D.

findings even as *prima facie* evidence of the facts upon which the complaints are based would be inimical to the requirements of the system of justice of this country; the Court cannot allow the findings of the body, which investigates the complaints and brings the facts upon which the complaints are based to the attention of the Court, to be presumptive evidence of such facts.'

This was said to be a parallel situation where that approach applied.

[14] The judge accepted these contentions. He said in regard to *Rottanburg* that the court should not be the rubberstamp of the registrar. He held that the evidence embodied in the bundle of annexures to the report had not been properly placed before the court and that the contents of the report itself constituted the opinion of the inspectors and could not be relied on in the absence of evidence *aliunde* of 'the primary facts on which they are based'. He said that the failure to deal extensively and specifically with the passages in the annexures on which the findings and conclusions in the report were based was fatal to the application. He relied on passages in *Swissborough Diamond Mines (Pty) Ltd & others v Government of the Republic of South Africa & others*[13] and *Minister of Land Affairs and Agriculture & others v D & F Wevell Trust & others*[14] in support of that conclusion.

[15] In adopting this approach the judge erred. His starting point that the annexures to the report were not evidence before the court was incorrect. Had they been attached to the founding affidavit there could have been no doubt that they were properly before the court as evidence. Counsel for the respondents conceded as much. The fact that they were not physically attached to the founding affidavit, cannot affect their status

[13] *Swissborough Diamond Mines (Pty) Ltd & others v Government of the Republic of South Africa & others* 1999 (2) SA 279 (T) at 324F-325C.
[14] *Minister of Land Affairs and Agriculture & others v D & F Wevell Trust & others* 2008 (2) SA 184 (SCA) para 43.

as evidence. That is to place form over substance. Solely for reasons of convenience, and to avoid the papers being unduly and possibly unnecessarily bulky, they were placed in an identified separate bundle that was served on the respondents and made available to the court. It was expressly stated that they formed an integral part of the report that was attached to the founding affidavit. They were properly placed in evidence and should not have been excluded.

[16] The confusion arose because the registrar sought in his affidavit 'to capture … the salient findings of the inspectors' and relied on a verifying affidavit by the leading inspector that confirmed 'the authenticity of the report'. This led the court below to think that the source of the evidence was the registrar as opposed to the report and its annexures. It would have been far simpler had the report been attached to an affidavit by the leading inspector in which he confirmed that insofar as it contained facts they were embodied in the annexures and that the conclusions were drawn from those facts. The registrar could then have confined his affidavit to saying why the matters disclosed in the report concerned him and justified the appointment of curators. Be that as it may, properly understood the registrar's affidavit incorporated and relied on the report and the annexures. The most relevant passages in the report were clearly identified by page and paragraph references. Those in turn took the reader to the source of the facts. A commendable endeavour to limit costs and simplify the judge's task in reading the papers in a busy opposed motion court should not have led to the exclusion of the evidence embodied in the documents in that bundle and the failure to consider the merits of the application.

[17] As the foundation for the judge's conclusion lay in his erroneous decision to exclude the annexures to the report the other points argued before him and upheld cease to be of relevance. It is accordingly unnecessary to examine the authorities on which he placed reliance.

[18] There was no dispute that if the annexures were properly before the court the evidence embodied in them was admissible. This was so in regard to the bulk of them because their source was the respondents themselves. Some were public documents and others were properly admissible under the exception to the hearsay rule contained in s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988. They must accordingly be considered in assessing the merits of the registrar's application. This distinguishes *Rottanburg*, which in any event predates the mentioned Act. In this case the registrar did not base his case on the conclusions in the report of the inspectors but on the admissible facts on which they had based their conclusions. The court could, accordingly, decide for itself whether those conclusions were justified.

