FINANCIAL SERVICES TRIBUNAL

Case no A19/2019

In the matter between

FERN FINANCE (PTY) LTD	First applicant
CHARLTON LUNGISANI SIKUZA	Second applicant

And

FINANCIAL SECTOR CONDUCT AUTHORITY ("FSCA")	Respondent

Tribunal: LTC Harms (chair), Adv W Ndinisa and Mr A Jaffer

For the applicant: Adv JL Hobbs instructed by DZ Dukada & Co, Mthatha

For the respondent: Mr Barend Bredenkamp of FSCA

DECISION

1. The applicants apply in terms of sec 230 of the Financial Sector Regulation Act 9 of 2017 ("the FSR Act") for the reconsideration of regulatory action taken against them by the Authority in a notice dated 11 October 2019. The parties will be referred to by name.

2. The parties waived their right to a public hearing and agreed that the application could be decided on the papers and heads of argument filed.

3. Fern Finance has been an authorised financial service provider in relation to short-term insurance, long term insurance,[1] and friendly society benefits under the Financial Advisory and Intermediary Services Act 37 of 2002 ("the FAIS Act") since 5 July 2016. According to one letterhead its business relates to sureties, loans, financial planning, insurance, investments, risk advice and provident funds and, according to the affidavits filed, the letting of property.

4. Mr Sikuza is the controlling mind of Fern Finance and is its key individual and representative under the FAIS Act.

GUARANTEE POLICIES, CREDIT GUARANTEES AND SURETYSHIPS

5. The basis of the regulatory action taken against the applicants was a finding by the Authority that Fern Finance, while not being licensed as a short-term insurer, issued guarantee policies during the period 10 January 2015 to 11 July 2017. This, the FSCA said, amounted to a contravention of sec 7(1) of the Short-Term Insurance Act 53 of 1998[2] which defined a guarantee policy as

[1] The terminology under the Insurance Act 18 of 2017 is since 1 July 2018 "non-life insurance" and "life insurance" respectively.

[2] Section 7 was repealed by s. 72 of the Insurance Act 18 of 2017 with effect from 1 July 2018 and replaced by sec 5 read with Schedule 2 Table 2 (non-life insurance) under the heading "guarantee", which covers loss resulting from insolvency; the direct and indirect failure of a person to discharge an obligation; or

"a contract in terms of which a person, other than a bank, in return for a premium [i.e., "the consideration given or to be given in return for an undertaking to provide policy benefits"], undertakes to provide policy benefits [i.e., "one or more sums of money, other than an annuity, or services or other benefits"] if an event, contemplated in the policy as risk relating to the failure of a person to discharge an obligation, occurs".

Nobody, unless licenced as a short-term insurer or as a bank, was entitled to conclude such contracts.

6. It is a standard requirement of construction contracts, especially those concluded by local authorities and state-owned entities, that the contractor must provide a performance guarantee to the employer by a third party based on a percentage of the contract sum. Fern Finance undertook towards employers (principally if not exclusively local authorities) to pay such a percentage to the employer should the contractor fail to comply with the construction contract. The contractor "compensated" Fern Finance for the undertaking by paying or promising to pay Fern Finance in advance a percentage of Fern Finance's potential obligation to the employer.

7. When confronted about this practice by the Financial Services Board, the predecessor of the Authority, Fern Finance's attitude was that its undertakings were not covered by sec 7 because they were credit guarantees as defined in the National Credit Act 34 of 200; that they could therefore not also have been covered by the Short Term Insurance Act; that Fern Finance

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suretyship offered as part of normal business activities, other than a guarantee issued by a Bank registered under the Banks Act, 1990.

had an operational licence under the National Credit Act; and that the Authority consequently had no jurisdiction to deal with the matter.

8. The submission that the same subject matter cannot be covered by different laws and different regulatory bodies is a *non sequitur*. In any event, sec 8(5) National Credit Act 34 of 2005 states as far is relevant that a "credit guarantee" is an agreement, irrespective of its form, if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies.

