

SOUTH AFRICA / JUDGMENT

Odendaal v Absa Brokers (Pty) Ltd and Another (A112/2009) [2011] ZAFSHC 65 (24 March 2011)

[2011] ZAFSHC 65

COURT

Free State High Court, Bloemfontein

BEFORE

Van der Merwe, Lekale

CASE / FILE NUMBER

A112/2009

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No.: A112/2009

In the matter between:-

NICOLAAS ODENDAALApplicant

and

ABSA BROKERS (PTY) LTDFirst Respondent

FINANCIAL SERVICES BOARDSecond Respondent

CORAM: VAN DER MERWE, J et LEKALE, AJ

HEARD ON: 21 FEBRUARY 2011

JUDGMENT BY: VAN DER MERWE, J

DELIVERED ON: 24 MARCH 2011

INTRODUCTION

- [1] This is an application to review and set aside a decision of the first respondent to debar the applicant in terms of section 14(1) of the Financial Advisory and Intermediary Services Act, No. 37 of 2002 (“the Act”).

LEGISLATION APPLICABLE

- [2] The main aim of the Act is to regulate the rendering to clients of financial advisory and intermediary services as defined therein. The definition of “person” includes any natural person, partnership, trust, company or other corporate body. In terms of the Act a financial services provider means any person, other than a representative, who as a regular feature of the business of such person furnishes advice and/or renders any intermediary service and “financial service” has a corresponding meaning. An authorised financial services provider is a person who has been granted an authorisation as a financial services provider by the issue of a licence under section
8. The definition of “intermediary service” includes the acts normally performed by a broker in respect of short-term insurance. A representative in terms of the Act is essentially a person who renders a financial service to a client for and on behalf of a financial services provider in terms of conditions of employment or any other mandate. A key individual includes any natural person responsible for managing or overseeing the activities of a corporate body relating to the rendering of any financial service. The executive officer of the Financial Services Board established in terms of the Financial Services Board Act, No. 97 of 1990, is the registrar of financial services providers in terms of the Act. In terms of section 17 authorised financial services providers must appoint at least one compliance officer to monitor compliance with the Act by the provider and its representatives and to liaise with the registrar.
- [3] In terms of section 7 no person may act or offer to act as a financial services provider unless such person has been issued with a licence under section 8. Section 8(1) provides as follows:

“8 Application for authorisation

An application for an authorisation referred to in section 7(1), including an application by an applicant not domiciled in the Republic, must be submitted to the registrar in the form and manner determined by the registrar by notice in the Gazette, and be accompanied by information to satisfy the registrar that the applicant complies with the requirements for fit and proper financial services providers or categories of providers, determined by the registrar by notice in the Gazette, after consultation with the Advisory Committee, in respect of-

personal character qualities of honesty and integrity;

the competence and operational ability of the applicant to fulfil the responsibilities imposed by this Act; and

the applicant’s financial soundness:

Provided that where the applicant is a partnership, a trust or a corporate or unincorporated body, the applicant must, in addition, so satisfy the registrar that any key individual in respect of the applicant complies with the said requirements in respect of-

personal character qualities of honesty and integrity; and
competence and operational ability,

to the extent required in order for such key individual to fulfil the responsibilities imposed on the key individual by this Act.”

