

IN THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

In the appeal of:

**ISITHA FINANCIAL PLANNERS AND
LEGAL ADVISORS**

Appellant

and

**REGISTRAR OF FINANCIAL
SERVICES PROVIDERS**

Respondent

DECISION

1.

INTRODUCTION

1.1 The Appellant brought an appeal in terms of Section 39 of Financial Advisory and Intermediary Services Act No. 37 of 2002 "FAIS Act" collated with Section 26 of the Financial Services Act No. 97 of 1990 "Act 97 of 1990" against the Registrar's decision dated 3 August 2009 withdrawing the Appellant's licence to act as a financial services provider.

1.2 The Appellant lodged its notice of appeal dated 23rd October 2009 during or about November 2009.

THE APPELLANT

1.3 The Appellant is Isitha Financial Planners and Legal Advisors CC a close corporation having its registered office and / or place of business at 1215 Nditha Street, Fort Beaufort, Eastern Cape Province.

2.

HEADS OF ARGUMENT

- 2.1 The Appeal Board has been provided with sets of heads of argument from the Appellant and the Registrar.
- 2.2 The main themes of the parties' submissions are contained in the heads of argument and dealt with in the following paragraphs hereinbelow. Oral submissions have also been made before the Appeal Board Hearing.

3.

PARTIES' CONTENTIONS

Appellant's Contentions:

- 3.1 The Appellant's submissions found basis in the Republic of South Africa's Constitution Act No. 108 of 1996 "*the Constitution*".
- 3.2 The Appellant's submissions could be summarised as follows:
 - 3.2.1 According to the Appellant it embarked on a large scale employment of agents towards the end of 2007 with a view to meet a good production of volume of insurance business. According to the Appellant it could only win respect if it produced and wrote quality business as in the insurance industry respect is obtained by the volume of business produced. The Appellant acknowledges that in its employment of agents it trusted people and out of pity and kindness it made a mistake of recruiting unqualified wrong people. The Appellant emphasises the fact that the selfsame agents it recruited stole money from it as and

when the said agents received monies generated by insurance policies.

3.2.2 According to Appellant it opened criminal cases for such agents to be prosecuted. Not much has been said and ventilated about the status of such criminal cases. No detail has been provided of how far are they from being prosecuted. According to the Appellant it was taken by surprise when it received the withdrawal of authorisation of its licence to act as a financial services provider. The Appellant contends that insofar as it is concerned this was done illegally. According to Appellant, Liberty Life ought to have questioned and investigated the whole matter before withdrawal of the Appellant's authorisation.

3.2.3 The Appellant further contends that it was not given an opportunity by the Financial Services Board to answer to the allegations underpinning the withdrawal of its licence to act as a financial services provider. The Appellant further contends that the Registrar failed to appreciate the fact that its principal, namely, Mr Nceda Kidwell Mfana " Mr Mfana " has children and their interests were being violated by the withdrawal of the Appellant's authorisation.

3.2.4 The Appellant further contends that history particularly the impact of the historical aspect of apartheid should have been considered when the decision to withdraw its licence to act as a financial services provider was being taken. On this basis, the Appellant contends that a number of its constitutional rights have been violated including but not limited to Section 33 of the Constitution read with PAJA Act 3 of 2000 regarding its right to a just administrative action. Further, Appellant contends that its right to due process of law has been violated as the evidence upon which the Registrar relies to withdraw its licence to act as

a financial services provider was obtained in a procedurally unfair manner from Liberty Life. On this basis, the provisions of Section 35(3) of the Constitution have been violated.

3.2.5 The Appellant further contends that there is a private privilege on the documentation that the Registrar relied on to withdraw its licence to act as a financial services provider. The Appellant contends that such documents belongs to it, albeit they were in the hands of Liberty Life. On this basis, there is private privilege between the fraudulent policy documents in its hands and Liberty Life. This private privilege has accordingly been violated.

The Registrar's Contentions

3.3 I have read the Registrar illustrative heads of argument. I have even noted the Registrar's persuasive oral submissions. The theme of the Registrar submissions is underpinned on the following main points:

3.3.1 The Appellant's conduct of allowing persons who did not appreciate and understand financial services has to be looked at in a serious light. Clearly the Appellant was aware that the agents it employed did not comply with the requirements of Section 8(1)(a)(b) of the FAIS Act. The Registrar contends that the Appellant was driven by desire to produce a certain volume of business without considering whether the provisions of the Act were being complied with.

