



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 455/12
Reportable

In the matter between:

TRISTAR INVESTMENTS (PTY) LTD

Appellant

and

**THE CHEMICAL INDUSTRIES NATIONAL
PROVIDENT FUND**

Respondent

Neutral citation: *Tristar Investments v The Chemical Industries National Provident Fund* (455/12) [2013] ZASCA 59 (16 May 2013)

Coram: NUGENT, LEWIS, TSHIQI and PETSE JJA and SWAIN AJA

Heard: 3 MAY 2013

Delivered: 16 MAY 2013

Summary: Financial Advisory and Intermediary Services Act 37 of 2002 – meaning of ‘intermediary service’.

ORDER

On appeal from South Gauteng High Court, Johannesburg (Lamont J sitting as court of first instance).

The appeal is upheld with costs. The orders of the court below are set aside and substituted with the following:

- ‘1. It is declared that the agreement between the parties is not unlawful.
2. The plaintiff is to pay the costs associated with disposal of the issue referred to in 1 above. The remaining costs are reserved for the decision of the court that disposes of the remaining issues.’

JUDGMENT

NUGENT JA (LEWIS, TSHIQI and PETSE JJA and SWAIN AJA CONCURRING)

[1] Two signatories purporting to represent the Chemical Industries National Provident Fund – the respondent in this appeal – signed a written agreement with TriStar Investments (Pty) Ltd – the appellant – under which TriStar agreed to provide certain services to the Fund. The Fund contends that it is not bound by the agreement for one or other of three reasons. First, it alleges, the signatories who purported to act on its behalf were not authorised to do so. Secondly, it alleges in the alternative,

the agreement was void because it was unlawful. And thirdly, it alleges that if it indeed became bound, the agreement was subsequently cancelled.

[2] On those grounds the Fund instituted action against TriStar in the South Gauteng High Court for commensurate declaratory relief. The trial court (Lamont J) separated out for decision the question whether the agreement was void for illegality. He held that it was and made declaratory orders to that effect. TriStar now appeals those orders with the leave of that court.

[3] The agreement is said by the Fund to have been unlawful because it called upon TriStar to provide services in contravention of the Financial Advisory and Intermediary Services Act 37 of 2002. Section 7 of the Act prohibits a person from acting or offering to act as a ‘financial services provider’ unless that person has been issued with a licence to do so.

[4] A ‘financial services provider’ is defined to mean a person who, as a regular feature of his or her business ‘furnishes advice’¹ or ‘renders any intermediary service’ or does both. TriStar was licensed under the Act to ‘furnish advice’ but was not licensed to render an ‘intermediary service’.

¹ 'Advice' is defined to mean (subject to exceptions) ‘any recommendation, guidance or proposal of a financial nature furnished, by any means or medium, to any client or group of clients –

- (a) in respect of the purchase of any financial product; or
- (b) in respect of the investment in any financial product; or
- (c) on the conclusion of any other transaction, including a loan or cession, aimed at the incurring of any liability or the acquisition of any right or benefit in respect of any financial product; or
- (d) on the variation of any term or condition applying to a financial product, on the replacement of any such product, or on the termination of any purchase of or investment in any such product, and irrespective of whether or not such advice –
 - (i) is furnished in the course of or incidental to financial planning in connection with the affairs of the client; or
 - (ii) results in any such purchase, investment, transaction, variation, replacement or termination, as the case may be, being effected;

[5] It is not controversial that a substantial portion of the services TriStar undertook to provide constitutes the furnishing of ‘advice’. It is also clear from the agreement that some of the services it undertook to provide did not constitute furnishing advice. The court below found that because TriStar was licensed only to ‘furnish advice’ it was prohibited from rendering those other services, and the agreement was consequently invalid.

[6] That approach to the matter was not correct. The Act does not prohibit TriStar from performing any service other than ‘furnishing advice’ (which it is licensed to do). It prohibits it only from providing an ‘intermediary service’ in the absence of a licence to do so. The correct question, then, is not whether the services in issue constitute something other than ‘furnishing advice’ (which they are), but instead whether they constitute an ‘intermediary service’.

[7] In ordinary language an ‘intermediary’ is one who ‘acts between others; a go-between’ and the word has a corresponding meaning when used as an adjective.² The Act assigns its own meaning to the term that retains that characteristic. The definition contemplates a person who is interposed between a ‘client’ (or a group of clients), on the one hand, and a ‘product supplier’ on the other hand. It is as well to have clarity on what is meant by those terms – which are also defined – before turning in more detail to the definition of an ‘intermediary service’.

