



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

2022-10-13

DATE

SIGNATURE

Case Number: 13261/2021

In the matter between:

FERN FINANCE (PTY) LTD

(Registration No: 1998/023533/07)

First Applicant

SIKUZA, ANDA LUMKILE

Second Applicant

and

FINANCIAL SERVICES TRIBUNAL

First Respondent

FINANCIAL SECTOR CONDUCT AUTHORITY

Second Respondent

NATIONAL CREDIT REGULATOR

Third Respondent

MINISTER OF FINANCE

Fourth Respondent

MINISTER OF TRADE, INDUSTRY AND

COMPETITION

Fifth Respondent

MINISTER OF JUSTICE AND CORRECTIONAL

SERVICES

Sixth Respondent

JUDGMENT

POTTERILL J

[1] The first applicant, Fern Finance (Pty) Ltd [Fern Finance] and the second applicant, Anda Lumkile Sikuza [Mr Sikuza], the Managing Director of Fern Finance sought a plethora of declaratory relief against the first respondent, The Financial Services Tribunal [the Tribunal] who had found that Fern Finance was engaged in the business of issuing guarantee policies without being authorised thereto by the Short Term Insurance Act 53 of 1998 [STIA]. The Tribunal had made such decision pursuant to an investigation and report filed by the second respondent, the Financial Sector Conduct Authority [FSCA]. This investigation was initiated by the FSCA's predecessor, the Financial Services Board.

[2] For ease of reference I will refer to both the applicants as Fern Finance. Fern Finance applied to the Tribunal for the reconsideration of the Authority's decision and penalties in terms of s230 of the Financial Sector Regulation Act 9 of 2017 [FSR-Act]. The reconsideration was dismissed save for the wording of the debarment order that was referred back to the FSCA for re-wording.

- [3] Condonation for the late filing of this application was granted.

Were the policies issued by Fern Finance guarantee policies and therefore regulated by STIA before its repeal?

- [4] It is common cause that Fern Finance had to be registered as a short-term insurance provider if it was in the business of providing or undertaking to provide policy benefits under short-term policies.
- [5] On behalf of Fern Finance the argument was that the business of Fern Finance was regulated by the National Credit Act 34 of 2005 and not by STIA.
- [6] Although not abandoning the argument on merits, counsel for Fern Finance made it clear that there was only a thin line between suretyship and insurance rendering it difficult to determine into which class a particular contract fell. But, the argument went that in terms of s8(5) of the NCA Fern Finance had undertaken or promised to satisfy upon demand any obligation of its clients in terms of a credit facility or a credit transaction; thus not insurance. They were registered with the National Credit Regulator and thus acted *bona fide*.
- [7] In *Becker v The Registrar of Financial Service Providers* 2018 JDR 0088 (GP); (61274/2015) [2017] ZAGPPHC 926 (30 November 2017) the court rejected the argument that an entity had to be registered in terms of the NCA or the STIA. If the service rendered fell under STIA, registration with the NCA, did not exclude registration with STIA. I agree with this *ratio* and Fern Finance did on the facts issue guarantee policies as defined in terms of STIA and thus had to be registered in terms of STIA.

Must the penalties be reviewed and set aside

[8] The penalties imposed can be summarised as follows:

- Fern Finance's licence to act as a financial service provider was withdrawn
- Fern Finance was fined R3.5 million
- Fern Finance was debarred from providing or being involved in the provision of financial service for 10 years.

Argument on behalf of Fern Finance

[9] In main the argument was that the penalty of R3.5 million was to be reviewed and set aside because the Tribunal did not take into consideration all the factors as set out in s16(2) of the Act. It was also submitted that the Tribunal took into consideration irrelevant amounts that were not derived from the guarantee policies, but from rentals and loans and should not have been considered. The penalty amount was thus determined arbitrarily or capriciously and unreasonable.

[10] Although a search and seize warrant was utilised, Fern Finance denied that it did not initially co-operate within the investigation team.

[11] Pertaining to the withdrawal of the license it was argued that Fern Finance had a good business track record and at all times acted *bona fide*. It had afforded vast numbers of South Africans to venture into business that were in the normal course locked out of the economic main stream due to South African banks and insurance companies risk assessment for the financing of small and start-up businesses.

Argument on behalf of the Tribunal

- [12] On behalf of the Tribunal it was denied that the Tribunal duly considered all the relevant factors and did not take into account irrelevant considerations. Fern Finance had not co-operated with the investigation team and that the penalty and sanctions imposed were lawful, rational and reasonable in the circumstances.
- [13] In the application for reconsideration the Tribunal even considered an application for condonation and further evidence as addressed in the heads of argument on behalf of Fern Finance despite procedural irregularities.
- [14] Pertaining to the withdrawal of the licence of Fern Finance to act as a financial services provider in terms of s9(1) of the FIAS Act, the Tribunal found that Mr Sikuza (the deceased) was no longer able to act as the key individual of Fern Finance (sub-section 9(6) of the FIAS Act). This finding only affected its ability to render financial services in respect of short-term insurance, long-term insurance and friendly society benefits. On Fern Finance's own argument, the guarantees only generated very little nett income for the business; this finding is not a death sentence for the business that in total it generated R24 million out of other business. I am satisfied that the Tribunal took into account the material breach and that this sanction is proportionate, reasonable and fair.
- [15] The Tribunal found that the administrative penalty imposed of R3.5 million in terms of s16(1) of the FSR Act was appropriate. The Tribunal could not find that the Authority when imposing this penalty was biased, did not act for substantial reasons or exercised its discretion capriciously or upon a wrong principle.

- [16] I cannot find that this finding must be reviewed and set aside. Although it considered the amount of R24 million, it clearly took note that the income received from the guarantees over 2 years was R3.5 million only.¹
- [17] The Tribunal found that the main focus of a penalty is deterrence. The Tribunal considered all the facts and correctly came to the conclusion that Fern Finance did not co-operate with the financial sector regulator.
- [18] The Tribunal considered, although not raised in the heads of argument, a submission made in a letter dated 4 June 2019 that Fern Finance had no intention to contravene the regulatory framework of the law. The Tribunal, on the common cause facts, found that Fern Finance when asking whether it must register did not give the true facts to the FSB and therefore received the answer it did. This submission was thus correctly regarded as not constituting a mitigating factor.
- [19] I am satisfied that the Tribunal considered all the relevant factors listed in s176(2)(b) and correctly found no basis for the reconsideration of this penalty. Before me, only the *bona fides* of Fern Finance, the nett income and the co-operation of Fern Finance was raised. The reasons provided for the findings on these issues were rational, reasonable and lawful.
- [20] I accordingly make the following order:

The application is dismissed with costs.

¹ Paragraph 38 of the decision

A handwritten signature in dark ink, appearing to read 'S. Potterill', is written over a horizontal line.

S. POTTERILL
JUDGE OF THE HIGH COURT

CASE NO: 13261/2021

HEARD ON: 10 October 2022

FOR THE APPLICANT: ADV. D.P. MOGAGABE

INSTRUCTED BY: Makaula Zilwa Inc

FOR THE 2ND RESPONDENT: ADV. L. MAITE

INSTRUCTED BY: Ncube Incorporated Attorneys

DATE OF JUDGMENT: 13 October 2022