- [4] The requirements for fit and proper financial services providers or categories of providers determined by the registrar after consultation with the Advisory Committee, were published in Board Notice 91 of 2006 in both Government Gazette No. 25446 of 10 September 2003 and Government Gazette No. 29132 of 16 August 2006. Part II deals with personal character qualities of honesty and integrity. Regulation 2(1) simply provides that an applicant must be a person who is honest and has integrity. Regulation 2(3) sets out factors that constitute prima facie evidence that the applicant does not qualify in terms of sub-paragraph (1), without prejudice to the generality of the other sub-paragraphs. For example, these factors include that the applicant has within a period of five years preceding the date of the application been found guilty by any professional or financial services industry body recognised by the Board or denied membership of such body or had any licence granted to the applicant by such body suspended or withdrawn, on account of an act of dishonesty, negligence, incompetence or mismanagement, sufficiently serious to impugn the honesty and integrity of the applicant.
- [5] Section 13(2)(a) provides that an authorised financial services provider must at all times be satisfied that its representatives, and the key individuals of such representatives are, when rendering a financial service on behalf of the provider, competent to act, and comply with the requirements contemplated in paragraphs (a) and (b) of section 8(1) and subsection (1)(b) (ii) thereof, where applicable. In terms of sections 13(3) and 13(4) an 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. Such register must contain every representative’s or key individual’s name and business address and state whether the representative acts for the provider as employee or as mandatory and must specify the categories in which such representatives are competent to render financial services.

- [6] Section 14(1) provides as follows:

“14 Debarment of representatives

- (1) An authorised 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, and the names of the key individuals of the representative, are removed from the register referred to in section 13(3): Provided that any such provider must immediately take steps to ensure that the debarment does not prejudice the interest of clients of the

representative, and that any unconcluded business of the representative is properly concluded.”

[7] Section 14(3) provides that an authorised financial services provider must within a period of fifteen days after the removal of the name of a representative from the register as contemplated in subsection 14(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. The registrar may then make known any such debarment and the reasons therefor by notice in the Gazette or by means of any other appropriate public media.

[8] The meaning of all this for purposes of this case is that if it is established by an authorised financial services provider that its representative has committed an act of dishonesty sufficiently serious to impugn the honesty and integrity of the representative,

the authorised financial services provider must ensure that the representative is debarred in terms of section 14(1) and that the

registrar is notified thereof.

BACKGROUND

[9] The first respondent is an authorised financial services provider. The second respondent is the Financial Services Board referred to above. No relief is claimed against the second respondent and the second respondent took no part in these proceedings.

[10] For a number of years prior to 1 July 2007, the applicant acted as representative and apparently as key individual of a close

corporation that provided financial services. The applicant mainly acted as a broker in respect of short-term crop insurance in the Bethlehem area. In the process he built up a sizeable portfolio of clients. This portfolio of clients as it existed on 1 July 2007 was referred to in the papers as “the applicant’s existing book” and for convenience I will do the same.

[11] During 2007 the applicant and the first respondent, represented by its Free State Regional Manager, Mr. Chris Liebenberg, entered into negotiations with a view of the applicant entering into the employment of the first respondent and the first respondent taking

over the applicant’s existing book. As a result the applicant and the first respondent entered into a written employment agreement in terms of which the applicant was employed by the first respondent with effect from 1 July 2007. In terms of this agreement the applicant would be remunerated in terms of the so-called Agri Model. This entailed that the applicant would be paid a salary of R25 000,00 per month and that if the applicant’s annual target in respect of commission on insurance premiums, namely the applicant’s costs to company plus 50% thereof, is exceeded, a bonus of 50% of the exceeded amount would be paid to the applicant at the end of

the relevant financial year. Whether the parties also reached agreement in respect of the applicant's existing book, remains in dispute. The first respondent says that in terms of an oral agreement, the applicant's existing book was purchased and transferred to the first respondent and that the agreed consideration therefor was payment to the applicant of 100% of the commission earned by the first respondent on what was the applicant's existing book, for a period of 18 months. In terms of the first respondent's case therefore, commission on these insurance agreements earned by the first respondent would be shared with the applicant only after expiry of a period of 18 months after 1 July 2007, on the Agri Model, set out above, or any other commission regime then agreed upon. The applicant admits that negotiations in respect of his existing book took place in the terms referred to by the first respondent, but denies that an agreement was reached or entered into. It is common cause however that the insurance contracts that formed part of the applicant's existing book were transferred to the first respondent and that the first respondent paid 100% of the commission earned thereon to the applicant until his resignation.

