THE FINANCIAL SERVICES TRIBUNAL

Case PA1/2019

In the matter between	
MIGHTY MWALE (MR)	First applicant
MIGHTY SOLUTIONS CC	Second applicant
And	
THE PRUDENTIAL AUTHORITY	First respondent
BOWMAN GILFILLAN INC	Second respondent

Tribunal: LTC Harms (chair), Adv William Ndinisa and Mr Ahmed Jaffer

For the applicants: Mr Mighty Mwale in person

For first the respondent: Adv EL Theron SC and Adv M Rourke instructed by Bowman Gilfillan Inc

Hearing: 11 June 2019

Summary: Reconsideration of a decision by the Prudential Authority ito sec 83 of the Banks Act; conducting the business of a bank; GN 498 published in the Government Gazette No. 17895 on 27 March 1997.

DECISION

INTRODUCTION

The Applicants, Mr Mighty Mwale and Mighty Solutions CC, seek a reconsideration of the decision by the Prudential Authority (hereinafter referred to as 'the Authority') to issue a directive in terms of Section 83 of the Banks Act 94 of 1990.

The close corporation, of which Mr Mwale is apparently the only member, is under business rescue, but the application was launched on its behalf by Mr Mwale and not by the business rescue practitioner. Mr Mwale has no legal standing to act or appear on behalf of the business rescue practitioner. This, in the event, has no practical effect on our decision.[1]

The Authority is a financial sector regulator as defined in sec 1 of the Financial Sector Regulation Act 9 of 2017 ('the FSR Act'), and established in terms of section 32, and its decisions (as defined in sec 218) are subject to reconsideration by this Tribunal upon application by a party aggrieved (sec 230).

The Authority is not the SA Reserve Bank or its Governor or Deputy Governor but is a juristic person operating within the administration of the Reserve Bank.[2]

This Tribunal does not have jurisdiction over decisions of the Reserve Bank or its Governor or Deputy Governor.

[1] The joinder of the second respondent is out of order and will be ignored.
[2] The relationship between Banks Act and the Financial Sector Regulation Act is dealt with in sec 1A of the former. The Reserve Bank is not regulated by the latter Act.

The origin of the impugned decision is to be found in sec 12 of the South African Reserve Bank Act 90 of 1989, which provides that if the Governor or a Deputy Governor of the Reserve Bank has reason to suspect that anybody not registered as a bank or as a mutual bank, is carrying on the business of a bank or a mutual bank, he or she may direct the Registrar of Banks to cause the affairs or any part of the affairs of such party to be inspected by an inspector in order to establish whether or not the business of a bank or mutual bank, as the case may be, is being carried on by that party.[3]

Reverting to the Banks Act, sec 83(1) states that if as a result of such an inspection the Authority (formerly the Registrar of Banks) is satisfied that any person has obtained money by carrying on the business of a bank without being registered as a bank or without being authorized to carry on the business of a bank, the Authority may in writing direct that person to repay all money so obtained by that person.

In terms of sec 84(1), simultaneously with the issuing of the direction, or as soon thereafter as may be practicable, the Authority must appoint a the repayment administrator (hereafter the 'administrator') to manage and control the repayment of money in compliance with the direction by the person subject thereto.

On appointment of an administrator, the administrator must recover and take possession of all the assets of the person subject to the relevant direction; and all actions, legal proceedings, the execution of all writs, summonses and other legal process against that

[3] Since 1 April 2018, such inspections are conducted in terms of the provisions of Part 4 of Chapter 9 of the Financial Sector Regulation Act.

person are stayed and may not be instituted or proceeded with without the leave of the court. (Sec 84A.)

A Deputy Governor of the Reserve Bank had reason to suspect that TVI Express ('TVI') was carrying on the business of a bank or a mutual bank, whilst not being registered, and inspectors were appointed on 18 March 2011 as temporary inspectors of inter alia, TVI, a number of named role players, and 'any related persons and entities'.

