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Financial Service Providers: What is a "fit and proper person" and does such finding constitute administrative action?

In terms of the Financial Advisory and Intermediary Services Act of 2002 (the FAIS Act), Financial Service Providers, commonly referred to as FSPs, must be licensed with the Financial Services Conduct Authority (the FSCA), and its predecessor, the Financial Services Board (FSB). The FSCA regulates and authorises the rendering of financial services to clients.

If you snooze, you lose!

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Financial Service Providers: What is a "fit and proper person" and does such finding constitute administrative action?

In the matter, the SCA had to consider whether the debarment of a representative and key individual of a FSP was lawful.

In terms of the Financial Advisory and Intermediary Services Act of 2002 (the FAIS Act), Financial Service Providers, commonly referred to as FSPs, must be licensed with the Financial Services Conduct Authority (the FSCA), and its predecessor, the Financial Services Board (FSB). The FSCA regulates and authorises the rendering of financial services to clients. Once a license has been granted to a FSP, it is the responsibility of the individual FSP's to appoint a key individual to serve as their representative. The FAIS Act requires that such person is deemed a "fit and proper person" and decrees a close supervisory responsibility by FSP's over such chosen individuals. The onus is thus on the individual FSP to ensure that their respective representative falls within the ambit of "*fit and proper*".

In the matter between *Associated Portfolio Solutions (Pty) Ltd and Pentagon Financial Solutions (Pretoria) (Pty) Ltd* versus Pieter Willem Basson, the Registrar of Financial Service Provides and another, the Supreme Court of Appeal (SCA) had to consider whether the debarment of a representative and key individual of a FSP was lawful, since the debarment occurred as a consequence of an internal disciplinary inquiry that lead to the representative's dismissal and not as a consequence of a fresh separate enquiry conducted by the then FSB.

Background

Pieter Willem Basson (Basson) was a director of two companies, both registered FSP's, as well as a representative and key individual on their behalf, in terms of the FAIS Act. After a somewhat troubled history with these companies, Associated Portfolio Solutions and Pentagon Financial Solutions (the Appellants), followed by a disciplinary hearing, Basson was dismissed from his position as employee and director of the Appellants. Given that the independent chairman of internal enquiry had also found Basson guilty of acts of misconduct involving dishonesty, the Appellants debarred him from his position as their representative and key individual in terms of section 14(1) of the FAIS Act.

Basson instituted High Court proceedings to challenge the Appellants' decision to debar him and did so successfully in the Western Cape High Court. The Appellants then took the decision of the High Court on appeal to the Supreme Court of Appeal.

Judgment

The Western Cape High Court found in Basson's favour on two grounds – the first relating to the appropriateness of using decisions taken in a disciplinary hearing to decide on a subsequent debarment, and the second based on the perceived bias, prejudgment and ulterior motives involved in the decision

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Financial Service Providers: What is a "fit and proper person" and does such finding constitute administrative action?*...continued*

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to debar Basson. Notwithstanding that Basson had been fully involved in the disciplinary proceedings, been given ample opportunity to represent and defend himself therein, and had been notified of the looming board meeting where a decision to debar him would be tabled, the High Court found that a separate enquiry, dealing solely with the merits of his debarment, should have been held in addition to the completed disciplinary proceedings. The court's reasoning was based on the fact that the proceedings in the disciplinary hearing were regulated by the Labour Relations Act 66 of 1995, whilst the issue of debarment was regulated by section 14(1) of the FAIS Act. As such the High Court found that two separate enquiries had to be held.

Basson had also presented the High Court with an array of arguments pointing to the fact that the decision to debar him was one wrapped in bias and ulterior motives. He argued that the Appellants' respective boards of directors did not want to pay him the full share price for the value of his shares, that they had testified in the litigation initiated by Basson and that the Appellants had therefore prejudged the issue of his guilt. Compelled by these arguments, the High Court held that proceedings would have to be held anew in order to validly debar Basson from his position as key representative the Appellants. Notably, they did not find fault with the decision taken in the disciplinary hearing and Basson's resultant dismissal as an employee.

