

SOUTH AFRICA / JUDGMENT

Celliers v Warwick Invest (Pty) Ltd and Others (85389/16) [2019] ZAGPPHC 540 (31 October 2019) [2019] ZAGPPHC 540

COURT

North Gauteng High Court, Pretoria

BEFORE

Francis-Subbiah

CASE / FILE NUMBER

85389/16

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

Case No: 85389/16

31/10/2019

In the matter between:

DESIREE KIM CELLIERS

APPLICANT

And

WARWICK INVEST (PTY) LTD

FIRST RESPONDENT

WARWICK SPECIALISTS (PTY) LTD

SECOND RESPONDENT

WARWICK WEALTH (PTY) LTD THIRD RESPONDENT

THE REGISTRAR OF FINANCIAL

SERVICES PROVIDERS

FOURTH RESPONDENT

JUDGEMENT - PAJA REVIEW

FRANCIS-SUBBIAH, AJ:

[1] The applicant, Ms Celliers was debarred from practicing as a financial services representative by the second respondent, an authorized

financial services provider (FSP). She brings an application to review and to set aside the decision taken by the second respondent in terms of section 14(1) of the Financial Advisory and Intermediary Services Act, No 37 of 2002 (FAIS Act). The application is opposed by the second and third respondents. The second and third respondents are one and the same legal persons and will be referred to jointly as 'Warwick'. The first respondent took no decision in respect of the applicant and therefore is not susceptible to review. No relief is sought from the fourth respondent who played no role in the decision to debar and maintains a watching brief in these proceedings and further abides by the decision of the court.

Background facts

[2] Celliers was employed by the first respondent as a client relationship specialist on 23 April 2012 and placed under guidance and

supervision. Thereafter on 11 June 2013 the first respondent promoted her to investment specialist and on 15 December 2013 she became employed by the second respondent (Warwick) to render financial services to its clients. During February 2014 Warwick became aware that the applicant was in possession of blank records of advice and blank risk profile questionnaires which had been signed by her client in respect of a Shadow Trust transaction. On 27 February 2014 Warwick informed Celliers that she had breached the FAIS Act and was suspended with immediate effect. In addition she received a notice to attend a disciplinary enquiry. The applicant then resigned from Warwick's employ on the next day. On 4 March 2014 she referred a dispute to the CCMA regarding her termination of employment.

[3] On 13 March 2014 Celliers attended a disciplinary enquiry at Warwick where she represented herself. She was dismissed on the ground that she had caused Warwick's clients to sign blank documents which she intended to complete at a later stage. The outcome of the disciplinary hearing was emailed to her on 31 March 2014 which read as follows:-

"You are hereby notified of your dismissal, with immediate effect, from the employ of Warwick Specialists (Pty) Limited, that your name will be removed from the Representative Register of both Warwick Specialists (Pty) Limited and Warwick Invest (Pty) Limited and that the Registrar of Financial Service Providers will be advised that you (sic) debarment in terms of Section 14(1) of the FAIS Act."

[4] Accordingly, on 31 March 2014 the fourth respondent updated its register with the second respondent's decision to debar the applicant and recorded it as follows:-

"Ms Desiree Kim Celliers does not comply with personal character qualities of honesty and integrity 31/03/2014"

[5] As a result of the debarment, the applicant could not render any financial services as a representative on behalf of any financial

service provider to date hereof as she was categorized as not having personal character qualities of honesty and integrity.

[6] Section 14(1) of FAIS Act provides for debarment as follows:-

- (1) An authorized financial services provider must ensure that any representative of the provider who no longer complies with the requirements referred to in section 13 (2)
- (a) or has contravened or failed to comply with any provision of this Act in a material manner, is prohibited by such provider from rendering any new financial service by withdrawing any authority to act on behalf of the provider, and that the representative's name... [be] removed from the register referred to in section 13(3)..."

