FINANCIAL SERVICES TRIBUNAL

A7/2022

In the reconsideration application of:

QUINTIN MOORCROFT Applicant

and

FINANCIAL SECTOR CONDUCT AUTHORITY Respondent

Re: Reconsideration of decision of the FSCA to impose an administrative penalty in terms of section 167(1) of the FSR Act and to debar the applicant for a period of 10 years in terms of section 153(1)(a) read with section 154(1) of the FSR Act

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DECISION

INTRODUCTION

1. The applicant has asked the Tribunal to reconsider two (2) decisions which the respondent (the Authority) made on 22 February 2021.[1] These decisions are the decision to:-

    1.1. impose an administrative penalty of R2 million in terms of section 167(1) of the FSR Act,[2] on the applicant and Pioneer FX jointly; and

[1] Record Part A: p 87 - 91
[2] Financial Sector Regulation Act, No. 9 of 2017

1.2. debar the applicant for a period of 10 years in terms of section 153(1)(a) read with section 154(1) of the FSR Act.

2. In terms of section 234(1)(b)(i), the Tribunal may only set aside the Authority's decision and substitute it with a decision by the Tribunal with respect to the administrative penalty issued "in terms of Chapter 13" and may only set aside the Authority's decision on debarment and remit it for further consideration. This has consequences for the overall disposition of this reconsideration application.

GROUNDS FOR DECISION

3. The stated grounds and reasons for the Authority's two decisions included that:-

3.1. The applicant was the sole director and in control of Pioneer FX. The applicant opened a multi-account-manager ("MAM") trading account at IFX Brokers Holdings (Pty) Ltd ("IFX") on 11 March 2019.[3] IFX is a financial services provider that offers a trading platform for clients to trade in derivative instruments.

3.2. The MAM account arrangement at IFX enabled the applicant to link client accounts (the copy accounts) to his trading account (the master account). Every transaction entered into on the master account was executed in the copy accounts (proportionally), to the extent that the copy account was funded.

[3] Record Part B: p 12 – 20; p 57 – line 16 - 36

3.3. The clients signed up with IFX to copy-trade with the applicant on his MAM account and this enabled him to make trading decisions on their behalf. He caused the trades to be executed on their accounts thus conducting intermediary services without being authorised to do so in terms of the Financial Advisory and Intermediary Services Act no. 37 of 2002 ("FAIS Act").

3.4. The Authority found that the applicant contravened section 7(1) of the FAIS Act in that he conducted financial services as defined in the FAIS Act; and/or that he caused Pioneer FX to contravene section 7(1); and/or that he attempted, or conspired with, aided, abetted, induced, incited or procured Pioneer FX to contravene section 7(1) in a material way.

4. Following an inspection of the affairs of Pioneer FX, the Authority further relied upon the following facts for its decisions:

4.1. In his marketing material, the applicant *stated* that "*I, Quintin Moorcroft have a Trading Account with IFX Brokers, a South African Broker, FSCA Registered FSP 48021. This is a Management Account in my own name and we use Metatrader 4 as a Trading Platform. So you open a Live Account with a minimum of R750-00 and link it to my Account (MAM). I execute Forex and Indices Trades on my Account then the trades automatically duplicate to your account on a daily basis from Monday to Friday.*"[4]

[4] Record Part B: p 44

4.2. The MAM account arrangement at IFX enabled the applicant to link a total number of 276 client accounts from 11 March 2019 to 5 July 2019, to his account (such clients are referred to as copy traders). The clients collectively deposited a total of R2,788,957.13 into their accounts over the period. Every transaction entered in the master account was executed in the copy accounts (proportionally), to the extent that the copy accounts were funded.

4.3. The clients signed a Power of Attorney that allowed him to trade on their behalf. Upon perusing the Power of Attorney,[5] the Authority found that:

4.3.1. The applicant was reflected as the trading agent and was authorised to purchase and sell securities on margin or otherwise for the client's account and at the risk of the client; and

4.3.2. IFX was authorised to follow the applicant's instructions in every respect relating to the client's trading account.

