

SOUTH AFRICA / JUDGMENT

Ilse Becker and Others v The Financial Services Conduct Authority and Others (454/2022) [2023] ZASCA 149; 2024 (2) SA 348 (SCA) (10 November 2023)

[2023] ZASCA 149

COURT

Supreme Court of Appeal

BEFORE

Petse, Mothle, Meyer, Siwendu, Unterhalter

CASE / FILE NUMBER

454/2022

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 454/2022

In the matter between:

ILSE BECKER

FIRST APPELLANT

EUGENE BECKER

SECOND APPELLANT

FUSION GUARANTEES (PTY) LTD

THIRD APPELLANT

and

THE FINANCIAL SERVICES

CONDUCT AUTHORITY

FIRST RESPONDENT

THE HONOURABLE MINISTER

ENOCH GODONGWANA IN HIS

CAPACITY AS THE MINISTER

OF FINANCE

SECOND RESPONDENT

THE NATIONAL CREDIT REGULATOR THIRD RESPONDENT

THE PRUDENTIAL AUTHORITY

OF SOUTH AFRICA

FOURTH RESPONDENT

Neutral citation: Ilse Becker and Others v The Financial Services Conduct Authority and Others (454/2022) [2023] ZASCA 149 (10 November 2023)

Coram: PETSE DP and MOTHLE and MEYER JJA and SIWENDU and UNTERHALTER AJJA

Heard: 15 September 2023

Delivered: 10 November 2023

Summary: Constitutional law – financial services regulation – whether ss 154, 167 and 231 of the Financial Sector Regulation Act 9 of 2017 (the Act) unconstitutional and invalid – failure to observe procedural fairness in deciding whether a person has contravened a financial sector law – challenge to constitutional validity in terms of s 33 of the Constitution – subsidiarity – application of s 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Ncongwane AJ, sitting as court of first instance):

The appeal is dismissed with costs, such costs to include the costs of two counsel, where so employed.

Unterhalter AJA (Petse DP and Mothle and Meyer JJA and Siwendu AJA concurring):

Introduction

[1] The first and second appellants, Ms Ilse Becker and Mr Eugene Becker respectively, (the Beckers) are the directors of the third appellant (Fusion Guarantees (Pty) Ltd (Fusion)). Fusion is a company, the business of which is to offer guarantees and sureties. The first respondent is the Financial Services Conduct Authority (the Authority). The Authority was established in terms of s 56 of the Financial Sector Regulation Act 9 of 2017 (the Act). Among its functions, the Authority is charged with the power to regulate and supervise the conduct of financial institutions in terms of the Act.

- [2] At the behest of the Authority an investigation was conducted, in terms of s 80 of the Financial Institutions Act 80 of 1998, into the affairs of Fusion. Mr Panday rendered an inspection report, dated 16 July 2019. He concluded that Fusion was in contravention of the Short-Term Insurance Act 53 of 1998. On 12 February 2020, Mr Dikokwe of the Authority gave notice to Fusion and the Beckers of the Authority's intention to take regulatory action against them. The notice stated that, based on the findings of the investigation, the Authority was of the prima facie view that Fusion, through the agency of the Beckers, was in contravention of certain financial sector laws. The Authority indicated that it intended to impose an administrative penalty of R200 million on Fusion, and make a debarment order in respect of the Beckers for a period of 15 years. The notice set out the factors that the Authority took into consideration in determining the regulatory actions the Authority intended to take. Fusion and the Beckers were afforded an opportunity to make submissions on the investigation report, the proposed administrative penalty, and the proposed debarment.
- [3] Fusion and the Beckers took up this invitation, and made detailed submissions. They also made application to the Gauteng Division of the High Court, Pretoria (the high court) to declare ss 154, 167, 230 and 231 of the Act (collectively, the impugned provisions) unconstitutional and invalid. They cited, among others, the Authority and the Minister of Finance as respondents. Before the high court, the challenge to s 230 was not persisted with. The high court dismissed the application. With its leave, Fusion and the Beckers now appeal to this Court. The Authority and the Minister of Finance oppose the appeal and seek its dismissal. While this litigation has been engaged, the Authority has not taken a final decision to impose an administrative penalty or make a debarment order.

The issues on appeal

- [4] In oral argument before us, counsel for Fusion and the Beckers, commendably, simplified their challenge on appeal. First, they no longer challenge the impugned provisions on the basis that they infringe s 22 of the Constitution. Second, they draw a distinction between the finding of the Authority that there has been a contravention of a financial sector law and the appropriate sanctions that should be imposed, upon such a finding having been made.
- [5] Third, the challenge they make is directed, in the first place, to the scheme of the Act in terms of which the Authority makes a finding of a contravention of a financial sector law. Fusion and the Beckers contend that the Act does not permit them a hearing in respect of this finding. That, they contend, is unfair and constitutes an infringement of s 33 of the Constitution.
- [6] Fourth, when the Authority comes to decide upon the appropriate

sanctions that should be imposed upon persons found to have contravened a financial sector law, here a different kind of unfairness arises. The Authority is not an impartial and independent tribunal, and hence the power of the Authority to impose an administrative penalty and order disbarment offends s 34 of the Constitution.

