

**IN THE PROCEEDINGS BEFORE THE ENFORCEMENT COMMITTEE
ESTABLISHED IN TERMS OF SECTION 10(3) OF THE FINANCIAL SERVICES
BOARD ACT, 97 OF 1990**

Case Number: **19/2014**

In the matter between:

THE REGISTRAR OF LONG TERM INSURANCE

APPLICANT

and

MICHAEL THATAYAONE PODILE

RESPONDENT

DECISION OF THE ENFORCEMENT COMMITTEE

Before Advocate A de Vos SC, Mrs H. K. Dlepu, Advocate T Golden and Professor T Woker.

A. INTRODUCTION

1. In the present matter the Applicant alleges that from about January 2010 until about 30 August 2013, the Respondent carried on long term insurance business under the name and style of Mitpo Building Society (Pty) Ltd with registration number 2010/022388/07 (Mitpo) by providing

policy benefits in relation to life policies (assistance policies) to the public. In essence the policies are what is known as funeral policies. These policies were not underwritten by a registered long term insurer and neither the Respondent nor Mitpo was registered as a long term insurer. The complaint is that this is a contravention of Section 7(1) of the LTI Act.

2. The Applicant referred the alleged contravention by the Respondent to the Enforcement Committee in terms of Section 6A(1)(a) of the Financial Institutions (Protection of Funds) Act, 28 of 2001 (the "Financial Institutions Act").
3. The referral to the Enforcement Committee in terms of the Financial Institutions Act dated the 17th October 2014, the notice in terms of Section 6B(1)(a) of the Financial Institutions Act dated 16 October 2014, the founding affidavit of the Applicant in terms of Section 6B(1)(b) of the Financial Institutions Act dated the 16th October 2014 and the supporting affidavit and annexures on behalf of the Applicant dated 15th October 2014 were duly served on the Respondent.
4. This fact was confirmed by an affidavit filed on behalf of the Applicant dated 5 February 2015, deposed to by Mr William Nkadameng. The information contained in the said affidavit clearly indicates that the Respondent received all the relevant documents and was aware of the

fact that he was required to submit his answering affidavit on or before the 4th December 2014 and that the hearing would proceed on the 5th February 2015.

5. The Respondent failed to file an answering affidavit as required. The Respondent did indicate in a letter that he sought a postponement of the hearing on the basis that his attorney had passed away sometime in the middle of 2014 and that he needed more time to prepare for the case. The Applicant duly informed the Respondent that the Chairperson required the Respondent to apply formally for a postponement at the hearing of the matter. No such application was filed and neither did the Respondent appear at the hearing. Heads of argument were filed on behalf of the Applicant. The Applicant requested that the hearing proceed on an unopposed basis.

The facts:

6. The Applicant became aware of the activities of the Respondent in September 2010 when the Ombudsman for Long Term Insurance referred a complaint against the Respondent to the Applicant.
7. The Applicant first tried to engage with the Respondent about the complaint, the nature of his business and his underwriting status. (It is common cause that at no stage was the Respondent registered as a long

term insurer under the LTI Act).

8. As all attempts to contact the Respondent were unsuccessful, the Applicant issued instruction in terms of Section 3(2) of the Inspection of Financial Institutions Act, 8 of 1998 ("The Inspection Act") that an inspection be conducted into the affairs of the Respondent, Mitpo and its associated institutions.
9. During the inspection information was obtained from the Respondent either in the form of documentary evidence or through an interview. The undisputed facts on the papers before us are as follows:
 - 9.1 Respondent was the sole director and controlling mind of Mitpo, and commence to sell funeral policies in 2010 under the name and style of Mitpo, Building Society (Pty) Ltd. This is inter alia clear from the fact that the income of Mitpo was paid into the Respondent's personal account and that the Respondent did not differentiate between himself and Mitpo. The benefits in terms of these policies ranged from a R1 000.00 to R10 000.00 and included funeral cover. Premiums ranged from R21.36 a month to R162.10 per month.
 - 9.2 The Respondent marketed Mitpo as an institution on radio stations. Agents were also utilised to market and sell funeral policies.

