IN THE FINANCIAL SERVICES TRIBUNAL

CASE NO: A29/2022

In the matter of:

BRITE ADVISORS SOUTH AFRICA (PTY) LTD Applicant

and

THE FINANCIAL SECTOR CONDUCT AUTHORITY Respondent

Panel: LTC Harms (chair), Adv W Ndinisa and Adv M Holland

For the applicant: Adv JWG Campbell SC and Adv T Dalrymple instructed by Bowman Gilfillan Inc

For the respondent: Adv G-M Goedhart SC and Adv H Drake instructed by Salijee Govender van der Merwe Inc

Hearing: 1 August 2023 virtual

Decision date: 16 August 2023

Re: Reconsideration application in terms of sec 230(1) of the Financial Sector Regulation Act 9 of 2017; sec 65(3) of the Collective Investment Schemes Control Act 45 of 2002; foreign schemes; peremption and waiver

DECISION

1 This decision concerns a reconsideration application filed by the Applicant, Brite Advisors South Africa (Pty) Ltd, in terms of sec 230(1) of the Financial Sector Regulation Act 9 of 2017 ("the FSR Act"), which permits a person aggrieved by a decision (defined in sec 218) of the Respondent, the Authority, to apply for reconsideration of the decision.

2 The application relates to "administrative action" taken by the Authority, dated 26 May 2022.

3 The jurisdiction of the Tribunal is, as it was with the then Appeal Board of the Financial Services Board, when the judgment in *Nichol and Another v Registrar of Pension Funds and Others* [2006] 1 All SA 589 (SCA), 2008 (1) SA 383 (SCA) was delivered.[1] The Court pointed out that the Appeal Board was a specialist and independent tribunal as contemplated in sec 34 of the Constitution:

> "It has very wide powers on appeal, including the power to confirm, set aside or vary the decision of the Registrar against which the appeal is brought; to refer the matter back for consideration or reconsideration by the Registrar in accordance with such directions as the Board may lay down; or to order that its own decisions be given effect to. In addition, it is empowered under section 26(2A) to grant interim relief by suspending the operation or

[1] Decision - MET Collective Investments (RF) (Pty) Ltd v FSCA and another Case No.: A23/2019

execution of the decision appealed against and, under section 26(14), it can make an appropriate order as to costs. The Appeal Board therefore conducts an appeal in the fullest sense – it is not restricted at all by the Registrar's decision and has the power to conduct a complete rehearing, reconsideration and fresh determination of the entire matter that was before the Registrar, with or without new evidence or information."

In short, this Tribunal exercises an appeal jurisdiction of the first category referred to in *Tikly v Johannes NO* 1963 (2) SA 588 (T) 590.

4 The Tribunal has repeatedly stated that it is not a review "court" as defined in the Promotion of Administrative Justice Act 3 of 2000 ('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." We have since said the same about this Tribunal

5 The Tribunal also applies the principle that

> a higher body is not entitled to interfere with the exercise by a lower body 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.

6 It is mentioned at the outset that the conduct that gave rise to the administrative action took place during the period 22 February 2010 to 1 August 2015 when the

Applicant was first known as deVere Investments South Africa (Pty) Ltd and later as deVere SA Acuma (Pty) Ltd. The Applicant was then a fully owned subsidiary of a foreign holding company, for the sake of convenience referred to as the deVere Group, and Mr Nigel James Green was directly or indirectly the sole shareholder of the Group.[2] The local director and CEO, one Featherby, left the company during May 2014, and Green resigned as director during 2015.

7 On 28 November 2019 a foreign company in the Brite Advisors Group acquired the shares in deVere SA Acuma (Pty) Ltd and in due course the name was changed to the present name. The implicated employees had left the Applicant before then and the "inappropriate" business that gave rise to the administrative action had terminated, as said, during 2015. After the change of control, the global Brite Advisors Group business model was adopted.

8 We mention this to emphasise that the contraventions that have been the subject of the administrative action do not reflect on the company as presently owned, constituted or on its present personnel and business practices. That much is common cause and explains the concessions, to which we shall revert, the Authority has made.