4.4. For the period 11 March 2019 to 4 August 2019, the applicant entered transactions on the master account and caused copy accounts to execute the transactions for his clients.[6]

[5] Record Part B: p 25
[6] Record Part B: p 34 lines 10 – 20, p 41 lines 11 - 26

4.5. The applicant claimed and was paid commission by his clients. On his own admission he received approximately R250 000 in commission from clients since March 2019.[7]

4.6. On 10 July 2019 the funds in the master account (the clients' funds - representing provision for margin calls) were exhausted because of trading losses. This resulted in the applicant no longer being in a position to enter transactions into the IFX system on behalf of clients.

4.7. On his own admission, the applicant also advised clients on their trading decisions.

5. The Authority argued before the Tribunal that

5.1. Financial Services are defined as "…any service contemplated in paragraph (a), (b) or (c) of the definition of "financial services provider", including any category of such services; "financial services provider" means any person, other than a representative, who as a regular feature of the business of such person - (a) furnishes advice; or (b) furnishes advice and renders any intermediary service; or (c) renders an intermediary service" ;

5.2. Advice, in turn is defined as "…any recommendation, guidance or proposal of a financial nature furnished, by any means or medium, to any client or group of clients - (a) in respect of the purchase of any financial product; or (b) in respect of the investment in any financial product; or (c) on the conclusion of any other transaction, including a

[7] Record Part B: p63 lines 16 - 41

loan or cession, aimed at the incurring of any liability or the acquisition of any right or benefit in respect of any financial product;

5.3. It was found that the applicant provided discretionary services through the MAM without being licenced to do so in terms of the FAIS Act; and

5.4. The applicant also conceded to this subsequent to obtaining legal advice which confirmed that a Category II FAIS licence is required for the services he was rendering on behalf of his clients.[8]

6. As a result, the Authority came to the two decisions challenged in these proceedings.

GROUNDS FOR RECONSIDERATION

7. The applicant, who was not legally represented, appeared in person and submitted to the Tribunal that:

7.1. He did not intend to contravene any part or section of any Act or Regulation;

7.2. He was unaware that the operation of a MAM required any permission or license;

7.3. IFX ought to have ensured that the MAM account complied with the Act when it requested that he operate it;

7.4. He admitted providing advice to clients regarding their trades by operation of the MAM account;

[8] Record Part B: p 80

7.5. He admitted that he may have contravened the Act, but contended that it was an innocently-made error;

7.6. IFX managed the MAM account activities in that it attached or detached from the MAM account;

7.7. He had and has no intention to trade for others or to give advice to others regarding trading;

7.8. He denied causing any loss to any party; and

7.9. IFX, which admittedly was not before the Tribunal, bore responsibility for any contravention that occurred.

8. The facts in the record before the Tribunal paint a more mixed picture for Mr Moorcroft:

8.1. When advised on more than one occasion by IFX that he required a license, he indicated that he disagreed and that he would not apply for such a license, despite taking also legal advice which confirmed the need for the license;

8.2. Mr Moorcroft's position appeared to be based, in part, on his belief that clients chose to attach to or detach from the MAM account and that they were thereby copying his trades;

8.3. He maintained this position until appearing at argument before the Tribunal;

8.4. This was not the first instance of Mr Moorcroft trading on behalf of others without the required license;

8.5. He admitted to the Authority during its investigation that he aware of the requirement for a license but took no steps to obtain it;

8.6. He launched these proceedings on the basis that he did not require the license;

8.7. Mr Moorcroft admitted during the investigation that he advised clients on their trading decisions or, at least, exercised his discretion to invest or trade on their behalf. This position also was recorded in the sample form that a client completed in order to join the MAM account;

8.8. Approximately R2.7 million was deposited by 276 clients into the MAM account, which amount was depleted through Mr Moorcroft's trading activities;

8.9. Mr Moorcroft received commission income of approximately R250,000 from the MAM trading activities that he conducted; and

8.10. Mr Moorcroft made some commission revenue for himself from the trades.

THE APPLICABLE TEST AND PROCESS FOR RECONSIDERATION OF AN APPROPRIATE ADMINISTRATIVE PENALTY

9. The starting point in considering the applicable test and process for the reconsideration by the Tribunal of an administrative penalty imposed by the Authority is that it is an internal remedy following the imposition of the penalty. The penalty must be assessed against the requirements of section 167.