- 9.3 Policy holders paid their monthly premiums in cash. The Respondent caused premiums to be paid inter alia into Mitpo's Absa bank account with number 9255312586. The Respondent was the only authorised signatory of the account and the premiums were not differentiated from the Respondent's personal funds.
- 9.4 Between January 2010 and August 2013 the Respondent had approximately 1 295 clients and collected no less than R162 801.00 in premiums from policy holders. This amount was reflected as income in the Absa bank account.
- 9.5 The Respondent received at least ten claims from policy holders and settled only two claims in full and paid half in respect of another claim.
- 9.6 Neither the Respondent nor Mitpo was registered as a long term insurer or underwritten by a long term insurer. The Respondent approached various entities to cause his business to be underwritten by an insurer but on each occasion failed to provide the required information and to pay the required amount of premiums in order that he be properly registered. In spite of this, the Respondent fraudulently indicated on documentation provided to the public that he was duly underwritten by at least some of the insurers for instance Riskfin.
- 10.1 Section 7(1) of the LTI Act provides that no person shall carry on any

kind of long term insurance business unless that person is registered or deemed to be registered as a long term insurer and is therefore authorised to carry on the kind of long term insurance business concerned, either under the LTI Act or in accordance with the LTI Act.

10.2 The policies marketed and sold by the Respondent qualify as long term insurance business in terms of the definition of the LTI Act.

11. Consequently and based on the above facts this committee found that the Applicant has shown on a balance of probabilities that the Respondent contravened Section 7(1) of the LTI Act in that:

11.1 As a juristic person Mitpo could not act on its own and acted through its sole director being the Respondent. The director's of a company are the controlling minds of a company. In this case the Respondent is the controlling mind of Mitpo;

11.2 The Respondent marketed and sold assistance policies to approximately 1 295 policy holders from January 2010 to August 2013 and collected no less than R162 797.19 in premiums from policy holders;

11.3 The assistance policies were not underwritten by a registered long term insurer;

- 11.4 The Respondent also received and settled insurance claims from clients during the period between January 2010 and July 2012;
- 11.5 Neither the Respondent nor Mitpo is registered as a long term insurer or underwritten by a long term insurer.
12. The Applicant does not have the power to impose an administrative penalty for the contravention in question and was therefore obliged to approach the Enforcement Committee which has jurisdiction to hear the matter.

ADMINISTRATIVE SANCTION

13. The Applicant contended that the Respondent should be ordered to pay a penalty of R1 million to the Applicant based on the following arguments:

13.1 **Nature, duration, seriousness and extent of the contravention**

- 13.1.1 The purpose of the legislative framework under discussion is to protect policyholders and to provide a safeguard to make sure that service providers make good on their promises when clients

claim. The regulation of the industry is imperative as long term insurers accept funds from the public against the undertaking to provide policy benefits in the case of an insured event. This is particularly true in cases of life policies and especially funeral policies as in the present case, where families of the deceased are dealing with what is already an extremely distressing situation.

13.1.2 From the facts it is clear that the Respondent conducted his unregistered business for more than 3½ years. This in itself makes the contravention serious. It appears from the correspondence that the Respondent is still operating a business under the name and style of MBS Funerals (Pty) Ltd as a so-called "director". According to the correspondence the e-mail address and telephone number is the same as the one used whilst still actively collecting premiums from clients. The letterhead also states falsely that the Respondent is administered by Riskfin which is an authorised financial service.

13.1.3 The Respondent went to great lengths to lure the public into taking out his assistance policies by marketing Mitpo as a reliable institution on local radio stations. Most of the policy holders from whom the inspector obtained affidavits indicated that they first heard about the funeral policies on Mafikeng FM, a

community radio station. The Respondent also employed agents to market and sell funeral policies. According to the respondent, he had approximately 100 agents who marketed and sold funeral policies. None of these agents were authorised as FSP's or registered as representatives of any authorised FSP.

13.1.4 The Respondent's conduct in utilising the FSP licence number that belongs to the 4D Group and Riskfin when marketing and selling its funeral policies is clearly fraudulent. These FSP licence numbers were used on client application forms and cash receipts.

13.2 Previous failure to comply

13.2.1 It is a further aggravating factor that the Respondent was given the opportunity to get his house in order but failed to do so despite giving numerous assurances that he would comply.

13.2.2 During October 2012 the Applicant received a further complaint from the Ombudsman against the Respondent and made several attempts to contact the Respondent without success. This forced the Applicant to call for an inspection. The Respondent's disregard of the Applicant's directive to be underwritten resulted in additional costs being incurred in the form of an inspection (in

the amount of R226 173.00).

13.3 Any loss or damage suffered by any person

13.3.1 The Respondent's activities came to the attention of the Applicant because the Respondent failed to honour at least two claims by policy holders.