[7] Fifth, if we do not find that the challenge, predicated upon s 33 of the Constitution, is valid, then Fusion and the Beckers do not persist in their challenge under s 34.

The fairness challenge

[8] Fusion and the Beckers challenge the constitutional validity of the powers enjoyed by the Authority, in terms of the Act, to make a debarment order and impose administrative penalties. Section 154 sets out the consultation requirements with which the Authority must comply, before making a debarment order in respect of a natural person. The Authority must give a draft of the debarment order to the person affected; provide reasons and other relevant information about the proposed debarment; and invite the person to make submissions 'on the matter, and give the person a reasonable period to do so'. Section 154(3) then provides as follows:

'In deciding whether or not to make a debarment order in respect of a natural person, the responsible authority must take into account at least –

- (a) the submissions made by, or on behalf of, the person; and
- (b) any advice from the other financial sector regulator.'

[9] Section 167(1) of the Act empowers the Authority to impose an administrative penalty upon a person if they have contravened a financial sector law. Section 167(2) sets out the matters that the Authority must, and those that they may, have regard to in determining an appropriate administrative penalty for particular

conduct. The Authority must have regard to 'any submissions by, or on behalf of, the person that is relevant to the matter, including mitigating factors referred to in those submissions' (s 167(2)(a) (iii)).

[10] The constitutional challenge of Fusion and the Beckers, regarding the power of the Authority to make a debarment order and impose an administrative penalty, has undergone some refinement. Their challenge was ultimately cast in the following way. Sections 154 and 167 afford a right to those who might be subject to sanction to make

submissions to the Authority, and the Authority is required to consider those submissions before deciding whether or not to exercise

its powers of sanction. But this is inadequate protection. Section 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. While ss 154 and 167 provide for those at risk of sanction to make submissions before the Authority determines whether to impose a sanction, there is no like procedural

fairness that is accorded to persons under the Act whose conduct has been found by the Authority to have contravened a financial sector law. Such a finding is the jurisdictional predicate for the exercise of powers by the Authority to impose a sanction, whether by imposing an administrative penalty or making a debarment order. Yet, so it was contended, the competence of the Authority to decide whether a contravention of a financial sector law has taken place is unconstrained by the obligation to invite submissions from the person who is alleged to have acted in contravention of the law, and only then to determine whether there has been a contravention, taking account of these submissions. This want of constraint upon the exercise of the Authority's power is an infringement of the rights of Fusion and the Beckers to procedural fairness, recognised in s 33(1) of the Constitution.

[11] Counsel for the Minister of Finance submitted that the constitutional challenge made by Fusion and the Beckers was not open to them because the principle of constitutional subsidiarity provided a complete answer to their challenge. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) was enacted to give effect to the rights protected in s 33 of the Constitution. Where a statute confers power to take administrative action, such action is made subject to the disciplines of PAJA, unless the statute excludes its application or is otherwise inconsistent with PAJA. Absent such exclusion or

inconsistency, a statute cannot be directly challenged for its inconsistency with s 33 of the Constitution because whatever

administrative action the statute empowers, it is subject to the protections of PAJA which, in turn, gives effect to the rights in s 33 of the Constitution.

[12] The principle of subsidiarity was central to the reasoning that led the high court to dismiss the constitutional challenge. Before us, the application of the principle of subsidiarity was debated, and, in particular, the holding of the Constitutional Court in *Zondi v Member of the Executive Council for Traditional and Local Affairs & Others (Zondi)*.^[1] *Zondi* requires that before a statute can be found to be inconsistent with s 33 of the Constitution, the statute must be read with PAJA. Generally, PAJA will be of application to any administrative action that the statute empowers, and hence, no s 33 inconsistency can arise, unless PAJA is itself deficient in some way in giving effect to the rights in s 33.

[13] What *Zondi* requires is that we read the Act with PAJA. Fusion and the Beckers contend that the Act excludes their right to procedural fairness when the Authority determines whether they have contravened a financial sector law. Whether that is the correct interpretation of the Act is a matter to which I will come. However, that is the cause of action upon which they rely. If the Act is interpreted as Fusion and the Beckers submit it should be, then the Act would be subject to a direct challenge under s 33 because PAJA would have been found to be of no application to the exercise of powers by the Authority in determining whether there had been a

contravention of a financial sector law. The principle of subsidiarity does not obviate the need to consider the interpretation

of the Act that Fusion and the Beckers contend for. Rather, Zondi requires us to engage that interpretative question. And I turn to this issue.

