

APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

A9/2016

In the matter between:

MICHELLE HOLLENBACH

Appellant

and

THE REGISTRAR OF FINANCIAL SERVICES PROVIDERS

First respondent

MIRABILIS ENGINEERING UNDERWRITING MANAGERS

PROPRIETARY LIMITED

Second respondent

Appeal panel: LTC Harms (chair), Mr Jay Pema and Adv Ndumiso Nxumalo

Appellant: In person

For the Registrar: Mr B Bredenkamp

For the second respondent: Mr J Olivier of Webber Wentzel Attorneys

Hearing: 13 September 2016

Judgment: 15 September 2016

Summary: Financial Advisory and Intermediary Services Act 37 of 2002 sec 14 – role of Registrar in debarment – does not involve any administrative decision – effect of resignation of representative on debarment proceedings by FSP

JUDGMENT

- 1 The appellant, Ms Michelle Hollenbach, seeks to appeal “decisions” of the Registrar of Financial Service Providers relating to her debarment by her erstwhile employer, Mirabilis Engineering Underwriting Managers (Pty) Ltd, the second respondent.
- 2 The appeal is bad in respect of her attempt to appeal a decision by the Registrar to debar her in terms of sec 14A of the Financial Advisory and Intermediary Services Act 37 of 2002 because the Registrar did not and did not purport to debar her.
- 3 She also intends to appeal the decisions (a) to accept a debarment notification concerning her debarment by and from Mirabilis and (b) to make known the debarment on the official website in terms of sec 14 of the Act. This led to points *in limine* raised by both the Registrar and Mirabilis and this judgment deals with those points. The factual background to the matter follows.
- 4 The facts or events that informed the debarment enquiry against the appellant, namely the alleged downloading, copying and deleting of electronic files of her employer occurred during January to February 2015, at a time when she was a representative and key person of Mirabilis.

- 5 She tendered her resignation on 31 March 2015, which required a three-month notice period, meaning that her last working day at Mirabilis was to be 30 June. During this period Mirabilis became aware of her alleged wrongdoing and, inter alia, suspended her and held a disciplinary enquiry. The outcome of the enquiry was conveyed by its presiding officer to Mirabilis on 1 July, a day after her employment had terminated, and a notification of dismissal was sent to her on the following day and she was notified of the intention to debar her.
- 6 She, through her attorneys, insisted on a proper debarment hearing and Mirabilis conceded her right thereto and a fresh debarment enquiry commenced on 3 – 4 September, and continued on 1 – 2 December. She was legally represented and gave and presented evidence in her defence. In spite of this, the chairman of the debarment enquiry, senior counsel practising in Johannesburg, found in a decision dated 29 February 2016, that the appellant is not a person who has the required honesty and integrity as required by the Act.
- 7 In consequence, Mirabilis took a decision to debar her and informed her and the Registrar of its decision. On 23 March, the Registrar notified Mirabilis that the appellant’s debarment had been recorded and published the fact of the debarment on the FSB’s website. This “acceptance” by the Registrar of the notification and the publication of the fact of the debarment are the “decisions” against which the appellant wishes to appeal.
- 8 The appellant’s case in a nutshell is that an FSP may only debar a person who, at the time of debarment, is a representative (i.e. a person employed or mandated by the FSP)

of the FSP and this means that the debarment was unlawful being beyond the jurisdiction of the FSP. The Registrar, she says, had to decide whether the debarment by the FSP was in order and only then could she record and publish the fact of debarment on its website. The Registrar erred in her decision because, as said, the debarment by the FSP was fatally defective.

- 9 The question whether an FSP may debar a former representative under sec 14 is an intriguing one. The argument of the appellant is that the provisions of sec 14A should instead be used, namely that it is for the Registrar to make such decision. She relies on the wording of sec 14 and the definition of “representative” in sec 1. The approach of the respondents is different. They say that sec 14 must be read in context (especially that of sec 13) and purposively – an approach adopted by the Supreme Court of Appeal when dealing with the section in *Financial Services Board v Barthram and Another* [2015] ZASCA 96; [2015] 3 All SA 665 (SCA) – and that an FSP may debar a former representative provided the impugned acts were committed during the period of employment, as is the case in the present matter.
- 10 We do not find it necessary to decide this issue and shall assume with the necessary degree of diffidence in favour of the appellant that she is correct in saying that Mirabilis was not entitled to debar her after she had left the firm finally.
- 11 The next issue to consider is the nature and effect of an invalid debarment. According to the appellant it simply does not exist and must be ignored. The answer is not that simple.