3.3.2 The Registrar further contends that the signatures of clients for whom the fictitious policy application were submitted to Liberty Life on their behalf are some of the most vulnerable members of our society. The Registrar contends that the Registrar's duty is to protect vulnerable members of the society. This is so as such vulnerable members lack the skill and knowledge to protect themselves against unscrupulous services providers.

3.3.3 The Registrar contends that because the Appellant admitted its mistake therefore there is no doubt that the Appellant contravened the FAIS Act. This is a serious contravention. The Appellant contravened Section 13(2) of the FAIS Act in the more serious manner by allowing persons who were probably not fit and proper to render financial services and thereby failed to take steps to ensure that such persons complied with the general code of conduct for authorised financial services providers and representatives (the general code of conduct) when rendering financial services.

3.3.4 According to the Registrar, the principal of Appellant, ie, Mr Mfaxa did participate in the fraudulent completion of the application forms for life cover jointly with the agents, more so as Mr Mfaxa signed on the application forms confirming that he has satisfied himself with the identity of the client(s) and also verified such identity. On this basis, it is palpable that Mr Mfaxa was involved in the fraud committed by the Appellant's agents.

4.

ANALYSIS OF THE SUBMISSIONS

4.1 The Appellant throughout its submissions relied on constitutional case law and authorities without dealing with the facts and evidence before the Appeal Board Hearing. The Appeal Board members time and again attempted to direct the Appellant to address them on the facts and evidence before the hearing. At each step and opportunity the Appellant ducked questions relating to the facts and evidence before the hearing. The Appellant's absolute reliance on the Constitution, that is, constitutional authorities and case law did not fully assist the Appellant. This is so as the appeal could be decided without resorting to constitutional issues. The words of Kentridge AJ (as he then was) in **S v Mhlungu & Others, 1995 (3) SA 867 CC** are apposite:

"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed".

4.2 The abovesaid authority clearly lays down that the question of constitutional law should never be anticipated in advance of the necessity of deciding it. Cases should not as a rule be formulated as constitutional cases making them broader than is required by the precise facts and evidence.

4.3 The words of Kentridge AJ in **S v Zuma & Others, 1995 (2) SA 642 CC** bear relevance in this regard. He said:

"While we must always be conscious of the values underlying the constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single objective meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the constitution does not mean whatever we might wish it to mean". At page 652, para 171-J

4.4 On this basis alone, it is palpable that the Constitution does not mean whatever the Appellant wishes it to mean. The contentions of the Appellant all of which were underpinned on the Constitution bear no relevance to the facts and evidence before the hearing. On this basis, the Appellant's contentions deserve no merit.

5.

CONCLUSION

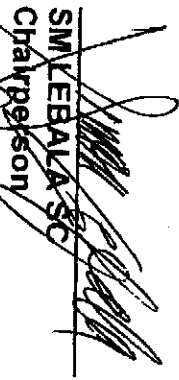
5.1 From the foregoing we are persuaded that the Appellant has contravened and / or failed to comply with the provisions of the FAIS Act in that it initiated various policies without authority from prospective clients to Liberty Life.

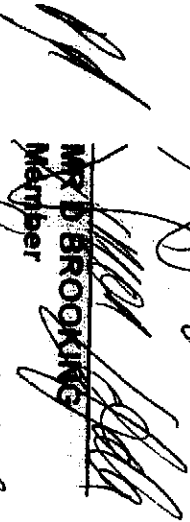
5.2 We are persuaded that it is not in the public interest to allow Appellant to continue as a financial services provider. The Appellant's licence is hereby withdrawn.

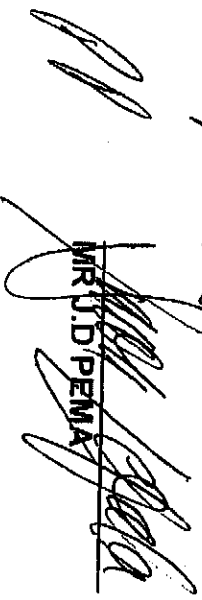
5.3 There is merit in the Registrar's submission that the Appellant's licence should be withdrawn and the Appellant not to be allowed to apply for a new licence for a period of five (5) years. This period will take effect from the 10th December 2010, that is, the date on which this appeal was heard by the Appeal Board. In essence the Appellant is debarred from the 10th December 2010 to the 10th December 2015 from applying for a new licence.

The decision of the Registrar is confirmed as being correct and the appeal is dismissed with no order as to costs.

DATED AT PRETORIA ON THIS THE 20th DAY OF JANUARY 2011.


~~S.M. LEBALA SC~~
Chairperson


~~MR. D. BROOKINGS~~
Member


~~MIR. J.D. PEMA~~