

**IN THE BOARD OF APPEAL OF THE FINANCIAL SERVICES BOARD**

In the matter between:

**COLEEN RACHEL BLESSIE  
(t/a FINANCIAL SOLUTIONS)**

**APPELLANT**

and

**THE REGISTRAR OF FINANCIAL  
SERVICES PROVIDERS**

**RESPONDENT**

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**DECISION**

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**(A) INTRODUCTION**

- [1] This is an appeal in terms of **Section 39** of the **Financial Advisory And Intermediary Services Act, No. 37 of 2002** (the "FAIS Act") read together with **Section 26** of the **Financial Services Board Act, No. 97 of 1990** (the "FSB Act") against the decision of the Registrar of Financial Services Providers ("the Registrar") given on 7 December 2006 declining the application of Mrs. Coleen Rachel Blessie (trading as Financial Solutions) ("the Appellant") for a licence to act as a financial services provider ("FSP").
- [2] At the inception of the hearing on 26 October 2007, the Appellant raised two points *in limine*, namely, condonation for the late filing of the notice of appeal and her *locus standi* to appeal to this Board. These two points, however, were not put in issue by the Respondent because he, rightly in our view, conceded that the Appellant does have *locus standi* in this matter. It was also indicated that the Respondent would not oppose the Appellant's application for condonation but the submission was made that it is the Appeal Board which must exclusively decide whether to grant condonation.

This Board accordingly granted the necessary condonation to the Appellant, and the hearing continued unabated on the basis that this is an appeal in the wide sense. This means that the Appeal Board is not limited to a decision whether the Registrar's decision of 7 December 2006 was right or wrong. Neither is this Board confined to the evidence of grounds upon which the Registrar's decision was based. The Appeal Board has to hear the matter *de novo* and arrive at its own decision. (*F. Nichol & Another v. Registrar of Pension Funds & Others [2006] (1) All SA. 589 (SCA) paragraphs 20 – 22*) This was duly done by this Board and its decision is given below after considering and dealing with the appeal under the following subheadings:

- [b] Appellant's grounds of appeal;
- [c] the factual background;
- [d] the question to be decided by the Appeal Board;
- [e] the Appellant's case;
- [f] the Respondent's case;
- [g] analysis and findings;
- [h] conclusion and decision.

## **(B) THE APPELLANT'S GROUNDS OF APPEAL**

[3] In the relevant notice of appeal the Appellant has, in a three-page document, filed comprehensive grounds of appeal. These may be summarised as follows:

[3.1] That Mr. Ranveer Singh ("Singh") the broker consultant employed by Discovery Health ("Discovery") who liaised with the Appellant on behalf of Discovery, was aware that Hlengiwe Zinhle Mchunu ("Mchunu") was not an accredited broker and was using the Appellant's code to submit membership applications to Discovery and thus acquiesced to this arrangement. Consequently, Singh's knowledge is imputed to Discovery and Appellant therefore concludes that there was no misrepresentation on her part to Discovery;

- [3.2] That since Singh was informed of Mchunu's fraudulent conduct, his knowledge is imputed to Discovery. Appellant therefore concludes that Discovery was informed of Mchunu's fraudulent conduct. Appellant further concludes that there was no attempt on her part to conceal the fraud and she cannot be accused of being an accessory-after-the-fact;
- [3.3] That the Appellant's failure to properly oversee Mchunu's functions is not a reflection of her honesty and integrity;
- [3.4] That Appellant did not consider herself to be a complainant to report the matter to the South African Police Services ("SAPS"). Appellant *bona fide* believed that Mpanza, Discovery or Zondi were under obligation to report the matter to the SAPS.
- [3.5] That the discrepancy in respect of Zondi's complaint and the manner in which it occurred was neither a deliberate attempt by the Appellant to mislead the FSB nor an attempt by her to distance herself from the allegation. It was merely an oversight and a lapse of memory on her part in not having informed Discovery.

### **(C) THE FACTUAL BACKGROUND**

- [4.] The factual backdrop against which this appeal has to be decided is briefly the following:
- [4.1] The Appellant applied to the Registrar in terms of **Section 8** of the **FAIS Act** for a category 1 and 2 licence authorising her to render advice and intermediary services in respect of long-term insurance products: Category C and Health Service Benefits.
- [4.2] The Appellant, in her application, disclosed the following information;
- (a) Since **1 March 2000** she is an accredited broker in terms of **Section 65** of the **Medical Schemes Act, No. 131 of 1998** ("the MS Act"), rendering broker services as defined in the MS Act. These services include the provision of service or advice in respect of access to, or benefits or services offered by, a medical scheme.

- (b) Mr. Nikiwe Christopher Pamla would be appointed as a representative of the Appellant.
- (c) Sometime during **2003** the Appellant employed Mchunu as a consultant to render broker services. Mchunu was paid on a commission basis for policies she (Mchunu) secured.
- (d) At the time Mchunu was not accredited as a broker but, with the knowledge and consent of the Appellant, rendered broker services by way of using the Appellant's broker code. In the meantime an application was lodged for Mchunu to be accredited.
- (e) A client by the name of Mrs. C. Mpanza ("Mpanza") complained to the Appellant that Discovery had deducted two medical aid premiums from her salary when in fact she did not apply to Discovery for membership. Upon investigation it became clear to the Appellant that Mchunu had forged Mpanza's signature and fraudulently applied on behalf of Mpanza for membership to Discovery. Thereupon the Appellant reimbursed Mpanza in respect of the two premiums which had been deducted.
- (f) Shortly thereafter Appellant learnt of a similar complaint from a Mr. N. C. Zondi ("Zondi"), who complained that Discovery had deducted an amount of R220 without his consent. Thereupon, as in the case of Mpanza, the Appellant reimbursed Zondi in the amount of R220.
- (g) The Appellant thereafter terminated Mchunu's employment.
- (h) Thereupon Discovery cancelled Appellant's contract for marketing the Health Care Products of Discovery because she had allowed Mchunu to render broker services by way of using Appellant's accreditation code.

[4.3] The Registrar, after considering Appellant's application for a licence in terms of **Section 8** of the **FAIS Act**, took the view that Appellant's honesty and integrity were

impugned by her failure to report Mchunu's conduct to the relevant authorities. The Registrar therefore declined the Appellant's application for authorisation as a FSP, which decision prompted Appellant to lodge this appeal.

**(D) THE QUESTION TO BE DECIDED BY THE APPEAL BOARD**

[5] In the light of the foregoing factual background the issue which the Registrar had to deal with in the circumstance, and which falls to be decided by this Board, was whether, on the Appellant's own version and the other relevant information, the Appellant is fit and proper in respect of the personal character qualities of honesty and integrity. Stated otherwise, the Appeal Board is called upon to determine, by way of making a value judgement, whether the Appellant's conduct was of such a nature that it renders her unfit in respect of her honesty and integrity to act as a FSP. The onus rests on the Appellant to prove on a balance of probabilities that she is a fit and proper person, in respect of her honesty and integrity, to act as a financial services provider.