10. Section 167(1) and (2) of the Act provides that:

> *(1) The responsible authority for a financial sector law may, by order served on a person, impose on the person an appropriate administrative penalty, that must be paid to the financial sector regulator, if the person:-*
>
> *(a) has contravened a financial sector law; or*

(b) has contravened an enforceable undertaking accepted by the responsible authority.

(2) In determining an appropriate administrative penalty for particular conduct:-

(a) the matters that the responsible authority must have regard to include the following:-

(i) The need to deter such conduct;

(ii) the degree to which the person has co-operated with a financial sector regulator in relation to the contravention; and

(iii) any submissions by, or on behalf of, the person that is relevant to the matter, including mitigating factors referred to in those submissions; and

(b) without limiting paragraph (a), the matters that the responsible authority may have regard to include the following:-

(i) The nature, duration, seriousness and extent of the contravention;

(ii) any loss or damage suffered by any person as a result of the conduct;

(iii) the extent of any financial or commercial benefit to the person, or a juristic person related to the person, arising from the conduct;

(iv) whether the person has previously contravened a financial sector law;

(v) the effect of the conduct on the financial system and financial stability;

(vi) the effect of the proposed penalty on financial stability;

(vii) the extent to which the conduct was deliberate or reckless.

11. As the Tribunal has previously held[9]:

"*[63] Deterrence is an elastic concept with grey borders, and it is easy to justify a sanction which is in effect retributory under the heading of deterrence. . . .*

[9] *Met Collective Investments (RF)(Pty)(Ltd) v Financial Sector Conduct Authority* Case No A23/2019 at paras [63] to [67]

[64] . . . the provision is not penal in the criminal sense. Furthermore, it is not overriding. What is overriding is the appropriateness of the penalty, which means that it must be balanced, proportionate and fair.

[65] Deterrence in sec 167 is not a self-standing determinant but "must" be "considered" in conjunction with the degree to which the person has cooperated with the regulator in relation to the contravention; and any submissions by, or on behalf of, the person relevant to the matter, including mitigating factors referred to in those submissions. . . .

[66] That illustrates the fact that mechanical checklists in determining any sanction, administrative or criminal are problematic. Ticking the box of each element does not mean that the correct weight was attached to the element or that result is necessarily 'appropriate', which is the ultimate measure. . . . Eventually, the 'appropriate' penalty, having regard to the deterrence factor, can only be assessed after consideration of all the relevant factors, whether aggravating or extenuating.

[67] *In reconsidering the penalty, it must be borne in mind, as we have held in* Mwale v The Prudential Authority *that:*

> *"The ordinary rule is 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. There is no reason why we should not apply the same approach during an application for reconsideration."*

12. The Authority's administrative penalty order in the record before the Tribunal[10] does not explain or cross-refer to its reasons for the administrative penalty amount of R2 million. However, the reasons for it are set out in the Authority's Notice of Administrative Sanctions[11]:

> *"[23] The Authority is of the view that deterrence should be a central consideration when determining the quantum of the administrative penalty to be imposed. The strong need to deter future conduct of this nature, which is directed at protecting members of the public, is the overriding consideration in the present matter.*
>
> *[24] Unregistered financial services are endemic in the industry and notoriously difficult to detect. The risk that unregistered financial services poses to the segment of the public that can least afford the risk,*

[10] Record Part A p 13-14
[11] Record Part A p 7-11 at paras 23 - 28

makes it imperative that the Authority should focus on effective deterrence.

