THE FINANCIAL SERVICES TRIBUNAL

A7/2020

In the matter between

MICHELLE HOLLENBACH Applicant

And

THE FINANCIAL SECTOR CONDUCT AUTHORITY Respondent

APPLICATION FOR THE RECONSIDERATION OF REFUSAL OF AN APPLICATION FOR REGISTRATION AS FINANCIAL SERVICE PROVIDER – PERSON AGGRIEVED – KEY INDIVIDUAL -

INTRODUCTION

1. A company, K2019197833 (Pty) Ltd, trading as "Bouwen" (or whose name may have been changed to Bouwen Engineering (Pty) Ltd), applied for an authorization to do business as financial service provider in terms of sec 8(1) of the Financial Advisory and Services Act 37 of 2002 ("the FAIS Act"). It wishes to conduct the business of underwriting manager in relation to short-term (non-life) insurance in the construction and engineering field, and for this purpose intends to enter a binder agreement with some insurer once the licence is granted. The Authority dismissed

the application and this application for reconsideration followed. The grounds were later augmented.

2. The reason for the application for a licence is that under sec 7(1)(a), a person may not act or offer to act as a financial services provider unless such person has been issued with a licence under section 8.

3. Section 8(1), in turn, states that an application for an authorisation referred to in section 7 (1) must be submitted to the Authority in the form and manner determined by the Authority, and be accompanied by information to satisfy the Authority that the applicant complies with the fit and proper requirements.

4. In addition, if the applicant is a partnership, trust or corporate or unincorporated body, the application must be accompanied by additional information to satisfy the Authority that every person who acts as a key individual of the applicant complies with the fit and proper requirements for key individuals in the category of financial services providers applied for to the extent required for such key individual to fulfil the responsibilities imposed by the Act.

5. The application was dismissed because the Authority was not satisfied that Mrs Hollenbach, the present applicant, who is Bouwen's nominated key individual, complied with the fit and proper requirements for key individuals because, the Authority found, she lacks the personal character qualities of honesty and integrity.

6. Mrs Hollenbach applies for the reconsideration of the decision under sec 230(1) of the Financial Sector Regulation Act 9 of 2017 ("the FSR Act") because, she alleged, she is a person aggrieved by the decision because it has infringed her legal rights. She identifies herself as the key individual and chief executive officer of Bouwen. Bouwen itself does not apply for reconsideration although the decision was made in relation to its application and not one by Mrs Hollenbach.

PERSON AGGRIEVED

7. In support of the contention that she is a person aggrieved, she relies on *Durham v Registrar of Financial Service Providers* (29 April 2005),[1] a decision of the Appeal Board of the Financial Services Board as constituted under the repealed sec 26 of Act 97 of 1990. The facts, as far as the meaning of the term "person aggrieved" is concerned, are identical: the question there was whether the nominated key individual was an aggrieved person entitled to appeal where an application for registration of a company as FSP is dismissed because the nominated key individual was found not to be a fit and proper. The Board said:

> **"The decision of the registrar was that appellant did not measure up to the requirements in respect of personal qualities of honesty and integrity required in terms of Section 8 of the FAIS Act. As appellant's legal rights were infringed by that decision**

[1] https://www.fsca.co.za/Enforcement-Matters/Publications%20and%20Documents/AJamesThomasDurham.pdf

and as it could be regarded as harbouring a legal grievance, appellant qualifies as a person aggrieved."

8. The Board relied on a passage from *Francis George Hill Family Trust v SA Reserve Bank*, [1992] 2 All SA 137 (A), 1992 (3) SA 91 (AD):

"Leaving aside the significance of statutory context in particular cases, the tenor of decided cases in South Africa points, I think, to the general conclusion that the words "person aggrieved" signify someone whose legal rights have been infringed - a person harbouring a legal grievance."

9. The Board did not identify the "legal right" or "legal grievance" of the appellant/applicant, and it did not have regard to the context of the quotation and the actual decision. Following the quoted statement, the Appeal Court said (redacted):

"South African decisions require a legal grievance before the objector can qualify as a 'person aggrieved'.

The critical question in the present case is whether the attachment by the Reserve Bank of the assets of Phoenix represents an invasion of the legal rights of the Hill FT. That question must be answered in the negative. The notion of a company as a distinct legal personality is no mere technicality -

'It is a matter of substance; property vested in the company is not, and cannot be, regarded as vested in all or any of its members.'