**(E) THE APPELLANT'S CASE**

[6] The argument presented on behalf of appellant by her counsel was divided into the following sub-headings:

- (a) Summary of the Appellant's arguments.
- (b) Negligent conduct of the Appellant.
- (c) Factors in mitigation.
- (d) Unfair, unreasonable and/or unsubstantiated conclusions reached by the Respondent.
- (e) Affidavit of Ntombizodwa Florence Maphanga.
- (f) Requirements for fit and proper financial services providers.
- (g) in the alternative.
- (h) conclusion.

Only salient points raised under the above sub-headings will be mentioned for the purposes of this decision.

[7] In dealing with the summary of the Appellant's argument, counsel for the Appellant argued firstly that there is a *nexus* between Discovery Health and Ranveer Singh in that:

- (i) It is common cause that Singh was the Appellant's supervisor/broker consultant at Discovery.
- (ii) Singh's role in that capacity involved liaising between Appellant and Discovery accepting proposal/application forms from Appellant on behalf of Discovery; Advising Appellant of any queries requests and information that emanates from Discovery; forwarding applications for consultants to Discovery as forwarded by Appellant; and submitting proposals/ applications that emanate from brokers such as Appellant allocated him to the company under her broker code.
- (iii) Singh is not merely a conduit between Appellant as a broker and Discovery as the flow of information goes via him, he is also a representative of Discovery as he is employed by Discovery.
- (iv) It must therefore follow that when an independent broker such as Appellant deals with a broker consultant such as Singh the former is effectively dealing with Discovery which Singh represents.
- (v) The Applicant can accordingly not be held to have misrepresented to Discovery when Singh was aware of the arrangement *vis-à-vis* Mchunu.
- (vi) It must accordingly follow that reporting the fraud to Singh was tantamount to reporting it to Discovery.

Secondly, counsel for Appellant submitted that the fact that Singh was aware of the arrangement *vis-à-vis* Mchunu, the Appellant cannot be held to have represented a set of facts wrongly and inaccurately. That this so if one has regard to the dictionary meaning of the word "misrepresent" which is "to represent wrongly and inaccurately".

Thirdly, in dealing with Appellant's obligations vis-à-vis Mchunu, counsel for Appellant submitted that except for effectively "shadowing" Mchunu, the Appellant or anyone else in her position, would not have been in a position to prevent the fraud committed by Mchunu from taking place by overseeing and closely scrutinising the latter's conduct. That the very nature of the manner in which business is solicited in the insurance industry would explain this difficulty.

Fourthly, on fraud and the duty of the Appellant to report, counsel for the Appellant, after giving a textbook definition of fraud, submits that Mchunu's conduct clearly did amount to fraud. Also that Appellant was under a contractual duty to report the fraud to Discovery and did so by advising Singh; that there was no legal duty on the Appellant to report the crime to the SAPS.

In the fifth instance, counsel for Appellant, after giving/ quoting a textbook definition of an accessory after the fact, submitted that Appellant cannot be considered as one to the fraud perpetrated by Mchunu, as her conduct, even on Respondent's version, was not orchestrated to help Mchunu evade justice.

Sixthly, in dealing with the question of conflicting version vis-à-vis Zondi, counsel for the Appellant quoted certain extracts from a letter dated 1 December 2006 written by Appellant to one Thembi Mthenjane, which is to be found on page 124 of the appeal record. Thereafter counsel made the submission that the preamble and conclusion to the said letter clearly reflects that the Appellant was addressing the issue of notification to Discovery of the fraud committed by Mchunu and not the chronology of events as such; that this is supported by the fact that the chronology of events is contradictory to those reflected in the Affidavit submitted to Discovery in the course of their investigations. That, in any event, the affidavit has more force and effect as the averments were made under oath.

[8] Dealing with the sub-heading on the negligent conduct of the Appellant, counsel for the Appellant submitted that the following listed conduct of the Appellant is not indicative of any malicious intent or reckless oversight on the part of Appellant:

- (i) Entering into an agreement with Singh to allow Mchunu to utilise the Appellant's broker code, pending the granting of the one to Mchunu;

- (ii) Failing to establish whether or not Mchunu was accredited with the Council of Medical Schemes;
- (iii) Accepting at face value Mchunu's statement that she had previously been employed by medical aid schemes;
- (iv) Appellant's failure in her letter dated 1 December 2006 to Thembi Mthenjane to pay attention to the chronology of events, whilst concentrating on the aspect of failure to notify Discovery;
- (v) Appellant's attempt to resolve the matters between the complainants and Mchunu by refunding the amounts paid as premiums by the complainants instead of following the correct procedure of refunds *via* Discovery themselves;
- (vi) Appellant's assumption that reporting the fraud to Singh was sufficient and thereby not informing the head office or the forensic department;
- (vii) Appellant's failure to seek independent legal advice and merely relying on the legal expertise of Singh.
- (viii) Submission made in this regard is that the above conduct of the Appellant are clearly errors of judgement rather than lacking in honesty and integrity.

[9] On factors in mitigation, counsel for the Appellant contended and submitted that the following factors need to be considered:

- (i) That the Appellant's omission, which resulted in the Discovery broker code being cancelled, did not result in her being S-referenced;
- (ii) That apart from "the Mchunu issue" there is nothing to put a blight against the Appellant's character;

- (iii) That the Appellant has not employed anyone else since dismissing Mchunu;
- (iv) That the Appellant fully disclosed what was within her knowledge to the Discovery investigator;
- (v) That the Appellant has neither misled the Respondent nor has she attempted to downplay her conduct;
- (vi) That Appellant was attempting to empower fellow historically disadvantaged individuals.
- (vii) That the Appellant has been severely prejudiced by the conduct of Mchunu as the former's code with Discovery had been cancelled resulting in her income being compromised;
- (viii) That the Appellant was not a party to the commission of the fraud;
- (ix) That whilst it may be true that Mchunu was never accredited with the Council of Medical Schemes to sell health products, she was, nonetheless, given a broker code by Discovery.

[10] In so far as the sub-heading "*Unfair, and reasonable and/or unsubstantiated conclusions reached by the Respondent*" is concerned, counsel for the Appellant did not persist with this part of his argument.