9. The definition is by no stretch of the imagination applicable to the undertakings given by Fern Finance to the employers. A construction contract is not a credit facility or credit transaction simply because the employer does not provide the contractor with any credit. In addition, the contractor is not in this arrangement a "consumer". If anyone is a consumer it is the employer, and if the employer is a public body, the National Credit Act does not apply (sec 4(1)(a)(iii)).

10. It is accordingly not surprising that counsel for the applicants in argument did not even raise this contention, which was all along the main pillar of the applicants' case. Counsel also did not argue that the undertakings were not guarantee policies as defined in sec 7 of the Short-Term Insurance Act. Counsel had, when his heads were drafted, the detailed argument of the Authority on the subject for a considerable time and avoided it. In fact, once they had perused the Authority's heads, the applicants changed tack and filed new evidence and augmented grounds – a matter to which we revert.

11. This means that we must deal with an issue without knowing what the argument is supposed to be. If it were that Fern Finance's undertaking was but a suretyship the argument

would have been bad. The predecessor of this Tribunal, namely the Appeal Board of the Financial Services Board, dealt with such argument in the case of *Ilse Becker v The Registrar of Financial Service Providers.* The essence of the decision was that "the question is not whether the guarantees in issue had many or even all the attributes of suretyship but whether they conformed to the statutory definition of guarantee policy."[3] The decision of the Board on this point was taken on review, and the review application was dismissed.[4] An application for leave to appeal to the Supreme Court of Appeal was dismissed not only by the High Court but also the Supreme Court of Appeal.[5]

12. In sum, Fern Finance, in guaranteeing the obligation of the contractor in part, used an arrangement consisting of an agreement with the contractor in terms of which Fern Finance, in return for payment of a premium (as defined), would pay a sum of money to the employer in the event the failure of the contractor to discharge its obligation as contemplated in the agreement (the risk).

THE DECISIONS AND THE APPLICATION FOR RECONSIDERATION

13. Against that background, the FSCA (a) withdrew the licence of Fern Finance to act as a Financial Services Provider in terms of section 9(1) of the FAIS Act; (b) imposed an administrative penalty in terms of section 167(1) of the FSR Act on Fern Finance in the amount of R3.5 million;

[3] See also *Johannesburg Livestock Auctioneers Association v President Insurance Co Ltd* 1987 (1) SA 539 (W) at p542 – 544.

[4] *Becker and Another v Registrar of Financial Services Providers and Others* (61274/2015) [2017] ZAGPPHC 926 (30 November 2017) at http://www.saflii.org/za/cases/ZAGPPHC/toc-B.html

[5] SCA Case 980/18 dated 30 October 2018.

(c) debarred Mr Sikuza for a period of 10 years in terms of section 153(1)(a) read with section 154(1) of the FSR Act; and (d) issued a directive in terms of section 144 of the FSR Act ordering Fern Finance and Mr Sikuza to immediately cease offering and providing guarantee policies.

14. The applicants filed an application for the reconsideration of the four decisions on 31 October 2019. The grounds were set out in an affidavit and are rather diffuse but one may, liberally interpreted, discern the following grounds: (a) that Fern Finance did not contravene sec 7 of the Short-Term Insurance Act but acted under the National Credit Act; (b) that Fern Finance had no intention to contravene the regulatory framework of the law; and (c) that the penalty was based on an incorrect assumption as to the amount of money (the premiums) paid to Fern Finance by the contractors.

15. Out of all order and five months after "pleadings" were closed but because counsel had failed to diarise the date on which heads were due, the pandemic, and better or new legal advice, the applicant filed an application for the admission of further evidence and augmented grounds for reconsideration. The Authority, understandably, opposed the application but filed argument in response.

16. The failure of the applicants to comply with the rules and directions of this Tribunal and its general disrespect have been set out in a ruling issued on 11 May 2020, and is attached as an endnote in order not to interfere with the flow of this decision.[i] The ruling elicited no response, and another ruling was consequently issued on 28 May:

> **"It would appear that the applicants have decided to not prosecute the application any further and unless the Office is informed otherwise by Friday 5 June, the matter will be**

referred to the Tribunal for disposal on the basis that the application has lapsed due to non-prosecution, and be dismissed on that ground.