[12] During 2008 the relationship between the parties soured. On 4 November 2008 the applicant gave written notice to the first

respondent of his resignation with effect from the end of November

2008. By that time the applicant had already applied for a close

corporation by the name of Nico Odendaal CC to be licensed as an authorised financial services provider with himself as key individual.

[13] On 20 November 2008 the applicant received a notice entitled "INTERNAL ENQUIRY FOR THE PURPOSES OF COMPLYING WITH THE FAIS ACT AND TO CONSIDER REDS LISTING". The FAIS Act refers to the Act and the REDS listing refers to a confidential list circulated amongst the major financial services providers in the RSA and which is compiled from information supplied by the major role players in the financial service sector. This list contains details of individuals who have made themselves guilty of dishonesty. In terms of this notice the applicant was invited to attend an enquiry into two sets of allegations set out in an annexure to the notice. At the enquiry these sets of allegations were referred to as charges. In terms of the notice the applicant was also informed that should he be found to have engaged in conduct which renders him not fit and proper as defined in the Act and/or to have engaged in conduct which contains an element of dishonesty, it will result in him being debarred in terms of the Act and/or his name being listed on the REDS list.

[14] The enquiry took place on 27 November 2008 in Bethlehem. The enquiry was chaired by Mr. G.J. Koen, employed as legal adviser by Absa Financial Services Ltd. Mr. Chris Liebenberg represented the first respondent. The applicant requested that he be represented by a legal representative, but this was refused by Mr. Koen. Mr. Koen explained the purpose of the enquiry, particularly that it was a fact finding enquiry for purposes of complying with the Act and to consider a possible REDS listing of the applicant and not a disciplinary hearing. The procedure was also explained in some detail. Mr. Liebenberg handed in a so-called

“charge sheet” to which a third set of allegations or charge was added. The applicant was given the opportunity to peruse these new allegations and the matter proceeded when the applicant indicated that he was ready to do so. The essence of these charges were that the applicant acted dishonestly by whilst in the employ of the first respondent, applying for a financial services provider licence for Nico Odendaal CC as aforesaid and by whilst knowing that the first respondent had purchased the applicant’s existing book, removing the files pertaining to the clients that belonged to the applicant’s existing book from the possession of the first respondent and by instructing the insurance company, Santam, to transfer these clients to his new brokerage. The applicant was required to plead to these charges and pleaded not guilty thereto.

[15] Mr. Liebenberg then presented the case for the first respondent by way of his own evidence and by submitting documentary proof. He was cross-examined by the applicant. The applicant then presented his evidence and he was also cross-examined by Mr. Liebenberg. Finally, both Mr. Liebenberg and the applicant presented closing arguments. Mr. Koen then adjourned the enquiry in order to consider the matter on the basis that the parties would be notified of the outcome.

[16] Mr. Koen considered the evidence and arguments and came to the conclusion that the applicant was guilty of dishonest conduct as alleged. He therefore concluded that the applicant was no longer fit and proper as contemplated in section 8(1) of the Act and took the decision that the applicant be debarred as contemplated in section 14(1) of the Act and that his name be placed on the REDS list. Mr. Koen liaised with the first respondent’s compliance officer in terms of the Act, Mr. Emile Scholtz, whereafter the first respondent notified the applicant of the outcome of the enquiry by letter dated 3 December 2008 and signed by Mr. Koen on behalf of the first respondent. The material contents of the letter are the following:

“2. We confirm the enquiry was held on 27 November 2008 which you attended and that you were given an opportunity to make representations during the enquiry. We hereby wish to notify you that after consideration of all representations made, the independent internal chairperson found you guilty of engaging in conduct which contains an element of dishonesty whilst you were in the employ of Absa Brokers (Pty) Ltd.

3. As confirmed in the notice to attend the enquiry, a finding of guilt in relation to the allegations will result in your name being listed on REDS and you being debarred in terms of the FAIS Act. Accordingly, we advise that your name will be listed on REDS and that you will be debarred in terms of the FAIS Act.
4. We also confirm that a decision was made by the said decision maker that the Broker Book was indeed sold to Absa Brokers, for which a consideration was paid on a monthly basis on the agreed terms and conditions.”