On appeal, the arguments raised on behalf of the Appellants were firstly that the findings in the disciplinary hearing could indeed inform the decision in the debarment process, secondly that the Appellants had a duty to debar Basson based on the finding that he lacked integrity and honesty, and thirdly that they would be persisting to request that the then FSB review the decision taken by another FSP to appoint Basson as their representative and key individual. This last issue needs no further discussion, since the court, after short consideration, found the issue to have become academic. Basson on the other hand, stuck to his guns and argued that the process in itself had been procedurally unfair and was clothed in bias and ulterior motives.

In terms of the FAIS Act, a finding of fraud, misconduct or dishonesty would mean that a person does not meet the fit and proper standard required for a key individual. Accordingly, in terms of section 14 of the FAIS Act, the FSP in question has a responsibility to debar such person as its key individual and representative. Such FSP must immediately withdraw any authority that person has to act on their behalf, take steps to ensure that the interests of clients are not harmed and notify the Financial Sector Conduct Authority (FSCA) of the debarment. Once an individual is debarred in terms of the FAIS Act, the Registrar of the FSCA is obliged to remove the name of that person from the list of persons eligible to be appointed as a representative (key individual) of any FSP. This would ensure

Financial Service Providers: What is a "fit and proper person" and does such finding constitute administrative action?*...continued*

Fairness in this instance requires adequate notice to be given to the relevant parties, as well as the opportunity to make representations.

that such an individual can in future not be appointed as a key individual and representative of any other FSP, since prior to such appointment, a company is required to search the FSCA database to determine whether a prospective appointed individual has been disbarred.

The SCA held that, if the finding that Basson had acted in a dishonest way, was a just and equitable finding – both in the manner in which it was taken, as well as the process that was followed - then the Appellants were indeed obligated to debar Basson.

Administrative action - lawful, reasonable and procedurally fair

Notably, despite the Appellants not being organs of state, the SCA found that in making the decision to debar Basson, the Appellants had acted in furtherance of the objects of the FAIS Act and in the public interest and as such the decision fell within the ambit of section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and qualified as administrative action.

PAJA requires administrative action to be lawful, reasonable and procedurally fair. If an administrative action was found to be biased or reasonably suspected of bias, it would not be deemed procedurally fair. Fairness in this instance requires adequate notice to be given to the relevant parties, as well as the opportunity to make representations.

The SCA, looking at the facts of the case, held that Basson had clearly been given a fair opportunity to make representations, as well as having been given adequate notice of the proposed administrative action. Furthermore, the SCA held that the facts established in the disciplinary proceedings leading to the debarment, clearly impacted on his honesty and integrity and that it would be unnecessary to have another enquiry into the same issues.

On the question of reasonableness, the SCA found that there was clearly a strong rational connection between the findings of the disciplinary hearing and the decision to debar Basson (rationality being the minimum standard of reasonableness). The SCA could not find any evidence to support the allegation made by Basson, that the issues ventilated in the disciplinary enquiry, had been prejudged or that the decision taken had been unreasonable. In fact, the SCA held that the duty to debar Basson once the disciplinary proceedings found him to be dishonest, fell squarely on the Appellants. Basson's argument that it was the duty of the Registrar of the then FSB to decide on the debarment was found to be untenable.

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Financial Service Providers: What is a "fit and proper person" and does such finding constitute administrative action?*...continued*

This SCA judgment provides a useful oversight of the responsibilities that the FAIS Act places on FSP's and highlights the importance of ensuring that all decisions taken in respect thereof, meet the requirements of lawfulness, reasonableness and procedural fairness.

Conclusion

This SCA judgment provides a useful oversight of the responsibilities that the FAIS Act places on FSP's and highlights the importance of ensuring that all decisions taken in respect thereof, meet the requirements of lawfulness, reasonableness and procedural fairness.

FSP's play an integral role in the functioning of our economy and the day-to-day lives of ordinary people. It is thus to be expected that certain key decisions taken by these FSP's should be defined as administrative action and therefore subject to administrative review. This judgment also sheds light on the importance of the responsibility on each FSP to ensure that their representatives are fit and proper persons, who are capable of rendering the services expected of them, and their duty to debar unscrupulous representatives who are no longer "fit and proper" to represent them.

Lucinde Rhoodie, Pauline Manaka and Kara Meiring

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The usual defence to such allegations of lack of actual authority is to plead either that there was actual authority, or alternatively that the contracting party represented that the representative had the necessary authority to conclude the contract and is accordingly estopped from denying the lack of authority.