[19] There is a further point in relation to the evidence before the court. It was not correct for the judge to say, as he did, that the respondents refrained from dealing with the allegations in the founding affidavit. In a lengthy answering affidavit they dealt with each paragraph of the founding affidavit and in particular with each of the 42 sub-paragraphs in which the deputy registrar set out the salient findings of the inspectors. Where the correctness of those findings, or the facts on which they were based, was challenged the basis for such challenge was set out and support was sought from the contents of 50 annexures, many of which were also annexures to the inspection report. It is true that the affidavit was frequently superficial in its answers but the respondents nonetheless

addressed the case on the merits. In so doing it became apparent that there was no serious dispute of fact. The relevant facts were essentially common cause and derived from information and documents supplied by the respondents. Counsel for the respondents properly disavowed any reliance on cases where argument is addressed to a court on the basis that the founding affidavit does not establish a case. In those circumstances the case should have been and must be determined on the evidence as a whole.[15]

The merits

[20] At the outset of the appeal appellant's counsel said he had been advised by respondents' counsel that the respondents accepted that, if the inspection report and annexures were properly before the court, these disclosed good cause for the grant at the time of the hearing of an order for curatorship in terms of s 5(1) of the FI Act. Respondents' counsel confirmed this, saying only that it would still have been open to them to argue that the matters disclosed in the report were largely of an historical nature and that by the time the application was brought matters had been put in train to remedy the problems identified by the inspectors, thereby rendering curatorship unnecessary. It is unnecessary in those circumstances to go into the merits in any great detail. I will confine myself to the two major issues that aroused the registrar's concern.

[21] The first issue concerned the status and functioning of the associations that were cited as part of the business the registrar sought to have placed under curatorship. According to a sample constitution of one such association they were established:

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[15] *Valentino Globe BV v Phillips & another* 1998 (3) SA 775 (SCA) at 779E-780C.

'To create pooled investment structures for purposes of direct pooled investments by its members in such investment structures, which direct pooled investments will be managed by the Asset Management Company appointed on behalf of its members.'

Pooled investments in which members of the public are invited to invest are regulated in terms of the Collective Investment Schemes Control Act 45 of 2002 (CISCA). That requires that persons carrying on the business of a collective investment scheme be licensed. Schemes must have an approved manager and, depending on the nature of the scheme, a trustee or custodian must hold the assets of the scheme. An auditor must be appointed and there must be both accounting records and annual financial statements prepared in accordance with generally accepted accounting practice. These must be audited in accordance with the requirements of CISCA. All this is intended to safeguard the investments of the investors. None of the companies in the Dynamic Wealth group were licensed to conduct collective investment schemes under CISCA and none of the portfolios of investments held on behalf of the associations were administered in accordance with the requirements of CISCA. Therefore if the associations were collective investment schemes it was unlawful for the Dynamic Wealth group to operate them, as they had been doing since 2002, with a substantial number of 'portfolios', each of which was in essence a separate scheme. Dynamic Wealth contended that the associations were not subject to CISCA and that it was unnecessary to observe the controls laid down in CISCA or to have the accounts of the associations audited.

[22] A collective investment scheme is defined in s 1 of CISCA as:

'[A] scheme, in whatever form, including an open-ended investment company, in pursuance of which members of the public are invited or permitted to invest money or other assets in a portfolio, and in terms of which –

(a) two or more investors contribute money or other assets to and hold a participatory interest in a portfolio of the scheme through shares, units or any other form of participatory interest; and

(b) the investors share the risk and the benefit of investment in proportion to their participatory interest in a portfolio of a scheme or on any other basis determined in the deed ...'

In setting up the associations Dynamic Wealth, under whose umbrella the other companies in the group operated, sought to take advantage of an exception in the definition of 'members of the public' in s 1 of CISCA designed to exclude from its operations certain limited types of collective investment schemes, such as stokvels or investment clubs. The definition reads:

'**Members of the public'** includes –

(a) members of any section of the public, whether selected as clients, members, shareholders, employees or ex-employees of the person issuing an invitation to acquire a participatory interest in a portfolio; and

(b) a financial institution regulated by any law,

but excludes persons confined to a restricted circle of individuals with a common interest who receive the invitation in circumstances which can properly be regarded as a domestic or private business venture between those persons and the person issuing the invitation.'

