

FMT

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

DATE: 3/4/2009

NOT REPORTABLE

CASE NO: 8154/09

In the matter between

STEPHANUS JOHANNES KRUGER

APPLICANT

And

SANLAM LEWENSVERSEKERING BEPERK

RESPONDENT

JUDGMENT

MSIMEKI, J

INTRODUCTION

[1] The Applicant brought this application on urgency seeking an order:

“2. That a rule nisi do issue, returnable on 31 March 2009, calling upon the Respondent to provide reasons on the return date why the following order should not be made final:-

a. That the Respondent be ordered to, within 5 days of the granting of this order:-

- i. Uplift the debarment of the Applicant in terms of section 14 of the Financial Advisory and Intermediary Services Act, No. 37 of 2002 (as amended) (“the Act”) to deliver any new financial services;
- ii. Restore the Applicant’s name on the register of representatives, kept in terms of the provisions of section 13 (3) of the Act;
- iii. Inform the Financial Services Board (“FSB”) accordingly;

- b. That the Applicant be granted leave to file his application for review and setting aside of the Respondent's decision to remove his name from the register of representatives and/or of the process before as well as the recommendation of the Tokiso Legal Consultant, within 15 days of this order;
 - c. That the Respondent be ordered to pay costs of the application;
- 3. That the order in paragraph 2 *supra* will serve as temporary interdict with immediate effect pending the finalization of the Applicant's application to FSB for a licence to work as authorized supplier of financial services and/or the Applicant's application for review mentioned *supra*, whichever is concluded successfully first.
- 4. Further and/or alternative relief."

- [2] The Respondent did not file its Notice of intention to oppose the application but filed an Answering Affidavit on 25 February 2009. This was followed by the affidavit of the Registrar of Financial Services Providers (“the Registrar”) which was submitted on 02 March 2009. Mr H. B. Smalberger SC (“Mr Smalberger”) on behalf of the Respondent, had no difficulty if the Registrar’s affidavit was admitted. It was accordingly admitted. Mr Venter, on behalf of the Applicant, also was not worried by the fact that no Notice of Intention to Oppose the application had not been filed. So the matter accordingly proceeded.

BACKGROUND FACTS

- [3] The Applicant worked for 27 years since 1981 in the Insurance Industry attached to Sanlam (“the Respondent”), an authorised financial services provider and according to the contract between them earned a commission only as an independent contractor. His case

is that, he, for the past 5 years, was one of the elite group consisting of the best 15 representatives who generated the most business for the Respondent. He, in 2002 when Sanlam trust received a contract to manage the rehabilitation trust formed by mining companies in terms of the mining legislation, received a contract to do the investments on behalf of the trustees. With the support of his branch manager and armed with his prior knowledge from the mining industry, he developed an insurance product which enabled the mines to provide security that required less capital in the form of re-assurance. He managed this lucrative and complex business alone for the first 3 years. Jacko Moll and Johan Kruger, also representatives from the same branch, joined him in 2006 and did the mining rehabilitation business. They, however, encountered problems in September 2008 when a decision was taken which meant that 15% of their commission on mine rehabilitation business be given to one Mr Dries Bekker ("Bekker"). The three were against the decision which was

not implemented. Bekker then launched a forensic investigation against the Applicant who was notified thereof in October 2008. Bekker, on 5 November 2008, informed the Applicant that he had been suspended pending the finalisation of the forensic investigation. The Applicant, on 11 November 2008, was advised that the Respondent would be submitting the forensic reports to a legal consultant from Tokiso for recommendations and that it was contemplating terminating his contract as financial advisor (which at the time the Applicant was) and debarring him. The legal consultant only found the Applicant guilty on all the charges after hearing oral evidence. The matter was heard on 23 January 2009 while the Applicant was notified about the verdict on 2 February 2009. The Applicant's contract was terminated on 4 February 2009. The Applicant, in terms of Section 14 of Financial Advisory and Intermediary Services Act, No. 37 of 2002 ("the Act") was, accordingly debarred.