The purpose of the appointment was to establish whether or not the business of a bank or mutual bank was being carried on by TVI and any related person or entity in contravention of the Banks Act.

During the inspection and as a consequence, the Authority became satisfied that the applicants were a related entity and had obtained money from members of the public by carrying on the business of a bank without being registered as a bank .

Subsequently, on 28 June 2018, the Authority issued a directive, in which the applicants were directed to repay all money obtained in contravention of the Banks Act. Simultaneously, the Authority appointed a repayment administrator, Mr JG Kruger.[4]

This decision is the subject of the application for reconsideration.

However, the applicants have in addition attacked the appointment of Kruger by the Reserve Bank and everything that he did, flowing from the appointment. As mentioned, Kruger was appointed by a Deputy-Governor of the Reserve Bank, and not by the Authority.

[4] The delay is ascribed to the size of the scheme and the number of role players that had to be investigated and against whom orders had to be sought.

The appointment took place before the FSR Act and as said, this Tribunal does not have jurisdiction over the Reserve Bank, and the ground will not be considered.

On 26 November 2018 a rule *nisi* was granted by the High Court on an *ex parte* application to confirm the duties of the repayment administrator. The return date was 16 May 2019.[5]

On 5 December 2018 the rule *nisi* was executed and the directive was served, together with a letter informing the Applicants of the amount unlawfully obtained.

In execution of the rule *nisi*, caveats were registered over two immovable properties of the first applicant and a motor vehicle, being a BMW 320 D series, with registration number DH19FBGP was removed.

THE BUSINESS OF A BANK

The Banks Act defines 'the business of a bank' in sec 1 to mean

(a) - (d) ; or

(e) any other activity which the Authority has, after consultation with the Governor of the Reserve Bank, by notice in the Gazette declared to be the business of a bank,

. . ..

The then Registrar of Banks (since 1 April 2018 the Authority) extended the definition of activities that constitute the business of a bank in GN4 98 published in the Government Gazette No. 17895 on 27 March 1997, to cover active participants in pyramid and related schemes.

[5] We have not been informed as to the outcome of the application.

The decision was taken under the extended definition of the Regulation and not under any other definition, and it is consequently unnecessary to consider the other definitions for purposes of this case.

The Regulation provides that

> 'in terms of paragraph (e) of the definition of "the business of a bank" in section 1 of the Banks Act, 1990 (Act 94 of 1990), and after consultation with the Governor of the South African Reserve Bank, I, Christo Floris Wiese, Registrar of Banks, hereby declare the activities set out in paragraphs 2 and 3 of the Schedule to be the business of a bank.'

The Schedule states as follows:

> 1. Definitions.—In this Schedule, 'the Act' means the Banks Act, 1990 (Act 94 of 1990), and any word or expression to which a meaning has been assigned in the Act shall bear such meaning and, unless the context otherwise indicates—
>
> 'business practice' includes—
>
> (a) any agreement, arrangement or understanding, whether legally enforceable or not, between two or more persons; or
>
> (b) any scheme, practice or method of trading, including any method of marketing or distribution.
>
> 2. The acceptance or obtaining of money, directly or indirectly, from members of the public as a regular feature of a business practice, with the prospect of such members (hereinafter referred to as the "participating members") receiving payments or other money-related benefits, directly or indirectly—

(a) on or after the introduction of other members of the public to the business practice (hereinafter referred to as the "new participating members"), from which new participating members, in their turn, money is accepted or obtained, directly or indirectly, as a regular feature of the business practice, whether or not—

(i) the introduction of the new participating members is limited to their introduction by participating members or extends to the introduction of the new participating members by others persons; or

(ii) new participating members are required to acquire movable or immovable property, rights or services;

(b) on or after the promotion, transfer or change of status of the participating members or new participating members within the business practice; or

(c) from funds accepted or obtained from participating members or new participating members in terms of the business practice.

3. The soliciting of, or advertising for, directly or indirectly, money and/or persons for introduction into or participation in a business practice as described in paragraph 2 supra.

