



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

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| (1) | REPORTABLE: No. |
| (2) | OF INTEREST TO OTHER JUDGES: No. |
| (3) | REVISED. |



SIGNATURE

DATE: 29 April 2024

Case No. 2023-067825

In the matter between:

KENEILWE ZONDI

Applicant

and

THE REGISTRAR OF FINANCIAL SERVICES PROVIDERS First Respondent

AON SOUTH AFRICA (PTY) LTD Second Respondent

JUDGMENT

WILSON J:

- 1 The applicant, Ms. Zondi, is serving pupillage, but the Legal Practice Council has apparently declined to certify that she is a fit and proper person to do so. This is on the basis that the second respondent, Aon, has debarred Ms Zondi, under section 14 (1) of the Financial Advisory and Intermediary Services Act 37 of 2002 ("the FAIS Act"), from rendering the financial services to which the Act applies. Section 14 (1) (a) (iii) of the FAIS Act requires a financial services

provider, such as Aon, to debar any of its representatives involved in the provision of financial services if the representative no longer meets the “fit and proper” requirements applicable to individuals who provide such services. Aon debarred Ms. Zondi under this provision, and Ms. Zondi now applies to me to review and set aside Aon’s decision to do so.

- 2 On 1 April 2015, Aon employed Ms. Zondi as a short-term insurance salesperson. In May 2016, Aon charged Ms. Zondi with dishonestly claiming commission on fictitious sales of short-term insurance products to customers, some of whom turned out not to exist. Ms. Zondi was also accused of claiming commission on genuine sales that was in fact due to other salespeople that Aon employed. After a disciplinary hearing, Aon dismissed Ms. Zondi from her employment on 23 June 2016. Aon also debarred Ms. Zondi under the FAIS Act with effect from 27 June 2016.
- 3 Shortly after she was dismissed, Ms. Zondi instituted proceedings to impugn the fairness of her dismissal in the Commission on Conciliation, Mediation and Arbitration (“the CCMA”). Those proceedings were settled on somewhat obscure terms which now lie at the heart of this dispute.
- 4 The CCMA settlement recorded that the parties had agreed that Aon would pay Ms. Zondi just under R58 000 in full and final settlement of any monetary claims she may have against it. Aon undertook to “make application” to the Financial Services Board “for the upliftment of” Ms. Zondi’s debarment. Aon also promised to tell the Financial Services Board that “there was insufficient evidence of wrongdoing on the part of [Ms. Zondi] at the CCMA”.

- 5 Soon after it signed the settlement agreement, Aon sought to resile from it. Those efforts were unsuccessful. On 7 February 2017, the agreement was made an arbitration award under section 142A of the Labour Relations Act 66 of 1996. Between 15 March 2017 and 17 May 2023, Ms. Zondi issued a series of demands that Aon make good on its promise to apply to the Financial Services Board to uplift the debarment. Ms. Zondi also contacted the Financial Services Board and asked it to honour the CCMA award. On 1 April 2018, the second respondent, the Registrar, took over some of the Financial Services Board's functions, including the function of keeping a record of debarred representatives. Ms. Zondi then asked the Registrar to implement the CCMA award.
- 6 The Financial Services Board and the Registrar both told Ms. Zondi that they could not uplift the debarment, and that the only way that she could reverse it was by means of a review of Aon's decision to impose it. For its part, Aon simply refused to abide by its undertaking to apply to the Financial Services Board or the Registrar to reverse the debarment. Aon apparently took the view that, once it had imposed the debarment, it had no power to reverse itself, the decision to debar being administrative action under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). Aon agreed with the Financial Services Board that the only way to reverse the debarment was to bring a review application under PAJA.
- 7 The position adopted by the Registrar, Aon and the Financial Services Board was of course correct. Once administrative action is taken, it stands until it is set aside, and cannot unilaterally be reversed by the person who took it, unless

the legislation governing the action itself says so. Here, the legislation does not say so, and Aon had no power to reverse Ms. Zondi's debarment once it had taken place.