Any notice of intention to proceed must be accompanied by the heads of argument and an application for condonation for non-compliance with the directions issued.

If the necessary notice is received, the matter will be enrolled on a date to be fixed by the Tribunal."

17. Unsurprisingly, on the last day, 5 June, the applicants filed a notice stating that they intend to proceed with the application. The accompanying affidavit dealt with condonation, further evidence, and augmentation in one pot. Despite the procedural difficulties we have decided to deal with the matter with reference to their counsel's heads of argument on the assumption that what the applicants wish to argue is contained in the heads.

18. A problem with counsel's argument is that he relies on the Promotion of Administrative Justice Act 3 of 2000, known as "PAJA", and assumes that this Tribunal is a court of review allowing him to raise review issues. We have repeatedly stated that the Tribunal is not a review "court" as defined in PAJA. Reviews are concerned with process; appeals with result. But that does not necessarily mean that review grounds may not overlap with appeal grounds. This is especially the position where a flawed process impacts on the result, for example, where the Registrar omitted to have regard to a jurisdictional fact. This Tribunal reconsiders matters.[6]

[6] Cf *Nichol and Another v Registrar of Pension Funds and Others* [2006] 1 All SA 589 (SCA), 2008 (1) SA 383 (SCA). It is unnecessary to deal again with the history of the Tribunal's powers.

19. We shall deal with the different decisions separately.

DEBARMENT OF MR SIKUZA FOR A PERIOD OF 10 YEARS IN TERMS OF SECTION 153(1)(A) READ WITH SECTION 154(1) OF THE FSR ACT

20. Counsel submitted that Mr Sikuza was debarred under sec 8A of the FAIS Act although he was debarred under section 153(1)(a) of the FSR Act which states that

> **"the responsible authority for a financial sector law may make a debarment order in respect of a natural person if the person has contravened a financial sector law in a material way."**

The Short-term Insurance Act is under Schedule 1 of the Act such a law.

21. We have already found that Mr Sikuza, through Fern Finance, contravened the Short-Term Insurance Act. It was not submitted that the transgression was not material. The inspectors on 3 November 2017 seized a random sample of 53 guarantee policies with a value of more than R24 million issued during the period 10 January 2015 to 11 July 2017

22. As to process, sec 154(1(a)) requires that before making a debarment order in respect of a natural person, the Authority must give a draft of the debarment order to the person and to the other financial sector regulator (the Prudential Authority), along with reasons for and other relevant information about the proposed debarment. Although the National Credit Regulator is also a financial sector regulator, that designation does not apply to Chapter 10 of the FSR Act in which secs 153 and 154 appear, and notification to that regulator is not required.

23. The Authority and the Prudential Authority concluded a Memorandum of Understanding in terms of secs 76 and 77 of the FSR Act. It inter alia identifies matters where concurrence or notification between the parties is not required.[7] Paragraph 7.2 states:

> **"The PA hereby specifically agrees that the FSCA may take a debarment order in respect of a natural person without giving the PA a draft of the debarment order as required by section 154(1) of the FSR Act."**

The submission that the correct procedural steps had not been taken is, accordingly, rejected.

24. It was further submitted that the Authority had failed to take the personal circumstances of Mr Sikuza into account and that they are, under PAJA, relevant considerations that should have been considered. The answer to that is that although the applicants were invited to make submission before the sanctions were imposed, they consciously decided not to do so and rather issued a warning to the Authority (an issue to which we shall revert).

25. The final submission was that the decision is ambiguous because the terms of the regulatory action and the published debarment order differ. In terms of the regulatory action, Mr Sikuza was to be "prohibited from providing or being involved in the provision of financial services as defined in the FAIS Act". In the debarment order itself he was prohibited "from being, or being involved in the provision of financial services to financial customers" where the words and expressions "have the meaning assigned to it in the FSRA unless the context indicates otherwise". The definitions of "financial services" in the two Acts are different.

[7] Published at https://www.fsca.co.za/Regulatory%20Liaison/MOU_FSCA%20and%20PA.pdf.

