

THE FINANCIAL SERVICES TRIBUNAL

CASE A31/2023

In the matter of:

WILMIC TRUST

Applicant

and

RIEBEECKSTAD MAKELAAR CC

First Respondent

LEON MARX

Second Respondent

FINANCIAL SECTOR CONDUCT AUTHORITY

Third Respondent

APPLICATION FOR RECONSIDERATION OF THE DECISION OF MR JUNIOR MATHYE OF THE FINANCIAL SECTOR CONDUCT AUTHORITY IN TERMS OF SECTION 230 OF THE FINANCIAL SECTOR REGULATION ACT 9 OF 2017 ("FSR Act")

Re Dismissal of application under sec 234(4)

DECISION

- 1 The applicants are the trustees of Wilmic Trust - one an attorney and the other (Mr Viljoen Jnr) a son of one of the founders of the Trust (Mr Viljoen Snr, "the deceased"). They filed a complaint with the Authority (the third respondent) against the first and second respondents who are, respectively, a financial service provider

and/or representative under the Financial Advisory and Intermediary Services Act 37 of 2002. For present purposes I shall simply refer to them as “the broker”.

2 The Authority raised points in limine, submitting that the application be dismissed summarily in terms of sec 234(4) of the Financial Sector Regulation Act.

3 The deceased had on 8 September 2004 ceded a life policy underwritten by Momentum to the Trust. The cession was an “algehele sessie” and not *in securitatem debiti*. On 13 September the deceased authorised Mr Marx to act as his broker and to register the cession with the insurer, which he did.

4 Shortly after the divorce of the deceased and his first wife (the mother of Viljoen Jnr), the trustees (the then authorised trustees, namely, the deceased and Viljoen Jnr) changed the beneficiary to one “Ms M” as some kind of security of money lent by her to the Trust. Ms M soon thereafter became the second Mrs Viljoen Snr and is now his widow. The change in beneficiary was processed by Momentum on 9 July 2015.

5 The beneficiary nomination was soon afterwards (allegedly on 17 September 2015) changed to be the Trust.

6 Despite this the deceased again nominated his now wife and later widow as the beneficiary under the policy and that nomination was apparently also registered with the insurer. This nomination, say the applicants, was void because it was not done by the trustees who had to act in terms of the trust deed. The policy belonged to the Trust. For purposes of this decision that may be accepted as being correct. It is not said that Marx was involved in this change.

- 7 Mr Viljoen Snr died, Marx acted as executor, the insurer paid the widow (whether directly or indirectly is not said), and the Trust being dissatisfied with the payment to the widow laid a complaint with the Authority.
- 8 The question is to determine what the complaint laid with the Authority was, what relief was sought, and what the powers of the Authority are.
- 9 The letter of complaint stated that the broker (a) had failed to provide the trustees with documentation pertaining to the change of beneficiaries on the life policies of the deceased – presumably proof that the last change was in terms of the trust deed; (b) had failed not to proceed with the filing of a claim with the insurance company as the trustees dispute the correctness of the change in the beneficiaries; and (c) to date he has not provided the trustees with the requested documentation; and (d) the trustees have learned that he had proceeded to register and finalize the claim which they requested he should not proceed with and (e) the result was that the incorrect beneficiary has now received the proceeds of the insurance policy.
- 10 The letter of complaint concluded with the statement that “the trustees require urgent intervention and assistance in this matter.”
- 11 The letter did not indicate what substantive relief was sought. It was nowhere even suggested that the Authority should order the broker to pay damages or make good the loss allegedly suffered by the Trust.
- 12 The complaint was investigated by a member of the investigations department of the Authority presumably in terms of secs 134 to 139 of the FSR Act. In the alleged

“decision” letter the relevant employee stated that the investigation had been completed, and that the following had been found:

- The Trust was never a successor in title of Viljoen Snr in respect of the Policy. Viljoen Snr was the policyholder and the client. Viljoen Snr, and not the Trust, was Marx's client;
- Viljoen Snr acted without proper authorisation of the trustees when signing the cession document and change of beneficiary forms. The internal arrangement relating to the operation of the Trust does not fall within the scope of financial services. It was the duty of the trustees to ensure that they act in accordance with the Trust Deed;
- Marx discharged his duties as a financial service provider properly and in accordance with the contractual relationship and reasonable requests and/or instructions of his client (Viljoen Snr); and
- The death claim payment of R859 954.31 into the bank account of [the widow] was paid in accordance with the request and/or instructions of the policyholder.

13 Nothing more was said, and one may accept that the Authority then closed the file.

14 The trustees applied for reconsideration of the “decision” of the investigating department on the ground that the deceased did not have the power to nominate his widow because of out-and-out cession. Once again, it was not stated what the “decision” in contradistinction to the “reasons” should have been.

15 Significantly, the Trust did not raise any of the other “findings” in its grounds for reconsideration under Tribunal Rule 11, especially that Viljoen Snr, and not the Trust, was Marx's client; that the internal arrangement relating to the operation of the Trust does not fall within the scope of financial services; and that Marx discharged his duties as a financial service provider properly and in accordance with the contractual relationship and reasonable requests and/or instructions of his client (Viljoen Snr).

16 It was only in the replying argument on the point in limine that the Trust suggested that its claim relates to the loss suffered because of the negligence of the broker. That being so, I shall assume that the Trust seeks an enforceable order by the Authority or the Tribunal to order Marx to pay the amount paid to widow as damages to the Trust.

17 For purposes of this decision only and despite the foregoing I shall assume in favour of the Trust that Marx was also its broker and that he in some or other manner failed to comply with his duties as broker negligently and that the Trust suffered a loss equivalent to the amount paid to the widow.

18 The Financial Sector Regulation Act circumscribes the powers of the Authority. The Authority is not a civil court, and it does not make civil orders in favour of complainants who wish to bypass the courts of the land.

19 There is the power to debar Marx if he contravened any financial sector law in a material way. See secs 153 to 154. Assuming once again in favour of the Trust that Marx had contravened some or other financial law in a material way, his debarment

would not be of any value to the Trust in its attempt to recover the amount paid by the insurer to the widow.

20 Then there is sec 167 which permits the Authority to impose an appropriate administrative penalty, which must be paid to the regulator for the purse of the National Revenue Fund (sec 171), on someone who has contravened a financial sector law. Once again, this is not a provision that carries any benefit for the Trust.

21 In sum, failure by the Authority to find that the nomination of the widow as beneficiary under the policy was void has no legal consequences. The same applies to the “decision” as a whole. It does not bind a court, does not lead to any executable judgment, or has any administrative consequences.

22 There are additional reasons why the application for reconsideration is frivolous, and these have been dealt with by the Authority in its submissions. First, the investigator cannot make any decisions on behalf of the Authority without a delegation under sec 71. Investigations are conducted under secs 134 to 139 while enforcement falls under secs 153 and 167 as discussed. There was, accordingly, no decision by the Authority.

23 The second is that the Trust cannot be an aggrieved person interested in the “decision” not to debar or impose a financial penalty on the broker. There are many decisions of the Tribunal that deal with this, some quoted by the Authority¹ and not addressed in the reply of the Trust, and it is unnecessary to reinvent the wheel.

¹ A18/2020 - <https://www.fsca.co.za/EnforcementMatters/Publications%20and%20Documents/Decision%20%20AON%20SA%20v%20FSCA%20and%20Others.pdf>

24 The ultimate finding is that the application is dismissed summarily under sec 234(4) of the Act.

Signed on behalf of the Tribunal on 31 October 2023

A handwritten signature in black ink, appearing to read 'LTC Harms', enclosed in a thin black rectangular border.

LTC Harms (deputy chair)