

SOUTH AFRICA / JUDGMENT

Odendaal v ABSA Brokers (Pty) Ltd and Another (2243/2010) [2010] ZAFSHC 61 (25 June 2010) [2010] ZAFSHC 61

COURT

Free State High Court, Bloemfontein

BEFORE

J P Daffue

CASE / FILE NUMBER

2243/2010

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No.: 2243/2010

In the matter of:

NICOLAAS ODENDAAL Applicant

and

ABSA BROKERS (PTY) LTD 1st Respondent

FINANCIAL SERVICES BOARD 2nd Respondent

JUDGMENT:

DAFFUE, AJ

HEARD ON: 10 JUNE 2010

DELIVERED ON: 25 JUNE 2010

INTRODUCTION

- [1] The applicant is a former employee of first respondent. He was employed as a representative of first respondent who conducts business as an authorised financial services provider as defined in the Financial Advisory and Intermediary Services Act no 37 of 2002 (the Act). On

19 June 2009 applicant filed a review application in terms whereof he seeks the review and setting aside of a decision made by the first respondent on 11 Desember 2008 in terms of which it debarred applicant as representative in accordance with the provisions of section 14 of the Act.

[2] On 29 October 2009 first respondent filed the record of proceedings sought to be reviewed. This was more than three months late. On 12 November 2009 the reasons for the decision sought to be set aside were filed. Applicant was dissatisfied with first respondent's response and embarked upon a process in terms whereof a rule 30 A(1) notice was eventually served on first respondent. No reply was received and applicant's frustration culminated in the present application.

[3] In this application the applicant seeks an order in accordance with the provisions of rule 30A(1) in terms whereof first respondent is directed to file:

3.1 All documentation considered by the individual who took the decision to debar the applicant on behalf of the first respondent;

3.2 The written notification of the applicant's debarment, together with the reasons for said debarment, which it was enjoined to furnish to the Registrar of Financial Services Providers by virtue of the provisions of section 14(3) of the Act;

3.3 A legible (typed) transcript of the record of the disciplinary enquiry conducted by it on 27 November 2008.

[4] Applicant also seeks leave, in the event of first respondent failing to comply with the order sought, to approach the court on the same papers duly amplified for an order reviewing and setting aside the decision made by first respondent on 11 Desember 2008.

[5] First respondent elected to oppose the present application and filed an opposing affidavit to which applicant replied. The matter was argued by Mr Human on behalf of applicant and by Mr Cilliers on behalf of first respondent. Second respondent did not oppose the application.

THE REQUEST FOR ALL DOCUMENTATION CONSIDERED

[6] The documents filed on 29 October 2009 in the review application in accordance with the provisions of rule 53(1)(b) are voluminous. The bundle contains numerous correspondence, the employment contract of applicant, as well as a handwritten transcript of a disciplinary enquiry held on 27 November 2008 by a certain Mr Koen on behalf of first respondent. Applicant is dissatisfied with the documents filed and maintains that it is evident that certain further documents must have been considered by the individual who gave the decision on 11 December 2008 which is the subject of the review application. In this regard it must be mentioned that first respondent has stated categorically that Mr Koen took a decision on 27 November 2008 and no further decision was taken by any other individual in the employ of first respondent pertaining to the debarment of applicant. I accept that the correctness of this statement is severely put in dispute, but in my view this is an aspect to be considered on

review.

- [7] Nowhere in the founding affidavit could I find any averment pertaining to additional documents that might be available or might have been considered by the decision maker. No documents have therefore been identified. I have also requested applicant's counsel during his oral argument to address me on this issue and to inform me what further documentation applicant had in mind. I did not get a positive response.
- [8] It is generally accepted that courts are reluctant to go behind a discovery affidavit which is generally regarded as conclusive, save where it can be shown either (1) from the discovery affidavit itself,
- (2) from the documents referred to in the discovery affidavit; (3) from the pleadings in the action, (4) from any admission made by the party making the discovery affidavit, or (5) the nature of the case or the documents in issue, that there are reasonable grounds for supposing that the party has or had other relevant documentation in his or her possession or power, or has misconceived the principles upon which the affidavit should be made. See *SWISSBOROUGH DIAMOND MINES v GOVERNMENT OF THE RSA* 1999 (2) SA 279 (T) at 320F–H and Erasmus Superior Court Practice B1-256A. The same principle should apply in this instance. Although it might be doubtful whether Mr Koen really made a decision on 27 November 2008, or thereafter only or whether the decision maker was another individual in the employ of first respondent, I have to accept that no other documentation exists on which the decision by whoever taken, was made. Consequently the applicant is not entitled to the relief claimed in paragraph 1.1 of the Notice of Motion.