The antithesis between mere pecuniary interest on the one hand and actual legal right on the other is crisply stated in the minority judgment (in this connection unaffected by the ratio decidendi of the majority judgment) in Stellenbosch Farmers' Winery v Distillers Corporation Ltd and Another 1962 (1) SA 458 (A) at 472A-

> **'The fact that the shareholder is entitled to an aliquot share in the distribution of the surplus assets when the company is wound up proves that he is financially interested in the success or failure of the company but not that he has any right or title to any assets of the company.'"**

10. Applied to the fact of this case, the fact that Mrs Hollenbach is affected in her capacity as chief executive officer and nominated key individual, does not mean that any legal right of hers has been affected. She may be aggrieved, but the grievance is not a legal grievance. She is an employee or prospective employee and in no better position than a shareholder of a company.

11. Aside from that, one must, as was said in *Francis George Hill Family Trust*, have regard to the statutory context in which the term is used. Chapter 15 of the FSR Act deals with this Tribunal and the sections referred to hereafter are contained in the chapter. In terms of sec 230(1), "a person aggrieved by a decision may apply to the Tribunal for a reconsideration of the decision".

12. The concept of "decision" is defined in sec 218(a). Relevant for present purposes is that "decision" means "a decision by a financial sector regulator . . . in terms of a financial sector law in relation to a specific person." The "specific person" in this matter is Bouwen, not Mrs

Hollenbach. Her character qualities were the reason for decision, i.e., they informed the decision, but did not form the decision.

13. That (specific) person has the right to request reasons for the decision in terms of section 229; and to have the decision reconsidered by this Tribunal (sec 228). The (specific) person who received the reasons or was notified of the decision may then apply for reconsideration within a given time frame (sec 230(2)). That is the person aggrieved referred to in sec 230(1).

14. This Tribunal obviously respects decisions by the former Board, but it is not bound by them especially where the legislative context is different, or if we are satisfied that the Board failed to fully appreciate the essence of binding authority.

15. The problem now is that Mrs Hollenbach waived her right to file heads of argument and to a hearing and that this aspect was not raised by the Authority. It would accordingly be unfair to dispose of the application without regard to the merits of the decision under reconsideration.

KEY INDIVIDUAL

16. A “key individual”, in relation to an authorised financial services provider, is the natural person responsible for managing or overseeing the activities of the body, trust or partnership relating to the rendering of any financial service.

17. As submitted by the Authority, the scheme of the FAIS Act gives effect to a self-regulating model of regulation where in the absence of direct or front-line oversight by a regulator, the regulatory function is entrusted to a self-regulatory organisation, for instance, the appointment

of representatives by FSPs in terms of section 13 of the FAIS Act without the intervention of the Authority. This does not apply to key individuals under sec 8 of the FAIS Act. The nature of the position was dealt with by the former Appeal Board in *Jonker v Registrar of FSPs*[2] at para 165:[3]

> **"A key individual therefore plays a critical oversight role which must be performed with utmost good faith. That it shall and must protect its client's interests, serving with due care, skill and diligence is imperative. He or she is responsible for managing and/or exercising oversight over all activities of the FSP and the people who serve as representatives of the particular licencee. The key individual therefore has a legal duty to ensure that financial services are performed with standards of conduct similar to those of a trustee in relation to the interests of a trust".**

It follows from this that if one speaks of issues like fit and proper or honesty and integrity, the bar for a key individual is set high.

HONESTY AND INTEGRITY

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[2] At https://www.fsca.co.za/Enforcement-Matters/Publications%20and%20Documents/Judgment%20-%20Willem%20Daniel%20Jonker%20and%20Registrar%20of%20Financial%20Services%20Providers.pdf.

[3] See also *Joy Finance Consultants v Registrar of FSPs* https://www.fsca.co.za/Enforcement-Matters/Publications%20and%20Documents/JoyFinance.pdf.

18. The requirements of honesty and integrity have been codified in Board Notice 194/2017.[4] Key individuals must be honest and have integrity. Section 9 states that without limiting the generality of section 8(1), any of the following constitutes *prima facie* evidence that a person does not qualify in terms of section 8(1), namely if the person – (a) has been removed from an office of trust for theft, dishonesty, breach of fiduciary duty or business conduct; (b) has breached a fiduciary duty; (c) has had a licence or authorisation to carry out a trade, business or profession revoked, withdrawn or terminated by a regulatory authority; (d) has been disqualified, or removed in relation to matters relating to honesty, integrity, incompetence or business conduct by a regulatory authority, (e) has knowingly been untruthful or provided false or misleading information to, or been uncooperative in any dealings with, a regulatory authority; (f) has demonstrated a lack of readiness and willingness to comply with legal, regulatory or professional requirements and standards; and (h) has been found to be not fit and proper by a regulatory authority in any previous assessments of fitness and propriety and the reasons for being found not fit and proper have not been remedied. [Redacted.]

