IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICH IS NOT APPLICABLE
[1] REPORTABLE: YES / ~~NO~~
[2] OF INTEREST TO OTHER JUDGES:
YES / ~~NO~~
[3] REVISED
DATE 21/6/16 SIGNATURE

CASE NO: 86753/2014

21/6/2016

In the matter between:

PIETER REYNECKE Plaintiff

and

ODINFIN (PTY) LIMITED Defendant

JUDGMENT

J W LOUW, J

[1] The defendant is an authorised financial services provider (FSP) in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act or the Act). On 10 August 2010, the plaintiff and the defendant entered into a written employment contract in terms whereof the plaintiff was employed by the defendant as a representative to render financial services to the defendant's clients. It was a term of the agreement that the plaintiff's employment would be subject to the provisions of the FAIS Act.

[2] The relevant part of the definition of a '*representative*' in s 1 of the Act is "*any 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 .....*". In terms of s 13(3), an authorised FSP must maintain a register of representatives, and key individuals[1] of such representatives, which must be regularly updated and be available to the registrar for reference or inspection purposes. Sec. 13(2)(a) of the Act provides that an FSP must –

at all times be satisfied that the provider's 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-

(i) the fit and proper requirements; and

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[1] Section 1 of the FAIS Act contains a definition of the phrase "*key individual*". It is not necessary for present purposes to refer thereto.

(ii) any other requirements contemplated in subsection (1) *(b)* (ii).

[3] The phrase *"fit and proper requirements"* is defined in s 1 as *"the requirements published under s 6A".* Section 6A provides that the registrar of FSP's may determine fit and proper requirements for FSP's, key individuals and representatives. Such requirements were published by the registrar in the Government Gazette of 15 October 2008. Part II of the publication bears the heading *"PERSONAL CHARACTER QUALITIES OF HONESTY AND INTEGRITY"* and, *inter alia,* provides the following:

2. (1) An FSP, key individual or representative must be a person who is honest and has integrity.

(2) In determining whether an FSP, key individual or representative complies with sub- paragraph (1), the Registrar may refer to any information in possession of the Registrar or brought to the Registrar's attention.

(3) Without prejudice to the generality of subparagraphs (1), (2) and (4), any of the following factors constitutes *prima facie* evidence that an FSP, key individual or representative does not qualify in terms of subparagraph (1), namely that the FSP, key individual or representative-

(a) has within a period of five years preceding the date of application or the proposed date of appointment or approval, as the case may be, been found guilty in any criminal

proceedings or liable in any civil proceedings by a court of law (whether in the Republic or elsewhere) of having acted fraudulently, dishonestly, unprofessionally, dishonourably or in breach of a fiduciary duty;

(b) has within a period of five years preceding the date of application or the proposed date of appointment or approval, as the case may be, been found guilty by any statutory professional body or voluntary professional body (whether in the Republic or elsewhere) recognised by the Board, of an act of dishonesty, negligence, incompetence or mismanagement, sufficiently serious to impugn the honesty and integrity of the FSP, key individual or representative;

(c) has within a period of five years preceding the date of application or the proposed date of appointment or approval, as the case may be, been denied membership of any body referred to in subparagraph (b) on account of an act of dishonesty, negligence, incompetence or mismanagement, sufficiently serious to impugn the honesty and integrity of the FSP, key individual or representative;

(d) has within a period of five years preceding the date of application, or the proposed date of appointment or approval, as the case may be –

(i) been found guilty by any regulatory or supervisory body (whether in the Republic or elsewhere), recognised by the Board; or

(ii) had its authorisation to carry on business refused, suspended or withdrawn by any such body,

on account of an act of dishonesty, negligence, incompetence or mismanagement, sufficiently serious to impugn the honesty and integrity of the FSP, key individual or representative.

[4] Sec. 14 of the Act provides for the debarment of representatives. It reads as follows:

(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.

(2) For the purposes of the imposition of a prohibition contemplated in subsection (1), the authorised financial services provider must have

regard to information regarding the conduct of the representative as provided by the registrar, the Ombud or any other interested person.

(3) *(a)* 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.

(b) The registrar may make known any such debarment and the reasons therefor by notice on the official web site or by means of any other appropriate public media.