[11] With regard to the "affidavit" of Ntombizodwa Florence Maphanga, counsel contended and submitted that this document does not amount to an affidavit as it does not comply with the provisions of the Commissioner of Oaths and Justice of Peace Act. Also that the Appellant was never aware that she was under a legal obligation to inform the Council for Medical Schemes each time a contract with a medical scheme had been terminated; that indeed, the application for removal of her accreditation does not enquire into any changing circumstances regarding the status of contracts with medical schemes; that since the appeal in this matter has not yet been finalised, the Appellant did not deem it necessary, at this stage, to inform the Council for Medical Schemes of the decision by the Registrar to

decline her application for a licence to act as a FSP; that it is interesting that Discovery has not advised the Council for Medical Schemes about their decision to terminate the contract with the Applicant.

[12] In dealing with the requirements for fit and proper Financial Services Providers, counsel for the Appellant firstly quoted the provisions of Board Notice No. 91 of 2003 as amended by Board Notice 101 of 2004 *in extenso*, and submitted that paragraphs (1) and (4) thereof appear to have applicability with regard to the Appellant. These paragraphs refer to honesty and integrity on the one hand, and candidness, accuracy and full disclosure on the other hand, respectively. These requirements will be reverted to later, suffice is to say that counsel for Appellant submitted that in her application for FAIS licence she is on record as having been quite candid on Mchunu's fraudulent behaviour.

Secondly, counsel for the Appellant further quoted certain principles derived from the approach adopted by the Board of Appeal in the matter of **Hamilton Smith and Co. Pty Ltd and the Registrar of Financial Markets** (decided on 16 September 2003) on the determination of whether a person is of sound character. These principles will be dealt with later. For now it is enough to say that it was submitted that the references submitted by the Appellant as contained in her annexure to her application for FAIS licence are indicative of her sound character; that her acts and motives with regard to the Mchunu issue cannot be held to be devious or vexatious and that the Mchunu issue is a solitary one against the Appellant.

Furthermore and thirdly, Appellant's counsel liberally quoted certain extracts from the following cases:

- (i) **Three Diamonds Trading 35 (Pty) Ltd t/a Financial Planning Mentors vs. Registrar of Financial Services Providers paragraph 15 pages 19.**
- (ii) **Ex parte Tziniolis 1967 (1) NSW 357 at 377.**
- (iii) **Anthony James Thomas Durham v. Registrar of Financial Services Providers paragraph 17 page 21, 22 and 23.**

These cases will be referred to later. The submission is however made by counsel that the contents of the quoted passages do not apply to Appellant and that, on the evidence, there is nothing in the Appellant's character, out of the Mchunu matter which reflects adversely on her honesty and integrity; also that Appellant's conduct cannot be said to be congruous with the comments expressed in the **Durham** case, *supra*, at paragraph 19, page 23. and yet, with reference to the case **Jones v. Gordon (1877) 2 Appeal Case 616 (HL)** cited in the **Durham** case *supra* at page 24, the words of Lord Blackburn therein are said to be equally applicable to the Appellant, it is submitted on her behalf.

- [13] Under the sub-heading "In the alternative", counsel for Appellant contended and stated that it is Appellant's respectful submission that the appeal should be upheld. However, in the alternative, Appellant avers that in the event the Board of Appeal is of the *prima facie* view that the Respondent was justified in declining the Appellant's application, that the Respondent ought to have considered the provision of **Section 8(4) (a)** of the **FAIS Act** which has to do with the conditional granting of a licence by the Registrar. One such condition ought to be that the Registrar makes it a condition of the licence that the Applicant should not employ any consultants under its wing for a specific period of time, more so that the Registrar has conceded that Appellant was not a party to the fraud committed by Mchunu, and that there was no misconduct by the Appellant since the Mchunu issue.

As a further alternative, it is submitted on behalf of the Appellant that the Respondent could have imposed a suspended "sentence" on the Appellant should there be a recurrence of the aforesaid conduct. Counsel for the Appellant concluded his argument by submitting that the appeal ought to be upheld with costs.

(F) **THE RESPONDENT'S CASE**

- [14] In his argument on behalf of the Respondent, Mr. D. A. Govender began by sketching the legislative and judicial framework which prescribes the "*fit and proper*" requirements for financial services providers in respect of their conduct. Also, counsel referred the Appeal Board to several authorities on the definition of words such as "accomplices", "conspiracy", "accessory-after-the-fact" and "culpability (mens rea)", to illustrate the applicable principles of criminal law in the present appeal. Thereafter, counsel for the Respondent, in answer to

the question whether the Appellant's conduct impugned her personal qualities of honesty and integrity, presented an extensive argument under the following sub-headings:

- (i) The alleged application for Mchunu's accreditation;
- (ii) Appellant's contravention of **Section 65(1)** of the **MS Act**;
- (iii) Appellant's contravention of **Section 65(3)** of the **MS Act**;
- (iv) Appellant's failure to report Mchunu's misconduct to the relevant authorities;
- (v) Is the Appellant guilty of being an accessory after the fact?
- (vi) Appellant's failure to timeously terminate Mchunu's conduct;
- (vii) Appellant's contradictory versions relating to the Zondi complaint;
- (viii) Appellant's failure to oversee and supervise Mchunu's activities;
- (ix) Is there evidence that the Appellant is remorseful for her actions?; and
- (x) Maphanga's affidavit.

[15] In dealing with the alleged application for Mchunu's accreditation counsel for the Respondent pointed out that in her application for **FAIS licence** the Appellant stated firstly that when she employed Mchunu as a consultant to render broker services, she attended to applying for a code for Mchunu; secondly, that the code was in fact issued. And thirdly, that upon termination of Mchunu's employment contract she cancelled Mchunu's code.

This state of affairs, it is submitted on behalf of the Respondent, gives an impression that Appellant was referring to an application for accreditation to the **MS Council**. But enquiry directed to such council indicates otherwise, in that an application was never sought or obtained in respect of a person bearing Mchunu's name or identity number. Had

Respondent not made the enquiry he would have been misled into believing that Mchunu was, in fact, granted accreditation by the Council that was eventually cancelled.

Respondent submits that Appellant, as a person who herself applied to the Council for accreditation, must have been aware of the provisions of **Section 65 (1)** of the **MS Act**. Besides, the said provisions were brought to her attention in terms of her contract with Discovery. This contract which she personally signed stated that any consultant she employed to market Discovery Health care products must first be accredited by the Council before applying to be accredited by Discovery. That the Appellant's statement in grounds of appeal that Mr Ranveer Singh, an by implication Discovery was aware that Mchunu was never accredited by the council to sell health products, clearly implies that Appellant knew that Mchunu was not accredited by the Council; that this statement is now contradicted by Appellant in her heads of argument that she failed to establish whether Mchunu was accredited with the council due to an error of judgement on her part. Respondent submits that this contradiction reflects adversely on her credibility; that not withstanding this contradiction, this statement also shows that she knew that any person she employs to render broker services must be accredited with the Council.