[4] On behalf of the Respondent, on the other hand, it was contended by Mr Smalberger that the Respondent had merely discharged its duties in terms of the Act. These are that:

4.1 The Respondent in terms of section 13 (1)(b)(1)(aa) and (bb) and 13(1)(b)(ii) of the Act must ensure that:

4.1.1 the representative (such as the Applicant) is contractually allowed or entitled to represent the financial services provider (such as the Respondent) (the provider)

4.1.2 it accepts responsibility for the representative's activities performed within the scope of, or in the course of implementing only such contract or agreement.

4.1.3 if debarred as envisaged by section 14 of the Act, that he or she complies with the requirements determined by the Registrar for the reappointment of a debarred

person as a representative. (Section 13(1)(b)(ii)),

14.1.4 the representative has personal character qualities of honesty and integrity (Section 8 (1) (a) of the Act)

4.2 The Respondent is obliged to maintain an up to date register of its representatives (Section 13(3) of the Act)

4.3 Section 14 of the Act which is peremptory requires the Respondent :

4.3.1 to prohibit a representative who no longer complies with the requirements referred to in Section 13 (2) (a) of the Act from rendering any new financial services by withdrawing any authority to act on its behalf ,

4.3.2 to remove the name of the representative from the register referred to in section 13(3),

4.3. 3 to, within 30 days after the removal of the names of the representative from the register as contemplated in subsection 1, inform the Registrar in writing thereof.

[5] The Respondent, after the disciplinary process described by the Applicant in the founding affidavit, cancelled its contract with the Applicant, removed the names of the Applicant from its register of representatives, debarred him in terms of section 14 (1) of the Act and accordingly notified the Registrar in accordance with the provisions of Section 14 (3) of the Act. This happened immediately the Applicant, according to the Respondent, no longer complied with the requirements referred to in section 13 (2) (a) of the Act. It is contended on behalf of the Respondent, that the Applicant, due to the cancellation of the contract, no longer can represent the Respondent. The Applicant acknowledges this in his case stressing that it is also not his wish to do so. The order that the

Applicant seeks then becomes an exercise in futility. It will serve no purpose because the basis for the existence of his name on the register of the Respondent is gone. The name, clearly, cannot be restored to the Respondent's register. It will be contrary to the provisions of section 13(1)(b)(i)(aa) and (bb) of the Act. It will also be contrary to the provisions of Section 14 (1) of the Act. Mr Smalberger's submission, therefore, has merit.

- [6] What is left for the Applicant, it is further contended on behalf of the Respondent, is for the Applicant to comply with the requirements determined by the Registrar. This contention, too, is correct. Unless the Applicant complies with the provisions of section 13 (1)(b)(ii), he cannot, too, act as a representative for another authorised financial services provider. The Applicant has, consequently, it is further contended, on behalf of the Respondent, approached this court for an order compelling the Respondent to annul or uplift the debarment. In deed,

this is the relief that the Applicant seeks. The question that immediately springs to mind is whether the court can give such an order. This then takes me to the issues that need to be decided.

ISSUES TO BE DECIDED

[7] These are whether:

7.1 the Registrar should have been joined as a party,

7.2 the matter is urgent,

7.3 the Applicant has made out a case for the relief that he seeks. Put differently whether the Applicant has satisfied the requirements for the relief that he seeks.

COMMON CAUSE FACTS

[8] These are:

1. The Applicant was a representative of the Respondent as a financial services provider for many years,
2. a forensic investigation was launched against the Applicant and that that resulted in the Applicant being found guilty and his contract with the Respondent cancelled,
3. his name was removed from the Respondent's register and he was debarred,
4. the Applicant does not intend to again represent the Respondent,
5. following a disciplinary process the Respondent complied with the provisions of the Act.

[8] Mr Smalberger, on behalf of the Respondent, as already shown above, contended that the Respondent cannot be

faulted for complying with the requirements of the Act. The contract that had brought the parties together, according to him, no longer exists. The name of the Applicant has validly been removed from the Respondent's register and the Applicant has properly been debarred and such debarment has duly been communicated to the Registrar. It is Mr Smalberger's contention that what was done was properly done in accordance with the peremptory provisions of section 14 (1) of the Act. This debarment of the Applicant, according to him, stands until set aside in review proceedings. This contention is also correct. A debarred representative **must** (my emphasis) comply with the provisions of section 13 (1)(b)(ii) of the Act if he/she seeks reappointment as a representative of a financial services provider. The Registrar determined the requirements which **shall** (my emphasis) be met before one is reappointed once he/she is debarred. These are that the Applicant in such a case must prove that:

1. twelve (12) months have lapsed since the date of such debarment,
2. all unconcluded business of the appellant has been properly concluded,
3. all complaints or legal proceedings submitted by clients, or other administrative or legal procedures have been lawfully resolved,
4. all fit and proper requirements are complied with.