[17] Mr. Scholtz directed a letter dated 11 December 2008 to the registrar. In the letter the registrar is requested to kindly note

that the applicant "... is herewith debarred". The letter also purports to provide the registrar with the reasons for the debarment.

THE DECISION

[18] In the notice of motion the applicant asks for an order reviewing and setting aside the decision made by the first respondent on 11 December 2008 in terms of which it debarred the applicant as a representative in accordance with the provisions of section 14 of the Act. In terms of the well-known rules in respect of adjudication of applications, the application has to be decided on the factual version put forward by the first respondent. On this evidence the decision to debar was taken after the conclusion of the enquiry on 27 November 2008 and the applicant was notified thereof by the letter of 3 December 2008. In context the letter of 11 December 2008, despite the quoted wording thereof, constitutes notification of the debarment to the registrar by the first respondent as required in terms of section 14(3) of the Act. This letter was not directed or sent to the applicant. A representative cannot be debarred by a letter to the registrar. Debarment takes place by the authorised financial services provider, here the first respondent, by withdrawing any authority to the representative to act on behalf of the provider and by removal of the representative's name from the register that is kept by the authorised financial services provider in terms of section 13(3) of the Act. In my judgement therefore the decision to debar the applicant was not taken by Mr. Scholtz or in terms of the letter dated 11 December 2008, but by Mr. Koen on behalf of the respondent, of which the applicant was notified by the letter of 3 December 2008. However it would in my judgment not be in the interest of justice to dismiss the application simply on this basis. Counsel for the first respondent fairly conceded that the first respondent would not in any way be prejudiced if the application is determined on the basis of review of the decision of Mr. Koen on behalf of the first respondent already mentioned. I therefore proceed to determine the application

on this basis.

[19] 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, 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.

[20] In the founding affidavit the applicant mentioned virtually all the grounds for review contained in section 6(2) of PAJA. In my judgment however, only two grounds for review warrant consideration. The first is whether the decision was arrived at as the result of an unfair procedure, because the applicant was denied legal representation at the enquiry. The second is whether the decision was rationally connected to information before the decision-maker or one that a reasonable person could make in the circumstances.

UNFAIR PROCEDURE: DENIAL OF LEGAL REPRESENTATION?

[21] At the commencement of the enquiry the applicant requested to be represented by a legal representative. This was opposed by Mr. Liebenberg on behalf of the first respondent with reference to the disciplinary code of the first respondent which provides that at a disciplinary hearing an employee is entitled to be represented by a fellow employee or trade union representative and by adding that the nature of the enquiry did not differ significantly from that of a disciplinary hearing. This provision does not exclude legal representation, which was understood by Mr. Koen. Mr. Koen concluded that the applicant did not advance any reason why he should be permitted legal representation and refused the request.

[22] Section 3(3)(a) of PAJA provides that in order to give effect to the right to procedurally fair administrative action, an administrator

may, in his or her discretion, give a person whose rights or legitimate expectations may be materially and adversely affected by

administrative action, an opportunity to obtain assistance and, in serious or complex cases, legal representation. This position is materially in accordance with the common law. See *HAMATA AND ANOTHER v CHAIRPERSON, PENINSULA TECHNIKON INTERNAL DISCIPLINARY COMMITTEE, AND OTHERS* 2002 (5) SA 449 (SCA), in particular at paras [5] and [23]. In my view a complex case is one that involves a complex procedure or issue. A serious case is one that has the potential of a grave consequence. The question is whether there are any grounds for interfering with the exercise of the discretion not to allow representation at the enquiry. The first difficulty, in my view in itself fatal for the applicant, is that no reliance was placed in the founding affidavit on the denial of legal representation as a ground for review. I am in any event not convinced that the enquiry constituted a serious or complex case. The applicant did not attempt to convince Mr. Koen that it did, nor was such attempt made in the founding affidavit. The procedure and questions to be determined at the enquiry were relatively simple and uncomplicated. This is borne out by the fact that the applicant was able to put forward his case in a coherent and understandable manner. I also do not think that grave consequences were involved. At the time of the enquiry the applicant had already resigned from his employment with the first respondent. The only real consequences of debarment for the applicant therefore was notification thereof to the registrar in terms of section 14(3)(a) or possibly publication thereof by the registrar in terms of section 14(3)(b). I am not persuaded that the absence of legal representation as such resulted in an unfair procedure.