THE BUSINESS OF TV1

The nature of the business of TV1 was described in detail in the judgment in *Kruger v Joint Trustees of the Insolvent Estate of Paulos Bhekinkosi Zulu and Another* [2016] ZASCA 163;

[2017] 1 All SA 1 (SCA), and we quote liberally (with changes where appropriate and without quotation marks) from that judgment.[6]

TVI was described on its website as: 'an International Direct Selling Company having Alliances and Channel partners all across the world' and as 'one of the fastest growing companies in the Network Marketing Industry today'. It claimed to operate in over 160 countries across the globe and that its head office was in London.

The business entailed the marketing and sale of a travel voucher, mostly in electronic form. The voucher purportedly gave members significant discounts for international travel and accommodation with 'travel partners' including the Hilton Hotels, Lufthansa, Swissair, South African Airways and many other reputable companies.

It had to be bought electronically at USD250 via TVI's website. Each had a unique number and a member purchasing it was accorded a particular status, such as an 'Associate' or 'Distributor'. The member would be granted certain rewards such as a seven day holiday at a partner's three to five star hotel or resort, a free companion flight and a lifetime access to TVI's promotions and discounts in relation to air travel, accommodation, car hire and travel insurance.

The structure of the institution and its business was that of a typical pyramid scheme. A member had to traverse two boards, the 'traveller' and the 'express' boards. Upon joining, members were initially given positions at level one of the traveller board and would thereafter travel across four levels until they exited the first (traveller) board. On exiting the first board they received a reward of USD250 in cash and USD250 in vouchers ('double your

[6] The legal issues (but not these basic facts) were different and the case is not quoted for any legal proposition.

investment'!). But to qualify for the rewards they had to 'sponsor' two new entrants. A member exiting the traveller board would then go on to the first level of the express board where the exit reward was USD10 000.

The US Dollars were, for local purposes, conveniently expressed as R2 700.00 at the then prevailing exchange rate.

Thereafter the member could go on to the next express board, *ad infinitum*. A member would also earn five to ten per cent of sales made by his or her 'downline' (those that he sponsored and those sponsored by them), and be eligible for numerous other prizes.

Unsurprisingly, TVI was declared an illegal scheme in various jurisdictions throughout the world. In this country, the institution had brutally taken advantage of the informal communal savings structures (the stokvels) through distributors, some of whom were religious ministers, politicians, and civil servants, including magistrates and prosecutors. The total investment into the institution, within the country, was estimated at R1,6 billion.

Moving away from the SCA judgment, it is beyond doubt that, on these undisputed facts, TV1 conducted a business practice falling within the terms of the Regulation. In simplified terms and based on the alternative in para 2(c) of the Regulation, it obtained money, directly or indirectly, from members of the public as a regular feature of a business practice, with the prospect of the participating members receiving payments or other money-related benefits, directly or indirectly from funds accepted or obtained from participating members or new participating members in terms of the business practice.

DID THE APPLICANTS CONDUCT A BUSINESS PRACTICE?

The applicants point out that they are and were not TV1, but that has never been alleged by anyone.

Mr Mwale's repeatedly relied on the reports of the inspector where it was stated that his 'involvement in TVI is only substantiated to the extent of our review of his banking records. We therefore, have no independent, direct evidence that he conducted the business of a bank in contravention of the Banks Act.'

The statement must be read in context and bearing in mind that independent, direct evidence is never essential to establish a fact – indirect and circumstantial evidence often carries more weight.

The reports added that it was suspected that most of Mr Mwale's activities were conducted either on a cash basis and/or through unidentified account and that sufficient evidence exists to substantiate the submission that the Banks Act had been contravened.

The question is then whether, in terms of Regulation 1, the Applicants were parties to any understanding, whether legally enforceable or not, with TV1 in conducting the scheme as described. This depends on their involvement, as detailed in para 16 of the reasons of the Authority, in the scheme.