The Respondent further submits that Appellant could easily have established whether Mchunu was accredited by Council by simply requiring her to produce her accreditation certificate; that Appellant's version of this point is so highly improbable that it must be rejected as false; that Appellant definitely knew that Mchunu was not accredited with the Council and that she now claims to have failed to check such accreditation in order to deny knowing that Mchunu was not accredited by the Council.

- [16] On the contravention of section 65(1) of the MS Act, counsel for the Respondent pointed out that in terms of this section, no person may render broker services unless accredited by the Council; that based on the Appellant's own version and her grounds of appeal it is evident that firstly, she employed Mchunu as a consultant to specifically render broker services; secondly, she knew that Mchunu was not accredited by the Council; and thirdly, she knowingly permitted Mchunu to render broker services using her (Appellant's) broker code. The submission that flows from the above three facts is that Mchunu would not have been able to render broker services without the Appellant's assistance of allowing Mchunu to use the Appellant's broker code. Counsel for Respondent also submitted that the

Appellant contravened section 65(1) of the MS Act as an accomplice because she facilitated Mchunu's contravention of that section of the MS Act in that:

- 16.1 She employed Mchunu as a consultant to render broker services knowing that Mchunu was not accredited by the Council;
- 16.2 Appellant unlawfully assisted Mchunu to render broker services whilst unaccredited by allowing her to use Appellant's broker code;
- 16.3 Mchunu's lack of accreditation was concealed by rendering broker services under the Appellant's code. This was done with the Appellant's consent and knowledge;
- 16.4 Appellant directly intended to assist Mchunu to contravene section 65(1) of the MS Act by unlawfully allowing Mchunu to render broker services using Appellant's broker code. Alternatively, Appellant foresaw as certain or substantially certain that by unlawfully allowing Mchunu to render broker services, she would be assisting Mchunu to contravene section 65(1) of the MS Act. Further alternatively, the Appellant foresaw the possibility that by unlawfully allowing Mchunu to render broker services using her code she would be aiding Mchunu to contravene section 65(1) of the MS Act and was indifferent as to whether such contravention ensued or not;
- 16.5 The Appellant contends that Singh (and by imputation Discovery) was aware that Mchunu was not accredited with the Council; also that Singh was also aware of the arrangement that Mchunu would render broker services using the Appellant's broker code pending an application to Discovery for Mchunu to be accredited to market Discovery health care products. Since Singh did not object to this Appellant assumed that he endorsed the arrangement and "believed that nothing untoward was taking place." The Respondent takes issue with this averment by Applicant for the following reasons:
  - (i) Firstly, the Respondent has no knowledge whether Singh is in fact an employee of Discovery and therefore denies this allegation. The Appellant bears the onus to prove that Singh is an employee of Discovery and knew of

the arrangement; that in the Respondent's understanding an independent broker consultant is one who acts as an intermediary between Discovery and the Appellant; that if the Respondent is correct, then Respondent submits that Singh is not an employee of Discovery and therefore his knowledge cannot be imputed to Discovery, unless he specifically communicated Mchunu's non-accreditation to Discovery; that in any event, the Appellant on her own version stated that Discovery terminated its contract with her because she allowed Mchunu to market "medical aid" using the Appellant's broker code; that this suggests that Discovery was not aware of the fact that Mchunu was submitting membership applications to Discovery using the Appellant's broker code.

- (ii) Secondly, if one assumes that Singh was aware of such arrangement, the Respondent submits that, in any event, whether Singh endorsed such arrangement cannot serve as a defence for the Appellant because Singh is not entitled in law to condone Mchunu's non-compliance with section 65(1) of the MS Act; that incidentally it would also have been contrary to the contract the Appellant had with Discovery that required her to ensure that any consultant she employs must be accredited by the Council and that such consultant also cannot market Discovery health care products until accredited by Discovery.
- (iii) Thirdly, that, at worst, Singh is guilty of complicity; that in any event, Singh's knowledge of the arrangement does not relieve or excuse Appellant from complying with section 65(1) of the MS Act; that as an accredited broker Appellant is under an obligation to comply independently with section 65(1) of the MS Act; that her conduct must be assessed independently from that of Singh.
- (iv) Fourthly, Respondent submits that the Appellant as a person who herself applied to the Council for accreditation, must have been aware of the provisions of section 65(1) of the MS Act; that she also knew that Mchunu was not accredited by the Council; that she further knew that in terms of her contract with Discovery, any consultant she employed to market Discovery

health care products must first be accredited by the Council before applying to be accredited by Discovery; that under these circumstances it is difficult to understand how the Appellant could not appreciate her wrongdoing; that the only reasonable inference is that she knew and appreciated fully well that she was facilitating the contravention of section 65(1) of the MS Act.

[17] As to a contravention of section 65(3) of the MS Act by Appellant, it was pointed out on behalf of Respondent that section 65(3) provides that no person may be paid commission for rendering broker services unless accredited by the Council; that the Appellant, on her own version, compensated Mchunu by way of commission for business she secured; that based on this admission, Respondent submits that Appellant contravened section 65(3) of the MS Act, more particularly in that:

- 17.1 As a perpetrator she directly intended to pay Mchunu commission in return for rendering broker services on behalf of the Appellant whilst knowing that Mchunu was not accredited. Alternatively, that the Appellant foresaw, as certain or substantially certain that by paying Mchunu commission for rendering broker services on her behalf whilst knowing that Mchunu was not accredited, she (Appellant) would be contravening section 65(3) of the MS Act; Further alternatively, that Appellant foresaw the possibility that by paying Mchunu commission for rendering broker services on behalf of the Appellant whilst knowing that Mchunu was not accredited, she (Appellant) would be contravening section 65(3) of the MS Act and nevertheless paid the commission to Mchunu and was indifferent whether she contravened this provision or not.
- 17.2 Alternatively, that the Appellant contravened section 18(2)(a) of the Riotous Assemblies Act 17 of 1956 in that she intentionally conspired with Mchunu to contravene section 65(1) and 65(3) of the MS Act by aiding or procuring Mchunu to render broker services without accreditation, by using the Appellant's broker code and by paying Mchunu commission for rendering such service.
- 17.3 Alternatively, that if the Appeal Board concludes that the Appellant lacks intention, then it is submitted by the Respondent that the Appellant, on her own version, was negligent in not checking whether Mchunu was accredited with the Council; that the

Appellant could easily have verified whether Mchunu was accredited by either requesting Mchunu to produce her accreditation certificate or enquiring from the Council. Any reasonable broker would have first checked Mchunu was accredited with the Council before paying her commission for broker services, that Respondent submits that culpability in the form of negligence has been established on the part of the Appellant; that the Respondent submits that Appellant contravened section 65(3) of the MS Act by paying commission to Mchunu who was not accredited with the Council.