IRRATIONAL OR UNREASONABLE DECISION?

[23] It was common cause at the enquiry that whilst the applicant was still in the employ of the first respondent, he did what was alleged. He admitted that he applied for a financial services provider licence for the close corporation, that he instructed Santam to transfer the clients that had belonged to his existing book to this close corporation and that he removed the files pertaining to these clients from his office and therefore from the possession of the first respondent. He essentially said that he made the application for the licence after he had decided to resign and because it takes some time to have such an application approved. He said that he gave the instruction for transfer of the clients and removed the files, because an agreement for the purchase of his existing book was never entered into and that he was entitled to do so. Mr. Koen appears to have found that in itself there was nothing wrong with applying for the licence in these circumstances. Mr. Koen, however, found that the applicant knew that he had transferred his existing book to the first respondent because the first respondent had purchased it. In the result Mr. Koen found that the applicant had committed acts of dishonesty as a result of which he no longer complied with the requirements in respect of personal character qualities of honesty and integrity.

[24] There can be little doubt that if the applicant had made over his existing book to the first respondent because the first respondent

had purchased it, he acted dishonestly. He could then have no reasonable belief that he was entitled to take the files in question

and to have the clients transferred. The main attack of the applicant therefore was directed at the finding that an agreement was entered into in terms of which the first respondent had purchased the applicant's existing book. It is as well to be reminded at this point that this is a review and not an appeal. The question is not whether the decision-maker erred on the facts but whether any review ground relied upon by the applicant is established. For this purpose the information presented at the enquiry must be considered.

[25] I consider the following evidentiary material that was before the decision-maker, to be dispositive of the matter:

(i) An important background fact is that it was not possible for the applicant to join the first respondent as its employee and to retain his existing book independently from the first respondent. (The policy of the first respondent in respect of consideration for taking over the existing book of a broker employed, was to allow the broker/employee to receive 70% of the commission on the existing book for a period of 12 months. As a result permission was asked for, and obtained on 24 May 2007, to make the offer to the applicant that resulted in the agreement relied upon by the first respondent.)

(ii) The applicant was aware hereof. At the enquiry the applicant said that during his negotiations with Mr. Liebenberg, he proposed that he keeps his existing book independent from the first respondent, but that Mr. Liebenberg said that that was not permissible.

“Ek stel voor dat ek my boek buite Absa kan hou. Hy sê nie toelaatbaar.”)

(iii) By reason thereof that the applicant was employed by the first respondent on the basis of the Agri Model, the first respondent had to assign a broker code to the applicant. The first respondent says that because it had purchased the applicant's existing book for the consideration of payment of 100% of commission earned by the first respondent on the insurance contracts that formed part of the existing book for a period of 18 months, the applicant had to be assigned a second broker code for this period of 18 months. Ms Annetjie O'Reily was responsible for the creation of the policy-related information on the first respondent's computer database in respect of the policies that formed part of the applicant's existing book. The following admitted e-mails must be viewed in this light.

(iv) On 25 July 2007 Mr. Chris Liebenberg sent the following e-mail inter alia to Ms O'Reily and to the applicant:

“1.) Kan ons asb reel vir nog ‘n ‘broker code’ vir Nico aangesien hy sy bestaande boek, waarvoor ons hom betaal soos ooreengekom per kontrak, daarop kan laai sodat ons kan rekord hou.

Nico, kan jy jou laaste kommissie staat aan my stuur sodat ons kan rekord hou asb. Stuur ook volgende maand ens. sin vir my asb.