[23] Dynamic Wealth said that the members of the associations were a restricted circle of individuals engaged in a domestic or private business venture and therefore that the associations were not collective investment schemes in terms of CISCA. This claim was shown to be false when lists of participants were provided to the inspectors. By way of example, in one of the portfolios the members included a tennis association; a primary school and a school for the blind; a church; an optometrist and other businesses; several trusts, both family and charitable; some deceased

estates and a number of individuals from various parts of the country and having little other than their investment in that portfolio in common. The answering affidavit said that membership was restricted to persons invited to join through Dynamic Wealth's network of independent financial advisers. However this network was 470 strong and it recruited literally thousands of investors who invested hundreds of millions of Rand through these associations. There can be no doubt that investments were being solicited from members of the public. By no stretch of the imagination did the associations fall within the ambit of the exemption. Their business operations were being conducted unlawfully by unregistered persons, without audits and without complying with the requirements of CISCA designed to safeguard investors' funds in collective investment schemes. The proffered excuse that the FSB was aware of these activities and did not stop them was based on documents that revealed that the FSB was told that these were investment clubs and that investments were not being solicited from the general public. This was false. The bulk of the business in respect of which curatorship was sought was being conducted unlawfully and without complying with regulatory safeguards.

[24] The second issue concerns the circumstances in which the fifth respondent, Specialist Income Ltd (SIL), came into being. One of the portfolios offered to investors in the associations was an investment in bridging finance transactions. This attracted very large sums of money the bulk of which was placed in the Specialist Income Portfolio A and the Specialist Income Portfolio B. The attraction of these portfolios was said to be that the investments were backed by bank and similar guarantees, that they paid more generous rates of return than could be obtained elsewhere in the market and that they were relatively liquid. This may

have been true for a while but by early in 2008 market conditions had changed, there was a view that bridging finance transactions might be affected by the National Credit Act 34 of 2005 and the operations were no longer profitable. This was recorded in the minutes of an investment committee meeting of Dynamic Wealth held on 29 January 2008. At that meeting the decision was taken to close the fund and to seek an institutional investor with which to place the money. The existing investors were to have their money returned to enable them to invest in other funds. It was, however, agreed that this was to remain confidential and not be disclosed to the network of agents.

[25] At a later meeting on 25 February 2008 it was agreed to close the fund in order to create a new portfolio for an investor known as Kwanda. The existing funds would only be closed once Kwanda had deposited money in the group's money market fund and until at least the end of March everything was still to be kept confidential. The intention was said to be that the fund would close at the end of April after which the money in the fund would be transferred to the money market fund and agents would be given the opportunity to approach their clients and ascertain what they wanted to do with their money.

[26] It is unclear whether the Specialist Income Portfolios continued to accept further investments after the decision to close them. On 4 August 2008 investors were notified that the portfolios would be closed. This was blamed on the impact of the National Credit Act and high rates of interest rendering bridging transactions uncompetitive. The letter advised investors to speak to their brokers about transferring their funds to other investments and assured them that the funds would be transferred once

the capital was available.[16] Thereafter on 8 September 2008 Dynamic Wealth advised the FSB as part of a package of proposals to regularise its operations that the Specialist Income Portfolios, with investments of some R247 million, and three smaller but apparently similar portfolios,[17] had been closed and the investments were being liquidated. They said that the members would either have their money returned to them or it would be reinvested in one or other of the white label funds. It said that all members and their advisers had been informed of this.

[27] The registrar's response to this package of proposals on 11 September 2008 was to instruct Dynamic Wealth not to implement them. Thereafter on 16 September (and again on 25 September after receiving a letter of 17 September that did not deal with this instruction) the FSB asked for confirmation that the instruction had been followed. It sought the same assurance on 2 October threatening action if it did not receive a response. That same day Dynamic Wealth wrote to the registrar saying 'Dynamic Wealth has ceased implementation of the plan or solution' described in its letter of 8 September. Insofar as the Specialist Income Portfolios and the three smaller portfolios were concerned that was technically true, but only because Dynamic Wealth had done something entirely different with the assets of these portfolios.

[28] On 1 October 2011, SIL, a company with an issued share capital of 100 shares, all owned by the second respondent, took cession from the third respondent, as 'asset administrator' of the Specialist Income, Secure

[16] The letter read: 'Ons beveel aan dat u met u makelaar in verbinding sal tree om die oorplasing na ons ander fondse te bespreek. U kapitaal sal dan na hierdie fondse oorgeplaas word soos die kapitaal vrygestel word. U en u makelaars is welkom om ons te kontak rakende advies oor die beskikbare portefeuljes.'