8 There is, however, no evidence I can see on the papers that Aon communicated this position to Ms. Zondi before 17 May 2023. In its answering papers, Aon does not suggest that it attempted to do so, and in fact denies that it had any duty to do so. As a result of this, it seems that Ms. Zondi persisted, for a number of years, in the erroneous view that, the Financial Services Board's and the Registrar's admonitions notwithstanding, the settlement agreement required Aon to take the necessary action to reverse her debarment. However, in correspondence addressed to Ms. Zondi on 17 May 2023, Aon for the first time stated unequivocally that it could not reverse the debarment and that the only way to do so was for Ms. Zondi to bring a review application under PAJA.

9 That application is now before me. It was instituted on 17 July 2023. In it, Ms. Zondi seeks the review and setting aside of Aon's decision to debar her; an order directing the Registrar to amend its records by expunging the debarment; an order directing Aon to pay compensation to her under section 8 (1) (c) (bb) of PAJA; an order extending the time available to her to bring these proceedings; and an order for costs.

10 The Registrar abides my decision. Aon, however, opposes the application on that basis that it has been brought out of time; that an extension should not be granted; that the decision to debar Ms. Zondi was lawful, rational and procedurally fair, and accordingly should not be set aside under PAJA; and

that, finally, even if the decision is set aside, an award of compensation is inappropriate.

The application for an extension of time

- 11 Section 7 (1) (b) of PAJA requires Ms. Zondi to have instituted these proceedings within 180 days of “becoming aware” of the administrative action she seeks to challenge. Under section 9 of PAJA, I may extend that period if the interests of justice so require.
- 12 This case presents some conceptual difficulties in applying these provisions because, although everyone now accepts that the decision to debar Ms. Zondi was administrative action, and that Ms. Zondi became aware of that decision sometime shortly after 29 June 2016, it seems clear to me that Ms. Zondi did not know, until 17 May 2023, that the decision to debar her constituted administrative action, and that her only remedy was to review it. Ms. Zondi instead treated the decision to debar her as part of the sanction imposed by Aon’s disciplinary inquiry. She believed, erroneously, that the debarment could be undone through the implementation of the remedy she obtained at the CCMA. That suggests that Ms. Zondi only “became aware” that the debarment decision was administrative action on 17 May 2023, when Aon told her it was, and explained that, because of this, it was not open to Aon to implement the terms of the CCMA award.
- 13 If the 180 day period under section 7 (1) (b) commences when an applicant for review becomes aware of the decision they seek to challenge, then Ms. Zondi was required to institute these proceedings within 180 days of becoming aware of the 29 June 2016 decision. If that is so, she requires an extension of

time under section 9 of PAJA. If, however, the 180 day period commences only when an applicant becomes aware that the decision they wish to challenge constitutes administrative action that must be reviewed under PAJA, then it seems to me that Ms. Zondi only “became aware” of the action on 17 May 2023, and that she does not need an extension of time under section 9.

14 This issue was not explored in argument before me, because everyone approached the case on the basis that an extension is required. For that reason, I will assume, without deciding, that an extension is required. It seems to me that a judgment that the 180 day period under section 7 (1) (b) only commences when the applicant becomes aware that a decision constitutes administrative action has potentially far-reaching consequences for PAJA review proceedings, and I am reluctant to draw that conclusion without hearing full argument on the point.

15 It is in any event unnecessary to confront the issue because, even if it is assumed that the 180 day period commenced when Ms. Zondi became aware of the debarment decision, the interests of justice cry out for the exercise of my power to extend the period available to Ms. Zondi to launch these proceedings. There is no suggestion on the papers that Ms. Zondi did not genuinely believe that reversing her debarment was a simple matter of Aon implementing its undertaking, made in the CCMA award, to apply to the Registrar to uplift the debarment. Ms. Drake, who appeared for Aon before me, criticised Ms. Zondi’s belief as unreasonable in light of the Registrar’s repeated warnings to Ms. Zondi that she should bring review proceedings. However, I do not think I can endorse that criticism in circumstances where

Ms. Zondi had the CCMA award in hand, and Aon was, for several years, silent on whether it could or would implement its obligations under the award.

16 In addition, Ms. Zondi was, throughout the 180 day period notionally available to her to institute these proceedings, raising a new born child. She was not consistently employed. She clearly lacked the means to institute full blown proceedings in the High Court. She cannot realistically be blamed for clinging to the CCMA award when the alternative was a time-consuming and expensive approach to this court that Aon itself had not confirmed was necessary. I have also taken into account Ms. Zondi's prospects of success on review, which, for reasons to which I shall shortly turn, are very good. All of these considerations weigh strongly in favour of granting an extension of time.