[7] Accordingly, Warwick as an FSP is authorized to perform a public function in terms of the FAIS Act to regulate the rendering of financial services. Therefore Warwick's decision leading to the debarment of Celliers constitutes an administrative action as defined in the Promotion of Administrative Act, No 3 of 2000 (PAJA). This view was confirmed by the Supreme Court of Appeal in *Financial Services Board v Barthram*[1] and as well in terms of s235 of the Financial Sector Regulation Act.[2]

[8] An administrative action as defined in PAJA, requires that the decision 'adversely affects the rights of any person and which has a direct, external legal effect'.[3] Celliers alleges that debarment has such an impact on herself and on the public including the financial sector.

Condonation

[9] A review under the provisions of S7(1) of PAJA must be instituted without delay within a period of 180 days after the person concerned

was informed of the administrative action became aware of the action and the reasons for it. As described by Brand AJ in the Constitutional Court in the Camps Bay Ratespayers matter, "it is the awareness of the action that sets the clock ticking." [4] The applicant failing to comply with this provision seeks condonation that the period is extended from 1 October 2014. It is also common cause that the present application was only launched during, on or about October 2016 which is approximately two years since the cause of action arose.

[10] In *Uitenhage Transitional Local Council v South African Revenue Service* [5] condonation was discussed and referred to in the following terms:

"Condonation is not to be had merely for the asking; a full detailed and accurate account of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess responsibility. It must be obvious that, if non-compliance is time related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out."

[11] Celliers states in her affidavit that she experienced many difficulties in accessing what remedies were available to her as a result of the debarment.

[12] It is common cause that the financial services sector failed to have an internal review process in place when a FSP exercised a statutory power to debar a representative [6]. The financial services sector has, since institution of the present proceedings, undergone significant change in establishing an internal review process. At the hearing of this matter the court called for a supplementary affidavit from the Financial Sector Conduct Authority (Conduct Authority) [7] for the purpose to provide an overview of the functions of the Financial Services Tribunal, detail the remedies presently available

to debarred persons to challenge debarment decisions and the availability of these remedies to the applicant. However this process

is not retrospective and is not available to the applicant. It becomes available to causes of action arising from 1 April 2018.

Hence it is appropriate that the applicant seeks to have the debarment considered in terms of PAJA through the current application

process.

[13] The facts set out by Celliers in support of condonation is that she received reasons for the debarment on 31 March 2014 and the Fourth Respondent updated its register to record the applicant's debarment on 23 April 2014. During the period from May 2014 to February 2015 she approached Retrench Assist and MD Swanepoel Attorneys to pursue the CCMA proceedings. Being dissatisfied with the CCMA award the applicant approached Botha Copco Attorneys for assistance but not could pay their legal fees.

- [14] On 27 March 2015 Celliers made written representations to the Fourth Respondent regarding her debarment with a view to review Warwick's decision. She was subsequently informed in April 2015 that the Fourth respondent did not have the authority to review the debarment because the decision was made by Warwick.
- [15] Upon requesting reasons from Warwick she was given none and advised that the fourth respondent had instituted and processed her debarment. However the debarment in terms of s14(1) is a regulatory power in the hands of an authorized FSP. Warwick exercised this public power by acting in a statutorily delegated role as if it were the regulator. In this regard the Registrar was not required to interrogate whether the decision taken by Warwick was correctly performed in terms of section 14(1). It is common cause at the time of Celliers debarment there existed no internal review process of the exercise of this statutory power.
- [16] In June 2015 with the assistance of Advocate Ungerer on a pro bone basis, the matter was referred back to the CCMA. Warwick opposed the referral to the CCMA and Advocate Ungerer then did not assist her any further. From August 2015 up to April 2016, the applicant approached various legal professionals for assistance, as well as conducted her own research regarding debarment after which she appointed Harry Pretorius and instituted the current review proceedings against Warwick.
- [17] Upon receiving the opposing affidavit of the respondents she was met with further delays in filing her replying affidavit. This was due to her attorney's further request for funds to proceed with the application in excess of the agreed fee which the applicant could not afford. She then attempted to draft the replying affidavit by herself and forwarded it to her attorney for consideration but received no assistance at all.
- [18] On 15 July 2017 she approached her current attorney Mr De Bruyn who assisted her over the period from September to November 2017 and finalized the applicant's replying affidavit.
- [19] Warwick opposes the application to condone the applicant's non-compliance regarding the delay. However there is nothing substantial in its opposition. Warwick repeatedly contends that if the applicant was not dismissed for misconduct, she would not have been debarred. Since she was aware that the debarment process followed automatically from the dismissal she pursued the challenge in the CCMA, rather than the debarment review in the High Court which is the reason for her delay.
- [20] However Warwick has not indicated that any substantial prejudice is suffered by them. It is apparent that the prejudice suffered by the applicant significantly outweighs any prejudice that the Warwick may suffer. Her debarment stands forever. She has no alternative remedy at her disposal except for the current proceedings before this court to challenge the debarment. The impact of the debarment has seriously affected her access to employment in the financial industry or in any other employment field due to being categorized as not