The Authority explained that the standard practice in South Africa was that the investor purchased a block on the traveler board for R 2 700.00. Participants were advised that they would receive R 5 400.00 on completion of the traveler board and R 108 000.00 on completion of the express board. It would appear that no actual cash returns were paid but that TVI credited the investors with US $500 and UD $10,000 when cycling out of the respective boards. (Mr Mwale admitted that he cycled out, which explains the numbers of

vouchers he had – see below.) The member then converted the credits into vouchers on the website and sold them to other members of the public at the rate of R 2700 per voucher in order to realise the financial benefit from the scheme.

Mr Mwale did not deny on the papers that he had 19 (nineteen) registered profiles with the highest ranking of Presidential Associate within TVI South Africa, which entitled him to 10% commission for sales in his downlines, and that there were a further 17 registered profiles found on the list of TV1 under the surname 'Mwale'. The names linked to these profiles were all family members of him and all used his residential address.

The schedule on which the applicants rely, marked 'MM', purports to be a 'blow-by-blow rebuttal of the nature purport and motive of the transactions' relied on by the Authority. When the same information was sought on 2 December 2014, the applicants failed or refused to provide any.[7] Now, after the sec 83 decision, they have an explanation. Unfortunately for the applicants, MM does not rebut but rather confirms the opinions formed.

In respect of MM, Mr Mwale admitted that he had sold vouchers to the sum of R116 100 to persons in East London, Kokstad, Bracken, Maclear and diverse places in Gauteng. In some instances he sold eight or nine vouchers to a single person, and to one Dumisane he sold vouchers on at least three occasions. How and why this happened is not explained.

These amounts were deposited in the bank account of the second applicant. The denial that the applicants have ever received money from members of the public is accordingly false.

[7] Mr Mwale during argument disputed this but he did not deny para 16.11 of the Reasons which raised the matter pertinently with reference to the letter of 2 December 2014..

The applicants also admit in the present application that they have lost money in this scheme because after the scheme was closed they had to throw away the vouchers they had thought they could sell. During argument, Mr Mwale said that he thought that 98 vouchers were involved – which represents vouchers to the value of R264 600.00.

The applicants have no credible explanation for the numerous deposits or amounts loaded onto the ATM or Smartbox systems into the second applicant's account of amounts at multiples of R2 700.00. The coincidence of all these being related to cash petrol sales at two different locations is simply too good to be true.

However, during the hearing Mr Mwale sought to add credence to his submission that all these payments were cash receipts in respect of petrol and other sales at his retail outlets which were then 'banked' onto the ATM or Smartbox systems. For this, he handed in a letter from ATM Solutions which confirms that he had an agreement with them to upload a cash machine at Meadowlands.

The letter proves nothing. The question is not whether cash had been received by either of the applicants but why it had been received.

He also handed a printout of cash receipts at Engen Meadowlands to show that large amounts of cash were daily loaded onto the ATM system. That was also never in dispute and was taken into account by the inspector but the printout similarly does not prove anything in his favour. To the contrary, what strikes one is that the printout covers the period 11 February 2011 to 15 May 2011, while MM deals with the period 13 August 2010 to 2 May 2012; that the printout relates to Meadowlands only; that the daily takings on the printout were nearly all in excess of R100 000.00 while the amounts on MM are, save for two, less than R45 000.00; and that not a single transaction appearing on MM appears on the printout.

The payments in multiples of R2 700.00 made to a contractor, to a Quickshop supplier, for airtime vouchers and the like raise the same questions.

The explanation that the vouchers were goods that were sold does not change the fact that accepting money for the vouchers fell within the scope of the prohibition.

Importantly, schedule MM deals with FNB account number 62044324911 only and the 'suspicious' transactions identified by the inspectors in that account.

