THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: A19/2022

RENAULT OTTO KAY APPLICANT

and

THE FINANCIAL SECTOR CONDUCT AUTHORITY RESPONDENT

Hearing: 31 January 2023

Order: 6 February 2023

For the applicant: Adv JC Tredoux instructed by RK Hall & Associates

For the Respondent: Ms Ziyanda Mshunqane of the FSCA

Re: Application for reconsideration of administrative penalty and debarment of key individual – failure to manage or oversee FSP – no continuing operational ability – meaning of 'contravention' in secs 167 and 153 of the Financial Sector Regulation Act.

DECISION

1 The applicant, Mr RO Kay, applies in terms of sec 210(1) of the Financial Sector Regulation Act 9 of 2017 ('the FSR Act') for the reconsideration of two decisions of the respondent, the Authority. The parties agreed to waive their rights to a formal hearing in terms of the Act and after filing argument and additional argument they argued the matter before me virtually. This is, accordingly, the decision of the Tribunal under sec 234(1) of this Act.

2 This is a reconsideration application and not a review or appeal.

3 The impugned decisions of the Authority of 31 March 2022 were to

(a) impose an administrative penalty of R500 000.00 on Mr Kay in terms of sec 167(1) of the Act and

(b) debar (prohibit) him for a period of five years from providing or being involved in the provision of financial services, acting as a key person of any financial institution or providing any service to a financial institution, whether under outsourcing arrangements or otherwise, applying sec 153(2)(a), (b) and (c) of the Act.

4 The relevant jurisdictional fact for the imposition of an administrative penalty is the 'contravention' of a financial sector law and for a debarment such a contravention must have been 'in a material way'.

5 The applicable financial sector law is the Financial Advisory and Intermediary Services Act 37 of 2002 ('the FAIS Act'), any regulation made under that Act and any regulatory instrument made in terms of that Act. (See the definition in sec 1 of 'financial sector law' read with Schedule 1 of the FSR Act.)

6 The relevant regulatory instrument is Board Notice 194 of 15 December 2017 (GG 41321 of 15 December 2017) which replaced the less detailed BN 106 of 2008 (GG of 15 October 2008).

THE BACKGROUND FACTS

7 For a recitation of the basic facts, I rely to an extent on Mr Tredoux's heads of argument for the applicant.

8 Applicant and Mr Ntumba were the executive directors of Smart Billion (Pty) Ltd. The third director was a non-executive director.

9 Mr Ntumba, an accountant, was the CEO of Smart Billion.

10 The applicant was since inception the key individual of Smart Billion.

11 Smart Billion had other staff; it was mentioned that it had five financial services representatives (one of which was the CEO) and another company was supposed to act as compliance officer.

12 Smart Billion was authorised as a discretionary financial service provider on 11 August 2015 with the Applicant as its key individual. Smart Billion had a Category I and II licence and was authorised to provide advice and render intermediary services in respect of derivative instruments, shares, warrants, certificates and other instruments and bonds.

13 Members of the public invested funds in Smart Billion and these funds were deposited into Smart Billions' business bank account.

14 Smart Billion used some of the funds to invest in a product on a platform other than that authorised by its licence. The balance of client funds was used to pay clients' withdrawal requests. When a client requested a withdrawal, Smart Billion took deposits from other clients in the bank account of Smart Billion to pay the client who requested a withdrawal – a typical pyramid/Ponzi scheme.

15 Fraudulent representations were made to clients by Smart Billion that the money they invested in Smart Billion was used by Smart Billion as FSP to trade in the financial instruments they were licensed to trade in, whilst in truth, part of the funds were used to invest for unlicensed trading purposes, but then also in the name of Smart Billion and not of the clients.

16 The clients received false financial statements from Smart Billion purporting to contain accurate information in respect of accounts held in their names.

17 When the scheme failed, Kay resigned, the company was liquidated, and clients lost millions.

THE STATUTORY CONTEXT

18 A key individual/person is a natural person responsible for managing or overseeing, either alone or together with other so responsible people (i.e., other key individuals if any), the activities of the body corporate (the FSP, in this case Smart Billion) relating to the rendering of defined financial services (sec 1 of the FAIS Act). [1]

19 To obtain authorisation to act or offer to act as an FSP, the FSP must satisfy the Authority (formerly the Registrar) 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 in order for such key individual to fulfil the responsibilities imposed by the FAIS Act (sec 8(1)).

20 If satisfied that the proposed key individual(s) comply with the requirements of the Act and the Authority approved the key individual(s), the Authority grants the requested authorisation (sec 8(3)).

21 Compliance with the fit and proper requirements of a key individual is a continuous obligation (sec 8A read with BN 194 par 5).

22 Depending on the terms of a Board Notice, fit and proper requirements may include, but are not limited to, appropriate standards relating to (sec 6A) –

(a) personal character qualities of honesty and integrity;

(b) competence, including–

[1] See, in general *Jonker v Registrar of Financial Service Providers* Case 23/2015 (Appeal Board of the FSB).

