

IN THE FINANCIAL SERVICES TRIBUNAL

CASE NUMBER A31/2024

In the matter between

WENRU (PTY) LTD

APPLICANT

and

THE FINANCIAL SECTOR CONDUCT AUTHORITY

RESPONDENT

Summary: Reconsideration of a directive and penalty order made by the Financial Sector Conduct Authority.

DECISION

A. INTRODUCTION

1. This is an application in terms of Section 230 of the Financial Sector Regulation Act 9 of 2017 ('FSR') against the directive and penalty order issued by the Respondent ('the Authority') set out in a letter dated 4 September 2024.
2. The subject matter of this application relates to a finding by the Authority that the Applicant had contravened sections 2, 3(1)(e), 3(2)(a), 9(1), 9 (2),

10(1)(e) and 11 of the General Code of Conduct for Authorised Financial Service Providers, 2017 (the Fit and Proper Determination) and section 2(b) of the Financial Institutions (Protection of Funds) Act, No. 28 of 2001 ("FI Act").

3. The alleged contravention findings all relate to one client of the Applicant, namely, Karlien Jansen van Vuuren ('the Client') and an account held by her at Investec, the Investec Corporate Cash Manager Account ('ICCM').
4. At the material times, the Applicant was represented by:
 - 4.1 Adell van Wyk ('AVW') who was a director and representative of the Applicant. AVW was authorised to provide financial services for long-term insurance, pension benefits, CICs, and health service benefits; and
 - 4.2 Jan Petrus Wentzel ('JPW') who was a director and representative of the Applicant. JPW was authorised to provide financial services for long-term insurance, pension benefits, structured deposits, CISs, shares, debentures, and long- and short-term deposits.
5. JPW is AVW's brother-in-law.
6. AVW's husband practised as an attorney under the name and style of Van Wyk Attorneys ('the Attorneys'), and AVW Assisted him part-time in his practice.
7. The parties have waived their right to a formal hearing, and this is the Tribunal's decision.

B. THE FACTS

8. The Client and her deceased life partner were the Applicant's clients.
9. On the death of the life partner, the Client became entitled to the proceeds of a life policy in the amount of R3,828,845,00 and the ICCM account was opened to receive these funds.
10. In August 2018, the Applicant received instructions from the Attorneys to transfer R3,500,000.00 million Rand to their trust account. The Client signed a consent letter in this regard, but the communication came from AVW.
11. It is common cause that the advice surrounding the ICCM account did not fall into the services that AVW was permitted to provide, but these fell into JPW's purview.
12. During 2018 to 2020, several payments were made from the ICCM account on behalf of the Client. In 2020, the Client filed a complaint with Investec, the gravamen of which was an allegation that an amount of R161,890.20 was paid from the ICCM account without her permission. An investigation ensued, and the Authority interviewed AVW, the Client, and JPW. These investigations culminated in AVW's debarment on 4 September 2024.

C. THE NOTICE OF DIRECTIVE AND ADMINISTRATIVE PENALTY ORDER IN TERMS OF SECTIONS 144 AND 167 OF THE FSR

13. In a letter dated 11 December 2023, the Authority informed the Applicant of its intention to consider certain contraventions and administrative sanctions against them.

14. The intended sanctions included:

14.1 a directive, and

14.2 the imposition of an administrative penalty of R100,000.00.

15. The Authority based its intended sanctions on findings that the Applicant had contravened sections 2, (3)(1)(e), 3(2)(a), 9(1), 9(2), 10(1)(e) and 11 of the General Code of Conduct for Authorised Financial Services Providers and Representatives, 2003 (The General Code), section 13(1)(g) of the Determination of Fit and Proper Requirements for Financial Services Providers, 2017 (the Fit and Proper Determination) and section 2(b) of the Financial Institutions (Protection of Funds) Act, 28 of 2001 ('FI Act').

16. The Applicant submitted written representations to the Authority. Having considered the written representations as well the evidence obtained in the interviews mentioned in 12 above, the Authority decided to proceed with the intended sanctions and notified the Applicant on 4 September 2024, accordingly. That said, the Authority did concede that not all of the contraventions would pass muster, and the following contraventions were scrapped:

16.1 Contravention of sections 9(1) and 9(2) of the General Code.

16.2 Contravention of sections 3(2)(a) of the General Code.

17. The Authority set out its reasons as follows for its contravention findings as follows:

- 17.1 Section 13(1)(g) of the Fit and Proper Determination in that the Applicant failed to ensure AVW did not render financial services in a product for which she was not approved. The evidence obtained in the interviews under oath of AVW, JPW and the Client indicates that AVW and not JPW, as should have been the case, advised the Client on the opening of the ICCM account and that in the premises, the actual financial advice was provided by AVW which amounted to a contravention.
- 17.2 Section 3(1)(e) and 10(1)(e) of the General Code and section 2(b) of the FI Act by failing to obtain the Client's consent before making payments from the ICCM account. The arguments of good faith and due diligence made by the Applicant were rejected by the Authority and were not in accordance with the observation of the utmost good faith and the exercise of care and diligence required of them.
- 17.3 Section 11 of the General Code by failing to employ resources, procedures and technological systems that could have eliminated the risk to the Client and prevented the professional misconduct of AVW. The Applicant attempted to *inter alia* 'victim blame' the client in their excuse to this charge. The Applicant suggested that in addition to having received the instruction for payment by the Attorneys, which so the argument goes absolved them from obtaining the Client's consent, but that in addition, the Client did not question payments made when she received statements at the end of each relevant month. The simple point made by the Authority was that the Applicant failed to operate the ICCM account according to the agreed mandate.

D. APPLICABLE LEGAL PRINCIPLES IN RELATION TO THE PENALTY

18. Section 167 of the FSR Act requires the Authority to consider certain factors when determining a Penalty. These include:

- (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.

E. DISCUSSION

19. The Authority correctly points out that this application for reconsideration involves a double question: whether the Applicant (1) contravened the provisions of the FAIS Act and its subordinate legislation and (2) whether the Authority was justified in its decision.

20. The Authority makes the following points in their Heads of Argument, which are borne out by the evidence:

20.1 AVW was the Client's financial advisor. She advised the Client to open the account despite not being permitted to render financial services regarding short-term and long-term deposits.

20.2 JPW was the only one with access to the ICCM account, and he acted on the instructions of AVW, not the Client. There were no measures in

place to ensure that the Client did not suffer a loss due to misappropriation as required in terms of section 11 of the General Code.

21. The Applicant does not appear to take issue with the quantum of the penalty order. It is trite that the Authority does not use a mathematical calculation when reaching a quantum penalty but instead considers the factors set out in section 167(2)(a) and (b) of the FSR Act.
22. In the circumstances, the Tribunal cannot find fault with the Authority's reasoning in either of the questions we are required to determine.

F. CONCLUSION

23. The Tribunal finds no grounds to interfere with either the issued directive or the penalty order.

ORDER: The application for reconsideration is

dismissed. Signed on 4 March 2025



PJ VELDHUIZEN and LTC HARMS