[5] It is common cause that the plaintiff, during May 2013, attended an induction programme with Nedbank with whom he was seeking employment. It is also common cause that the plaintiff did not disclose to the defendant that he was attending the induction programme, but that he rather told the defendant that he was attending at the premises of one of the defendant's clients. When the true facts came to the defendant's knowledge, the defendant initiated disciplinary proceedings against the plaintiff. It sent the plaintiff a notice on 10 May 2013, instructing him to appear at a formal hearing on 16 May2013. The alleged misconduct of the plaintiff was "*dishonesty and/or competing with employer and or*

conflict of interest". The details provided of the alleged misconduct was the following: *"During the period of 6 May 2013 to 9 May 2013 you signed up for training and/or registered to be trained in order to sell/promote Nedbank or other policies, while you are contracted to Odinfin* (the plaintiff); *These activities were not disclosed but rather concealed to Odinfin Management and took place while you were creating the impression that you were rendering services to Odinfin, as usual."*

[6] On the day that he received the notice, Friday 10 May2013, the plaintiff gave the defendant written notice of termination of his employment with effect from Monday 13 May 2013. He did not return to work on 13 May 2013 and did not attend the disciplinary hearing. The hearing continued in his absence and he was found guilty of all three charges. The chairperson of the enquiry recommended that the plaintiff be dismissed with immediate effect. The plaintiff testified that he did not attend the disciplinary hearing as he had, in any event, resigned. His evidence was that the defendant accepted his resignation.

[7] Subsequent to the plaintiff leaving the defendant's employ, the defendant, without notice to the plaintiff, debarred the plaintiff in terms of s 14(1) of the Act and removed his name from its register of authorized representatives. The defendant informed the registrar of the debarment and the registrar published the debarment on its website, indicating as

the reason that the plaintiff *"does not comply with personal character qualities of honesty and integrity".*

[8] The plaintiff had, in the meantime, taken up employment with Nedbank. His evidence was that he had signed the employment contract on 15 April 2013 but only started working on 15 May 2013 as Nedbank first wanted to do a background check on him to see if he had any criminal record or financial problems which could jeopardise Nedbank's clients. Upon receiving an anonymous call on 11 July 2013 informing it of the plaintiff's debarment, Nedbank dismissed the plaintiff from its employment. Subsequently, and in terms of a settlement reached during proceedings which the plaintiff instituted in the CCMA, Nedbank reinstated the plaintiff but suspended him pending an application to be brought by him to have his debarment set aside.

[9] It is common cause that the defendant did not inform the plaintiff of its intention or its decision to debar him. His evidence was that he first heard of his debarment from his manager when Nedbank received the anonymous telephone call. The plaintiff thereafter, during August 2013 and through his attorneys, requested reasons for the defendant's decision to debar him. It is common cause that the defendant denied that it had debarred the plaintiff in terms of s 14(1) of the Act and that it declined to furnish any reasons to the plaintiff. The defendant stated, through its

attorney, that it had "*merely reported the findings and summary of the enquiry of the Chairperson of the disciplinary hearing of your client and ours to the relevant governing body, as required from them*". This statement was untrue, and it must have been untrue to the defendant's knowledge as its attorney must have received his instructions from the defendant.

[10] The plaintiff thereafter, during September 2013, launched an application to review and set aside the defendant's decision to debar him. His evidence was that if the defendant had advised him that it intended to debar him, he would have opposed such decision if he had been given an opportunity to be heard. The defendant initially opposed the application, but filed a notice of withdrawal of its opposition during December 2013. The application was then enrolled and granted in the unopposed motion court on 14 March 2014. It must be accepted that the judge hearing the application (Fourie J) considered the evidence before him and that he was satisfied that the plaintiff was entitled to the relief sought.

[11] The present action was then instituted by the plaintiff during August 2014 in which he claims damages from the defendant for his loss of income during the period July 2013 to March 2014 when he was suspended by Nedbank and received no income. It is alleged in the plaintiff's particulars of claim that the decision of the defendant to debar

him constituted an administrative act as defined in the Promotion of Administrative Justice Act 3 of 2002 (PAJA). The plaintiff's pleaded cause of action is that, in terms of PAJA, the plaintiff was entitled to fair administrative action and that the defendant breached its statutory duty in this regard by not providing the plaintiff with adequate notice of the nature and purpose of the administrative action contemplated and by not providing the plaintiff a reasonable opportunity to make representations in regard thereto, such breach alleged to be wrongful and unlawful. The claim is therefore a delictual claim for breach of a statutory duty. The quantum of the plaintiff's claim was postponed *sine die* by agreement between the parties.