17 Against these considerations must be weighed the prejudice to Aon caused by the passage of time since the decision to debar Ms. Zondi was taken. That decision was taken for Aon by a Ms. Dyball, a human resources practitioner who has since left Aon's employment, and who cannot presently be traced. Ms. Dyball was also Aon's principal representative at the CCMA. It was she who entered into the settlement agreement. Without input from Ms. Dyball, Aon has obviously been hampered in preparing its defence to this application, but I do not think that prejudice outweighs the prejudice to Ms. Zondi if her review were not adjudicated on its merits. After all, much of the material evidence is contained in contemporaneous documents, the authenticity of which is common cause. Ms. Dyball's reasons for debarring Ms. Zondi are readily ascertainable from the record. While her reasons for entering into the

CCMA settlement agreement and then subsequently attempting to resile from it are not apparent from the record, they are at best of secondary relevance. The agreement stands as a fact, and no attempt has been made to assail it.

18 Finally, Aon's prejudice is at least partly of its own making. If Aon had promptly made clear to Ms. Zondi not only that it would not implement the CCMA award, but that it could not do so as a matter of law, then it would have extinguished much of the delay which has now redounded to its prejudice.

19 On balance, then, the interests of justice require an extension of time under section 9 of PAJA. I will extend the period available to launch this application to the day on which Ms. Zondi served her application papers.

The merits of the review

20 In her papers, Ms. Zondi launches a wide-ranging attack on Aon's decision to debar her. However, I need only consider the procedural fairness of that decision. As must be clear by now, the decision to debar Ms. Zondi was separate from the decision to dismiss her. Aon's obligation to debar those of its representatives who are no longer "fit and proper" to render financial intermediary services arises from, and is subject to, a set of statutory requirements that are completely different from the rules that govern its right to discipline and dismiss its employees. Ms. Zondi's dismissal from Aon and her debarment under section 14 of the FAIS Act are legally distinct processes. While dismissal Ms. Zondi's from Aon's employment for dishonesty may well justify her debarment under section 14, as a matter of law, debarment did not follow automatically from Ms. Zondi's dismissal.

- 21 This much is clear from section 14 (3) of the FAIS Act, which requires Aon to follow a set procedure before it debars one of its representatives. These steps include adequate notice of the intention to debar, the reasons for which debarment is being pursued, and the representative's right to make representations before a final decision to debar is taken.
- 22 Section 14 (3) of the FAIS Act did not apply at the time Ms. Zondi was debarred. It was inserted into section 14 on 1 April 2018. However, whatever the FAIS Act said at the time of her debarment, Ms. Zondi still had the basic right to procedural fairness before the decision to debar her was taken. That right flows from the mere fact that – as everyone before me accepts – the decision to debar Ms. Zondi constituted administrative action, and that, to be lawful, administrative action must be also be procedurally fair. The components of procedural fairness in Ms. Zondi's case would have been, at the very least, adequate notice of the intention to debar, an opportunity to make representations in light of that intent, and final notice of Aon's decision to debar and Aon's reasons for reaching it, having properly considered any representations Ms. Zondi chose to make.
- 23 That is not what happened in this case. On 27 June 2016, Aon gave Ms. Zondi notice that she "may" be debarred. She was not invited to make representations. Nor was she told why, other than because she had been dismissed, debarment may be imposed. That was insufficient. Aon was under a duty to identify the facts on which it intended to debar Ms. Zondi. The mere fact of her dismissal was not enough, although facts established at the disciplinary hearing may well have been enough if Aon had isolated and

identified them. Those facts ought nonetheless to have been set out in a notice of intention to debar, and representations ought to have been invited on them.

24 Finally, Ms. Zondi was not given final notice of her actual debarment at the time that it was communicated to the Financial Services Board on 29 June 2016. Having informed Ms. Zondi of the possibility that she “may” be debarred, Aon proceeded, two days later, to give notice of her debarment, effective from 27 June 2016, to the Financial Services Board, but not to Ms. Zondi. Aon also told the Financial Services Board that it had informed Ms. Zondi of her debarment. But Aon had, of course, done no such thing.