9 However, the first "audi" letter (the notification referred to in sec 154) was dated 18 January 2019, and deVere through one of its directors, Mr GA Smith, responded in detail on 31 May 2019 [B61; B4968], and the new management and

[2] His reconsideration application was dealt with:

Decision - Nigel James Green and FSCA

shareholder were fully apprised of all this before the take-over. Mr Smith had, already on 12 December 2017, given much of the same information and made similar submissions in response to the Authority's draft inspection report on 12 December 2017 [Item 1(64) B4915]. So had the persons of interest called as witnesses during the exhausting and exhaustive investigation.

10 The second audi letter of 15 December 2020 and the response of 29 January 2021 are not relevant for present purposes.

THE ADMINISTRATIVE ACTION

11 The administrative action of 26 May 2022 consisted of two parts:

a) a R10 million administrative penalty (inclusive of costs) in terms of section 167(1) of the FSR Act and

b) withdrawal of Brite's FSP licence, under FSP No. 23719 (Category I and II) in terms of section 9(1) of the Financial Advisory and Intermediary Services Act, No. 37 of 2002 ("FAIS Act").

12 Section 167(1)(a) of the FSR Act provides that the Authority may impose an appropriate administrative penalty on someone who has contravened a financial sector law and sec 9(1) of the FAIS Act allows for the withdrawal of the licence of a financial services provider (such as the Applicant) under similar circumstances. In both instances and for present purposes the jurisdictional fact for administrative action is the contravention of a financial sector law (listed in Schedule 1 of the FSR Act), one of which is the Collective Investment Schemes

Control Act 45 of 2002 ("CISC Act") and the other the FAIS Act and its regulations and notices.

13 The administrative sanctions arose from conduct by deVere that was, it was said, in contravention of the following:

a) Section 65(3) of CISC Act and Condition 6 of deVere's licensing conditions,[3] imposed in terms of section 8(4) of the FAIS Act by promoting and soliciting unapproved Collective Investment Schemes ("CISs") via Qualified Recognised Overseas Pension Schemes ("QROPS");

b) Regulation 3(a) of the Financial Advisory and Intermediary Services Regulations Government Notice 879 in Government Gazette 25092 of 13 June 2003 [not disclosing the fees in respect of the QROPS];

c) Sections 2 [excessive fees of the QROPS clients], 3A(1)(b)(ii), 3(1)(a)(vii), 3(1)(b) [conflict of interest], 7(1)(c)(iii)(bb), 9(1)(a)-(d) [record keeping] and 21 [waiver of rights] of the General Code of Conduct for Authorized Financial Services Providers and Representatives.

THE RECONSIDERATION APPLICATION

14 The application for reconsideration was filed on 26 July 2022, and it was accompanied by a suspension application in terms of sec 231 of the Act seeking suspension of the penalty and withdrawal of the licences pending the finalisation of the reconsideration application.

[3] We accept that this may be a splitting of charges, but it has no material effect on the result.

15 The withdrawal of the licences was suspended, and it was noted by the Tribunal that the financial penalty was automatically suspended in terms of sec 170.

16 It is, unfortunately, necessary to quote (with slight redaction) at length from the application for reasons that will become clear later.

- The applicant seeks a reconsideration of the Decisions imposed by the FSCA on the applicant and thus seeks orders:

    a. Setting aside the Administrative Penalty and substituting it with a reduced amount of no more than R3 665 748,00; and

    b. setting aside the Withdrawal Sanction and remitting it to the FSCA for further consideration.

- The applicant does not contest the findings by the FSCA that under the applicant's previous names (and owned by another shareholder and run by other individuals), it contravened the [listed provisions].

- The applicant, in its current form and under its current management and ownership, does not dispute the merits of the findings as to the aforementioned contraventions primarily because it cannot comprehensively address the merits since the impugned conduct took place years before its new shareholder, current board and management were installed.

- Nonetheless it is aggrieved by the Decisions in relation to sanctions and consequently makes this application.

- Insofar as the Administrative Penalty is concerned, the applicant accepts that an administrative penalty is an appropriate sanction and it accepts that it should be penalised.

- The applicant does not seek to minimise the alleged contraventions nor suggests that they are minor technical misdemeanours.

- The Withdrawal Sanction potentially and unfairly penalises other members of the Brite Advisors Group carrying on business in other jurisdictions, as the Withdrawal Sanction has the effect of causing reputational damage to the Brite Advisors Group and/or may have impact on the Brite Advisors Group's future applications for licences in other jurisdictions.