WRITTEN NOTIFICATION AND REASONS FOR DEBARMENT FURNISHED TO THE REGISTRAR OF FINANCIAL SERVICES PROVIDERS

- [9] Applicant seeks delivery of these documents and the reasons in prayer 1.2 of the Notice of Motion. First respondent is of the view that applicant is not entitled to the documentation and reasons. However and without conceding the point, it referred to the charge sheet and record of proceedings already filed in the review application and which were attached to the letter dated 11 December 2008 by first respondent's Compliance Officer, Mr Scholtz, to second respondent. It is first respondent's case that Mr Scholtz only conveyed the decision of Mr Koen dated 27 November 2008 and that he had no authority to reconsider the merits of the decision or to take a decision de novo. I have difficulty in understanding first respondent's version, especially in the light of the mere recommendations made by Mr Koen ex facie his handwritten notes and the contents of the letters of 3 December 2008 attached as annexure HS1 and of 11 December 2008 attached as annexure HS2 to the answering affidavit. However, I accept for purposes of the adjudication of this application that it is first respondent's case that a decision has been taken on 27 November

2008. Based on this fact, it is alleged that the correspondence between first and second respondents thereafter and in particular on 11 December 2008 is irrelevant as far as applicant's review application is concerned. This contention must now be considered.

[10] Section 13(3) of the Act reads as follows:

"(3) The authorised financial services provider must maintain a register of representatives, and key individuals of such representatives, which must be regularly updated and be available to the registrar for reference or inspection purposes."

An authorised financial services provider is duty bound to ensure that any representative of such provider which no longer complies with the requirements of the act is prohibited from rendering any new financial service by withdrawing his authority to act on behalf of the provider. The provider must also ensure that the guilty representative's name is removed from the register referred to in section 13(3). See section 14(1).

Section 14(3)(a) reads as follows:

"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." (emphasis added)

[11] In the light of the peremptory provisions of section 14. I am of the view that an applicant seeking the review of a decision to debar him, is entitled to know what reasons have been provided to the second respondent. As indicated such reasons must be provided within 15 days after the removal of the person's name from the register. A review application may be instituted much later and it is possible that the decision maker may advance totally different reasons in accordance with the provisions of rule 53 in an effort to substantiate the decision taken by him much earlier and before he had an opportunity to consult with legal representatives.

[12] I am therefore of the view that applicant was fully within his rights to serve the notice in terms of rule 30A(1) pertaining to this aspect and insofar as there was no compliance with the notice, to launch this application. There might have been some merit in Mr Cilliers's argument that should I find in favour of applicant in this regard, applicant should only be awarded costs until the time that the answering affidavit was filed. However, it must be mentioned that at no stage did first respondent tender the costs of the application on the basis of the argument advanced by Mr Cilliers. In the light of the finding in respect of prayer 1.3 of the Notice of Motion, it is unnecessary to consider the issue of costs in more detail.