Nico, ons kan jou hele boek net so oorswaai op die manier, jy hoef dus nie elke klient se getekende aanstelling te kry nie, maar benodig ek geskrewe toestemming van jou dat jy die boek aan ons verkoop en dat jy toestemming gee dat as eienaar van die boek jy al jou kliente [oorswaai] na Absa Makelaars (EDMS) Bpk. Absa sal dan 30 dae kennisgewing aan die kliente gee tov van die aanstelling (verkoop).”

Ms O'Reily did not know that the applicant would receive 100% commission on his existing book as in terms of the first respondent's remuneration policy, new brokers are normally entitled to a share percentage of 70% commission on their existing

book for 12 twelve months and therefore on the same day replied as follows and forwarded the reply to the applicant:

“Makelaar kode vir bestaande boek 271750 benodig deling op die bestaande boek.

Aangehegte moet voltooi word sodat [ons] die pri's kan skep.

(See attached file: Existing Book Template.xls)”

(vi) To this Mr. Liebenberg replied to both Ms O'Reily and the applicant as follows:

“Dankie Annetjie, ons betaal Nico vir 18 maande 100% van sy bestaande boek soos per ooreenkoms met hom gesluit.

Nico, gebruik asb die aangehegte spreadsheet sodat [kommissie] ad jou PRI's kan skep.”

“PRI” refers to policy –related information.

(vii) It appears therefore that it was made clear to applicant and others that the first respondent would pay the applicant a 100% share percentage on his existing book for a period of 18 months as per agreement reached with the applicant. No objection to this was raised by the applicant.

(viii) On the contrary, it was common cause at the enquiry that the applicant gave permission for his existing book to be transferred to the first respondent so that the commission thereon was paid to the first respondent, which in turn paid 100% thereof to the applicant. This was not written permission but nothing turns hereon. No explanation was provided by the applicant at the enquiry for these objective facts that militate strongly against the applicant's version. (On the basis that regard must be had to the explanations in this regard proffered by the applicant in the papers before us, it must be said that I find them to be plainly false and contradictory. The applicant said that a second broker code was allocated to him by the first respondent in order to indicate that he remained the owner of his existing book. He also said that Ms O'Reily's actions were intended to ensure that the first respondent's records clearly recorded that the applicant remained the owner of his existing book and therefore entitled to all the commissions or fees paid in respect thereof. He said that he simply granted permission to register the clients in his existing book on the first respondent's systems as he lacked the administrative infrastructure needed to perform the necessary administration, which was due to the closure of the office from which he had conducted business. But when explaining why he only granted this permission during October 2007 he said that was because he felt uncomfortable about the registration of his existing book on the first respondent's system. He said that he was eventually forced to do so, apparently because of the absence of an administrative infrastructure to administer his existing book on his own.)

(ix) The argument of the applicant that he was paid for his existing book what he would in any event have received, loses sight thereof that it was not possible to be employed by the first respondent without also transferring his existing book to the first respondent and that the applicant at the time must have perceived good reason for him to enter into the employ of the first respondent.

[26] In my judgment a reasonable person could on this material conclude that the applicant knew that he had sold his existing book to the first respondent and had therefore acted dishonestly to a degree that impugned his honesty and integrity when he acted as if he did not do so. The reasoning of the decision-maker in my view was objectively perfectly rational. There was a rational objective basis justifying the connection made by the administrative decision-maker between the material available and the conclusion arrived at. See *TRINITY BROADCASTING (CISKEI) v INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA* 2004 (3) 346 (SCA) at 354 H – 355I.

CONCLUSION

[27] It follows that in my view the application cannot succeed. Costs must follow the result.

[28] The application is dismissed with costs.

C.H.G. VAN DER MERWE, J

I agree.

L.J. LEKALE, AJ

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

Instructed by:

Lovius Block

BLOEMFONTEIN

On behalf of the first respondent: Adv. B.C. Stoop

Naudes

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