[17] These were called the Secure Growth A, Secure Growth Holdings and Kwanda Secure Growth Holding Fund respectively, holding total investments of some R45.5 million.

Growth and Kwanda Secure Growth Portfolios, of all 'right, title and interest in and to the book debts, bank, stockbroker accounts' of the Dynamic Wealth Investment Association in return for the issue to the investors in the affected portfolios of non-redeemable, non-cumulative preference shares in SIL. The second respondent consented to this cession on behalf of the Dynamic Wealth Investment Association and presumably through that association on behalf of the investors. It also entered into an agreement with SIL in terms of which it would manage the business of SIL in return for a fee. This amounted in the period until 28 February 2009 to R1.7 million.

[29] By these means the assets of these funds were transferred to SIL and the investors were made preference shareholders in SIL without their knowledge or consent. They were told about it in a letter addressed to them on 2 November 2008. In dealing with these transactions the letter read as follows:

'Conversion of portfolio

The Portfolio Manager has also, after taking into consideration all alternatives, made a decision to convert the portfolio's assets to a public company and to issue preferential shares to all investors within the two funds listed above. The main reason for the decision is that property cannot be held by the portfolio in its current structure as a legal entity.

The public company will become the beneficial owner of all bank guarantees and properties and all investors will be issued with preferential shares on a pro-rata basis to the investors' share in the portfolio. In essence, all assets and investor holdings will be converted into a new legal structure and all investors will receive the same value in shares as they currently hold within the portfolio. All assets, whether bank guarantees or properties, will be transferred to the new public company.

…

The preferential shares will be issued to investors in the weeks to follow. The surplus within the company, if any, will serve as a buffer and will be accrued to the benefit of the investors once the outstanding transactions have been collected.'

[30] In the result people who had invested on the basis that they would receive reasonable rates of interest on liquid investments became instead shareholders in a private company. That immediately detrimentally affected the value of their investments. The shares are described as non-cumulative, which suggests that the articles provided for an annual dividend at a fixed rate, but on the footing that if the dividend was not paid in any year it would be lost. The shares were non-redeemable so that investors were locked into the investment and could no longer demand the return of their capital. Nothing emerges from the papers concerning voting rights but it is relatively unusual for preference shareholders to enjoy such rights, which probably means that control over the company lay entirely with the second respondent. Even the tenuous rights the investors had enjoyed to vote in relation to the affairs of the Association were therefore nullified.

[31] All of this was done without informing the investors or affording them an opportunity to object and by misrepresenting to them what was happening with their investments. They were told that the portfolios would be closed and their investments repaid. Instead they were presented with a *fait accompli* in which they became, like it or not, preference shareholders in SIL. Throughout the process the FSB had been misled and its instructions defied. Counsel for the respondents was constrained to say that his clients should not have done this and that it was 'certainly improper conduct'. I go further. It was blatantly dishonest and of such a character that the registrar was compelled to act to remove

the persons responsible from their management and control of the financial institutions concerned.

[32] For those reasons alone, leaving aside all the other conduct identified by the inspectors, an interim curatorship order should have been granted by the court below. It was submitted that such an order could not be granted in relation to the third respondent because the registrar did not allege that there had been prior consultation with the committee or executive committee of the JSE before bringing the application as required by s 8 of the FI Act. There is no merit in this point. There had in any event been communication between the inspectors and the senior manager: surveillance of the JSE during the inspection process and an affidavit by her, detailing transgressions of the JSE's rules, was filed together with the replying affidavit. We do not know whether there was in fact 'consultation' as required by the section. The point was not raised in the affidavits and the registrar was therefore deprived of the opportunity, if there was non-compliance, to remedy the position as he could have done. The point cannot be raised by way of argument.

Further evidence

[33] The application was brought in October 2009 and an interim curatorship order should have been made when it was argued in February 2010. The registrar contends that an interim curatorship order should be granted now in a form slightly amended from that originally sought. However the situation has changed materially since then as emerged from three applications to lead further evidence on appeal lodged respectively by the registrar, the second and third respondents and the fifth respondent. This evidence satisfies the tests for the admission of further

evidence on appeal[18] and is admitted. It demonstrates that the present situation with the Dynamic Wealth Group is very different now from what it was when the application was brought.