[9] Mr Venter, on behalf of the Applicant, submitted that the Applicant seeks to set aside the debarment and not reappointment and that the two are different. In this event, then, as Mr Smalberger correctly pointed out, the Applicant's answer lies in the review proceedings. The Registrar, having determined the requirements for the reappointment of the debarred representative, becomes a relevant party in proceedings such as these.

The relevance, as Mr Smalberger correctly submitted, lies in the fact that the Registrar of necessity has to be

approached for his indication, whether or not he is prepared to allow the Applicant to act as a representative pending his proposed review application. The interim remedy, in deed, lies with the Registrar should he be unwilling to allow the Applicant to act as a representative pending the finalization of the review application. Clearly the Registrar has a direct and substantial interest in the relief that the Applicant seeks.

- [10] Mr Smalberger is correct in his contention that the relief that the Applicant seeks is a final interdict couched in a *Rule nisi*. (Prayer 2 of the Notice of Motion dated 16 February 2009.) This relief, in my view, the Applicant is not, as shown above, entitled to. The Applicant should have approached the Registrar for assistance and only if such assistance was not forthcoming would the Applicant have been justified in approaching the court for an interim relief, to have the court suspend the operation of the debarment, pending the finalisation of the review

proceedings. This, the Applicant failed to do. The decision of the Respondent, in deed, stands until it is set aside in review proceedings. The Applicant should have joined the Registrar as an interested party to these proceedings. The affidavit that the Registrar submitted, in my view, is of no assistance to the Applicant. It will, in my view, not be prudent to order that the debarment be uplifted or annulled as there, in deed, will remain nothing to review, as Mr Smalberger correctly contended. I need to point out that the Applicant, in any event, needs no permission from the court to institute the review proceedings. This renders prayer 2 (b) unnecessary.

[11] The above discussion reveals that it is unnecessary to deal with the other aspects of the case, however, it is important to mention the following;

APPLICANT'S REMEDY

The Applicant in his founding affidavit does not deal with whether or not the Registrar has been approached with a view to establish his attitude to the Applicant acting as representative of other authorised financial services providers now that he has been debarred. It is also not known how the Registrar would react in terms of section 13 (1) (b) (ii) of the Act were he to be approached. In deed, the Applicant provides no particulars of employment available to him as a representative. Even if the matter was urgent the Applicant has a problem, as he now either wants to be an authorised financial services provider himself or to act representing other authorised financial services providers. this of course presupposes that the Registrar becomes an interested party to the proceedings. Whether the Registrar will allow him to act as a representative pending review proceedings is unclear. The Applicant, in the result, cannot be said to have

established the necessary urgency. That he is unable to earn income as a representative of an authorised financial services provider, as it was submitted on his behalf, cannot be said to be sufficient to establish urgency. On this ground too, the application stands to fail.

PRIMA FACIE RIGHTS

The Applicant does not sufficiently disclose that he, in deed, would succeed in a review application if he brought one to set aside the decision of the Respondent to bar him. The Applicant, in his founding affidavit, fails to refer to or deal with the relevant sections of PAJA disclosing the basis from which one can see that prima facie he, in deed, would succeed in the review application. He fails to reveal the relevant evidence which the legal consultant did not consider before the decision to find him guilty as shown was arrived at.

[12] The above clearly demonstrates that the Applicant cannot be said to have made out a case for the relief that he seeks. The application, therefore, should fail.

In the result, I make the following order.

The application is dismissed with costs.

M. W. MSIMEKI

JUDGE OF THE HIGH COURT

Heard on: 05 March 2009

For the Applicant: Adv. Venter

Instructed by: S Roux Inc

For the Respondent: Adv. H. Smalberger (SC)

Instructed by: Erasmus Inc.