13.3.2 In view of the fact that the Respondent collected R162 801.79 in his bank account but has used R158 810.58, it is fair to conclude that the Respondent is not in a position to honour any of the policies taken out by his clients. This means that all the Respondent's clients suffered damages at least in the amounts paid by them on the said policies.

13.4 Profit derived from the contravention

13.4.1 The Respondent confirmed that he used one account for his personal funds and the income derived from the business. He said that he used the funds in the account for business administration as well as personal expenses.

13.4.2 Although the inspector's analysis of the bank statements for the period 1st January 2012 to 30th August 2013 shows an income of

R162 801.79 and withdrawals in the amount of R158 810.58, it is clear from the Respondent's statements that he must have received a far greater income from his clients. A simple sum shows that if the Respondent had only the 1 200 clients which was confirmed by the inspection (though according to the Respondent himself he had more than 2 000 clients) and on average each of them paid R30.00 per month (according to the Respondent he employed a hundred agents who collected contributions and sold policies with premiums ranging between R29.00 and R92.00 per month which makes an average of R30.00 more than probable), he would have received an amount of at least R36 000.00 per month from his clients. There is evidence to show that most of these payments were made in cash, which would explain why they are not reflected in his bank account. There is no indication from the Respondent that he used this money for any other purpose but his own. We can therefore accept for purposes of this application that all the monies derived from the contravention was in fact profit for the Respondent.

13.5 Deterrent effect of the administrative action

13.5.1 According to the Applicant the assistance sector of the industry is particularly inclined to be non-compliant with regulatory

requirements. The office of the Applicant has investigated several cases relating to unregistered insurance business especially in the arena of life insurance (assistance policies). Despite legal enforcement action taken against such entities, this fraudulent practice remains widespread and is of great concern not least because it targets those who are most gullible and least able to afford the financial and emotional damage brought about by such abuse.

13.6 Previous penalties imposed

The committee was referred to previous penalties imposed in matters where the Respondent contravened Section 7(1) of the LTI Act. It should be noted that these penalties were imposed after agreement were reached between the Applicant and the Financial Institution concerned. There is no detail available surrounding each of these contraventions. We are therefore of the opinion that the amount of the penalties so imposed is not a factor that we can take into account in the present matter.

DAMAGES:

14. The Enforcement Committee is impart in terms of the Financial Institutions (Protection of Funds) Act to order the Respondent to pay to

any person who suffered patrimonial loss or damage as a result of the contravention of law a compensatory amount to make good the patrimonial loss or damages suffered. Unfortunately in the present matter there is not enough facts before us to assist the Enforcement Committee in making such an order. This is probably due to the fact that the Respondent failed to file any affidavits or appear before the Enforcement Committee which had the effect that the Applicant only had the evidence gathered during the inspection available to it to present to this Committee. We are however of the opinion that in future the Applicant should make every effort possible to present facts to the Committee so as to enable it to make an order as envisaged above.

COSTS:

15. We were requested to make an order against the Respondent to pay the costs of the hearing, including the cost of instituting the panel and all expenses reasonably incurred by the Applicant in investigating the non-compliance and referring the matter to the Enforcement Committee (example inspection costs). We are of the view that this is precisely the kind of matter where the Respondent should pay the costs so incurred especially in view of the fact that the Respondent was given an opportunity to get his house in order but failed to do so. Furthermore the Respondent failed to co-operate with the Applicant which had the effect of escalating the costs.

16. CONCLUSION:

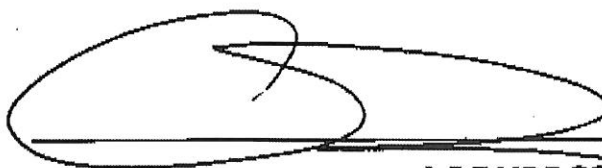
As this Committee is satisfied on a balance of probabilities that there was a contravention the impose the following administrative sanctions:

16.1 The Respondent is ordered to pay a penalty in the amount of R1 million to the Applicant;

16.2 The Respondent is ordered to pay the costs of the application as set out above;

16.3 Interest on the amount of R1 million at the rate prescribed in terms of Section 1(2) of the Prescribed Rate of Interest Act 1975 (Act 55 of 1975).

SIGNED at George on the 25th day of **FEBRUARY 2015**



A DE VOS SC

Chairperson of the Enforcement Committee