The applicants failed to deal with the particulars of Mr Mwale's platinum FNB account 620839986300 which indicate probable investor deposits of R670 000.00 and probable voucher purchases of R62 100.00.[8]

In particular, Mr Mwale did not dispute the allegations concerning the transactions reflected on the platinum account with other known TV1 operators living as far apart as the Northern Cape and the Eastern Cape involving sales of R40 500.00, R10 800.00 and R54 000.00 and purchases of R62 100 from another known operator.

These facts satisfy us that the applicants did obtain money by carrying on the business of a bank within the meaning of the Regulations. To 'tick the boxes' (using Mr Mwale's favourite expression) of the Regulation, the applicants obtained money, directly or indirectly, from members of the public as a regular feature of a business practice (i.e., the TVI scheme) with the prospect of the participating members receiving payments or other money-related benefits, directly or indirectly (a) on or after the introduction of new participating members of the public to the scheme, from which, in their turn, money is accepted or obtained, directly or indirectly, as a regular feature of the TVI scheme or (b) on or after the promotion, transfer

[8] He was asked during argument to deal with the allegations concerning the account but failed to provide any comprehensible answer.

or change of status of the participating members or new participating members within the business practice; or (c) from funds accepted or obtained from participating members or new participating members in terms of the scheme.

There is accordingly no reason for us to reach a different conclusion from that reached by the Authority in para 19 of its reasons.

IMPROPER EXERCISE OF DISCRETION BY THE AUTHORITY

Another ground raised by the applicants is based on the wording of sec 83(1), which states that if as a result of an inspection, the Authority is satisfied that any person has obtained money by carrying on the business of a bank without being registered as a bank *the Authority may* (and not 'must' or 'shall') direct that person to repay.

The distinction between the use of 'may' on the one hand and 'must' or 'shall' on the other in legislation is real. That the Legislature was aware of the distinction appears from other sections of the Act, more particularly sec 84.

The Authority was acutely aware of its discretion to direct repayment in terms of sec 83 or to leave the depositors with their civil remedies, and it decided on the former. In doing so (see paras 24 -29 of the reasons) it considered the consequences of a directive in terms of sec 83 in the light of sec 84 and against that the consequences of not issuing a directive and leave the depositors in a position where they would each have had to exercise their own civil remedies. These are the unequal and inequitable repayment; the trading of the applicants in insolvent circumstances; and the inability of depositors due to financial circumstances to enforce their civil remedies on an individual basis.

The Authority added that in its experience the type of business model employed and the potential of insolvency (it will be remembered that the close corporation is under business rescue already) made the issuing of a directive and the imposition of a statutory scheme the proper, reasonable and rational choice.

Against that, the case of the applicants is this:

> 'Initiating an inspection in terms of powers granted to [the] decision-maker was not the only option available to them. We submit that, had decision-maker carefully applied their mind to our specific issue they would have opted for the other option namely for the members of the public or investors who lodged a complaint against us to undertake civil litigation proceedings against us. However, since there is no member of public that "invested" with us and no member of public has complained to them about us, we question the motive of decision maker whose primary mandate, by their own admission, is to protect members of the general public. Which member of the general public are they protecting from us? Who have we defrauded?'

We have already found that members of the general public did 'invest' with the applicants and that, accordingly, the factual ground on which the submission is based is lacking.

The applicants have not disclosed the particulars of those whose money they took and they have not informed anyone of the right to recover. It is the function of the repayment administrator to seek and find those persons and to distribute the available funds. Each person who has invested in entitled to repayment of the investment, not because the applicants have defrauded them but because of the directive to effect repayment.

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.

We therefore conclude that that there is no reason to set aside the decision on this ground.

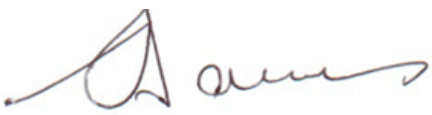
CONCLUSION

The application raised a number of side issues which are irrelevant for reconsideration of the decision and we consciously refrain from dealing with them.

ORDER

The application is dismissed. There is no costs order.

Signed at Pretoria on 12 June 2019 on behalf of the Tribunal



LTC HARMS (CHAIR)