[14] Fusion and the Beckers recognise that the Act does provide them with a right to make submissions. Section 154 requires the Authority, before making a debarment order, to provide reasons for the proposed debarment. The Authority must invite the person who may be debarred to make submissions ‘on the matter’, and afford a reasonable time within which to do so. Plainly, the obligation to provide reasons is intended to allow the person who may be subject to sanction to make informed submissions. These submissions must be considered before the Authority decides whether or not to make a debarment order.

[15] I do not understand Fusion and the Beckers to contest this understanding of what s 154 requires of the Authority. Their contention is that these duties of fairness are of application before the Authority decides whether or not to make a debarment order. The Act does not extend these duties to the decision of the Authority as to whether a person has contravened a financial sector law. Section 153(1)(a) provides that the Authority may make a debarment order if the person concerned has contravened a financial sector law. And so the finding of a contravention is a jurisdictional predicate for the exercise by the Authority of its power to sanction by recourse to the making of a debarment order. However, if the Authority is not required to invite and consider submissions from the person who has been investigated, as to whether they have contravened a financial sector law, before deciding this issue, then the Act

fails to respect the constitutional right to procedural fairness, which s 33(1) of the Constitution entrenches.

[16] This legislative omission, it was submitted, gives rise to considerable risk for the Beckers. Should the Authority make a debarment order, s 230 provides that persons aggrieved by that decision may apply to the Financial Services Tribunal (the Tribunal) for a reconsideration of the decision. However, the process to secure a reconsideration takes time. In the interim, the debarment is enforced, with its drastic consequences for the Beckers, both as to

what they may not do and the public opprobrium they will suffer. This is so because s 231 provides that neither an application for a reconsideration of a decision, nor the proceedings that follow, suspend the decision of the Authority, unless the Tribunal so orders. The Beckers complain that the first stage in the process by which sanctions may be visited upon them lacks procedural fairness. That renders invalid the competence of the Authority to impose sanctions, as also the enforcement of these sanctions, pending their reconsideration by the Tribunal. Put simply, if the exercise of competence by the Authority requires no procedural fairness so as to decide whether a person has contravened a financial sector law, then no decision as to sanctions predicated upon a finding of contravention is valid, whatever adherence to procedural fairness the Authority then demonstrates.

- [17] The same challenge is directed at s 167 of the Act. The Authority may impose an appropriate administrative penalty upon a person who has contravened a financial sector law. As I have explained, s 167(2)(a)(iii) of the Act requires that in determining an appropriate penalty, the Authority must have regard to any submissions 'relevant to the matter', made by or on behalf of the person who might be sanctioned. Fusion submitted that procedural fairness accorded to a person at the stage of sanction cannot cure the absence of procedural fairness when the Authority determines whether a contravention of a financial sector law has taken place. The imposition of an administrative penalty is rendered invalid by the failure to observe procedural fairness in determining that a contravention took place.
- [18] The challenge that Fusion and the Beckers make rests on a single proposition: that the Act does not require the Authority to invite a person to make submissions, nor to consider their submissions, before it decides whether this person has contravened a financial sector law. If the proposition is correct, this would constitute an infringement of the right to procedural fairness, entrenched by s 33(1) of the Constitution, and would render the power of the Authority to impose sanctions in terms of ss 154 and 167 invalid, as also the interim imposition of the sanction pending a reconsideration

that s 231 enjoins. Implicit in this submission is the following interpretation of the Act: the power of the Authority to decide whether a person has contravened a financial sector law, though administrative action, is not subject to obligations to observe procedural fairness imposed by s 3 of PAJA.

- [19] But is the proposition correct? Section 154(1), as we have observed, requires the Authority to invite submissions before making a debarment order. The Authority must give the person affected the draft debarment order 'along with reasons for and other relevant information about the proposed debarment'. The reasons for, and relevant information concerning, the proposed debarment order must necessarily traverse why the order is required. As a matter of law, a debarment order can only be required if there has been a contravention of a financial sector law. The reasons must therefore engage why it is that the Authority considers there to be a basis to conclude that such a contravention has taken place. The reasons are given to permit a person against whom a debarment order may be made to offer informed submissions. Section 154(1) refers to a proposed debarment. The Authority has not made a decision to make a debarment order when it invites submissions. It may do so, but only once it has invited submissions and considered them, before taking a decision.
- [20] Since a contravention of a financial sector law is the essential premise upon which any sanction may be required, I interpret s 154(1) to mean that the submissions that are invited, and must be considered, concern every matter relevant to making a debarment order. The text of s 154(1) says so. It refers to submissions 'on the matter'. No matter is more central to such a decision than the issue as to whether a contravention of a financial sector law has taken place. It would also be a perverse incongruity if s 154(1) required the Authority to provide reasons that engage the issue of contravention, but exclude from submission, and hence consideration, what might be said by a person as to why no contravention had taken

place or that the contravention is of a lesser kind or degree.