19. In terms of section 9(3) the Registrar [the Authority] must), notwithstanding subsection (1), in assessing whether a person meets the requirements in section 8(1) have due regard to – (a) the seriousness of a person's conduct, whether by commission or omission, or behaviour, and surrounding circumstances to that conduct or behaviour that has or could potentially have a negative impact on a person's compliance with section 8(1); (b) the relevance of such conduct or

[4] https://www.fsca.co.za/Notices/Board%20Notice%20194%20of%202017.pdf.

behaviour that has or could potentially have a negative impact on the persons' compliance with section 8(1), to the duties that are or are to be performed and the responsibilities that are or are to be assumed by that person; and (c) the passage of time since the occurrence of the conduct or behaviour that had a negative impact on the person's compliance with section 8(1).

THE MIRABILIS DEBARMENT AND DA VINCI REINSTATEMENT

[20] Mrs Hollenbach was employed by Mirabilis, an underwriting manager for Santam Insurance's construction and engineering non-life insurance business. She was not only an FSR but also the key individual and head of compliance. She gave notice of resignation towards the end of March 2015, the effective date being end June 2015. During this period Mirabilis had reason to believe that on 12 January 2015 she had downloaded 17 951 confidential files of about 5 gigabytes from the M-files system via a colleague's computer onto a flash disc; that she on 5 February downloaded 40 282 confidential files of between 10 and 30 gigabytes and constituting about two-thirds of the Mirabilis database from the company's server onto her company laptop; and on 2 February she copied 13 466 files from her laptop onto an unsecured personal external hard drive. According to the evidence the database was potentially worth R550 million in premiums per year.

[21] This led to debarment proceedings presided over by a senior advocate, Adv GC Pretorius SC. A number of witnesses testified. It is not in dispute that Mrs Hollenbach did not require most of the files for purposes of her work as compliance officer. Having dealt with the facts in detail, the chairman concluded:

"On a conspectus of all the evidence, much of which has not been disputed, the inference that Ms Hollenbach attempted to download the entire database of Mirabilis without their consent and use it in a future employment is not only the most probable, but the only one that can reasonably be made. There is no acceptable evidence that contradicts this inference."

"In summary Ms Hollenbach surreptitiously and without authority by the number of attempts to download the entire database of Mirabilis. Since she had no authority do so, and had resigned, the only inference is that she wanted to use this information in a future employment. The fact that she falsely denied this and accused Mirabilis of a hidden agenda , and by implication that Mirabilis influenced its employees to give false evidence against her, is clear proof that she is not a person with the honesty and integrity as required by FAIS."

[22] With that conclusion followed her debarment as FSR. She lodged an appeal to the erstwhile Appeal Board,[5] which was dismissed because the Board did not have jurisdiction to hear the kind of appeal that she had had in mind, and she was informed that her only remedy at the time was a review application to the High Court. She did not follow that course – for financial reasons she says – but there is a simpler explanation. Less than two weeks after the dismissal of her appeal her debarment was removed, and she was appointed as a representative, by Da Vinci

[5] *Michelle Hollenbach v Registrar FSPs* https://www.fsca.co.za/Enforcement-Matters/Publications%20and%20Documents/Judgment%20-%20Michelle%20Hollenbach.pdf

Underwriting Managers Holdings (Pty) Ltd. This fact was recorded by the Registrar on 3 October 2016.

[23] Da Vinci informed the Registrar at the time of its action and said that that they were "satisfied that Mrs. Hollenbach has acknowledged that there was reason for Mirabilis to institute the proceedings against her and that, to the extent that there was any wrongdoing on her part, is apologetic and will not commit and form of similar conduct ever again".

[24] Since the debarment was but six months old and the decision of the Appeal Board two weeks, and since the applicant had not been active in the insurance business since July 2015, it is rather difficult to understand on what basis Mr Breedt (in Bloemfontein) on behalf of Da Vince could have said that he was satisfied that she (in Florida) had "reformed". Mrs Hollenbach herself, in her accompanying statement, did not refer or allude to her debarment or her reformation.

[25] Mrs Hollenbach argued in the light of these facts that the Authority "acknowledged that an independent FSP had found that Mrs Hollenbach had the required character qualities of honesty and integrity". As the Authority pointed out, she is misguided:

> **"The Authority has long held the position through its Guidance on the Reappointment of Debarred Representatives which deals with BN 82 of 20036 that it does not (a)**

[6] Determination of Requirements for Reappointment of Debarred Representatives BN 82 of 2003 – see paras 21 to 22 of the Guidance

'consider or confirm a reappointment in order for it to have or take effect'; and (b) 'approve, uplift or review a reappointment'."