[12] Mr. Stoop, who appeared for the defendant, conceded that the defendant's decision did constitute administrative action as an FSP had to exercise a discretion when deciding whether a representative should be debarred. He also conceded that the defendant would not be entitled to regard dishonesty of a trivial nature as sufficient to debar a representative as item 2(3) of the Board Notice lists a number of factors which constitute *prima facie* evidence that a representative does not qualify as a person who is honest and has integrity, but that each of the factors require a finding that the dishonesty in question is of *"a sufficiently serious nature"* to impugn the honesty and integrity of the representative. Mr. Stoop further conceded that an FSP who intended to

debar a representative should take an informed decision in that regard and that it was required to make a value judgment if the dishonesty in question was sufficiently serious to conclude that the representative no longer complied with the fit and proper requirements prescribed in s 13(2)(a) of the FAIS Act. In my view, these concessions were correctly and properly made.

[13] It was further conceded on behalf of the defendant that its decision to debar the plaintiff without notifying him of its intended decision and giving him an opportunity to be heard amounted to unfair administrative action which fell to be reviewed and set aside.

[14] In *Steenkamp NO v Provincial Tender Board, Eastern Cape,*[2] the Constitutional Court noted[3] that ordinarily a breach of administrative justice attracts public law remedies and not private law remedies. The court said the following in para [30] of the judgment:

"Examples of public remedies suited to vindicate breaches of administrative justice are to be found in s 8 of the PAJA. It is indeed so that s 8 confers on a court in proceedings for judicial review a generous jurisdiction to make orders that are 'just and equitable'. Yet it is clear that the power of a court to order a decision-maker to pay compensation is allowed only in 'exceptional cases'. It is

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[2] 2007 (3) SA 121 (CC)
[3] At para [29]

unnecessary to speculate on when cases are exceptional. That question will have to be left to the specific context of each case. Suffice it for this purpose to observe that the remedies envisaged by s 8 are in the main of a public law and not private law character. Whether a breach of an administrative duty in the course of an honest exercise of a statutory power by an organ of State ought to be visited with a private law right of action for damages attracts different considerations ....."

[15] The claim in *Steenkamp* was a delictual claim for payment of damages. The pivotal question which the court had to decide was whether a successful tenderer whose tender award is subsequently set aside by a court on review, may claim damages from the relevant tender board for out-of-pocket expenses incurred in reliance on and subsequent to the award.[4] The court said the following in paras [41] and [42] of the judgment with regard to the question of wrongfulness:

"[41] Therefore, shortly stated, the enquiry into wrongfulness is an after- the-fact, objective assessment of whether conduct which may not be prima facie wrongful should be regarded as attracting legal sanction. In Knop v Johannesburg City Council[5] the test for wrongfulness was said to involve objective reasonableness and whether the boni mores required that 'the conduct be regarded as wrongful'. The boni mores is a value judgment that embraces all

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[4] See para [31] of the judgment.
[5] 1995 (2) SA 1 (A).

the relevant facts, the sense of justice of the community and considerations of legal policy, both of which now derive from the values of the Constitution.

[42] Our Courts - Faircape[6], Knop[7], Du Plessis[8] and Duivenboden[9] - and courts in other common-law jurisdictions readily recognise that factors that go to wrongfulness would include whether the operative statute anticipates, directly or by inference, compensation of damages for the aggrieved party; whether there are alternative remedies such as an interdict, review or appeal; whether the object of the statutory scheme is mainly to protect individuals or advance public good; whether the statutory power conferred grants the public functionary a discretion in decision-making; whether an imposition of liability for damages is likely to have a 'chilling effect' on performance of administrative or statutory function; whether the party bearing the loss is the author of its misfortune; whether the harm that ensued was foreseeable. It should be kept in mind that in the determination of wrongfulness foreseeability of harm, although ordinarily a standard for negligence, is not irrelevant. The ultimate question is whether on a conspectus of all relevant facts and considerations, public policy and public interest favour holding the conduct unlawful and susceptible to a remedy in damages."

[16] In the present matter, it is conceded that the defendant's decision to debar the plaintiff without notifying him of its intended decision and without giving him an opportunity to be heard amounted to unfair

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[6] *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) 13 (SCA).
[7] See fn 5 above.
[8] *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA).
[9] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA).

administrative action. However, as was pointed out in *Steenkamp*[10], a breach of a constitutional duty is not the equivalent of unlawfulness in the delictual liability sense. Whether the defendant's conduct is to be regarded as wrongful in the delictual liability sense depends on whether the *boni mores* would regard the defendant's conduct as such.