(i) experience;

(ii) qualifications; and

(iii) knowledge tested through examinations determined by the registrar;

(c) operational ability;

(d) financial soundness; and

(e) continuous professional development.

23 This case concerns the lack of continuous operational ability which is dealt with in BN 194. A key individual must be able to adequately and appropriately manage or oversee the activities of the FSP 'relating to the rendering of financial services', i.e., must have the necessary operational ability for it (par 36).

24 One of the functions is to have management policies, procedures and systems of corporate governance, risk management and internal controls to ensure compliance by the FSP with the FAIS Act and the like (par 37).

25 Eventually and more specifically, par 42(1) states that a key individual must have the operational ability to effectively manage and oversee the financial services related activities of the FSP or juristic representative and the financial services in relation to the financial product for which the key individual was approved or appointed.

THE FACTUAL FINDINGS

26 The findings against the applicant were the following:

- Kay, as director and key individual of Smart Billion, conceded in an interview on 14 January 2021 that he was not actively involved in the business or financial affairs of Smart Billion. According to Kay, his mandate was to secure a FAIS license for Smart

Billion, to source potential traders, develop trading processes, find platforms, instruments to trade, develop risk processes for traders, train newly appointed traders in-house and oversee general online trading.

- Kay realised in 2016 that some statements issued by Smart Billion were questionable and that trading by Smart Billion occurred deliberately without his knowledge. Despite these issues, Kay merely relied on the assurances of Ntumba, without improving operational processes at Smart Billion. Ntumba ceased presenting financial statements to board members and Kay had no oversight of the financial affairs of Smart Billion, but Kay turned a blind eye to this.

- Kay failed in his statutorily imposed responsibilities to manage and oversee the activities of Smart Billion. Kay failed in his obligations as key individual and admitted that there was no oversight; his only responsibility was to source traders and manage general online trading.

- The Authority considered, as aggravating factor, the submission by Kay that the only purpose of Kay was to join Smart Billion to secure a FAIS license, whereafter his only role was to oversee platform training.

- The Authority considered that Kay did not perform the responsibilities bestowed upon him as key individual to ensure that Smart Billion had the operational ability as envisaged in section 37 of Board Notice 194.

27 These findings also follow from the applicant's response to the *audi* letter from the Authority informing of the Authority's intention to impose administrative penalty and debar him.

28 The only conclusion one can draw from the lengthy response by his attorney is that the applicant acted as a front, pretending to be the key individual of the company and performed no functions as key individual.

29 His professed lack of knowledge of anything the company did is feigned and although the Authority accepted some of his explanations, I, on reconsideration do not. His version is improbable and to the extent true, shows a reckless, if not intentional, disregard of his duties as key individual.

30 He was one of two executive directors of the company; he spent every week for years at the offices of the company, flying weekly from Cape Town to Johannesburg; he knew that there were other portfolios; he knew that the company employed financial service representatives (providing no financial services?); he knew that board meetings were not being held since the one during 2016 in London UK (attended also by others); he was not asked (apparently) to consider financial statements and he did not see any since 2016; he did not have sight of bank statements; and he knew that he had been lied to about the affairs of the company and did not follow up. And so it goes.

31 In sum, he did not manage the rendering of financial services and he did not oversee the rendering of financial services at all. He had no management policies, procedures and systems of corporate governance, risk management and internal controls in place to ensure compliance by the FSP with the FAIS Act.

32 The inevitable result is, whatever the position was when he was first appointed key individual, that his acts and omissions establish that he no longer had the operational ability to effectively manage and oversee the financial services related activities of the company.

THE MEANING OF 'CONTRAVENTION'

33 That brings me to the crux of the applicant's case which is this: The jurisdictional fact for an administrative penalty and for a debarment is the 'contravention' of a financial sector law; non-compliance is not the same as contravention; and the failure to comply with art 42(1) of BN 194 or of sec 8A of the FAIS Act is not a 'contravention' because it does not amount to the disregarding or breaking of rules or laws that are sanctioned or punishable since they do not contain any penalty provision. As counsel submitted:

> In summary, failing to meet this requirement of art 42(1) at any given time whilst being a KI, does not constitute a contravention of art 42(1) (with some form of strict liability) but at best a non-compliance with art 42(1) the effect of which is that the KI no longer meets the requirements for his appointment. This in turn means that a failure to comply with the requirements or provisions of art 42(1) does not constitute a contravention of a financial sector law.

34 Artificially attractive, the argument is without merit. Statutes must be interpreted purposively and the one dictionary meaning of a word does not determine the meaning of the word within the context of the Act as a whole.

35 If one fails to comply with a positive obligation of the law one breaks, transgresses or contravenes the law, irrespective of whether the law imposes criminal sanctions. One can test this with reference to examples. (Professionals, by the way, may be subjected to a financial penalty and struck off rolls for unprofessional conduct irrespective of whether their conduct amounted to a crime.)