THE SUPPLEMENT

17 The application was set down for hearing on 17 May 2023. The Applicant did not file its argument on the required date and the Authority then filed concise submissions on 24 April, arguing that the only issues for determination were whether the Authority's proposed consent order (which had been the subject of correspondence) should be granted. The Authority had consented to the relief sought in the application, namely, the setting aside of the withdrawal of the licences and setting aside the financial penalty and substituting it with a penalty of R3 665 748.00.

18 Two days later the Applicant filed two unsigned applications and a set of heads of argument. The one application was entitled Supplementary Reasons for

Reconsideration of the Decision of the Financial Sector Conduct Authority in terms of Section 230 and the other was for condonation for the late filing.

19 The Supplementary Reasons were supposed to have been filed in accordance with the Tribunal Rule 14, which states that

> The applicant may, within 10 days of the date of receipt of the decision-maker's underlying documents and further reasons (if any) referred to in 14 above, by notice amend or augment the grounds on which the application is based, if necessary.

20 This application was not timeously filed but condonation was sought in the same document in relation to the non-compliance. Whether the application amended or augmented the reconsideration application or whether the Applicant sought to apply for reconsideration of "other" decisions of the Authority, which had to be done within 30 or 60 days of the decisions in terms of sec 230 of the FSR Act, are questions that arise but need not be answered in the light of what follows.

21 There are also Tribunal rules that deal with the submission of new evidence (Rules 22 to 24) which have not been complied with or in respect of which no condonation was sought, namely that

- 22: An application for submission of further evidence is filed in terms of section 232(5) of the Act.
- 23: The application must be on affidavit and be filed with the secretariat and all other parties to the proceedings as soon as the particular party becomes aware of the existence of the evidence.

- 24: The application must show good cause including the reason why the evidence was not submitted earlier, its likely credibility, and its relevance to the decision.

22 All this indicates that the Applicant requires condonation on many fronts because the FSR Act (sec 230(3)) states that reconsiderations applications must be made in accordance with the Rules of the Tribunal.

THE REJECTION AND REVERSAL

23 The Applicant, in no uncertain terms, rejected the Authority's "acceptance" of the Applicant's "offer" as expressed in the original application.

24 The primary application now is, quoting counsel's argument,

> "for reconsideration [of the Authority's]
>
> - Findings that for the period 2010 – 2015 it contravened the [listed financial laws] ('the Findings') and
>
> - Decisions to impose an administrative penalty of R10 million (inclusive of costs) . . . and to withdraw the applicant's Financial Services Provider licence."

25 In the alternative, should the "Findings" not be set aside, the Applicant asks that both the penalty and the withdrawal should be set aside and remitted to the Authority for reconsideration.

26 The Applicant, accordingly, is in essence seeking to "dispute the merits of the findings as to the aforementioned contraventions", something directly in conflict with its reconsideration application.

27 Counsel's argument summarised the reasons for the change of heart

- First: Consideration of the Record received on 25 August 2022 revealed that despite its earlier attitude of not contesting the merits of the findings by the FSCA, there were fundamental grounds upon which the findings of the FSCA could and should be challenged.

- Second: when the applicant brought its reconsideration application it did not know that the adverse consequences in jurisdictions outside of South Africa would manifest themselves. Had the applicant known that the findings in South Africa would damage its reputation to the extent that its fellow group companies would lose prospective clients and transactions in overseas jurisdictions, even though it had no knowledge of the facts underlying the findings, it would have contested the findings.

28 The first consideration is, subject to one possible qualification, without merit. The "fundamental grounds" had been raised by deVere to the Applicant's knowledge and debated at length with the Authority and were dealt with by the Authority in its determination (see the references given above). For instance, the attack on Mr Featherby's role was always there, if not expressed in the same terms. (The "qualification" relates to the jurisdiction of the Authority in terms of sec 65(3) – the Applicant claims to have found a new argument, which will be dealt with later.)

29 The second consideration is not really something new. The Applicant knew that the decision of the Authority could or would have adverse consequences on its business and the business of its associated companies. The extent may have surprised the Applicant, but the threat was always there and recognised in the reconsideration application.