[17] Mr. Stoop submitted that the *boni mores* would not require that the defendant's conduct be regarded as wrongful for the following reasons. Firstly, that s 14(1) of the FAIS Act places an obligation on an FSP to prohibit a representative who no longer complies with the requirements of s 13(2)(a) from rendering any new financial service by withdrawing any authority to act on behalf of the FSP and to remove the name of such representative from the register. The Act does not bestow an FSP with a discretion – it must debar the representative. The reason why the Act imposes this obligation on an FSP is because a representative who no longer meets the fit and proper requirements ought not to be unleashed on the unsuspecting public.

[18] What this argument loses sight of, is that before an FSP becomes obliged to debar a representative, there has to be a finding that the representative does not comply with the fit and proper requirements. For that decision to be made, a fair administrative process has to be followed.

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[10] In para [37] of the judgment.

The defendant has conceded that a fair administrative process was not followed and its decision to debar the plaintiff was reviewed and set aside after it withdrew its opposition to the application.

[19] The next argument was that the object of s 14(1) was mainly to protect individuals and to advance the public good. That may be so, but it cannot justify the debarment of a representative without a fair administrative process having been followed resulting in a finding that he or she does not comply with the fit and proper requirements. If a proper process had been followed, the plaintiff's conduct may have been found not to have been sufficiently serious to justify debarment.

[20] It was further submitted that the imposition of delictual liability would have a chilling effect on an FSP when it is required to implement s 14(1) of the Act. If an FSP knew that it could be held liable in delict if it incorrectly decided to debar a representative, it may, in order to avoid that possibility, simply terminate the employment of a representative who it considered did not meet the fit and proper requirements. The representative would then be free to continue working as a representative for another FSP.

[21] I do not agree with the submission. If an FSP acts responsibly and follows a fair administrative process before making a

bona fide finding that a representative does not comply with the fit and proper requirements and thereafter debars the representative, it is unlikely that such representative will succeed with a damages claim against the FSP. But if it debars a representative without following a fair administrative process and thereby potentially causes serious financial harm to the representative, the *boni mores* would not, in my view, require that the FSP be protected from delictual liability.

[22] It was further submitted that the plaintiff was afforded a remedy in terms of s 8(1)(c)(ii) of PAJA to claim payment of compensation from the defendant. But that remedy does not preclude an aggrieved representative from relying on a delictual claim for damages and would have required of the plaintiff to prove that his case was *"exceptional".*

[23] It was lastly submitted that a representative who suffers damage would be the author of his or her own misfortune because he or she failed to pursue the ordinary remedies afforded by PAJA or the common law. Ordinarily, so it was argued, an aggrieved representative would approach the court on an urgent basis for interim relief pending the review and setting aside of the unlawful administrative action so that the question of damages would not arise. It is not clear what interim relief was being referred to, but if the defendant had not responded to the demand of the plaintiff's attorney to provide reasons for the debarment by denying that

it had debarred the plaintiff and refusing to provide reasons, and had rather conceded at that early stage that its decision to debar the plaintiff had been unlawful, the matter could have been speedily resolved. Instead, it opposed the plaintiff's application to have its decision reviewed and set aside and only withdrew its opposition at a very late stage.

[23] Having regard to all the relevant facts, the sense of justice of the community and considerations of public policy, I am of the view that the *boni mores* would require that the defendant's conduct be regarded as wrongful for the purposes of delictual liability.

[24] As to the requirement of negligence, I find that a *diligens paterfamilias* in the position of the defendant would have foreseen the possibility of its conduct causing the plaintiff patrimonial harm and would have taken reasonable steps to guard against such loss by informing the plaintiff of its contemplated action and by affording the plaintiff an opportunity to be heard before taking the decision to debar the plaintiff. That negligence was clearly the cause of the plaintiff's loss. The plaintiff did, of course, have an obligation to mitigate his loss. That is something to be decided in the next round of the litigation.

[25] In the result, I grant the following order:

[a] It is declared that the defendant is liable for the damage which the plaintiff is able to prove that he suffered as a result of the defendant debarring him as a representative in terms of the Financial Advisory and Intermediary Services Act 37 of 2002.

[b] The defendant is ordered to pay the plaintiff's costs of the action to date.

Counsel for plaintiff: Adv. A Loubser
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