- 12 It is settled law that a debarment by an FSP is an administrative act. In *Odendaal v ABSA Brokers (Pty) Ltd and another* [2015] JOL 34944 (FB) at [20], the Court stated the following:

“At the hearing before us counsel were agreed that this decision constitutes administrative action as defined in the Promotion of Administrative Act, No. 3 of 2000, (‘PAJA’). I believe that counsel are correct. The decision in question is a decision taken by a natural or juristic person other than an organ of state in exercising a public power or performing a public function in terms of an empowering provision, [which] adversely affects the rights of the applicant and has a direct, external legal effect. I agree with counsel for the applicant that in terms of the Act authorised financial services providers such as the first respondent were woven into the statutory framework which performs the public function in terms of the Act to regulate the rendering of financial services”.

- 13 It is also settled that an administrative decision irregularly taken remains effective and will stand until set aside. It cannot be ignored or treated as a “non-decision”: *Member of the Executive Council for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (5) BCLR 547 (CC); *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] 3 All SA 1 ; 2004 (6) SA 222 (SCA).
- 14 The appellant submitted that this principle could not apply to a decision beyond the scope of a body’s jurisdiction. There is some merit in the submission because there is authority preceding the mentioned judgments to the effect that a judgment given by a court without jurisdiction may be ignored and need not first be set aside. However, to

apply that to administrative decisions would be to make sec 6(1)(a)(i) of PAJA nugatory. It states namely that a court or tribunal has the power to judicially review an administrative action if the administrator who took it was not authorised to do so by the empowering provision.

- 15 Since we have to accept for present purposes that the decision of the FSP stands because it has not been set aside by a court, it is necessary to consider the nature and effect of debarment by a FSP of a representative. This question was answered in *Barthram* (supra) at [15]:

“A debarment of a representative in terms of s 14(1) is complete when the FSP has withdrawn the representative’s authority to act on its behalf and has removed such person’s name from its own register in terms of s 13(3). Moreover, the Registrar only gets to learn of a representative’s debarment, after the event, on being informed of such by the FSP in terms of s 14(3). Upon removal of the representative’s name from the FSP’s register, the FSB’s central register is correspondingly updated.”

- 16 The court added at [16] that –

“it must therefore follow that any representative debarred in terms of s 14(1), must perforce be debarred on an industry-wide basis from rendering financial services to the investing public.”

- 17 This means that the decision to debar is that of the FSP and not that of the Registrar. Once that has taken place sec 14(3) of the Act kicks in, requiring of the Registrar to update the central register:

“(a) The authorised financial services provider must within a period of 15 days after the removal of the names of a representative and key individuals from the register as contemplated in subsection (1), inform the registrar in writing thereof and provide the registrar with the reasons for the debarment in such format as the registrar may require.

(b) The registrar may make known any such debarment and the reasons therefor by notice on the official web site or by means of any other appropriate public media.”

18 Consequently, two jurisdictional facts are required to update the register to set out what is a *fait accompli* in terms of *Barthram*. The first is that the FSP must inform the Registrar of the debarment and the second is that the FSP must provide the Registrar with the reasons for the debarment. It is not disputed that these jurisdictional requirements were satisfied.

19 There is nothing in the Act which requires or permits the Registrar to second-guess the debarment, whether by means of review, appeal or the making of a contrary decision.

20 The appellant sought to counter this conclusion with reference to a statement in *Pienaar v Registrar of Financial Services and Nationwide Funeral Services CC*, Case 629/2013 an unreported judgment of the Eastern Cape Division, Port Elizabeth, at [20]. It is to the effect that Registrar, before entering the name of the representative in the register, has to consider the reasons for the “request”.¹

¹ We respectfully mention that the FSP does not request the Registrar to do anything. The FSP is simply obliged to inform the Registrar of the fact of debarment.

- 21 The context of the statement was that the FSP in that case had not provided the Registrar with any reasons for the debarment, in other words, one of the jurisdictional facts for entering the debarment into the register was absent. The court consequently first set the debarment by the FSP aside because of the manner in which the debarment had taken place, recognising that unless and until that was done the debarment stood (at [27]), and it then ordered the Registrar to rectify the register.
- 22 It is respectfully suggested that what the court had to say about the functions of the Registrar under sec 14 was obiter. This Board respects obiter statements in High Court judgments unless it is satisfied that the statement cannot be correct. If the court intended to suggest that the Registrar has the duty to judge, set aside or ignore a debarment it did not, as far as we can see, base it on any provision of the Act.
- 23 But it goes further. This part of the *Pienaar* judgment cannot be reconciled with the later authoritative judgment in *Barthram* quoted above. This leads to the conclusion that the functions of the Registrar to update the register and to publish the changes do not require any administrative decisions which affect the rights of the debarred representative. Her rights were terminated by the FSP. And her remedy, which she did not pursue, was to review the decision of the FSP to debar her.

ORDER

The appeal is dismissed.

SIGNED ON BEHALF OF THE APPEAL PANEL

A handwritten signature in black ink, appearing to read "A Harms". The signature is written in a cursive style with a large initial "A" and a long, sweeping tail.

LTC HARMS