17.4 Lastly, the Respondent submits that the Appellant's conduct of employing and allowing an unaccredited person to render broker services under her licence and compensating such person for such services contrary to the provisions of the MS Act, is sufficiently serious on its own to impugn her honesty and integrity to the extent that she cannot be entrusted to fulfil her obligations imposed by the FAIS Act.

[18] As to Appellant's failure to report Mchunu's misconduct to the relevant authorities, it was pointed out on behalf of the Respondent that Appellant, in her statement to Discovery, stated that after having learnt and resolved Mpanza's complaint, she did not report the matter to any authority; that Appellant further claims that she cannot recall whether she informed Singh of this complaint. Respondent finds it difficult to understand how the Appellant cannot recall such an important issue and Respondent submits that if Discovery was informed of this complaint, it is highly probable that it would have immediately commenced an investigation; that it was only when Discovery received a complaint from Zondi that Discovery became aware of Mchunu's misconduct and thereafter commenced an investigation; and that it is highly unlikely that Appellant reported the matter to Discovery, because if she did, it would have been difficult for her to justify to Discovery why she continued employing Mchunu.

Respondent further submits that the Appellant had an independent duty to report the matter at the very least to Council for the following reasons:

- (a) Since Mchunu was an employee of the Appellant, the latter was vicariously liable for the actions of the former. And as an accredited broker in terms of the MS Act, she had an implied duty to protect the integrity of the medical schemes industry and its

participants by reporting Mchunu's misconduct to the Council, especially since broker conduct is regulated by the Council;

- (b) The Appellant, on her own version, admitted that after terminating Mchunu's services she "heard" that Mchunu was still rendering broker services. The Appellant must have known, based on own experience of Mchunu's misconduct, that Mchunu was not fit and proper to render broker services. For this reason also she should have reported the matter to the Council in order to protect the public; and
- (c) Since Discovery terminated their contract with the Appellant because of her own conduct, she had a duty to bring this matter to the attention of the Council as it also impacted on her own fitness and propriety. Respondent submits that Appellant's failure to report Mchunu's misconduct to the SAPS and the Council was to protect herself from being charged with the contravention of section 65(1) [on the basis of an accomplice] and section 65(3) of the MS Act, alternatively, section 18(2)(a) of the Riotous Assemblies Act 17 of 1956. Stated otherwise, that Appellant was prepared to selfishly protect her own interests at the expense of the medical schemes industry and its participants; and that this factor on its own is sufficient to impugn the honesty and integrity of the Appellant. The Respondent concluded by mentioning that the purpose of ensuring that any person who renders broker services must be accredited with the Council is to protect the participants of the health services industry against dishonest and incompetent service providers; that this is a fundamental principle of the MS Act. Respondent therefore submits that even if one accepts the Appellant's version that she was negligent in failing to verify whether Mchunu was accredited with the Council (which the Respondent denies), such negligence is in itself sufficient to impugn Appellant's honesty and integrity.

[19] As to whether Appellant is guilty of being an accessory after the fact, the Respondent submits that there is *prima facie* evidence that Mchunu is guilty of fraud or forgery and uttering; that this is apparent from Discovery's investigation and Appellant's own version in that :

- (a) Mchunu purported to submit applications to Discovery on behalf of Mpanza and Zondi;

- (b) Mchunu forged the signatures of Mpanza and Zondi on the application forms and misrepresented to Discovery that these persons wished to become members of Discovery; and
- (c) Discovery was induced by the misrepresentation and approved Mpanza's and Zondi's purported applications for membership and started deducting medical aid premiums from them to their prejudice. It would also appear from the investigation by Discovery that Mchunu, through similar conduct, also defrauded a Mrs B. D. Khumalo and a Mrs N. G. Ngema.
- (d) Alternatively, that by failing to report Mchunu's fraudulent conduct to the SAPS and the Council, whilst not her direct aim but rather to protect herself, she subjectively foresaw the possibility that she would assist Mchunu from evading prosecution for her fraudulent conduct by the criminal authority and any type of regulatory action that may be taken by the Council, and was reckless whether this resulted or not, in which event legal intention is present.
- (e) That according to the Discovery investigation when the Appellant refunded the clients' premiums she "did not follow the correct process of refunds via the company, thus the problems could not be traced." This, according to Respondent, reinforces the conclusion that the Appellant, always intended to conceal Mchunu's conduct.
- (f) Respondent submits that as an accredited broker and as the employer of Mchunu, the legitimate expectations of society would require the Appellant to have had the legal duty to refer Mchunu's misconduct to the SAPS and Council.
- (g) Appellant further points out that it is noteworthy that Appellant claims that she did not establish whether Mchunu was in fact accredited with the Council (which the Respondent denies). This, according to Respondent, implies that she assumed that Mchunu was accredited with the Council. Therefore on the Appellant's own version, the Respondent submits that she would have been

under a legal obligation to report Mchunu's misconduct to the Council especially since she employed Mchunu to render broker services.

- (h) The Respondent submits that, on a balance of probabilities, the only reasonable inference to be drawn is that the Appellant unlawfully and intentionally assisted Mchunu to evade justice by failing to report Mchunu's misconduct to the SAPS and the Council, thereby rendering her liable as an accessory after the fact. This, according to Respondent, further impugns the Appellant's honesty and integrity.

[20] On the issue of Appellant's failure to timeously terminate Mchunu's conduct, the Respondent argued and submitted that:

- (a) When Appellant received the first complaint from Mpanza, it would appear that she was satisfied that Mchunu had acted fraudulently and therefore agreed to reimburse Mpanza. Respondent further points out that it is noteworthy that when Appellant arranged for a meeting between Mpanza, Mchunu and herself to resolve the issue, she did not disclose to Mchunu what the purpose of the meeting was or who would be present as she doubted whether Mchunu would attend such meeting. This, according to Respondent, clearly suggests that she at that stage must have been convinced in her own mind that Mchunu was guilty of fraudulent conduct.
- (b) When the meeting did take place Mchunu initially denied any wrongdoing. It was only when Mpanza stated that she did not intend taking any action and only wanted her money back did Mchunu either expressed or impliedly admit her wrongdoing.
- (c) The Respondent submits that Mchunu's misconduct, coupled with her initial denial of any wrongdoing was serious enough to terminate her services immediately. And yet, states Respondent, there is no evidence to suggest that Appellant intended to take any urgent type of disciplinary action against Mchunu or to report the matter. On the contrary, the Respondent points out, Appellant continued to retain Mchunu's services. It was only when Zondi lodged a complaint with the assistance of Discovery, did the Appellant terminate Mchunu's services.