[34] The first and most important difference is that the second and third respondents are no longer licensed financial services providers in terms of the Financial Advisory and Intermediary Services Act 37 of 2002. That precludes them from conducting the business of a financial institution. The registrar withdrew their licences in terms of s 9 of that Act and the Appeal Board established under the Financial Services Board Act 97 of 1990 upheld that decision on 18 June 2011. The effect of the withdrawal was that these two entities could no longer conduct business in the financial services industry. As they were always the licensed vehicles through which the Dynamic Wealth group conducted its business, this destroyed the foundations of the group's business. All that remained for them to do under the terms of withdrawal laid down by the registrar was to return uninvested funds to clients without delay; account fully to the persons entitled thereto for any scrip, participating interests, investment vouchers or other forms of proof of investment; and, after consulting clients and product suppliers, to take reasonable steps to ensure that any outstanding business was transferred to another services provider in the best interests of clients.

[35] The second and third respondents led evidence of what they had done pursuant to these conditions of withdrawal. Neither of them is still conducting any business. Metropolitan Life has cancelled the white label agreements so that the second respondent no longer manages these portfolios. The equity portfolios managed under discretionary mandates

[18] *De Aguiar v Real People Housing (Pty) Ltd* 2011 (1) SA 16 (SCA) para 12.

have been transferred to another licensed financial services provider. The international portfolios are in the process of being transferred to the same provider. Thebe Securities, another financial services provider, has realized the investment portfolios of the associations and all of the funds, save some R110 000 owed to 18 clients, have been distributed to investors. In the case of these 18 clients there have been problems in communicating with them and payments could not be made because their bank accounts had been closed. The JSE platform clients are now invested directly through Metropolitan. There is very little business, if any, left in the second and third respondents.

[36] The first respondent's only business was that conducted through the second and third respondents. The fourth respondent closed for business on 31 July 2008 and retrenched its staff and ceased all operations a year later before the application was launched. That left only SIL in the group and the evidence was that the second respondent had disposed of its 100 shares in SIL and the two directors of SIL connected to Dynamic Wealth had resigned as directors.

[37] SIL's current chief executive officer amplified this. He testified that a new and independent board of directors has been appointed with considerable experience in the financial services industry. None of these directors were involved in the conversion of the portfolios into SIL. An annual general meeting of shareholders was held on 28 July 2011 and debated the advantages and disadvantages of curatorship. It resolved by a substantial majority[19] that they did not support a curatorship. According to the attendance register at least 40 to 50 percent of shareholders were

[19] 93,7% to 4.8%.

present at the meeting or represented by proxies and possibly more. The FSB declined an invitation to attend the meeting.

What relief should be granted?

[38] The registrar persisted in seeking an order appointing curators notwithstanding the change in circumstances outlined above. It is essential to bear in mind in dealing with this that the appointment of curators would operate prospectively not retrospectively. The order is not backdated and cannot be used to undo what has passed. The desirability of such an order must be assessed today in the light of the information we have about the current situation with the respondents.

[39] In the course of his reply counsel accepted that he could not ask for such an order in relation to the third and fourth respondents. As a matter of fact it is doubtful whether the first and second respondents are still carrying on a business. In my view before an order appointing curators can be made it is necessary for the registrar to show that there is a business that can be subjected to curatorship. Section 5(1) provides that the curator's function once appointed is to 'take control of and manage' the business subject to curatorship. It follows that if there is no longer a business there is nothing of which they can take control and nothing to manage, and the appointment of a curator is impermissible. That may be an insuperable bar to a curatorship order in respect of the first and second respondents.

[40] In the further evidence the deputy registrar said that a curatorship order would not be academic because there was work to be done by the curators in investigating and reporting to the registrar 'what exactly the business of the Dynamic Wealth entities consisted of at 18 June 2011'; to

investigate and report on irregularities by Dynamic Wealth's management and to ascertain the current status of Dynamic Wealth's business. If such investigations are necessary to identify the business, that illustrates how tenuous is the notion that there is still a business within the Dynamic Wealth group that can be subjected to curatorship. Furthermore I doubt whether investigation can be the principal reason for appointing curators. It may be something that curators should undertake, where appointed, but that is in the context of there still being a business that is under their control and being managed by them.

