

FSCA Press Release

20 December 2023

The FSCA welcomes Supreme Court of Appeal judgement against Fusion Guarantees (Pty) Ltd

The FSCA welcomes the decision by the Supreme Court of Appeal (SCA) in the matter between Ilse Becker, Eugene Becker and Fusion Guarantees (Pty) Ltd (the Appellants) v The Financial Sector Conduct Authority (FSCA) and Others (454/2022) [2023] ZASCA 149 (10 November 2023), wherein the Appellants failed in their attempt to have certain provisions of the Financial Sector Regulation Act, 9 of 2012 (FSR Act), declared unconstitutional.

The judgment follows an investigation conducted by the FSCA, into the Appellants' guarantee business. Following the completion of the investigation, the Appellants challenged the constitutionality of certain provisions of the FSR Act. See below a summary of the case as highlighted in the "Media Summary" dated 10 November 2023 as it appears on the website of the SCA, which is quoted here for ease of reference, and should be read with the entire judgment:

"Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal in which ss 154, 167 and 231 of the Financial Sector Regulation Act 9 of 2017 (the Act) were challenged on the basis that these provisions infringed the appellants' right to procedural fairness guaranteed in terms of s 33 of the Constitution. An investigation was conducted into the affairs of the appellants. The investigation concluded in a report that the appellants had contravened the Short-Term Insurance Act 53 of 1998. The Financial Services Conduct Authority (the Authority) gave notice to the appellants that it was prima facie of the view that the appellants were in contravention of certain financial sector laws and that it proposed to impose an administrative penalty of R200 million and make a debarment order against two of the appellants. The Authority invited the appellants to make submissions on the investigative report and the proposed administrative penalty and proposed debarment. The appellants made comprehensive submissions, but also challenged the constitutional validity of the powers enjoyed by the Authority, in terms of the Act, to make a debarment order and impose an administrative penalty. Their challenge did not prevail in the high court. In their appeal before the SCA, the appellants contended that while ss 154 and 167 afforded the appellants a right to make submissions to the Authority concerning the sanctions that might be imposed upon them, the Act did not provide the appellants with procedural fairness

Executive Committee:

Commissioner: U. Kamlana **I Deputy Commissioners:** A. Ludin I K. Gibson I F. Badat

in respect of the Authority's finding that the appellants had contravened certain financial sector laws. And since this finding was a necessary stage of decision-making by the Authority before it could decide upon any sanction, the Act was constitutionally invalid. The SCA dismissed this challenge. Upon a proper interpretation of ss154 and 167, the appellants enjoyed the right to make submissions and have those submissions considered by the Authority both as to the issue of the contravention of certain financial sector laws and any possible sanctions that might follow. The Authority cannot make any final decision as to the contravention of certain financial sector laws before inviting the appellants to make submissions on this issue and considering those submissions. Sections 154 and 167, the SCA found, are not invalid for want of procedural fairness and the appeal was accordingly dismissed."

<https://www.supremecourtofappeal.org.za/images/sca2023-149ms.pdf>

The Appellants have since lodged an application to the Constitutional Court for leave to appeal the SCA's judgment. The FSCA will be opposing the application.

ENDS

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