

SOUTH AFRICA / JUDGMENT

Smith v Financial Services Board and Another (9046/2018) [2019] ZAGPPHC 83 (20 March 2019)

[2019] ZAGPPHC 83

COURT

North Gauteng High Court, Pretoria

BEFORE

Millar

CASE / FILE NUMBER

9046/2018

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IN

THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1)

NOT

REPORTABLE

(2)

NOT

OF INTEREST TO OTHER JUDGES

(3)

NOT

REVISED

Case No. 9046/2018

20/3/2019

In

the matter between:

MARIE

SMITH

APPLICANT

And

THE

FINANCIAL SERVICES BOARD

FIRST RESPONDENT

BEST

ADVICE FINANCIAL SERVICES (PTY) LTD

SECOND RESPONDENT

JUDGMENT

MILLAR.AJ

1. This application was brought initially by way of urgency. The first part, part A was for inter alia a rule nisi and was heard on 20 February 2018. The order sought on that occasion was granted. The application now comes before me for the hearing of part B. When the matter was called, counsel for the applicant informed me that matters relating to part A had been resolved and furthermore that in regard to part B, the applicant would only be seeking an order in terms of prayers 1 and 4. The effect of this is that no relief would be sought against the first respondent.
2. Counsel for the first respondent confirmed that the applicant would seek no relief against his client and that each party would bare its own costs.
3. The relief sought against the second respondent is:

"1. The decision taken by the 2nd Respondent, Best Advice Financial Services (Pty) Ltd, to debar the Applicant in terms of Section 14(1) of the Financial Advisory and Intermediary Services Act 37 of 2002, is reviewed and set aside;"

"4. The 2nd Respondent pay the costs of this Application"
4. The facts in this application are largely common cause and uncontentious. The applicant has worked in the financial services sector since 1990 and began working for the second respondent as an agent from 2004 and earned commission. The second respondent conducts its business in Mbombela in the Mpumalanga Province. The applicant although living in Bloemfontein in the Free State Province from 2012 would travel to White River in that province to service clients there as and when necessary.
5. The present dispute has its origin in a meeting that the applicant was invited to at the offices of the second respondent on 14 December
2017. The subject line of the email dated 13 December 2017 which called for the meeting stated that the applicant "was to make herself available for an appointment at the offices of BAFS in terms of Sections 6 and 14 of FAIS[1]" and the purpose of the meeting was to "discuss the circumstances surrounding the current professional liability insurance claim as well as to investigate the complaints received from Mrs. V Leach[2]"
6. The applicant attended the meeting. The meeting was recorded and the transcript forms part of the record. The meeting was attended by the applicant and Leon Ferreira and Jacobus (Kobus) Janse van Rensburg. Mr. Gerhardus Pieter's attended vis skype and was not physically present.

7. It is not disputed that the applicant was never informed that the meeting was intended to be a formal proceeding, the outcome of which would be debarment in terms of section 14(1) of FAIS.
8. The applicable wording of section 14(1) at the time that the hearing was held read 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 concluded business of the representative is properly concluded."
9. The section in turn refers to the requirements set out in section 13(2)(a). This section in turn refers in section 13(2)(a)(i) to the requirements set out in section 6(2) for a representative to be regarded as "fit and proper." The section reads-
"6(2) Fit and proper requirements may include, but are not limited to, appropriate standards relating to-
 - (a) Personal character qualities of honesty and integrity;
 - (b) Competence, including-
 - (i) Experience;
 - (ii) Qualifications; and
 - (iii) Knowledge tested through examinations determined by the registrar;
 - (c) operational ability;
 - (d) financial soundness; and
 - (e) continuous professional development.
10. The section provides a list of no less than 5 different categories of criteria to be considered and specifically provides that the list is not a closed one.
11. Section 14 has however since, and with effect from 1 April 2018 been amended to provide specifically for hearings, the outcome of which debarment
is a possibility. The procedure followed in the present matter does not comply with the section as it is now.

12. In considering a matter in respect of which a debarment was challenged, under the section applicable at the time, it was held by the Supreme Court of Appeal in *Financial Services Board v Barthram and Another*[3]

"even in our pre-constitutional era, our courts generally accepted that certain principles of procedural fairness would find application in an instance such as this[4] ."

13. The Court quoted with approval the dictum of Colman J in *Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another*[5]:

"It is clear on the authorities that a person who is entitled to the benefit of the audi alterem partem rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing or allowed representation by an attorney or counsel; he need not be given an opportunity to cross examine; and he is not entitled to discovery of documents. But on the other hand (and for this no authority is needed) a mere pretence of giving the person concerned a hearing would clearly not be in compliance with the Rule. For in my view it will suffice if he is given such a right to make representations as in the circumstances does not constitute a fair and adequate opportunity of meeting the case against him. What would follow from the last-mentioned proposition is, firstly, that the person concerned must be given a reasonable time in which to assemble the relevant information and to prepare and to put forward his representations; secondly he must be put in possession of such information as will render his right to make representations a real and not an illusory one"

14. The applicant was not afforded a sufficient time to prepare and not notified of the possibility of an outcome that would result in a debarment. A consideration of the record as a whole also does not give any indication that this was drawn to her attention or for that matter ever appreciated by her.
15. The second respondent argued that the applicant being an experienced and qualified representative in the financial services sector knew or ought to have known what the provisions of section 6 and 14 of the FAIS Act were, and been sufficiently alerted to the true purpose of the meeting by the reference to those sections in the subject line of the email of 13 December 2018.
16. Even if this were to be accepted, the notice period of one day, given that the applicant had to travel from Bloemfontein to Mbombela taken together with the explanation in the email of the purpose of the meeting could not be said to have given her sufficient notice of the case she was expected to answer and the sanction which the second respondent would seek to impose. This is apparent from the record.
17. The applicant having been given inadequate notice and insufficient particularity to prepare for the meeting, it follows that the

decision taken pursuant thereto cannot stand.

18. the circumstances I make the following order:

18.1 The decision taken by the second Respondent to debar the Applicant in terms of Section 14(1) of the Financial Advisory and Intermediary Services Act 37 of 2002, is reviewed and set aside;

18.2 The second Respondent pay the costs of the Application.

A MILLAR

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON:

18 MARCH 2019

JUDGMENT

DELIVERED ON:

20 MARCH 2019

COUNSEL FOR THE APPLICANT:

ADV. COLLIS

INSTRUCTED BY:

PEYPER AUSTIN INC.

REFERENCE:

MSC DE BEER

COUNSEL FOR THE FIRST RESPONDENT: MR L GROOME

INSTRUCTED BY:

RW ATTORNEYS

REFERENCE:

MR L GROOME

COUNSEL FOR THE SECOND RESPONDENT: ADV M BESTER

INSTRUCTED BY:

CAZ DRY ATTORNEYS INC

REFERENCE:

MR B DRY

[1] "om jouself beskikbaar to stel vir 'n afspraak by die kantore van BAFS i.t.v Artikels 6 en 14 van FIAS"

[2] The email calling for the meeting was written in Afrikaans and stated the purpose of the meeting to be:"om omstandighede

aangaande die huidige eis teen ons profesionele aanspreeklikheids-versekering sowel as die klagte ontvang van Mev V. Leach te ondersoek

[3] 2018 (1) SA 139 (SCA)

[4] Supra at 151D-E

[5] 1980 (3) SA 476 (T) at 486E-G

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Prepared on 9 October 2026 · Esheria