[25] The Respondents benefitted from the contravention and received approximately R250 000 in commission from clients. Moorcroft caused trades to be executed on 276 client accounts and lost approximately R2 788 957.13 of clients' trading funds.

[26] The Authority noted the submissions that the trading losses was not entirely due to his trading activities.

[27] The Authority also considered the submissions.

[28] It is common cause that IFX was not the first broker through which Moorcroft traded on behalf of clients" (sic).

13. We are of the view that the mixed nature of the facts before the Tribunal do not support a finding that exonerates Mr Moorcroft for his admitted contravention of the Act. He was aware of the requirement of the license, including on legal advice. In addition, the insistent stance adopted by Mr Moorcroft that he did not require the license until his appearance at the hearing at which he conceded it was required and then stressed that it was not his intention to contravene the Act indicates a state of mind that was deliberate or at least reckless in its disregard of the requirement of a license until facing the Tribunal.
14. Related to this is Mr Moorcroft's efforts to apportion blame to IFX and the Authority at the hearing. Whatever role IFX played in his contravention of the Act, and whatever Mr Moorcroft's views of the Authority, they do not excuse him from his obligations in terms of it.
15. We are further of the view that the operation of a MAM account without compliance with the Act reflects harm to the members of the public whose trading was conducted in contravention of the Act on that MAM and the amounts that were depleted during those activities were probably significant to those individuals. The R2 million administrative penalty bears a reasonable

relationship to the R2.7 million that was depleted in the trading activities on the MAM account. Finally, the Authority's inclination to deter future conduct of this nature is correctly founded in the objectives of the Act.

16. The Tribunal is not minded to set the Authority's imposition of the administrative penalty of R2 million aside and substitute it with the Tribunal's decision of what an appropriate penalty would be in these circumstances. We turn to consider the debarment order next.

DEBARMENT

17. Section 153(1)(a) provides that

> ***153. Debarment***
>
> *(1) The responsible authority for a financial sector law may make a debarment order in respect of a natural person if the person has:-*
>
> *(a) contravened a financial sector law in a material way;*
> *. . .*

18. The Authority's Notice of Administrative Sanctions[12] records that it may debar "*a natural person if the person has contravened a financial sector law in a material way*".

19. The Authority's Heads of Argument submitted that "*The debarment of the applicant was therefore justified given that he was found to have conducted unregistered business. Nothing in the applicant's submission detracts from the correctness or appropriateness of the Authority's decision to debar him*."[13]

[12] Record p 8 at para 11
[13] At para 8

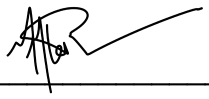
20. The Authority then argues further that:

> "*Although said in the context of a debarment by an FSP, it is apposite to invite the Tribunal's attention to the following statement by the Supreme Court of Appeal in the matter of* ***Financial Services Board v Barthram and another [2015] 3 All SA 665 (SCA)****:*
> *"The debarment of the representative by a FSP is evidence that it no longer regards the representative as having either the fitness and propriety or competency requirements. A representative who does not meet those requirements lacks the character qualities of honesty and integrity or lacks competence and thereby poses a risk to the investing public generally. Such a person ought not to be unleashed on an unsuspecting public and it must therefore follow that any representative debarred in terms of section 14(1), must perforce be debarred on an industry-wide basis from rendering financial services to the investing public"*[14] *(own emphasis)*".[15]

21. Since debarment had to follow, the period was within the discretion of the Authority. The applicant's only submission about debarment was that it affected his reputation in general, although it did not affect his business model since he has no intention to trade otherwise than on his own behalf. The applicant's remedy is to apply in due course to the Authority under sec 153(6) for a reduction or revocation of the debarment.

ORDER

22. The application is dismissed.



22 November 2022

Tribunal Panel: LTC Harms (Chair)

[14] At para [16] of that decision
[15] At para 7

J Pema
M Le Roux SC

For the Applicant: Q Moorcroft

For the Respondent: Z Mshunqane

Hearing Date: 26 October 2022