APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

A45/2015

In the matter between:

LPJ FINANCIAL SERVICES (PTY) LTD	First appellant
L A TEIXEIRA (AKA ICJ TEIXEIRA)	Second Appellant

and

THE REGISTRAR OF FINANCIAL SERVICES PROVIDERS	Respondent

Appeal panel: LTC Harms (chair), Mr L Makhubela and Mr G Madlanga

For the appellants: Adv AG Ungerer instructed by Tees Attorneys

For the respondent: Mr BJJ Bredenkamp

Hearing: 22 June 2016

Judgment: 29 June 2016

Summary: Financial Advisory and Intermediary Services Act37 of 2002 sec 1– meaning of "advice".

JUDGMENT

1 The Registrar of Financial Service Providers withdrew the authorisation of the first appellant (LPJ) to render financial services in terms of sec 9 of the Financial Advisory and Intermediary Services Act37 of 2002, and, under sec 14A, she debarred the second appellant (Ms Teixeira, LPJ's key individual, sole shareholder and representative) for five years from so doing. This is an appeal against that decision.

2 The grounds of the Registrar's decision were that (a) Ms Teixeira no longer meets the character qualities of honesty and integrity contemplated in terms of section 8 of the Act; and (b) Ms Teixeira failed to comply with paragraphs 2, 8 and 9 of the General Code issued under the Act.

NON COMPLIANCE WITH THE CODE: DID MS TEIXEIRA GIVE ADVICE?

3 Mr and Dr Heckroodt (the Heckroodts) lodged a complaint with the FAIS Ombud during 2014 against Ms Teixeira. They alleged that Mr Heckroodt, on her advice and during 2010, invested R525 000 as collateral in respect of the purchase and sale of sugar in Brazil. Mr Heckroodt never received his capital back or any returns despite Ms Teixeira's assurances that the investment carried no risk. The complaint was time-barred and the Ombud dismissed it on that ground.

4 Thereafter, Heckrood laid a complaint with the Registrar. The essence of the complaint was that that Teixeira had advised him of the sugar deal as an investment opportunity; that he had withdrawn funds from his "Momentum" investment to invest in the sugar deal; that the deal went sour and that he had lost his investment; and that she, as his

financial adviser, had failed him as she "apparently" had not performed the necessary due diligence for the proposed sugar investment.

5 This led to a lengthy debate between the Registrar and Ms Teixeira based on the accusation that she had provided advice in connection with the sugar investment without having complied with the mentioned provisions of the Code.

6 When the Registrar realised that the sugar deal was not a "financial product" as defined in the Act and that the complaint was in that regard misconceived the Registrar shifted her focus to an email of 5 October 2010 which, according to the Registrar, amounted to "advice" to Mr Heckroodt to withdraw the sum of R525 000 from an existing financial product (i.e. the Momentum investment) in order to invest it in the sugar transaction.

7 It was all along not an issue that Ms Teixeira had not taken steps to determine the suitability of her "advice" (section 8 of the General Code) and obviously did not have any record of advice (section 9 of the General Code) for either the sugar transaction or the Momentum withdrawal. The issue then is whether she had given "advice" within the meaning of the Act in respect of the withdrawal of the Momentum investment.

8 It is not without significance that Heckroodt did not allege that she had given him advice in relation to the Momentum withdrawal, and that she insisted throughout that she had not. As said, the Registrar wishes to draw a contrary conclusion from the email of 5 October read against its background, namely, the preceding emails of 22 and 28 September.

9 The email of 22 September deals with the "investment opportunity" offered by the sugar transaction. It mentioned that it was a structured finance deal and it gave

particulars of the amount required, the investment period, the rate of return, and ended with a statement that she thought that it would be a good (investment) opportunity. Nothing more was said.

10 The object of the email of 28 September was to provide "the full details of the [sugar] trade". It contains the statement that there was no risk in the transaction and that since Ms Texteira believed that it was a great opportunity she had invested her own funds.

11 There is no reference as to the method of financing and no mention of any existing investment of Heckroodt or its liquidation to finance the deal. According to her, Heckroodt then asked her to look at his portfolio and suggest which investment could be used to provide the funding.

12 In response she prepared an update of his insurance portfolio and sent the schedule to him with the email of 5 October. In the body of the email she dealt with two policies and made some calculations to assist him. The first was in respect of a Liberty Multi Access Endowment. (The Registrar did not suggest that this information contained "advice" and more need not be said about it.)

13 The second is the Momentum investment which was detailed in the schedule. About this she wrote:

> "I have also had a look at the Momentum Investment (item 7) on the attached schedule: According to Thulani at Momentum this is a flexible product which means that you can add and redeem at will. This is an option that you can consider as an alternative to the (Liberty) Multi Access."

14 Heckroodt subsequently chose to withdraw funds from Momentum.

15 The question then is whether Ms Texteira gave advice which triggered the provisions of the Code referred to. In this regard it is necessary to bear in mind that the advice in respect of the sugar transaction should not be conflated with advice in respect of its financing – a distinction that the Registrar's argument tended to ignore.