- (d) Respondent submits that it follows that the fact that Appellant did not immediately take any type of disciplinary action against Mchunu suggests that Appellant either condoned Mchunu's actions or was indifferent as to Mchunu's misconduct. Respondent further submits that it is open to serious doubt as to whether the Appellant would have terminated Mchunu's services if Zondi first came to the Appellant. According to Respondent it is reasonable to infer that because Discovery now became aware of Mchunu's misconduct, the Appellant was forced to terminate Mchunu's employment.

[21] On the question of the Appellant's contradictory versions relating to the Zondi complaint, the Respondent stated that:

- (a) The Appellant's original version to the FSB that Zondi first came to her office to lodge a complaint and that she thereafter contacted Discovery and informed them of the complaint is contradicted by the statement Zondi made to Discovery and Appellant's own statement made to Discovery. In her grounds of appeal, however, Appellant first concedes that Zondi's version is correct and she attributes the contradiction to an "oversight" and "a lapse of memory" on her part. And yet in her heads of argument Appellant now contends that there is in fact no contradiction because she was addressing the issue of reporting Mchunu's misconduct to Discovery and not the chronology of events. Accordingly, Appellant fails to appreciate that she has contradicted herself as to who initiated the Zondi complaint. Besides, in her letter to the FSB she clearly suggests that it was she who reported the Zondi complaint to Discovery. In the premises the Respondent submits that this statement has nothing to do with contradiction which reflects adversely on her credibility. Respondent states that this contradiction is significant because it is not an aspect the Appellant could have easily made a mistake on, moreso that the events relating to Mchunu's misconduct were not complicated or lengthy. Accordingly, the Respondent submits that it is reasonable to infer that Appellant deliberately made an incorrect statement in the hope of concealing the fact that she did not of her own volition report Mchunu's misconduct to Discovery in order to protect her own interests. Respondent lastly submits that this reflects adversely on the Appellant's honesty and integrity.

[22] As to Appellant's failure to oversee and supervise Mchunu's activities the Respondent contended and submitted that:

- (a) In the first instance, Appellant admitted that she failed to vigilantly oversee Mchunu's activities and accepts partial responsibility for Mchunu's actions. This is apparent on page 18 paragraph (iii) lines 1 – 6 of the appeal record.
- (b) Secondly, the Respondent states that the Appellant, in her heads of argument, claims that it was not possible to have prevented Mchunu from committing the fraud due to the nature of the health care business, without explaining in what respect; that on her own version, the Appellant did not verify Mchunu's previous employment credentials; that because Mchunu's employment contract with Appellant was for a very short duration, the Respondent submits that the Appellant should have closely supervised and scrutinised Mchunu's work; that Mchunu's submission of fraudulent application forms to Discovery could have been checked by merely telephoning the applicants and verifying whether they did in fact apply for membership; that if one bears in mind that the membership application forms contain certain details of the potential applicant, then Respondent submits that the Appellant could have easily checked Mchunu's work because Appellant herself signed the application forms warranting that the applicant's information is correct.
- (c) The Respondent submits that the foregoing facts are relevant because the Appellant in her application for approval as a FSP indicated that she would be appointing one representative. There is an obligation on a FSP to oversee the activities of the representative. This is in terms of section 13 of the FAIS Act. Also that if the representative fails to comply with the FAIS Act then the FSP must take the necessary steps to debar such representative in terms of section 14 of the FAIS Act. The Respondent submits that Mchunu's relationship with the Appellant was similar to that of being a representative, and that Appellant's failure to report Mchunu's misconduct to all relevant authorities leads one to the reasonable conclusion that there is a risk that the Appellant may fail to discharge the duties imposed in terms of section 13 and 14 of the FAIS Act relating to representatives. This, according to Respondent, serves as a further ground to decline the Appellant's approval to act as a FSP. The Respondent further submits that the Appellant's failure to properly

supervise Mchunu's activities was clearly negligent to such extent that it impugned her honesty and integrity.

[23] On the question as to whether there is any evidence that the Appellant is remorseful for her actions, the Respondent, after citing a passage from the court decision in **Ex parte Aarons (Law Society, Transvaal, intervening)** 1985 (3) SA 286 (T) at 294 G – I on the assessment of character reformation, points out that:

- (a) The Appellant's persistence that she had no duty to report Mchunu's misconduct to the SAPS and the Council clearly demonstrates that she has failed to appreciate the gravity of her conduct.
- (b) Even if Appellant avers that she is partially to blame for Mchunu's conduct, the Respondent submits that Appellant is equally to blame for Mchunu's misconduct for reason of being vicariously liable for Mchunu's actions and the fact that Mchunu would not have been able to perpetrate the fraud without the use of the Appellant's broker code; that Appellant's acceptance of only partial responsibility instead of equal responsibility demonstrates a lack of remorse and failure to appreciate her wrongful conduct or indifference as to her transgressions; that in either case it supports the conclusion that the Appellant lacks honesty and integrity.
- (c) The Appellant's attempt to justify her conduct by suggesting that since Singh was aware that Mchunu was not accredited and did not object to Mchunu rendering broker services on the strength of the Appellant's code comforted her to believe that there was nothing wrong with such arrangement, clearly demonstrates, according to Respondent, that she still does not fully appreciate the seriousness of her wrongdoing. It also evidences a lack of remorse, so submits Respondent.
- (d) Furthermore, Respondent submits that the fact that Appellant states that her failure to report Mchunu's misconduct to higher authorities at Discovery was because her broker consultant did not advise her to do so, demonstrates her failure to take responsibility for her own actions, especially that she continually places the blame on Singh. This, submits the Respondent, also reflected the absence of remorse on the part of the Appellant.

- (e) In the last instance, the Respondent states that an exacerbating factor in this case is that the Appellant's complicity of contravening sections 65(1) and (3) of the MS Act and her failure to report Mchunu's misconduct was committed at a time when she was expected to maintain the highest professional standards of integrity.