30 The problem is that we are not concerned with the Applicant's motives in limiting the scope of its reconsideration application but with its objective conduct, which was clearly enunciated in the application as filed. We refer in this regard to ***Venmop 275 (Pty) Ltd and Another v Cleverland Projects (Pty) and Another* (2014/14286) [2015] ZAGPJHC 176; 2016 (1) SA 78 (GJ)**

> [25] An unsuccessful litigant who has acquiesced in a judgment cannot appeal against it. The onus of proof rests on the person alleging acquiescence and in doubtful cases it must be held not to be proven. Although peremption has its origin in policy considerations similar to those of waiver and estoppel, the question of acquiescence does not involve an enquiry into the subject of state of mind of the person alleged to have acquiesced in the judgment. Rather it involves a consideration of the objective conduct of such person and the conclusion to be drawn therefrom [citations omitted].
>
> [26] Although the doctrine of peremption has its genesis in relation to appeals, it has been extended to applications for rescission of default judgment [citations omitted], and to the common law right of judicial review in respect of the exercise of statutory authority *Liberty Life*

Association of Africa v Kachelhoffer NO and Others 2001 (3) SA 1094 (C). Although there appears to be no precedent for peremption in the context of an application to set aside an arbitration award, there appears to be no reason, either in policy or principal, not to apply the doctrine of peremption to such a right.

31 To this can be added *RAF v Mothupi* 2000 (4) SA 38 (SCA) at para 15 where the Court said that waiver is a question of intention. The starting point therefore is invariably the intention of the party who is said to have waived the privilege. The Court went on to explain the test of waiver in the following terms:

> The test to determine intention to waive has been said to be objective . . . . That means, first, that intention to waive, like intention generally, is adjudged by its outward manifestations . . . ; secondly, that mental reservations, not communicated, are of no legal consequence . . . ; and, thirdly, that the outward manifestations of intention are adjudged from the perspective of the other party concerned, that is to say, from the perspective of the latter's notional alter ego, the reasonable person standing in his shoes.' [Citations omitted.]

32 We do not believe that the considerations mentioned in ***Minister of Defence and Others v South African National Defence Force Union and Another (161/11) [2012] ZASCA 110*** apply. The Applicant took a commercial decision deliberately, and it unequivocally expressed it. It is not a matter of implied or tacit election or acquiescence, and no public interest or constitutional issues arise.

QROPS and SEC 65(3)

33 We assume that a party cannot waive a defence of lack of jurisdiction,[4] the main stay of the argument in the Supplementary Reasons and counsel's submissions before us. The argument related to QROPS. Before dealing with section 65 of CISC Act, we deal with the factual context. The general scheme of things is not in dispute and for the sake of convenience we use the exposition of the Authority in the final investigation report.

34 QROPS refers to Qualified Recognised Overseas Pension Schemes. QROPS Companies in Gibraltar and Malta offered these QROPS products. deVere marketed them to their clients. These clients were United Kingdom citizens living in South Africa that have "frozen" pension benefits in the UK. To qualify for a QROPS, the UK citizens had to be resident outside their home country. Before April 2006, these expatriates could not transfer their UK pension to another country. Post April 2006 UK pension benefits became transferable to certain countries. With the assistance of deVere, these clients invested in the QROPS, effectively transferring their pension benefits to either Gibraltar or Malta. These investments offered the deVere clients tax and investment benefits. The QROPS had to be on the UK recognised list in terms the rules of HMRC (Her Majesty's Revenue and Customs). The clients received advice from the deVere advisor on

[4] Despite the decisions in

Decision - Nigel James Green and FSCA and

Decision - Viceroy Research Partnership LLC v FSCA and Others https://www.fsca.co.za/Enforcement-Matters/Publications%20and%20Documents/Decision%20-%20Viceroy%20Research%20Partnership%20LLC%20v%20FSCA%20and%20Others.pdf;

the benefits of the QROPS. deVere also conducted the needs analysis and risk profile. The client completed the application forms prescribed by the QROPS companies. The advisor sent the completed application forms as well as a bundle of supporting documents to the deVere Group office in Malta, for approval. The Malta office then approved and forwarded the documents to the relevant QROPS companies. The QROPS companies verified whether HMRC rules were complied with, and whether it was possible for the client to move their pension out of the UK. The QROPS companies registered a trust in the name of the clients and thereafter arranged with the client's previous employer in the UK to transfer the pension monies directly into the QROPS company's bank account. These individual pension trusts in the name of the clients were managed by the QROPS companies. Once the pension trust was created, the deVere advisor provided advice to the client on the life bond provider. A life insurance policy was then purchased in the name of the pension trust, specific to the investor whose funds were utilised. This was done as a result of the pension rules governing QROPS which required the policy to be held in the name of the pension trust, and not the client. According to deVere, this was in accordance with the instructions received from the client communicated to the QROPS company through deVere's advisor. The policy is a "whole of life" policy (linked investment). The pension trust was the (100%) policyholder. The client is the life assured and nominated his or her beneficiaries. Once the life bond provider issued the policy to the QROPS company, it bought units in the unapproved CISs such as one of the Strat Growth funds. The units purchased belonged to the life bond provider. And the unapproved CISs bought and sold the underlying assets (equities and bonds).