26. Although we are satisfied that Mr Sikuza's debarment must stand we intend, for the sake of clarity, to refer the decision back to the Authority to reconsider the terms of the order to accord with the wording of the action.

WITHDRAWAL OF THE LICENCE OF FERN FINANCE TO ACT AS A FINANCIAL SERVICES PROVIDER IN TERMS OF SECTION 9(1) OF THE FAIS ACT

27. Section 9(1)(a) provides in essence that the Authority may at any time withdraw any FAIS licence if satisfied, on the basis of available facts and information, that the licensee does not meet or no longer meets the fit and proper requirements applicable to the licensee, or if the licensee is a corporate body, that the licensee or any key individual of the licensee does not meet or no longer meets the fit and proper requirements applicable to the licensee or the key individual.

28. In addition, the FSCA may withdraw the licence if the licensee does not have an approved key individual. Under sub-sec (6) (a), a person whose licence has been withdrawn is debarred for a period specified from applying for a new licence.

29. The "business licence" of Fern Finance was not withdrawn, as counsel submitted, but its FAIS licence to render financial services in respect of short-term insurance, long term insurance and friendly society benefits.

30. It is not alleged that the prescribed procedure for debarment was not followed meticulously. Since Mr Sikuza contravened a financial sector law in a material way through Fern Finance, it follows that he is no longer able to act as the key individual of Fern Finance and that, accordingly, the withdrawal of Fern Finance's licence was fully justified. Because of the intrinsic link between the juristic person and Mr Sikuza, his acts were also those of Fern Finance, and they

both contravened a financial law in a material manner, the company no longer complies with the fit and proper requirements.

THE ADMINISTRATIVE PENALTY IMPOSED ON FERN FINANCE IN TERMS OF SECTION 167(1) OF THE FSR ACT IN THE AMOUNT OF R3.5 MILLION

31. The responsible authority for a financial sector law may, by order served, impose an appropriate administrative penalty, that must be paid to the financial sector regulator, if the person has contravened a financial sector law. This jurisdictional fact for the imposition of the administrative penalty by the Authority on Fern Finance was, as indicated, established.

32. The administrative penalty must be appropriate, and in this regard the section states that the matters that the responsible authority must have regard to the following: (i) The need to deter such conduct; (ii) the degree to which the person has cooperated with a financial sector regulator in relation to the contravention; and (iii) any submissions by, or on behalf of, the person that is relevant to the matter, including mitigating factors referred to in those submissions (sec 167(2)(a)).

33. In addition, and without limiting the three mentioned factors, the matters that the responsible authority may have regard to include the following: (i) The nature, duration, seriousness and extent of the contravention; (ii) any loss or damage suffered by any person as a result of the conduct; (iii) the extent of any financial or commercial benefit to the person, or a juristic person related to the person, arising from the conduct; (iv) whether the person has previously contravened a financial sector law; (v) the effect of the conduct on the financial system

and financial stability; (vi) the effect of the proposed penalty on financial stability; (vii) the extent to which the conduct was deliberate or reckless (sec 167(2)(b)).

34. In a recent decision of this Tribunal we considered the provision in detail and we do not intend to revisit or restate what was there said.[8] It is however necessary to stress once again that this Tribunal is not entitled to interfere with the exercise by the Authority of its discretion unless it failed to bring an unbiased judgment to bear on the issue; did not act for substantial reasons; exercised its discretion capriciously; or exercised its discretion upon a wrong principle.

35. Before considering the grounds on which the reconsideration application in respect of the penalty are based, it is necessary to give some background. The investigation into the affairs of Fern were, due to a complaint received on 4 November 2016, initiated on 3 August 2017 under the Inspection of Financial Institutions Act 80 of 1998, and continued as from 1 April 2018 under the FSR Act when the latter repealed and replaced the former.

36. The Authority made numerous attempts to obtain the evidence of Mr Sikuza. It conducted a search and seizure operation at the business premises on 3 November 2017. Mr Sikuza elected to exercise his right to be represented and the interview was postponed. On 25 May 2018, he reiterated his position regarding the right to legal representation and stated that he would not make any statement under oath without legal representation which had to be paid by the Authority. This, he said, was a non-negotiable issue.