[24] As to the issue of Maphanga's affidavit, the Respondent contends and submits that:

- (a) Despite what was held by the court in **Ladybrand Hotels v Stellenbosch Farmer's Winery** 1974 (1) SA 490 that there is an onus on the person who disputes the validity of an affidavit to prove by evidence the failure to comply with the prescribed formalities, the Appellant, without explaining on what basis, claims that the affidavit submitted by Ntombizidwa Florence Maphanga ("Maphanga") on behalf of the Council, does not comply with the Justice of Peace and Commissioners of Oaths Act 16 of 1963 ("the Commissioners Act"). This is denied by the Respondent who states that, in order to prevent unnecessary argument and protracted litigation, Maphanga would provide another affidavit. The Respondent further submits that if Appellant is right, (which Respondent still denies) Maphanga's affidavit nevertheless merely remains an unsworn statement.
- (b) The Respondent further submits that Appellant, in terms of regulation 28B(1)(c) read together with 28B(4) issued in terms of the MS Act, is required to comply with the fit and proper requirements prescribed by the FAIS Act. It is on this basis that the Appellant had a duty to report the Respondent's refusal to authorise the Appellant from acting as a FSP to the Council; That the fact that the Discovery cancelled its contract with the Appellant was a result of her own doing and can hardly serve as a mitigating factor
- (c) The Respondent's response to paragraph 45 of Appellant's heads of argument that "only sub-paragraphs (1) and (4) [of the Board Notice] appear to have applicability with regard to the Appellant" is firstly that part II section 2 (2) of the Notice is also applicable. Secondly , that if the Appellant reported Mchunu's misconduct to both the Council and the SAPS , it is highly probable that she may have been found guilty of contravening

sections 65 (1) and (3) of the MS Act on that , at the very least the Council would have found her to have been negligent , incompetent, or guilty of mismanagement to such extent that it impugned her honesty and integrity ; that if this occurred the provisions of Part II section 2 (3) of the Notice may have then been applicable; that it was the Appellant's own actions that enabled her to evade the applicability of these provisions.

(d) Furthermore, the Respondent's response to averments in paragraph 46 of the Appellant's heads of arguments that the references submitted by the Appellant, as contained in annexures to her application for an FAIS Licence, are indicative of her sound character, is a submission that these character references do not suggest whether the referees were fully aware of the Appellant's role relating to Mchunu's misconduct; that it follows that they can hardly assist the Appellant in these circumstances.

(e) Finally, the Respondent states that it is important to note that the Appellant clearly employed Mchunu to further her (Appellant's) own business interests as Mchunu was marketing health care products from the Appellant's support base; that membership applications were submitted under the Appellant's code; and that Appellant unlawfully shared the commission received with Mchunu in contravention of Section 65 (3) of the MS Act . The Respondent therefore submits that the Appellant has shared in the ill-gotten gains.

[25] As to the appropriate order, the Respondent submits and prays that the Appellant's appeal should be dismissed with costs.

### **(G) ANALYSIS AND FINDINGS**

[26] Having read the appeal record and having heard the argument and submissions which were presented on behalf of the respective parties, the Board of Appeal analyses the relevant facts and makes the findings below as follows:

(a) Having regard to, and keeping in mind the question which was to be decided by the Appeal Board as formulated in paragraph 5 above, a useful point of departure would be to spell out the "fit and proper" norm as well as the value judgment we have to exercise.

Thereafter, make a determination, by applying the norm and the law on the common cause facts or those undisputed, as to whether the Appellant's conduct was of such a nature that it renders her unfit in respect of her honesty and integrity to act as an FSP.

(b) The *fons et origo* of the "fit and proper" norm is to be found in section 8(1)(a), (b) and (c) of the FAIS Act, which deals with an application for authorisation of financial services providers and provides that:

*"8.(1) An application for an authorisation referred to in section 7(1), including an application by an applicant not domiciled in the Republic, must be submitted to the registrar in the form and manner determined by the registrar by notice in the Gazette and be accompanied by information to satisfy the registrar that the applicant complies with the requirements for fit and proper financial services providers or categories of providers, determined by the registrar by notice in the Gazette, after consultation with the Advisory Committee, in respect of –*

- (a) personal character qualities of honesty and integrity;*
- (b) the competence and operational ability of the applicant to fulfil the responsibilities imposed by this Act; and*
- (c) the applicant's financial soundness:*

*Provided that where the applicant is a partnership, a trust or a corporate or unincorporated body, the applicant must, in addition, so satisfy the registrar that any key individual in respect of the applicant complies with the said requirements in respect of –*

- (i) personal character qualities of honesty and integrity; and*
  - (ii) competence and operational ability,*
- to the extent required in order for such key individual to fulfil the responsibilities imposed on the key individual by this Act."*

*(underlining for emphasis)*

[27] In Board Notice 91 of 2006 ("the notice"), the Registrar prescribed the fit and proper requirements. Part II thereof deals with the personal qualities of honesty and integrity which are expected of a FSP. Paragraph 2(1) provides that: "*An Applicant must be a person who is honest and has integrity*" (underlining for emphasis).

[28] From time to time the Appeal Board hears and decides matters wherein the honesty and integrity of an Applicant is in issue. One such matter is that of **Hamilton Smith & Company v The Registrar of Financial Markets** which was decided on 16 September 2003. In that case, which, in our considered opinion, is equally applicable in assessing an application in terms of section 8(1) of the FAIS Act, and is germane to this appeal, the Appeal Board expressed itself in the following terms:

*"To determine whether a person is "of good character and integrity" involves a moral judgment. In arriving at that judgment it is necessary to have regard to the manner in which the person concerned has conducted himself not only in his private life but also in his dealings with those with whom he has come into contact professionally or in the course of his business. A distinction is sometimes drawn in this context between "character" and "reputation".*

As Lord Denning put it in **Plato Films. Ltd v Speidel [1961](1) All ER 876 at 889**: "A man's character, it is sometimes said, is what he in fact is', whereas his 'reputation is what other people think he is.'

In **Ex parte Tziniolis [1967] (1) NSW 357 Holmes J A at 377** described the term "good character" as follows: "Good character is not a summation of acts alone but relates rather to the quality of a person. The quality is to be judged by acts and motives, that is to say, behaviour and the mental and emotional situations accompanying that behaviour. However, character cannot always be estimated by one act or one class of act. As much about a person as is known will form the evidence from which the inference of good character or not of good character is drawn(underlining for emphasis).

The relevant definition of "integrity" in the Oxford English Dictionary reads:  
"3b. Soundness of moral principle; the character of uncorrupted virtue, especially in relation to truth and fair dealing; uprightness, honesty, sincerity."  
These definitions suggest that in determining whether a person is "of good character and integrity" it is necessary to know as much as possible about that person and his or her background or, put differently, to know the whole person."

- (e) That Mchunu, whilst her application for accreditation was still pending, rendered broker services by using the Appellant's broker code, with the full knowledge and consent of the Appellant.
- (f) That Appellant's supervisor at Discovery Health, Mr R Singh ("Singh") was aware of the fact that Mchunu was making use of Appellant's broker code.
- (g) That Discovery Health did issue Mchunu's broker code to her sometime in October/November 2003.
- (h) That a client, Mrs C Mpanza ("Mpanza") lodged a complaint to the Appellant that Discovery had deducted two medical aid premiums from her salary when, in fact, she did not apply to Discovery for membership.
- (i) That upon enquiry by Appellant it became clear to her that Mchunu had forged Mpanza's signature and without Mpanza's knowledge and consent applied on behalf of Mpanza for membership to Discovery.
- (j) That Appellant resolved Mpanza's complaint by reimbursing the latter in respect of the two premiums that were deducted and arranging for the cancellation of Mpanza's membership with Discovery.
- (k) That no further action was taken by Appellant against Mchunu in that Appellant neither reported Mchunu's fraudulent activity to Discovery nor did she report it to the police.
- (l) That soon thereafter a similar complaint was lodged by one Mr NC Zondi that Discovery had deducted an amount of R220 without his consent. This complaint came to Appellant's knowledge who immediately reimbursed Zondi the amount complained of. By that time Zondi had been to Discovery and had met with Singh to complained about the unauthorised deduction of R220.00.
- (m) That Appellant thereafter put a stop to any further activities of Mchunu by terminating the latter's employment.

