THE FINANCIAL SERVICES TRIBUNAL

A. CASE NO: A18/2020

AON SA (PTY) LTD Applicant

and

GERALD GORDON First Respondent

FINANCIAL SECTOR CONDUCT AUTHORITY Second Respondent

B. CASE NO: A19/2020

AON SA (PTY) LTD Applicant

and

GERHARD PRETORIUS First Respondent

FINANCIAL SECTOR CONDUCT AUTHORITY Second Respondent

Tribunal panel: LTC Harms (chairman), Adv W Ndinisa and Adv K Magano

For the applicant (AON): Mr P Bracher of Norton Rose Fulbright SA Inc

For the respondent Gordon: Mr L Oosthuizen of N Agnew Inc t/a LNA Attorneys and Conveyancers

For the respondent Pretorius: Ms F Salijee of Salijee Govender van der Merwe Inc

For the FSCA: Mr X Mthethwa

Virtual hearing on 26 February 2021

Application for reconsideration of a decision of the FSCA re debarment of FSRs – is the complainant a person aggrieved by the decision?

DECISION

[1] The applicant, Aeon SA (Pty) Ltd, a registered financial service provider, applies under sec 230 of the Financial Sector Regulation Act 9 of 2017 ("the FSR Act") for the reconsideration of two decisions of the FSCA concerning the misconduct of two of its former employees and financial service representatives, Messrs Gordon and Pretorius.

[2] Section 230(1) states that "a person aggrieved by a decision" of the FSCA may apply for a reconsideration of the decision. In both instances the issue arises whether the applicant qualifies as a person aggrieved.

[3] The acts of misconduct pre-date the amendment by the FSR Act (which came into effect on 1 April 2018) to sec 14 of the Financial Advisory and Intermediary Services Act 27 of 2002 ("the FAIS Act"), August 2016 in the case of Gordon and September 2017 in that of Pretorius and none since. The amended section provides that an FSP must debar an FSR

under prescribed circumstances and within certain time frames. Before the amendment, debarment was dealt under sec 14A, something left to the then registrar. This section was repealed by notice in the Gazette: 1 April 2018 (Government Notice No. 169 in Government Gazette 41549 of 29 March 2018) – see schedule 4 of the FSR Act.

[4] Debarment by the FSCA is now regulated by section 153 of the FSR Act. The FSCA (i.e., the responsible authority for a financial sector law, in this case the FAIS Act)[1] "may" make a debarment order for a specified period in respect of a natural person if the person has (relevant for present purposes) contravened "a financial sector law" in a "material" way. Such an order prohibits the person from providing, or being involved in the provision of, specified financial products or financial services, generally or in circumstances specified in the order.

[5] The FSR Act also introduced the possibility of the imposition of administrative penalties under sec 167. The FSCA "may" impose on the person an appropriate administrative penalty, that must be paid to the financial sector regulator, if the person has contravened a financial sector law (by implication whether in a material way or otherwise). In determining the appropriate penalty, the FSCA must have regard to certain factors and may have regard to further factors. It is unnecessary to list these for present purposes.

[1] The functions of the "registrar" under the FAIS Act now fall under the Authority.

[6] This, for present purposes, means that the FSCA may, in the event of a material contravention of the FAIS Act by an FSR either warn the FSR, impose an administrative penalty of varying amounts, debar the person for varying periods, and suspend the whole or part of the penalty or period of debarment.

[7] The FSCA found that the respondents had contravened a financial sector law (presumably the FAIS Act) and in the case of Gordon it issued a warning and in that of Pretorius it imposed an administrative fine of R25 000. That was on 29 June 2020, post the commencement of the FSR Act, which applies to matters preceding its commencement.

[8] The applicant is dissatisfied with the implicit decision of the FSCA that Gordon and Pretorius had not contravened the FAIS Act in a "material" way not and had not decided to debar them. Hence hence the present application.

[9] For purposes of deciding the question of locus standi, which is a preliminary issue, one must assume the correctness of the applicant's allegations, namely that Gordon and Pretorius contravened the FAIS Act in a material way.

[10] The question then is whether a former FSP and employer can be an aggrieved person if it is dissatisfied with the outcome of regulatory action under sec 153 (or, for the sake of completeness, sec 167) against its former FSR?