[41] Even if one accepts that there is some residual business located within the first and second respondents there is insufficient reason to justify making a curatorship order in respect of that business at this stage. In effect the curators would set out on a treasure hunt looking for the business of which they were the curators. That is not a desirable situation or one contemplated in s 5(1). In my view it has not been shown that the appointment of curators at this stage of affairs holds out any sufficient prospect of benefit to investors to render it desirable in respect of the first and second respondents.

[42] That leaves only SIL. I accept that, although it appears to have severed ties with the Dynamic Wealth group, it remains a financial institution and potentially subject to a curatorship order. However the fact that it is no longer under the control of those responsible for its travails is an important consideration in deciding whether to place its business under curatorship. A further important consideration is the views of the shareholders who are the investors whose investments were dealt with in such a cavalier fashion by the Dynamic Wealth group. They have said clearly that they do not want a curatorship and have appointed new

directors to look after their interests and see what part of their investments can be salvaged. It was suggested that they might have legal claims against Dynamic Wealth and its executives or management. However they are free to seek advice on that and to take action if so advised. The minutes of the annual general meeting reveal that some are already investigating that option. They do not need curators for that purpose. We were also referred to the terms of withdrawal that provide that the former investors in the portfolios transferred to SIL 'are to be regarded as investors' in the second respondent. Whatever this means, and assuming it to be valid, it does not provide any reason for subjecting SIL to a curatorship, which will on the unchallenged evidence be an extremely expensive undertaking at the cost of investors who have already incurred substantial losses. The condition in question invites the independent directors of SIL to meet with the registrar, presumably to try and address any continuing problems. It provides no reason to place SIL under curatorship.

[43] For those reasons and in the light of present circumstances, I do not think that a curatorship order is desirable at the present time in respect of any of the respondents. The respondents sought to turn this to their advantage by contending that the appeal should therefore be dismissed as moot, relying on s 21A(1) of the Supreme Court Act 59 of 1959 that empowers the court to dismiss an appeal if it would not have a practical effect or result. I do not agree that the appeal will have no practical effect or result. Its determination involves the proper construction of an important provision in the regulatory armoury of the registrar, the test to be applied in considering an application for curatorship under s 5(1) of the FI Act and a consideration of the evidential status of an inspection

report. These are all important issues that will impact upon the future conduct of the registrar.

[44] Lord Slynn of Hadley said in *R v Secretary of State for the Home Department, Ex Part Salem*:[20]

'The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.'[21]

The present seems to me precisely the type of case where the court should hear and decide the dispute because of its importance in the field of financial regulation, where it will have a practical effect.[22]

[45] In the result the registrar's submission that the court below erred in dismissing the application and refusing to appoint curators to the business of the Dynamic Wealth group must be upheld. His submission that curators should be appointed now fails. The appeal must therefore succeed and the order of the court below be set aside, but it can only be replaced by an order directing the respondents to pay the registrar's costs of the application. He sought an order that those costs be paid on the attorney and client scale on the basis that he was discharging a statutory duty and his office should not be out of pocket for the costs incurred in doing so but that was not pressed in argument. The respondents made

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[20] *R v Secretary of State for the Home Department, Ex Parte Salem* [1999] 2 All ER 42 (HL) at 47d-f.
[21] Cited in *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA) para 7 and *Rand Water Board v Rotek Industries (Pty) Limited* 2003 (4) SA 58 (SCA) para 18.
[22] See also *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA) at 444 I - 445C.

common cause both in the court below and in this court and are accordingly jointly and severally responsible for the payment of the costs.

Order

[46] In the result the following order is made:

(a) The appeal is upheld with costs including the costs of two counsel.

(b) The order of the court below is set aside and replaced by an order that the respondents pay the applicant's costs, including the costs of two counsel.

(c) Both costs orders are joint and several, the one paying the others to be absolved.

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant:	W H Trengove SC (with him E C Labuschagne SC) Instructed by: Rooth & Wessels Attorneys, Pretoria Naudes Inc, Bloemfontein
For respondent:	N D G Maritz SC (with him A P G Els) Instructed by: Van der Merwe & Associates, Pretoria Rossouw Attorneys, Bloemfontein.