having personal character qualities of honesty and integrity.

- [21] In my view Celliers has set out sufficient grounds to persuade this Court to accept her explanation for her delay as reasonable and to condone it in the interests of justice. The hardships and financial constraints experienced by the applicant are taken into account. In addition the new Conduct Authority for the financial sector concedes that the remedy of an application to Court to review debarment decisions is lengthy and costly. Therefore a cost effective internal remedy in terms of the FSR Act[8] is being expedited. Therefore the condonation for the late filing of the application in terms of PAJA and the late filing of the replying affidavit is hereby condoned.

Debarment process

- [22] The act does bestow an FSP with discretion whether to debar or not. The reason for this obligation upon the FSP is because a representative

who no longer meets the fit and proper requirements ought not to be unleashed on the unsuspecting public. Before a finding is made that a person does not comply with the fit and proper requirement a fair administrative process has to be followed. If the process was followed Celliers conduct may have been found not to have been sufficiently serious to justify debarment.

- [23] The question to be considered is whether the decision maker, Warwick took all relevant considerations into account. Was the debarment procedure and hearing in compliance with the FAIS Act and Board Notice 106 of 2008? The Board notice provides that an FSP, key individual or representative must be a person who is honest and has integrity and that only acts 'sufficiently serious to impugn the honesty and integrity of the FSP, key individual or representative are considered as prima facie evidence in debarment proceedings.[9] In this regard Warwick was duty bound to consider evidence whether Celliers did not qualify in having personal character qualities of honesty and integrity.

- [24] Section 3 of PAJA also provides that a fair administrative procedure must give a person a reasonable opportunity to make representation. Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. Celliers was not asked any question impeaching her honesty and integrity. She was not given a reasonable opportunity to make representation on personal characteristics of honesty and integrity. Debarment due to publication becomes public knowledge which has the effect of preventing the applicant from securing any form of employment in the financial services industry. These considerations were not taken into account by Warwick.

- [25] In Basson vs Associated Portfolio Solutions (Pty) Ltd and others[10] it was held that as debarment involves a higher threshold than dismissal, representations in respect of debarment would be different to those relating to dismissal. Celliers was not given a reasonable opportunity to make representations on debarment. The only opportunity given to her was on at the disciplinary hearing in regard to the misconduct proceedings but no opportunity was given to her to make representations regarding the proposed debarment.

There was no debarment procedure in place. She was not afforded sufficient time to consider and prepare a case for debarment. Further any decision that affects her capacity as a FAIS representative is subject to different considerations and legislation in comparative to the review under the CCMA proceedings under the labour legislation and the employment contract. Hence Celliers was not afforded a fair process to make input on something so serious that would impact her future and its potential consequences.