35 Some of these unapproved CISs suffered heavy losses (one was liquidated) which had serious consequences for the pensioners, and this led to complaints which may have led to the inspection of deVere by the Authority.

THE JURISDICTIONAL ISSUE

36 Section 65 of the CISC Act is contained in PART VIII of the Act, which deals with "foreign investment schemes", reads as follows:

> **Restrictions on foreign collective investment scheme to carry on business in Republic**. -
>
> **(**1) The registrar may approve an application by the manager or operator of a foreign collective investment scheme to solicit investments in such scheme from members of the public in the Republic . . .
>
> (2) A scheme approved in terms of subsection (1) must, . . . be regarded as a financial institution . . ..
>
> (3) A person who solicits investments in a foreign collective investment scheme which is not approved in terms of subsection (1) is guilty of an offence and liable on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

37 "Collective investment scheme" is defined as:

> a scheme, in whatever form, including an open-ended investment company, in pursuance of which members of the public are invited or permitted to invest money or other assets in a portfolio, and in terms of which—

(a) two or more investors contribute money or other assets to and hold a participatory interest in a portfolio of the scheme through shares, units or any other form of participatory interest; and

(b) the investors share the risk and the benefit of investment in proportion to their participatory interest in a portfolio of a scheme or on any other basis determined in the deed,

but not a collective investment scheme authorised by any other Act.

38 The term "solicit" is defined in sec 1 to mean any act to promote investment by members of the public in a collective investment scheme.[5]

39 The Applicant submitted that as appears from the structure of the QROPS they were offshore pension benefits and therefore a financial product beyond the Authority's jurisdiction and that the main issue is whether the regulatory reach of the Authority, in terms of the CISC Act, extends to UK pension funds and structures, held offshore, and permitted and regulated by UK and EU law.

40 Posing the wrong question inevitably leads to the wrong answer. It is self-evident that the Authority does not regulate QROPS and the underlying CISs. Section 65(3) does not deal with regulation. The regulatory powers are to be found in sec 65(1). The FSR Act of 2017, on which the Applicant relied for much of the argument, did not exist at the time of the contravention (2010 to 2015). The Registrar was the regulating authority and monetary enforcement was under sec

[5] Decision - 36ONE Asset Management (Pty) Ltd v FSCA.

6A of the Financial Institutions (Protection of Funds) Act 28 of 2001 and under the FAIS Act withdrawal was done by the FAIS Registrar.

41 Read in context with chapter VIII and ss (1), and even read on its own, ss (3) is not concerned with the regulation of foreign platforms and structures. It simply states that one may not in South Africa solicit investment in an unapproved (i.e., unapproved under ss (1)) foreign CIS. If you wish to solicit such investment you have to obtain prior approval from the Authority. Extra-territoriality does not arise – the prohibition is territorial.

42 To read into the sub-section the exception "save to foreign nationals living in South Africa" or "save to beneficiaries of QROPS" is as far-fetched as the submissions that such persons are not "members of the public" within the meaning of the phrase in the definition of "solicit". They are members of the public whilst in the country.

43 Beneficiaries of QROPS in South Africa were free to invest in unauthorised foreign CISs – to solicit them to do so in South Africa is another matter. Whether those structures were subject to foreign regulation is also irrelevant.

44 We therefore agree with the Authority that the question was not whether it had jurisdiction over or regulated QROPS or the unapproved CISs at the end of the process but whether deVere solicited or promoted investments in unapproved CISs, something we deal with in the next section although it ought not to arise because of the Applicant's admission of fact in the reconsideration application. We however deal with the issue to show that the admission was not incorrectly made.