[26] In *Basson v Associated Portfolio Solutions (Pty) Ltd and Others* (16224/2017) [2018] ZAWCHC 184[7] paras 75 and 76 it was held as follows:

"The proviso allows for the re-appointment of a debarred representative within a period of less than 12 months. Where the debarment was effected due to dishonesty or lack of integrity, the appointing FSP will have to be satisfied that the representative has been rehabilitated or reformed (i.e. that the representative has qualified within regard to the personal character qualities of honesty and integrity).

The re-appointment of a representative is the prerogative of a FSP and the Registrar is not empowered to interfere in the process of reappointment. The Registrar will merely satisfy himself that the process of re-appointment was correct. Should the Registrar be of the view that an FSP has re-appointed a representative who is not reformed, the Registrar may take action under section 9 or in terms of section 14A."

[27] Mrs Hollenbach also obtained a "testimonial", dated 28 September 2016, from an advocate practising at the Johannesburg Bar in "the rehabilitation proceedings before the Registrar". The learned advocate was not well informed because there were no such proceedings

[7] http://www.saflii.org/za/cases/ZAWCHC/2018/184.html.

and there could not have; he believed that she had exhausted the available statutory remedies, which is untrue; and he had no knowledge of the debarring proceedings. It is therefore understandable that he stated in conclusion that the document should not be seen as any effort to second guess, criticise, doubt or question any entity who played a role in any process or outcome during the events that led to his testimonial.

[28] Mrs Hollenbach's present reliance on these two outdated and valueless "testimonials" is surprising but it is not surprising that the Authority disregarded them. Da Vinci did not at the time have an affidavit that complied with paragraph 37(b) of the Guidance on the Reappointment of Debarred Representatives, setting out the "reasons for reform or rehabilitation".

[29] That then brings us to the status and effect of the debarment by Mirabilis. Mrs Hollenbach alleged that because of her reinstatement by Da Vince the debarment should have been ignored by the Authority. She is mistaken. The debarment was an administrative act which, until set aside by an appropriate body, remains in full force and effect. Her belated attack on the validity of the debarment is accordingly also out of order and her grounds will not be considered.

[30] In any event, the debarment is prima facie evidence that Mrs Hollenbach lacks the necessary qualities of honesty and integrity in the respects listed earlier. Furthermore, her reinstatement did not change the facts. Mrs Hollenbach, as said, downloaded nearly the whole of Mirabilis' data. She justified herself because, she said, Mirabilis had no rule prohibiting such download. That answer is cynical. Stealing remains stealing even if the owner has no rules

prohibiting theft. Taking someone's commercially important confidential information is akin to theft.

[31] Even if one ignores for a moment the disputed facts about the January download, the problem for Mrs Hollenbach is that she simply could not justify her actions before Adv Pretorius. Her attempts were all doomed because they were on her own showing either untrue or inherently improbable. Her latest statement of 14 November 2019 does not alter that conclusion.

[32] Having found that Mrs Hollenbach prima facie lacked the personal characteristics of honesty and integrity, regard must be had to the demands of sec 9(3) of Board Notice 194 of 2017, quoted in para 19 above. The grounds are interrelated, and it does not make much sense to discuss them individually.

[33] The Authority, quite correctly, considered the copying of Mirabilis' confidential information *en masse* and the dishonest defences raised before Adv Pretorius as serious and that Mrs Hollenbach's conduct and behaviour are relevant factors in determining her honesty and integrity. It also correctly identified the issue of rehabilitation and reformation. It will be recalled that Da Vinci has said that she, at the time, acknowledged that there was reason for Mirabilis to institute proceedings against her, that she was apologetic and that Da Vinci had satisfied itself that she had reformed and that it, accordingly, debarred her.

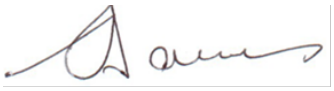
[34] That was, however, not Mrs Hollenbach's case before the Authority or before the Tribunal. She reverted to her initial defence that she did not download all and that since it was

not against the policy of Mirabilis to permit its employees to download its confidential information she had done nothing wrong and had nothing to regret. In other words, for purposes of her readmission she had one version but for present purposes another. One can only agree with the finding by the Authority that during a period of nearly five years she has failed to show any appreciation of the nature of her conduct and that she, accordingly, has failed to satisfy the authority about her honesty and integrity.

[35] It is not necessary to deal with the remaining points raised in the application because they are without any merit whatsoever.

Order: The application is dismissed.

Signed on behalf of the Tribunal at Pretoria on 14 August 2020



LTC Harms (Deputy Chair)