[8] *MET Collective Investments (RF) (Pty) Ltd v FSCA and another* https://www.fsca.co.za/Enforcement-Matters/Publications%20and%20Documents/Decision%20-%20MET%20Collective%20Investments%20(RF)%20(Pty)%20Ltd%20v%20FSCA%20and%20another.pdf

37. During June 2018, he was issued with a notice to appear to provide evidence. He responded by indicating that the Authority does not have the jurisdiction to investigate Fern Finance. He did not provide any evidence or offer any cooperation during the investigation. Although the Authority was able during the search and seizure operation to obtain some documentary evidence from there onwards it had to rely on external evidence.

38. Having concluded that Fern carried on short-term insurance business and that the National Credit Act did not apply, the inspectors submitted a report to the Authority dated 11 March 2019. On 4 April 2019, the Authority informed the applicants of its proposed regulatory and administrative actions, including the imposition of an administrative penalty of R3.5 million based on the fact that the value of the guarantees seized amounted to more than R24 million and that over the period 10 January 2015 to 11 July 2017 Fern Finance had received approximately R3.5 million for contractors. Attached was the inspection report. The applicants were requested to make submissions on the contents of the report, the proposed penalty, and the proposed withdrawal of the licences.

38. The response of the applicants was basically that the matter fell under the jurisdiction of the National Credit Authority and concluded with the following telling statements:

> **"We have been instructed to advise the FSCA and its relevant employees involved in this matter, as we hereby do, that the withdrawal of the client's financial provider license and the debarment of Mr CL Sikuza from acting as a key individual by your authority will not stop client from rolling out its guarantee/surety scheme. It is only the**

NCR that can do so through the withdrawal of the credit provider certificate that was issued by the NCR in respect of the said scheme.

We are accordingly instructed to demand that you desist from your proposed course of conduct to debar client and to further advise that in the event of the matter being dragged to Court, client will apply for legal costs to be awarded *de bonis propriis* on a punitive scale against the officials involved in this saga.

Furthermore, client instructs us that you have written to some of the entrepreneurs previously assisted by client under the said guarantee/surety scheme advising them not to deal with client as client is alleged to be flouting the law. Client has instructed us to advise that the FSCA, as we hereby do, that its conduct has resulted in heavy losses of revenue as a result of the said conduct and/or actions or the FSCA and client continues to lose revenue. Client reserves the right to seek compensation from the FSCA as its actions are wrongful."

39. Significantly, no submissions were made in respect of mitigating factors or the quantum of the financial penalty and its calculation.

40. The notice of regulatory and administrative action followed on 11 October 2019 and a directive was issued in terms of s 144 of the FSR Act, requiring the applicants to notify their clients that Fern Finance is not an authorised short-term insurer and that its clients did not have any cover.

41. As mentioned earlier, the reconsideration application took issue with the financial penalty on two grounds, namely that Fern Finance had no intention to contravene the regulatory

framework of the law; and that the penalty was based on an incorrect assumption as to the amount of money (the premiums) that were paid to Fern Finance by the contractors.

42. The applicants did not apply for a suspension of the decisions pending the finalisation of the application and the application did not deal with the content of the letter quoted, more particularly the statement that the applicants would not comply with any administrative action and would not stop "rolling out its guarantee/surety scheme".

43. In the late application, Mr Sikuza, disingenuously, stated that a proper reading of the letter merely indicated that he disagreed with the basis of the regulatory action. He added, rather meekly, that should it be held that their actions were in contravention of the Short-Term Insurance Act, "there can be no quarrel that we should be directed to cease issuing the impugned guarantee policies". Since they were already directed to cease during October 2019, this ambiguous statement might mean that they did not comply with the unsuspended order.

44. The letter quoted is relevant for two reasons, namely that the applicants are not fit and proper persons to be licenced under the FAIS Act because of their contempt of the regulatory scheme and, particularly in the present context, the question of deterrence, the main object of a financial penalty. This is thus a case where a substantial penalty was called for to have any deterrent effect on the applicants apart from deterring others – as appears from the *Ilse Becker* case, the applicants are not the only persistent operators in this field.