In many commercial cases, the actual authority of the representatives of the contracting parties is placed in dispute. By way of example, one party alleges that the signatory to a contract was not duly authorised by the board of directors to conclude the contract and, accordingly they seek to avoid the consequences of the contract by virtue of a lack of authority.

The usual defence to such allegations of lack of actual authority is to plead either that there was actual authority, or alternatively that the contracting party represented that the representative had the necessary authority to conclude the contract and is accordingly estopped from denying the lack of authority.

This is no different in the case of a trust, which acts through its trustees as specified in the trust instrument known as a trust deed, which is registered at the Master's office. The conduct and authority of certain of the trustees of the Bakubung-Ba-Ratheo Economic Development Trust (the trust) came into focus in a recent case before the Supreme Court of Appeal, *Tshaka N.O. and three others vs Standard Bank of South Limited and another* (Case Number 141/2019).

The trust had been established with the objective of advancing the socio-economic development and upliftment of the Bakubung-Ba-Ratheo community, and for this purpose the trustees passed a resolution on 23 July 2007 authorising two trustees to open a bank account with Standard Bank. The resolution contained two important provisions:

- These trustees were to arrange and maintain electronic banking access as well as transnational limits and to sign all relevant documentation pertaining to the account.
- This authority would remain in force indefinitely or until advised otherwise, by the trustees, by way of a further resolution.

Accordingly, as far as Standard Bank was concerned, these two nominated trustees were authorised to act on behalf of the trust and to transact on behalf of the trust until advised otherwise. The bank account was opened on 21 January 2018.

In this case there were two pertinent transactions that took place on the bank account that became the subject matter of litigation, being two transfers of monies to the second respondent, the Bakubung Economic Development Unit. A transfer of R5.5 million took place on 26 July 2011 and the second transfer of R4 million on 28 October 2011, both in terms of instructions from the authorised representatives of the trust.

On 17 October 2011, and shortly before the second transfer, a representative of the trust met with Mr Millar of Standard Bank to inform him that the first transfer had

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If you snooze, you lose!*...continued*

In this case despite being requested to act jointly, the trustees failed to act jointly at Standard Bank's special instance and request and failed to provide the bank with the necessary urgent instruction to stop all transfers.

occurred without a resolution or minutes of a trust meeting. On the same day this trust representative sent an email to Mr Millar requesting that he "*stop any transfers from the account... until we notify you as trustees*". The following day Mr Millar responded to the email with the following request: "*Please urgently send us a written request signed by ALL trustees to this effect.*"

No response was received to this written request at the time and a week later the two authorised trustees requested the second transfer of R4 million. It was only on 6 December 2011 that the trustees wrote to Standard Bank enclosing a resolution from all the trustees adopted on 28 November 2011, in terms of which new trustees were appointed as authorised signatories on the bank account.

Accordingly, the trustees of the trust instituted action against Standard Bank out of the Gauteng Local Division of the High Court, the *court a quo*, for repayment of the monies transferred out of the trust's account. The *court a quo* found that the bank was not negligent in acting on the instructions of the authorised signatories and had in fact made their position clear in regard to what steps had to be taken by the trust to stop any further transfers, which steps were not taken at the pertinent time.

The Supreme Court of Appeal quoted directly from several cases inclusive of the *Land and Agricultural Bank of South Africa vs Parker and other the 2005* (2) SA77 (SCA) which provided that "*It is a fundamental rule of trust law ... that in the absence of contrary provision in the trust deed the trustees must act jointly if the trust estate is to be bound by their acts... Since co-owners must act jointly, trustees must also act jointly.*"

In this case despite being requested to act jointly, the trustees failed to act jointly and failed to provide the bank with the necessary urgent instruction to stop all transfers. This was a critical requirement by virtue of the fact that their previous resolution had authorised two trustees as the authorised signatories on the bank account.

In transacting with third parties it is fundamental that trustees or directors for that matter inform third parties of who is authorised to represent the trust or the company so as to avoid any adverse transactions been concluded to the detriment of the trust and/or the company. At times urgent action is required and as the saying goes, "*If you snooze, you lose!*".

Burton Meyer

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