SOLICITATION

45 The Authority found that

> "deVere advised its clients to invest their pension funds with the QROPS Companies (creating individual pension trusts) and facilitated the process. In addition, deVere advised its clients on the actual unapproved CIS investments (interfacing with the life bond provider) and facilitated this process. In fact, they made recommendations to the clients, based on risk profiles and on the spread in the different unapproved CISs."

46 The best evidence on the issue is not the oral evidence of those implicated but the documentary evidence emanating from deVere. In the "Summary of South Africa Legislative Environment and Impact on deVere Operations" [B3654] (the "white list") deVere recognised that it is a criminal offence to solicit unapproved foreign collective investment schemes in South Africa and "at the fund level [the lowest level] we are restricted by the CISC Act" and "most of our funds (especially the structured notes) are unapproved."

> "Ultimately we have to rely on the pension trustees (as they are ultimately owners of on the funds on behalf of the member) and the member themselves to decide on the bond and investment funds. With the Bond level the client needs to select which bond made available by the trustees is most suitable. deVere SA cannot recommend a provider to the client. With the fund levels, the client's risk profile is the main focus point. Based on that the client is then given a basket of select suitable funds that meet this risk profile."

47 That was not what happened if one then turns to the deVere "Group Commission Schedule" [B3587], also referred to as the "white List", which sets out the commissions levied relating to the products approved by the deVere Group. It states:

> "In order to improve our QROPS business for our clients and indeed yourselves, we are going to phase-in a Portfolio Management Service. At the point of advice, you [the broker] will need to select from the enclosed fund options, and have it signed by your client/s. We will then be able to credit you with the correct amount of cc depending on the choice that you and client make. . . . This will ensure that our clients will always have a diversified portfolio and stay within the QROPS / Pension rules [B 3603]."

48 The investment process is set out, providing for broker advice on the whole structure, including the CISs [B 807 to 808]:

> **3rd Meeting**:
>
> Presentation and discussion of:
>
> - Investment proposal
> - Client Advice Record (this is either accepted or will be amended based on above discussion/presentation)
>
> Should the client find the proposal/advice record satisfactory to their requirements
>
> - Relevant applications/dealing instructions are completed
> - FICNKYC documents obtained
> - Client Risk Profile confirmed again

> The process for selection of investments will all be accordance to the client risk profile and the deVere (Nigel Green) approved "white list" of funds.

49 The submission that the white list was only for disclosure of commission is therefore incorrect. As Mr Green explained, the broker had to give advice ("suggestions") on the underlying investment because that was a requirement of QROPS and as the evidence shows, it was done because of the belief in the company that the FSB (now the Authority) did not apply a see-through policy.

50 Respondent's counsel dealt with the evidence and paperwork of affected clients which show that deVere more than solicited investments in the unapproved CISs. The only argument in response was that they were all QROPS clients, which misses the point.

51 One may also refer to the payment of commissions. The white list shows that the CISs paid commission on the investment in the CIS structure. This was paid to deVere Group who, in turn, paid 70% to the Applicant. That amounted to close to R600 million over the years that was divided between the company, management and the brokers concerned. It shows a clear link between the CIS and deVere – and what cannot be done directly cannot be done indirectly.

THE PLATFORM

52 The argument (quoting counsel's written submissions) was this:

> There is no dispute that the "click through button" amounted to solicitation for unapproved CISs' in the sense contemplated by this Tribunal in the 36One matter. The issue is responsibility, and we submit that Featherby deceived

deVere and that it would be unfair to make a finding against deVere of something that it had no knowledge of, and no means of preventing.

53 The argument in the Supplementary Application went wider and became a rule of law issue amounting to this: Featherby was responsible for the button; he lied to deVere that it had been sanctioned by the FSB; he was treated lightly by the Authority, which did not deal with this aspect expressly in the administrative action against him; and he did it on a frolic of his own.

54 It is unclear who is meant by "deVere" in this instance. Locally, Featherby was the CEO and the local director. There is no evidence that he misled Green; he may have misled the deVere Group, who had designed the platform in Malta, but that is another matter.

55 The argument, in the context of the contravention is not understood. The company is vicariously liable for the acts of its directors. That is what the FSCA had found and what the Applicant had conceded. The surprising submission was that this trite principle does not apply in administrative law. Had that been the position the whole administrative action against the Applicant would have been misplaced.