45. As to the degree to which the applicants have cooperated with the financial sector regulator in relation to the contravention, the undisputed facts have been set out. In the reconsideration application Mr Sikuza merely said that he became uneasy about the inspectors'

true intention, and then declined provide to information under oath. This simplistic explanation provides no justification. In his late affidavit he alleged that the inspector had lied to him about the purpose of the search and investigation and that in the light thereof he found it impossible to cooperate. Since this justification does not explain the wording of his communications cited by the inspector in his report, he now falls back on context.

46. The fact is that the applicants did not cooperate with the regulator in relation to the contravention. This aspect was dealt with in detail in the report and the applicants were asked to comment. They chose not to do so. The inspector did not have the opportunity to counter this belated attempt to justify the lack of cooperation (rule 54 of the Financial Services Tribunal Rules). The Authority was, accordingly, fully entitled to determine the penalty on the assumption that the applicants did not cooperate.

47. There is therefore no basis for the unsubstantiated submission that the Authority had failed to follow the mandatory and material procedure prescribed by sec 176(1) and 176(2)(a).

48. The checklist for determining an appropriate penalty in sec 176(2)(b) is not mandatory as counsel would have it but discretionary. The factors that could be relevant are (a) the nature, duration, seriousness, and extent of the contravention; (b) any loss or damage suffered by any person as a result of the conduct; (c) the extent of any financial or commercial benefit arising from the conduct; and (d) the extent to which the conduct was deliberate or reckless. The Authority said that it did have regard to these factors, and there was no need for it to provide a checklist because the eventual penalty is a value judgment.

49. A ground for reconsideration which we deduced from the reconsideration application, read with the applicants' response in the letter of 4 June 2019 referred to above, was that Fern Finance had no intention to contravene the regulatory framework of the law, which, cast in the wording of the section meant that it denied that its conduct was deliberate or reckless. Although counsel did not raise the issue in his heads of argument, we shall deal with it briefly.

50. Mr Sikuza alleges that prior to him embarking on the scheme he had enquired of the Financial Services Board whether his scheme fell under its regulatory regime and that he was told that it did not, and was a matter for the National Credit Regulator. The problem is that he did not provide the true facts to the Financial Services Board as the inspection report showed. The letter read as follows:

> **"Our company is a money lender which provides financial assistance to emerging entrepreneurs whose risk profile is considered unacceptable by the formal banking and financial sector. We assist financially clients we have won municipal and government tenders to execute such tenders. In our company, we do not provide financial advice on investments, do not sell insurance or medical aid products nor do we render any financial services as defined in [the FAIS Act]. We only grant loans and sureties."**

51. The inspection report also revealed that the applicants, through their interaction with the Ethekwini Municipality in 2013 and 2016, knew that it was conducting an unregistered insurance business. The applicants did not refute this inference.

52. As to the nature, extent and seriousness of the contravention, we know that the business started during 2010, that according to the applicants Fern Finance issued 714 guarantees since

2013, and that the seized sample consisted of 53 guarantees issued during an 18 month period to a value in excess of R24 million. But due to the refusal of the applicants to cooperate, it was impossible to determine the true extent of the transgression.

53. The true extent of loss or damage suffered is also not capable of determination but since all 53 guarantees were illegally issued and, accordingly void, the potential loss to the employers amounted to at least R24 million, and the potential loss to the contractors much more once the employers had obtained knowledge of the status of the guarantees.

54. That leaves the extent of the financial benefit derived by Fern Finance from the conduct. As mentioned, the applicants were told that the Authority could not establish the correct figure of the payments made to it by contractors, that it intended to take the value of payments from contractors as reflected on Fern Finance's bank statements for the 18 month period, that the amount was R3.5 million, and that the Authority intended to take that into account in determining the penalty.

55. The applicants did not take issue with the calculation in their response of 4 June 2019, and the Authority in its decision used the figure as the appropriate amount of the penalty. In the reconsideration application, however, Mr Sikuza stated that the assumption of the Authority was wrong because the receipts in the bank accounts include loan repayments and rentals received. He did not quantify those amounts.