A LEGIBLE (TYPED) TRANSCRIPT OF THE RECORD OF THE DISCIPLINARY ENQUIRY

- [13] The copy of the handwritten transcript attached to the application papers in this application and as contained in the court file was largely illegible. However, on perusal of the record filed with the court in the review application, it was possible to make much more sense of the handwritten notes, but I was still uncertain about several aspects, especially pertaining to abbreviations made use of, etc. The review Court should not be burdened with a partly illegible document.
- [14] The decision maker is required in terms of rule 53(1)(b) to dispatch within 15 days after receipt of the notice of motion to the registrar the record of such proceedings sought to be corrected. Upon receipt thereof the registrar shall make available to applicant the record dispatched and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made and shall furnish the registrar with two copies thereof and each of the other parties with one copy. See rule 53(3). It is also stated in the aforesaid rule that the costs of transcription, if any, shall be borne by the applicant and shall be costs in the cause.
- [15] Rule 62(2) reads as follows:

“All documents filed with the court, other than exhibits or facsimiles thereof, shall be clearly and legibly printed or typewritten in permanent black or blueblack ink on one side only of paper of good quality and of A4 standard

size.”

“Documents” is not defined in clause 1 of the rules, but in my view the written records of proceedings kept by Mr Koen cannot be regarded as an exhibit. Therefore first respondent was duty bound to file a legibly typewritten version of the aforesaid proceedings which it failed to do.

- [16] Even if I am wrong in my conclusion arrived at in the previous paragraph, I am of the opinion that no duty is cast upon an applicant in rule 53 to prepare of a typewritten version of a handwritten document filed by the decision maker, especially if such handwritten document is illegible and/or incomplete, either totally or only in part. The decision maker whose handwriting appears on parts of the record filed with the court is primarily the best person to decipher his own handwriting and to arrange for a typewritten copy thereof. Consequently I find that first respondent was obliged to comply with applicant's notice in terms of rule 30A(1) pertaining to the provision of a legible (typed) transcript of the record of the disciplinary enquiry conducted by Mr Koen on 27 November 2008. See J R de Ville, *Judicial Review of Administration Action in South Africa*, revised 1st edition, p 309; Harms, *Civil Procedure in the Supreme Court*, B-377 pertaining to an incomplete record and the same should apply to an illegible record.

CONDUCT OF FIRST RESPONDENT

[17] It is deemed apposite to make remarks pertaining to the obstructive behaviour of first respondent throughout and since receipt of the application for review. Its attitude towards the rules of this court is clearly disrespectful. Notwithstanding a far-reaching

decision taken by it pertaining to the career of applicant, it delayed finalisation of the review application, apparently deliberately, insofar as the record of proceedings and reasons were filed extremely late. Thereafter, and notwithstanding several requests made by applicant's attorneys it failed to adhere thereto whereupon a notice in terms of rule 30A(1) was eventually filed on 25 February 2010. No response was received from first respondent and in this regard it is merely stated on behalf of first respondent that the notice was ill conceived and that it was not in law obliged to react thereto. However, this contention was not put on record in reply to the rule 30A(1) notice. The same information set out in the rule 30A(1) notice was requested earlier in a letter

of 5 January 2010 by applicant's attorneys. First respondent did not make it clear then that applicant was not entitled to the documentation and/or information, but merely asked on several occasions for an opportunity to obtain proper instructions. Mr Human asked for costs on attorney and client scale, contrary to the relief claimed in the Notice of Motion. Although this is a borderline case, I have not been persuaded to grant such an order.

THE CONSEQUENTIAL RELIEF SET OUT IN PRAYER 2 OF THE NOTICE OF MOTION

[18] I am not prepared to grant the relief set out in prayer 2 of the notice of motion. The review application under case no A112/09 must be dealt with separately and in the normal cause of events. If first respondent fail to comply with the order to be pronounced herein, applicant will be entitled to institute contempt of court proceedings and this should afford him sufficient relief.

THE ORDER

[19] The following orders do issue:

1. First respondent is directed to lodge with the registrar of this court within 15 days of the service of this order on its attorneys of record a eligible (a typed) transcript of the record of the disciplinary enquiry conducted by it on 27 November 2008.
2. First respondent is ordered to pay the costs of this application.

J. P. DAFFUE, AJ

On behalf of the applicant: Adv. C. A. Human

Instructed by:

Lovius-Block

BLOEMFONTEIN

On behalf of the first respondent: Adv. H. J. Cilliers

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Prepared on 11 October 2026 · Esheria