36 If a key individual is found guilty of theft it is prima facie evidence (according to BN 194) that the person is not a fit and proper person because he is lacking the personal qualities of honesty and integrity. But, according to the argument, since that person did not

'contravene' any financial sector law the person may not be the subject of debarment despite the continuing obligation to remain fit and proper. (An administrative penalty is not possible in this instance – sec 167(4)).

37 Moving to a more general example: the Authority may on proper grounds be satisfied that a key individual committed theft or fraud (neither are 'contraventions' of financial sector laws) and that the individual therefore no longer has the necessary qualities of honesty and integrity but that person may, on the argument, not be debarred or penalised. That makes nonsense of these provisions.

38 Counsel sought to counter that example with reference to a key individual who is sequestrated and no longer complies with the financial soundness requirements. Why, says counsel, should he be subjected to a financial penalty? The answer is that the imposition of such a penalty is discretionary and that discretions must be exercised properly and in context and with reference to the provisions of sec 167(2). Apart from being rather futile to impose on a sequestrated person an administrative penalty, a financial penalty might be appropriate if his sequestration is linked to his lack of performance as key individual.

39 Counsel did not with his example deal with debarment. And the simple question is whether the Act intended that a sequestrated person should remain a key individual who, by definition, does not comply with the continuing obligation relating to financial soundness. The answer is obvious.

40 A different conclusion would lead to a serious anomaly in the FAIS Act. The FSP could have debarred the applicant under sec 14 for no longer complying with the fit and proper requirements but the Authority could not despite the elaborate scheme in both Acts and

the BN. Cf *Financial Services Board v Barthram and Another* [2015] 3 All SA 665 (SCA); 2018 (1) SA 139 (SCA).

PROCEDURAL ISSUES

41 I now turn to the procedural issues raised by the applicant. The first relates to secs 135 and 136 of the FSR Act, which provide that the Authority may instruct an investigator to conduct an investigation and for the investigator to question any person the investigator believes may be able to provide information. The Authority authorised an investigation into the affairs of the company and the appointed investigator questioned the applicant. The Authority, not the investigator, after following process, made the determinations which are the subject of this application.

42 The argument that the investigator may not have been qualified to conduct the questioning and lacked objectivity is spurious and not worthy of debate. The Authority's decision was based on the applicant's statement, prepared by his attorney and his evidence (some of it by his attorney's interruptions) during the questioning to which no objection was made at the time or in the response to the *audi* letter.

43 Another specious argument related to the non-compliance by the investigator of sec 140(2) which required of her to inform the applicant 'at the commencement of the investigation' of his right to object to criminally incriminating questions which, in any event had to be answered but may not be used in criminal proceedings against him.

44 In this case, the investigator informed the applicant of his right after three pages of 'evidence', none of which could have related to incriminating matter. The applicant's attorney then confirmed that he had already explained the applicant's rights to him before the hearing began.

45 The argument is now that the applicant should have been warned that his answers 'would be conclusive to find that he contravened a financial sector law' – which is not required and not the case. The other warning counsel expects was that admissions could be used against the applicant for findings by the FSCA. The expansive interpretation of the section is devoid of merit. The applicant had to answer the questions and one assumes that he would do so truthfully.

THE PENALTY

46 The applicant submits that the administrative penalty and the period of debarment are unreasonable and excessive. The argument was rather generalised and an attack of the propriety of administrative penalties, the lack of a scale of penalties, the ability of the applicant to pay, his 'innocence' (having been misled), his desire to maybe return to the financial industry, and the meaning and application of 'deterrence' in determining the quantum of a financial penalty. Much was also made of the applicant's personal and financial circumstances.

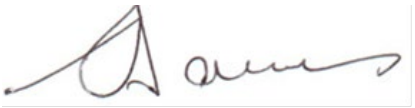
47 The Tribunal has often dealt with similar arguments and dealt with deterrence in Decision - MET Collective Investments (RF) (Pty) Ltd v FSCA and another Case No.: A23/2019, which need not be repeated. And then, the ordinary rule is that a higher body is not entitled to interfere with the exercise 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 (M Mwale and another v The Prudential Authority and another PA 19/2019.

48 The applicant, apart from generalities, was not able to show (and did not even attempt to do so) that the Authority's reasons and decisions fell foul of the test mentioned. If called

upon, I would have taken a more serious view about the applicant's nonchalant attitude about a serious statutory duty he undertook. There is no indication that he appreciates the seriousness of his failures. He still fails to appreciate that this case is about his failures and not those of his co-director or the company. If he, as executive director, had done the trouble over years to look once at the bank statements or ask once where the money came from and went, he would have seen a rat. The rot would have been put a stop to and the clients would not have lost their millions.

49 ORDER: The application is dismissed.

Signed on behalf of the Tribunal on 6 February 2023.



LTC Harms (deputy chair)