56 We dealt with this one further example to illustrate the lack of merit in the "new" points.

CONCLUSION ON "FINDINGS" AND CONDONATION

57 We conclude that the Applicant failed to make out a case on condonation, first because of peremption/waiver, second, because of lack of a reasonable

explanation; and third, lack of merit of the newly discovered jurisdiction law point.

THE WITHDRAWAL DECISION

58 The Authority "conceded" prior to the first set-down that the withdrawal should be set aside. Despite Ms Goedhart's objection, the concession by necessary implication meant that by withdrawing the licences the Authority fell foul of the test for a valid exercise of discretion. The Authority knew long before the withdrawal that all had changed at the Applicant (as set out at the outset) and that the Authority had expressed its satisfaction by, inter alia, issuing like licences to the "same people" under Brite#2, a parallel company.

59 We agree and set the withdrawal decision aside. Although the FSR Act requires of us to remit the matter to the Authority, that would, in the circumstances, be a fruitless and wasteful exercise, and we do not issue such an order.

THE PENALTY DECISION

60 Here, too, the Authority by necessary implication conceded that the penalty of R10 million could for the same reasons not be justified. As mentioned, the Applicant in the reconsideration application, whilst accepting that an administrative penalty is an appropriate sanction, submitted that (assuming the findings stand) the appropriate amount would be R3 665 748.00, and that the Authority accepted the suggestion.

61 The Applicant explained its calculations in these terms:

> Despite the AFS reflecting some of the difficulties of the applicant, it is important to note that the applicant did produce a profit for the year ended 31 December 2021, of R3 665 748,00; grew its nett asset value to R10 885 961,00; and generated trade receivables of R17 774 618,00.
>
> In light of the submissions made above, the applicant respectfully applies to the Financial Services Tribunal for the remission of the Administrative Penalty to the amount of no more than R3 665 748,00. This equates to the applicant effectively relinquishing its full profits for the past financial year. The applicant respectfully submits that this will enable the FSCA to demonstrate a robust but fair approach to the fair treatment and protection of financial customers, balanced with the safety and soundness of financial institutions, as contemplated in sections 7 and 57 of the FSR Act.

62 The Supplementary Reasons did not deal with the issue but the written argument states that "having regard to the remarkably changed circumstances, we submit that there should have been no Administrative Penalty at all" and that it should be set aside and remitted to the Authority.

63 The "remarkably changed circumstances" were set out in the reconsideration application and led to the "offer". Nothing materially new transpired. It is not a case of the sins of the father being visited on the child.

64 An administrative penalty stands on a different footing than the withdrawal of a licence. The penalty deals with the past, withdrawal affects the future.

65 Remitting the penalty to the Authority will not solve any problem and will be an exercise in futility especially since we have not upset any material “finding” of the Authority. We therefore decided to exercise our own discretion in the context of factors listed in sec 167. This is not a mathematical exercise and ticking boxes takes one not very far but here the material factor is the Applicant’s original submissions and the Authority’s acquiescence.

COSTS

66 The Tribunal may make a costs order in exceptional circumstances against an unsuccessful party. The Authority asks for such an order because of the “last-minute substantive and reinvention” of the Applicant’s case, which required the Authority to expend additional and significant resources to respond.

67 The problem confronting us is to isolate the costs caused by these exceptional circumstances. It appears to be fair to hold that these are the costs (including the costs of two counsel) that were incurred by the Authority between 24 April and 26 July, and that the Applicant should pay 2/3 of those costs.

ORDER

A. The condonation application is dismissed.

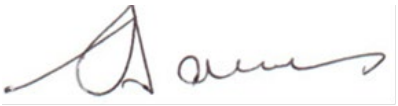
B. The reconsideration application is upheld to the following extent:

    a. The withdrawal of Brite's FSP licence, under FSP No. 23719 (Category I and II) in terms of section 9(1) of the Financial Advisory and Intermediary Services Act, No. 37 of 2002 is set aside.

b. The R10 million administrative penalty (inclusive of costs) in terms of section 167(1) of the FSR Act is set aside and replaced with an administrative penalty of R3.5 million payable as follows: R500 000 on 31 August 2023; R1.5 million on 30 November 2023; and R1.5 million on 28 February 2024.

C. The Applicant is to pay the Authority's legal costs (including the costs of two counsel) taxed on the High Court scale and incurred during the period 26 April to 26 July 2023.

Signed on behalf of the Tribunal Panel.



LTC Harms (chair)

16 August 2023.