[29] Another piece of legislative framework which is applicable *in casu* is the Medical Schemes Act 131 of 1998 (“the MS Act”)(as amended). Section 65 thereof deals with broker services and commission. In terms of section 65(1) thereof no person may act or offer to act as a broker unless the Council has granted accreditation to such a person on payment of such fees as may be prescribed. The word “Council” means the Council for Medical Schemes established by section 3. This is in terms of the definitional section 1 of the MS Act.

Furthermore, section 65(3) thereof states that no broker shall be compensated for providing broker services unless the Council has granted accreditation to such broker in terms of subsection (1). It follows that both sections 65(1) and (3) are prohibitory and peremptory in nature, and any person who contravenes any of the above provisions or fails to comply therewith shall, subject to the provisions of subsection (2), be guilty of an offence, and liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and imprisonment. This is in terms of section 61 thereof, which deals with offences and penalties. One of the aims of the MS Act is to protect the interests of members of medical schemes. This is according to the pre-amble of this Act.

[30] Turning to the objective facts of the matter, the following are either common cause or not disputed by any of the parties.

(a) That since 1 March 2000 the Appellant has been an accredited broker in terms of section 65 of the Medical Schemes Act no. 131 of 1998.

(b) That sometime during 2003 the Appellant employed Ms Hlengiwe Zinhle Mchunu (“Mchunu”) as a consultant to render broker services, notwithstanding the fact that Appellant had indicated that Mr N C Pamla would be appointed as her representative.

(c) That Appellant paid Mchunu commission for policies which the latter secured.

(d) That at the time of Mchunu’s employment by Appellant, the former was not accredited by Discovery Health but had applied for her own accreditation code.

- (n) That at the time when she employed Mchunu, Appellant had not conducted a background check of Mchunu to establish whether she was accredited with the Council of Medical Schemes.
  - (o) That whilst Mchunu was using her broker code for writing new business, the Appellant had not taken the trouble to oversee and to monitor Mchunu's conduct. Hence the complaints by Mpanza and Zondi.
  - (p) That in the end Appellant's contract for marketing Discovery Health Care products was cancelled by Discovery because she had allowed Mchunu to render broker services by using her (Appellant's) accreditation code.
  - (q) That the Registrar declined the Appellant's application for authorisation as a Financial Services Provider ("FSP") for reason of the fact that the Registrar, after considering Appellant's application, was not satisfied that the Applicant complies with the requirements for the fit and proper Financial Services Providers in respect of personal character qualities of honesty and integrity.
- [31] On applying the legal principles stated in paragraphs 26, 27, 28 and 29 above onto the foregoing common cause facts, we arrive at and make the following findings that:
- (a) From the moment Appellant became an accredited broker in terms of section 65 of the Medical Scheme Act, 131 of 1998, she was aware or ought to have been of what is expected of her as a FSP in terms of that Act, in particular of the provisions of section 65(1) of that Act.
  - (b) The Appellant, before employing Mchunu, ought to have conducted a simple background check of Mchunu's work history, more so that Appellant employed her as a consultant to render broker services in consideration of the payment of a commission. Appellant failed or neglected to do so and thus facilitated a contravention of section 65(1) of the MS Act. It does not avail her to plead that she was attempting to empower fellow historically – disadvantaged individuals as she does not have to break the law to do so.

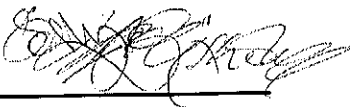
- (c) After taking Mchunu into her employ, Appellant failed and / or neglected to monitor or keep a supervisory check on Mchunu's activities, as one would expect from a prudent employer whose broker code was being used by another for the procurement of new business. In the absence of such supervisory duty on Appellant's part, one may be forgiven for thinking that Mchunu who was given *carte blanche* authority to operate as she pleased. If that is not the case, then Appellant cannot be heard contending that save for effectively "shadowing" Mchunu, she (Appellant) or anyone else in her position, would not have forestalled Mchunu's fraudulent conduct.
- (d) The fact that Appellant made a conscious choice to reimburse complainants Mpanza and Zondi and did not report Mchunu's misconduct to the relevant authorities, whatever prompted her to do so, amounts to defeating the ends of justice or becoming an accessory after the fact. Appellant must have weighed her options and realised that to report Mchunu's fraud to the relevant authorities would place her person and business in an embarrassing and precarious situation. It follows that she cannot be heard arguing that Singh was aware of Mchunu's fraud, and that reporting the fraud to Singh the broker consultant was tantamount to reporting it to Discovery. Neither can it avail the Appellant to plead in mitigation that even if her omission to report the fraud resulted in Discovery cancelling her broker code, she was not S-referenced.
- (e) It is the considered opinion of the Board of Appeal that without the role played by the Appellant in this sorry saga, Mchunu's fraudulent activities would not have occurred. And if Appellant had been vigilant and honest, Mchunu's nefarious intentions and deeds would have been nipped in the bud, with no concomitant prejudice suffered by the unwary such as Mpanza and Zondi. The Board of Appeal therefore rejects any submission made on behalf of the Appellant that her commissions and omissions *vis-à-vis* Mchunu's fraud, are mere errors of judgment rather than evidence of a lack of honesty and integrity.
- (f) In the circumstances, the Board of Appeal is constrained to arrive at the finding and conclusion that the Appellant's conduct is of such a nature that it does not measure up to the legal norm prescribed in Section 8(1)(a), (b) and (c) of the FAIS Act.

**(H) CONCLUSION AND DECISION**

[32] In the light of the above facts, contentions, submissions, analysis and findings, the Board of Appeal arrives at the ineluctable conclusion that the Appellant has failed to discharge the *onus* to prove, on a balance of probabilities, that her conduct *in casu* rendered her fit and proper, in respect of honesty and integrity, to act as a financial services provider in terms of the FAIS Act. In the result, the Board of Appeal makes the following decision:

THE APPEAL IS DISMISSED WITH COSTS.

**DATED AT PRETORIA ON 30 AUGUST 2008**



**MNS SITHOLE SC  
CHAIRPERSON**



**PP  
D BROOKING  
MEMBER**



**PP  
S KANA  
MEMBER**