[8] A ‘product supplier’ is a person who issues a ‘financial product’. The Act contains a comprehensive list of ‘financial products’, which

² Shorter Oxford Dictionary.

include shares, debentures, money-market instruments, insurance contracts, investment instruments, and the like. A 'client' means (to paraphrase that definition) a specific person or group of persons to whom a financial service is provided'.³

[9] With those definitions in mind an 'intermediary service' is defined to mean (with a reservation that is not now relevant)

'any act other than the furnishing of advice, performed by a person for or on behalf of a client or product supplier –

- (a) the result of which is that a client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier; or
- (b) with a view to -
 - (i) buying, selling or otherwise dealing in (whether on a discretionary or non-discretionary basis), managing, administering, keeping in safe custody, maintaining or servicing a financial product purchased by a client from a product supplier or in which the client has invested;
 - (ii) collecting or accounting for premiums or other moneys payable by the client to a product supplier in respect of a financial product; or
 - (iii) receiving, submitting or processing the claims of a client against a product supplier.'

[10] The agreement in this case was termed an 'Investment Consultancy Agreement'. It recorded the appointment of TriStar to provide the Fund with 'the full range of investment consulting services' detailed in an annexure to the agreement. They are detailed in the annexure under two headings: 'Investment policy implementation' and 'Ongoing monitoring and management'.

³"Client" means a specific person or group of persons, excluding the general public, who is or may become the subject to whom a financial service is rendered intentionally, or is the successor in title of such a person or the beneficiary of such service'.

[11] Much of what is contained under the first heading properly constitutes furnishing advice. In summary, TriStar undertook to meet with the relevant functionaries of the Fund, and others, so as to ascertain its financial objectives and review its assets, to construct an investment model and recommend investments strategies that would meet those objectives, and to place its recommendations before the Fund for its approval. Once its recommendations had been approved TriStar was to provide other services, and it is those services that the Fund submits were prohibited by the Act.

[12] The agreement contemplated that one or more independent asset managers would be appointed to effect the various investments approved by the Fund. Amongst the services TriStar was to provide, under the heading ‘Investment policy implementation’, were to ‘draft detailed asset manager mandates for [the Fund’s] domestic and international asset managers’, and to ‘implement the asset allocation model, investment strategy and asset manager mandates’, and to ‘negotiate any contractual issues with the current and any new asset managers on behalf of [the Fund], and to ‘manage the transition from [the Fund’s] current domestic and international portfolios to be created as a result of this process’. I need not set out in detail the various services to be provided under the heading ‘Ongoing monitoring and management’. It is sufficient to say that it undertook, amongst other things, to monitor and evaluate the performance of the investments, and the performance of the asset managers, and, in some cases to ‘correct any underperformance’, and in other cases to ‘take appropriate corrective action’. Clearly the ‘corrective action’ it was to undertake was no more than to ensure that the asset managers adhered to their mandates.

[13] Sub-clause (a) of the definition of an intermediary service, properly construed, contemplates acts that directly result in the consequences referred to. To construe it as including any act that indirectly has that result would lead to absurdities. It contemplates a person who stands with a client (or clients) on the one side, and a supplier of financial products on the other side, acting as the ‘go-between’ to effect the relevant transactions. Quintessentially, that person is the asset manager, who is mandated to act on behalf of the Fund. As for sub-clause (b), it contemplates a person who manages or administers the relevant financial products.

[14] None of the services TriStar undertook to provide falls foul of those provisions. Initially they were to compile and convey the appropriate mandates and instructions to the asset managers, and thereafter to take steps to ensure compliance with their mandates. It was not to bring about the relevant transactions – those would be brought about by the asset managers – nor was it to manage or administer the financial products. So far as it was to manage or administer anything at all, it was to manage and administer no more than the mandates of the asset managers.

[15] In my view none of those constitutes ‘intermediary services’ on the ordinary meaning of the language of the definition. I can also see no reason – and none could be suggested – why the legislature would have thought it necessary for services of that kind to be regulated. In those circumstances TriStar was not required to be licensed to provide them, and the objection raised by the Fund ought to have been dismissed.

[16] The appeal is upheld with costs. The orders of the court below are set aside and substituted with the following:

- ‘1. It is declared that the agreement between the parties is not unlawful.
2. The plaintiff is to pay the costs associated with disposal of the issue referred to in 1 above. The remaining costs are reserved for the decision of the court that disposes of the remaining issues.’

R W NUGENT
JUDGE OF APPEAL

APPEARANCES:

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