16 The Registrar relied on the definition of the term "advice", which, in terms of sec 1(1) means "subject to subsection (3) (a), any recommendation, guidance or proposal of a financial nature furnished, by any means or medium, to any client or group of clients—(d) on the variation of any term or condition applying to a financial product, on the replacement of any such product, or on the termination of any purchase of or investment in any such product." (Paras (a) to (c) do not arise on the facts of the case.)

17 Since it was apparent that the emails, singularly or jointly, did not contain any recommendation or proposal, the Registrar was driven to submit that Ms Teixeira had "guided" Heckroodt to terminate his Momentum investment.

18 This argument failed to have regard to the express qualification of the definition, namely that it is subject to the provisions of sec 1(3)(a), which provides (to the extent relevant) that "for the purposes of" the Act, "advice" does not include "factual advice" given merely in the form of "objective information" about a particular financial product; or an analysis or report on a financial product without any express or implied recommendation, guidance or proposal that any particular transaction in respect of the product is appropriate to the particular investment objectives, financial situation or particular needs of a client.

19 The effect of the two provisions read together is that "advice" falling under (3)(a) cannot amount to advice under the definition in ss (1). In other words, if factual advice given in the form of objective information about a particular financial product would guide a client to say purchase or terminate an investment, it is not "advice" as defined in ss (1).

20 Also, an analysis on a financial product "without any express or implied recommendation, guidance or proposal" that any particular transaction in respect of the product is appropriate to the particular investment objectives, financial situation or particular needs of a client is not covered. The email of 5 October described the facts concerning two financial products. It did not express any opinion or preference and it left it entirely to the client to make an election, if he so chose. In other words, the client was metaphorically at a fork in the road. Ms Teixeira describes the two routes in factual terms. She did not give any assistance as to the route that should be taken. She did not express any predilection but left it to the client to pick one of the roads. In other words, she gave no "guidance" – to "guide" means to show the way.

21 We accordingly find on the facts of the case that the emails read together did not amount to advice which required compliance with the Code.

22 We therefore conclude that the Registrar had erred in finding that Ms Teixeira had given advice to Heckroodt in conflict with the provisions of the Code.

DOES MS TEIXEIRA NO LONGER MEET THE CHARACTER QUALITIES OF HONESTY AND INTEGRITY?

23 The Registrar's alternative (actually main) ground for disbarment is the finding that Ms Teixeira attempted to mislead the Registrar by stating that that she had never been the financial adviser of the Heckroodts when in fact she had been their adviser and intermediary.

24 It is not necessary to deal with all the points made by the Registrar in her decision and we concentrate on the submissions made on her behalf by Mr Bredenkamp. The thrust of his argument was based on the assumption, which we have found to be wrong, that Ms Teixeira had given "advice" in respect of the Momentum withdrawal. In the light of our earlier finding the substrate of this argument falls away. In any event, she disclosed the full facts, including the emails from the beginning to the Registrar.

25 A further point that can immediately be dispensed of relates to her provision of intermediary services to the Heckroodts. This she disclosed already in the second paragraph of her response to the Ombud and was repeatedly admitted in her attorney's responses to queries from the Registrar.

26 The last point made by the Registrar relates to the inference drawn from documents that she in the past had given financial advice to the Heckroodts. This fact, too, was disclosed in the second paragraph of her response to the Ombud.

27 We find the proposition on which the Registrar's case is based incomprehensible. It is namely that someone who discloses all the facts and then draws an incorrect conclusion from them, makes a fraudulent or dishonest misrepresentation, even when that person qualifies the inference with "in my view".

28 The problem is that the Registrar did not appreciate the context of her denial. She made it clear that because of the personal relationship between her and the Heckroodts she was not formally appointed as their financial adviser and she regarded that all was done because of that relationship and not because of a professional one. That she was wrong is beside the point. She was not debarred on the basis of incompetence.

29 This brings one to the question of motive. The Registrar argued that her denial was prompted by her failure to have complied with the Code in respect of either the sugar transaction or the Momentum withdrawal. The problem with the submission is that it is not based on any allegation in the papers.

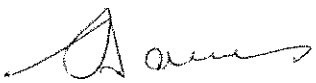
30 Mr Bredenkamp also sought to argue that Ms Teixeira lacked integrity and honesty because of the conflict of interest between her and the Heckroods in respect of the sugar transaction; that she failed to prove that she, too, had lost money; that she had made misrepresentations to the Heckroodts in connection with the sugar transaction in respect of her own involvement and it being risk-free; and that her attorney had misstated the reason for the Ombud's dismissal (as if the Registrar did not know the facts and the attorney had reason to mislead the Registrar). These matters were not foreshadowed in any communication from the Registrar and fairness demands that a provider must be alerted prior to the decision of the material facts on which the decision may be based. Cherry-picking after the event is not allowed.In this case the Registrar did not even consider these matters and Ms Teixeira was not called upon to deal with them.

CONCLUSION

31 In the result the appeal is to be upheld. As to costs, the appellants did not seek to justify their request for a cost order considering that the Registrar acted in an official capacity and it therefore not necessary to consider the matter.

THE APPEAL OF THE APPELLANTS IS UPHELD AND THE DECISION OF THE REGISTRAR OF 20 NOVEMBER 2015 IS SET ASIDE.

Signed on behalf of the panel on 29 June 2016



LTC Harms (Chair)