56. In his late affidavit, he returned to the issue and repeated what he had said about loans and rental but, again, did not quantify those amounts. He said he could not give that information because of the pandemic lockdown and, if given more time, he would be able to produce accurate

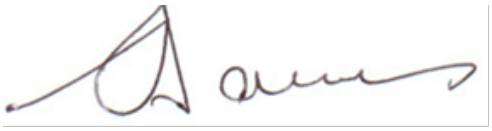
records. He had the period April 2019 to March 2020 to produce the records and provide the actual commercial benefit Fern Finance derived from its unlawful activity and did not.

57. Imposition of a penalty is not an actuarial exercise. Since we only have information relating to 53 guarantees over a period of 18 months instead of 714 guarantees since 2013, it is fair to assume that R3.5 million is a gross underestimate.

59. We therefore conclude that the Authority imposed an administrative penalty that was legal and appropriate in the circumstances.

ORDER: THE APPLICATION FOR RECONSIDERATION IS DISMISSED SAVE THAT THE WORDING OF THE DEBARMENT OF THE SECOND APPLICANT IS REFERRED BACK TO THE AUTHORITY FOR RECONSIDERATION.

Signed on behalf of the Tribunal on 11 August 2020



LTC HARMS (Chair)

[i] The ruling reads as follows:

1. The matter has been set down for Thursday, 14 May 2020, but matters have been bedeviled by the lockdown, the fact that the applicants are from Mthatha, that the attorneys do not comply with directions, and that they do not answer emails.

2. The history of the case is the following:

The hearing date was agreed to on 27 January 2020.

The case directive was sent out on 31 January, setting the dates for heads, namely 14 April (applicants') and 21 April (respondent's).

The applicants failed to file their heads but the respondent complied nevertheless on 21 April.

3. The following email was received from the applicants' attorneys on 23 April:

"Counsel was briefed to draw applicants' heads of argument and thereafter arrange applicants' case but subsequent to that and before 14 April 2020 the national lockdown ensued as a result of Covid-19. Our Mr Sapulana has been locked out of Mthatha due to the Government regulations issued as a result of Covid-19. Mr Sapulana has not been able to access the office since 26/03/2020. He has been contacted telephonically by Mr Sikuza about the emails received.

Now that Mr Sapulana has finally accessed our office he is to arrange to consult the applicant and also Counsel to establish the readiness of the applicant's heads of argument.

Our view is that the applicant should be allowed to file heads of argument even if the tribunal were to hear the matter based on papers in view of the uncertainty surrounding Covid-19 travel restrictions after 30/04/2020. We still need to thoroughly consult on the issue of whether the matter may be decided on papers only without oral presentation.

We shall revert to you soon."

4. In response the Office wrote on the same day:

> "The chair of the panel advises as follows:
>
> Notice of the date for filing heads was given on 31 January for 11 April and it has to be assumed that the attorney and counsel would have diarised same.
>
> It is not understood on what basis counsel finds it necessary consult with client in order to prepare heads of argument on a matter that is to be decided upon the record.
>
> Since the applicants now have the advantage of the respondent's heads, an extension for the filing of heads is granted to Friday 8 May.
>
> Unless the lock-out is extended to make appearance legally impossible on the hearing date of 14 May or the parties agree that the matter be disposed on the papers and argument filed, the matter will proceed on that date.
>
> If the applicants wish to apply for a postponement, they should do so by Monday, 4 May. Any postponement would mean that the matter can only be heard during the course of the second part of the year.
>
> The attention of the parties is drawn to the Rules of Procedure of the Tribunal."

5. The applicants did not revert as promised, did not ask for a postponement, did not waive their rights to a public hearing, and did not file their heads of argument.

6. In the meantime new ministerial directives were issued on 3 May, which allow a tribunal such as the FST to function subject to limitations.

7. In the light of the foregoing, the matter is removed from the roll and will be re-enrolled once the applicants' heads of argument have been filed accompanied by an application for condonation for the

failure to comply with the directives of the Tribunal, taking into account any lockdown restrictions that may apply.