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22 April 2022

Kern, Armstrong & Du Plessis Incorporated
Studio 402, 4th Floor
4 Loop Street
Cape Town

Attention: Michelle Toxopeus

BY EMAIL: michelle@KernAttorneys.co.za; Greg@KernAttorneys.co.za

Dear Sir/Madam

RE: GROUNDUP // YASHODA RAM

We refer to our letter of 15 April 2022.

In this letter, as previously undertaken, we respond, insofar as it is necessary, to the substance of your letter of 14 April 2022. However, we do not address each specific allegation made in your letter. Our omission to address each allegation is not an admission thereof.

We are instructed as follows:

The relevant background to the article

1. As mentioned previously, the article of 1 April 2022, complained of by your client, was based on the papers filed under case number 2021/58950 in the High Court of South Africa, Gauteng Division: Johannesburg High Court (“the curatorship application”). It is apparent from the voluminous court papers that the curatorship application progressed, and is indeed progressing, in several stages.
2. The curatorship application was instituted by the Prudential Authority (the Authority) against 3Sixty Life Limited, a life assurance company. For the purpose of this letter, it is not necessary to elaborate on the application suffice to record that:

- 2.1. It involves matters of complex insurance law and the regulatory provisions imposed on life companies;
 - 2.2. The application was launched because the Authority for various reasons no longer had faith that the management of 3Sixty could remedy its financial position;
 - 2.3. The financial position that concerned the Authority was the minimum capital requirements and solvency capital requirements prescribed in section 36 of the Insurance Act as well as perceived governance and management problems of 3Sixty;
 - 2.4. The application was brought *ex parte* on 21 December 2021; and
 - 2.5. Based on a submission by BDO Advisory Services Proprietary Limited, which was confirmed by your client, your client was nominated by the Authority to become the court appointed curator.
3. Your client was duly appointed as interim curator in terms of the *rule nisi* issued. The return date for the *rule nisi* was 22 April 2022.
 4. On 21 January 2022, the curatorship application entered a second stage, when 3Sixty entered the fray to oppose the application and asked for the return date of the *rule nisi* to be anticipated to 1 February 2022, and that the rule be discharged. Amongst various contentions in the first respondent's answering affidavit was the claim that your client did not have the requisite experience to act as curator.
 5. On 24 January 2022, NUMSA applied to be joined as second respondent to the proceedings.
 6. On 31 January 2022, the Authority filed its reply to the answering affidavits. Amongst the issues to be addressed in the reply was the experience of your client to act as curator.
 7. The second stage of the proceedings culminated in the order handed down by judge Dippenaar on 3 February 2022.
 8. The third stage commenced on 15 February 2022, when the Authority filed the ill-fated urgent application for the variation of the initial order and have your client removed as curator.
 9. It was during the third stage that your client entered the matter as a third respondent to, what became known as the variation application, and BDO Advisory Services ("BDO") was joined as fourth respondent.

10. The third stage dealt extensively, and almost exclusively, with your client's role as curator. The urgent application extended the already voluminous record by a further 880 pages.
11. In the meantime, certain events occurred that contributed to the matter. These included:
 - 11.1. BDO suspending your client's employment by reason of the allegations relating to her employment; and
 - 11.2. Your client filing the interim curator's interim report on the recapitalisation scheme, in terms of judge Dippenaar's order of 3 February 2022.
12. The case entered the fourth stage with the filing of the further affidavits, including your client's supplementary affidavit in response to the Authority's replying affidavit, until the matter was heard on 22 March 2022. A further 2300 pages were added to the record during this phase of proceedings. The affidavits and heads of arguments dealt with the merits of the curatorship application as well as the issues relating to your client's role as interim curator.
13. The fourth stage included the submission of your client's final report as well as her application of 18 March 2022 to intervene as third respondent as well as BDO's response to your client's founding affidavit in the joinder application.
14. In conclusion, the curatorship application involved a complex case, complicated further by the issues raised in respect of your client and the Authority's apparent lack of confidence and trust in her.

Articles

15. The article complained of by your client was the sixth in a series of articles published by our client on the curatorship application. The first five articles were headed:
 - 15.1. *"Irvin Jim's birthday party paid for embattled insurer"* (1 March 2022);
 - 15.2. *"Millions of rands siphoned from NUMSA's insurance company, report shows"* (4 March 2022);
 - 15.3. *"NUMSA responds to our report"* (4 March 2022);
 - 15.4. *"How NUMSA's life insurer went insolvent"* (10 March 2022); and
 - 15.5. *"Auditor accused 3Sixty managers of constructing evidence"* (14 March 2022)
16. The articles covering the saga of 3Sixty are of overriding public interest for the following reasons:

- 16.1. They cover a matter that is of critical and direct interest to the membership and potential membership of the largest single industry trade union in South Africa, with a membership in the region of 300,000 people and affecting more than a million lives.
 - 16.2. The curatorship application deals with the management of the life company that directly impacts on the future and financial security of the NUMSA members.
 - 16.3. The financial health of 3Sixty is also of interest to the rest of South Africa, in that any harm that may befall the NUMSA members, will eventually be felt by South Africa as a whole.
 - 16.4. Lastly, the articles deal with the general health, management, and regulatory control of the financial services industry in South Africa.
17. As far as the article complained of is concerned:
- 17.1. As with the previous articles in the series, the article was based on the extensive court record. The article was published after the matter was ventilated in open court on 22 March 2022.
 - 17.2. The article covered the specific issues raised by the Authority in respect of the qualifications of the curator and its loss of confidence in your client.
 - 17.3. The article further covered the conduct of your client during the interim curatorship, in particular her alleged *volte face* as reflected in the 21 February interim report and the final report, the dispute with her employer, the leaking of information to the press, and her incapacity due to medical reasons.
 - 17.4. All the issues raised in the article ventilated in open court and the article is a fair reflection of these matters, as they served before the court.
 - 17.5. The article was written by James Stent and edited by the GroundUp editorial team. Headlines and sub headlines were inserted during the editing process.
 - 17.6. None of the persons who attended to the preparation and publication of the article was motivated by malice in preparing the article and neither is the article biased.

The headlines

18. As mentioned above, the headlines were created during the editing process. They give a broad overview of the content of the article. Headlines are to be judged in the context of the article and not in isolation.
19. Your client has taken issue with the use of the word “curious”. With respect, the word “curious”:

- 19.1. is an apt description your client's role as curator, as highlighted by the dispute that has arisen in respect of your client's role and conduct as depicted in the court record; and
- 19.2. depicts a situation, in the context of your client's alleged conduct, as reflected in the article, that is unusual, peculiar, and strange.
- 20. The unusual, strange, and peculiar nature of the curator's involvement is evidenced by the fact that that the subject matter of your client's role as curator contributes to more than 1000 pages of the court record. Whilst this might be based on views of the regulator and your client's employer, it is a matter of public record.
- 21. Your client has also taken issue with the sub-headline stating that your client suddenly changed her mind. However, the court record is replete with allegations in this regard made by the Authority. The evidence presented is that, at least until 11 February 2022, your client held the same view as the Authority on the curatorship application. It is apparent that, a few days later by 21 February 2022, your client's view had changed. The variation application to have your client removed as curator happened to fall within this period.
- 22. Accordingly, the headline and sub headlines that are derived from the context of the article, is a fair reflection thereof, which context is based on the papers that served before the court.

Audi alteram partem

- 23. As stated before, the article (and indeed the series of articles) was substantially based on court records of a matter that has repeatedly been referred to in open court. The matter remains pending to the extent that judgment has been reserved after arguments were heard on 22 March 2022.
- 24. Thus, the article is subject to qualified privilege.
- 25. It is not good journalistic practice to interview witnesses or parties to proceedings while matters are pending. Indeed, in **Gama vs Sunday Times (21 June 2021)** the Press Ombud, in our client's submission correctly, held that Clause 1.8. of the press code is not applicable when the reportage is a fair and accurate reflection of privileged proceedings.
- 26. Moreover, contrary to your client's claim to have answered allegations made by the Authority and others against her, many of the criticisms against her conduct are not addressed in her answers. For example, your client does not deny the allegation about her leaking information and documents to the press.

Future reporting

27. Our client will continue to monitor the matter and, where appropriate, report on the further developments in the curatorship application.

Conclusion

28. In light of the above, our client maintains that the article was a fair report on the matter that served before the court on 22 March 2022, based on the papers before the court.
29. Insofar as headlines contained elements of comment, our instructions are that the comment was legally fair and reasonable.
30. Our client will not withdraw the article, nor will it give your client any undertaking other than to assure your client that:
- 30.1. Where it will publish reports on court proceedings, it will do so fairly and without malice and subject to the rights accorded to by the qualified privilege relating to such reporting.
- 30.2. Where it publishes facts outside the scope to the privilege, it will do so only if it has been assured of the factual basis thereof.
31. The meanings ascribed to the article by your client in paragraph 5 of your letter are denied. The context of the article is, insofar as claims were made by the PA and BDO (and the attorneys and other persons who filed confirmatory affidavits) and to the extent that such claims were recorded in the article, clear that these claims were disputed allegations in court papers. In any event, they do not have the underlying meanings stated in your paragraph 5.

Should your client persist with its threat of litigation, we are authorised to receive process on behalf of our client.

Yours faithfully

**Lionel Murray Schwormstedt
& Louw**

Per:

JF LOUW

This letter has been sent electronically
and is not signed by the writer