[26] Further thereto Celliers requested per e-mail on 10 March 2017 for copies of the complete client files for all three charges, a copy of the supervision agreement signed by Mr Coleman and herself which contained the supervisory mandate detailing the responsibilities and obligations of Mr Coleman as the appointed supervisor. Celliers was denied this information but informed that she ought to have requested same by subpoena. Even on this score she was denied the right to a fair administrative process where she could have been adequately assisted with her request.

[27] In the employ of Warwick Celliers was under the strict instruction and guidance of Mr Coleman the designated supervisor and overseen by Mr Meager the designated Key Individual. In the debarment decision making no consideration was given to an important arrangement to guide and mentor representatives which is underpinned by the FAIS Act. No consideration was given that Celliers was under supervision and that supervisors may be required to accept responsibility for the activities of its representatives.

[28] In Basson[11] Sievers AJ explained that the finding of misconduct at the disciplinary enquiry is insufficient for a finding that the applicant

should be debarred in terms of section 14(1) of the FAIS Act. Similarly Warwick contends in its opposing affidavit that if the

applicant was not dismissed for misconduct, she would not have been debarred. As such the debarment process followed automatically from the dismissal. This clearly indicates that Warwick failed to make a finding on the debarment and assumed that dismissal leads to a finding of lack of honesty and integrity. The dismissal and the debarment were founded on the exact same cause. This results in a pre-judgment of the debarment decision and procedurally unfair administrative action.

[29] I find that the decision of debarment of the applicant was arrived at as a result of an unfair procedure. Procedural fairness relates to the manner in which a decision was reached. Not to the merits of the reasonableness of the decision. Not all the relevant information was before the decision maker to enable a reasonable person to make a fair decision in the circumstances. The decision was therefore taken arbitrarily. An informed decision was not taken to conclude that the dishonesty and lack of integrity in question was sufficiently serious to conclude that the representative no longer complied with the fit and proper requirements prescribed ins 13(2)(a) of the FAIS Act.

Court Order

[30] In the result-

30.1 The decision of the second respondent taken on about 30 March 2014 to debar in accordance with s14(1) of the Financial Advisory and Intermediary Services Act 37 of 2002, Ms Desiree Kim Celliers that she does not comply with personal character qualities of honesty and integrity 31/03/2014 is hereby reviewed and set aside.

30.2 Costs of the application to be paid by the second respondent.

FRANCIS-SUBBIAH, AJ

ACTING JUDGE OF THE HIGH COURT

Counsel for the Applicant: Mr D. M De Bruyn

Counsel for the Respondents: Adv Snyman

Date of Hearing: September 2019

Date of Judgment: 31 October 2019

[1] Financial Services Board v Barthram (20207/2014) [205] ZASCA 96 (1 June 2015),
Supplementary affidavit of Caroline Dey Da Silva - Registrar and Deputy Executive Officer of
the Conduct Authority at para 29 confirms review of debarment proceedings in the Tribunal
i.t.o S235 of FSR Act be instituted in terms of PAJA

[2] Act 9 of 2017

[3] Section 1, PAJA

[4] Camps Bay Ratepayers' and Residents' Association and other v Harrison Case CCT 18/10
[2010] ZACC 19

[5] 2004 (1) SA 292 at para 6

[6] Supplementary affidavit of Caroline Dey Da Silva - Registrar and Deputy Executive Officer of
the Conduct Authority at para 22 and 23

[7] Established in terms of s56 of the Financial Sector Regulation Act, 9 of 2017 which came into
existence on 1 April 2018.

[8] Supplementary affidavit of Caroline Dey Da Silva - Registrar and Deputy Executive Officer of
the Conduct Authority at para 25.

[9] Section 2(3) read with s2(1) of Part II of FAIS Board notice 106 of 2008 - Fit an Proper
Requirements

[10] (WC)case no 16224/2017 (Judgment 14 December 2018) at para 26

[11] Basson vs Associated Portfolio Solutions (Pty)Ltd and 3 others (WC)case no 16224/2017
(Judgment 14 December 2018)

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