- [21] I find that the correct interpretation of s 154(1) does not exclude from submission or consideration the issue as to whether a person has contravened a financial sector law. On the contrary, this lies at the very heart of the matter. It follows that, properly understood, when the Authority comes to consider whether to make a debarment order, it cannot have made a final decision as to whether there was a contravention of a financial sector law. As occurred in this matter, the investigation may have led the Authority to conclude that there is a prima facie evidence of a contravention. Any decision on the issue, however, must await the submissions of the person alleged to have contravened the financial sector law, and the Authority's consideration of those submissions.
- [22] Once this is so, the Act permits no want of procedural fairness as to the making of a debarment order. On the contrary, it requires that the Authority provide reasons for its proposed order, and these

reasons

must traverse the issue of contravention. Furthermore, it requires the Authority to invite submissions that engage this issue. The constitutional challenge of the Beckers, who face a proposed debarment order, cannot succeed. The challenge to s 231 of the Act was framed as an entailment of the invalidity that was said to attach to the debarment order. It must therefore also fail.

- [23] For like reasons, the challenge of Fusion to s 167 must also fail. Although its wording and structure differ somewhat from s 154, as we have observed, it requires the authority to have regard to

submissions

'relevant to the matter'. Nothing is more relevant to the matter than the issue as to whether a person has contravened a financial sector law, the very predicate upon which any imposition of an administrative penalty rests. It follows, then, here

too, that the Authority can make no final decision as to whether a contravention has taken place until it has considered the submissions

of the person alleged to have contravened a financial sector law. Thus, for the reasons given, the Act permits of no want of procedural

fairness in conferring a power upon the Authority to impose an administrative penalty.

- [24] Sections 154 and 167 cannot be interpreted to exclude submissions concerning whether a person has contravened a financial sector law from the remit of the submissions that the Authority must invite an affected person to make. However, even if ss 154 and 167 could be read on the basis that they do not, in terms, expressly require the Authority to invite such submissions (contrary to the interpretation I consider to be correct), the interpretative

outcome is no different. Section 91 of the Act stipulates that PAJA applies to any administrative action taken by the Authority. Whether the Authority's

decision as to whether a person has contravened a financial sector law is a discrete action, as the Beckers and Fusion contend, or whether it forms part of what the Authority determines when deciding whether to impose a sanction, it is administrative action on the part of the Authority to which PAJA applies. Hence, the duty of the Authority to observe procedural fairness is inescapable and the Act, on this score, suffers no constitutional defect.

[25] As I understood the position of counsel for Fusion and the Beckers, if their challenge on the grounds of procedural fairness, in terms of s 33(1) of the Constitution, failed, then, they do not pursue

their challenge to the Act based upon the proposition that the Authority is not an independent tribunal or forum, and thus its power to make a debarment order or impose an administrative fine offends against the protections of s 34 of the Constitution. I have found that the procedural fairness challenge cannot prevail, and hence, say nothing more of the challenge of Fusion and the Beckers in terms of s 34.

Remedy

[26] For these reasons, the appeal of Fusion and the Beckers must be dismissed. Although the appeal raises issues of some constitutional import, this litigation has been pursued by Fusion and the Beckers to defend themselves against a regulatory imposition. That is of course their right. But having not prevailed, in my judgment, they should bear the costs of this appeal.

[27] In the result: the appeal is dismissed with costs, such costs to include the costs of two counsel, where so employed.

D N UNTERHALTER

ACTING JUDGE OF APPEAL

Appearances

For the appellants: A R G Mundell SC (with D van Niekerk)

Instructed by:

Cowan-Harper-Madikizela Attorneys, Sandton

Bezuidenhouts Inc., Bloemfontein

For the first respondent: A Cockrell SC

Instructed by:

Mothle Jooma Sabdia Inc., Pretoria

Matsepes Inc., Bloemfontein

For the second respondent: L Gcabashe SC (with P Jara)

Instructed by:

The State Attorney, Pretoria

The State Attorney, Bloemfontein

[1] Zondi v Member of the Executive Council for Traditional and Local Affairs & Others [2004] ZACC 19; 2005 (3) SA 598 (CC); 2005 (4) BCLR 347 (CC) paras 99 and 103.

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