[11] The applicant submitted that the term "person aggrieved" is broader than the standing requirement under PAJA. Whether it is broader or narrower is debatable, but it is

at least different, and the jurisdiction of this Tribunal is circumscribed. Parliament is presumed to have known the difference because the jurisdictional threshold applied in terms of the repealed Financial Services Board Act 97 of 1990 to the former Appeal Board. It nevertheless did not make this Tribunal a PAJA review tribunal but an administrative one – its decisions are internal remedies as contemplated in sec 7(2) of PAJA and are subject to judicial review under PAJA (secs 230(2) and 235 of the FSR Act).

[12] The applicant stated in the heads of argument that the decision materially and adversely affects the rights of the public but conceded during argument that this does not give the public or any other FSP the right to apply for reconsideration, which brings one back to the question whether, in the circumstances, the applicant is in a "better" position than any other aggrieved member of the industry or the public.

[13] The meaning of "a person aggrieved" was the subject of several decisions of this Tribunal and its predecessor. The last is the matter of *Michelle Hollenbach* (A7/2020).[2] The essence of the decision is that to qualify the applicant must have a legal grievance, i.e., someone whose legal rights have been infringed by the decision; and that a pecuniary interest is insufficient to qualify. The decision applied the principles laid down in *Francis George Hill Family Trust v SA Reserve Bank*, [1992] 2 All SA 137, 1992 (3) SA 91 (AD).

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[2] https://www.fsca.co.za/Enforcement-Matters/Publications%20and%20Documents/Decision%20-%20M%20Hollenbach%20and%20FSCA.pdf#search=Hollenbach.

[14] The applicant relied on two relatively old judgments in the field of trade-mark law for the proposition that a person aggrieved by the grant of a trade-mark application is someone "substantially interested" in the outcome (*Witwatersrand & District Nursery Trades v Herholdt* 1956 4 SA 362 (T); *Broadway Pen Corporation v Wechsler & Co* 1963 4 SA 439 T), submitting that it is substantially interested in the result of the decision. The trade-mark issue was authoritatively dealt with in *Ritz Hotel Ltd v Charles of the Ritz Ltd*, [1988] 2 All SA 292, 1988 (3) SA 290 (AD). The context is competition law: the infringement of the right to compete. The rule therefore is:

> The persons who are aggrieved are all persons who are in some way or other substantially interested in having the mark removed from the register; including all persons who would be substantially damaged if the mark remained, and all trade rivals over whom an advantage was gained by a rival trader who was getting the benefit of a registered trade mark to which he was not entitled.

The phrase "substantial interest" is not unqualified and it is difficult to draw an analogy between trade mark registrations and debarment proceedings

[15] The purpose of debarment is not to regulate or limit competition or remove a competitor. It is to deal with the consequences of a contravention of the FAIS Act. The applicant's grievance concerns competition. As was stated in the argument:

> Aon is aggrieved by the fact that someone who is, in Aon's submission and according to the finding of the FSCA, continuing to be employed in their industry by their direct opposition without any consequences whatsoever for his conduct.

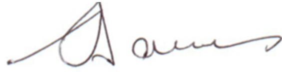
[16] The applicant also submitted that since the FAIS Act requires an FSP to ensure that its representatives comply with the fit and proper requirements, including personal character qualities of honesty and integrity (sec 8A read with sec 6A(2)(a), it somehow is an interested and therefore aggrieved person. Gordon and Pretorius are not its representatives and were not when the complaint was made against them. The applicant was fully entitled and probably required to bring the transgressions to the attention of the registrar once it knew about them but, in that regard, it is nothing more than an informant (in the good sense of the word), a provider of information. It has no legal interest in the outcome.

[17] One can test this with reference to the imposition of an administrative penalty under sec 167. Assume that the applicant felt that the penalty imposed on Pretorius was too low, the rhetoric question is what legal interest the applicant could have had in the imposition of a higher penalty. Returning to sec 153, a similar question could be asked in the event where the applicant was to be dissatisfied with the period or terms of debarment.

[18] Since we conclude that the applicant is not a person aggrieved, it is unnecessary to deal with the other issues raised and the application is dismissed.

Order: The application is dismissed.

Signed on behalf of the Tribunal panel:



LTC Harms (chair)

2 March 2021