25 It seems clear to me for all these reasons that Aon’s decision to debar Ms. Zondi was unlawful because it was procedurally unfair. It must be reviewed and set aside on that basis alone.

Remedy

26 There remains the question of remedy. In the event that I set the debarment aside, Aon asked me to refer the decision to debar Ms. Zondi back to it. If Aon proceeds with Ms. Zondi’s debarment afresh, Aon undertakes to follow the provisions of section 14 (3) of the FAIS Act as they now apply. Ms. Zondi, on the other hand, asks me not to refer the matter back to Aon for a fresh decision. She asks that I order Aon to compensate her for the unlawful decision to debar her in the first place.

27 It seems to me that the proper remedy is to refer the decision back to Aon for reconsideration. There is clear evidence on the papers that Ms. Zondi may in fact be guilty of dishonesty and that a decision to debar her may well have

been justified. Ms. Zondi studiously avoided dealing with the allegations of dishonesty made against her at the disciplinary hearing before me. She argued that she did not have to, because the CCMA award confirms that there was insufficient evidence on which to convict her.

28 I think that submission must fail for at least two reasons. The first reason is that I cannot accept, on the papers before me, that there was insufficient evidence to convict Ms. Zondi at her disciplinary hearing. The mere fact that Aon undertook to tell the Financial Services Board that there was insufficient evidence of wrongdoing to justify the debarment does not amount to an admission that Ms. Zondi had not committed misconduct, or that her dismissal was unfair or unlawful. On a conspectus of all the facts, Ms. Zondi has questions to answer about her honesty and integrity that she has failed to answer before me.

29 The second reason is that, even if I were to accept that there was insufficient evidence to convict Ms. Zondi at the disciplinary hearing, that is not the same as saying that Aon did not have the right to debar her under section 14 (1) of the FAIS Act. The requirements for a conviction at a disciplinary hearing are not the same as the requirements for debarment under the Act. To debar a representative under the FAIS Act, Aon need only be satisfied that the representative no longer meets the “fit and proper” requirements set out under the Act. That need not be the same as the kind of misconduct that would justify dismissal, although, on the facts of a particular case, they may ultimately amount to the same thing.

30 In those circumstances, I can neither refrain from referring the question of Ms. Zondi's debarment back to Aon nor order the compensation Ms. Zondi asks for. In any event, even if I were inclined to compensate Ms. Zondi for Aon's procedurally unfair decision to debar her, I am enjoined from doing so while at the same time referring the question of her debarment back to Aon (see in this respect *Trustees, Simcha Trust v De Jong* 2015 (4) SA 229 (SCA), paragraph 27).

Costs

31 Ms. Zondi has been substantially successful and is entitled to her costs. Although she argued her own case before me, she enlisted the support of a firm of attorneys, which apparently assisted her on the basis that it would recover its costs if Ms. Zondi was successful. Even if Ms. Zondi's attorneys had acted *pro bono*, section 92 of the Legal Practice Act would have permitted Ms. Zondi's attorneys to present a bill for taxation as if Ms. Zondi had paid for their services. There is accordingly no basis on which to limit Ms. Zondi's costs to her actual disbursements reasonably incurred, which is the usual approach when making costs awards in favour of lay litigants (see *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd* 2008 (6) SA 75 (NmHC)).

Ms. Zondi's aspirations and character

32 It seems clear that Ms. Zondi's motive for bringing this application is to remove an obstacle to the completion of her pupillage. Given the measured and professional way in which she presented her case before me, I am inclined to hope that she does one day become an advocate. Whatever her past

misconduct, the person who made submissions before me came across as honest, intelligent and serious. I cannot say whether Ms. Zondi is guilty of the misconduct of which Aon convicted her. At best, Aon has sent mixed signals on this issue. Aon went through what appears to have been a lengthy and expensive process to dismiss Ms. Zondi. But it then cast doubt on the outcome of that process. It undertook to tell the statutory body responsible for ensuring the integrity of financial services providers that there was not much evidence of wrongdoing against Ms. Zondi after all. Aon has never explained this contradiction. Given Ms. Dyball's unavailability, perhaps it cannot do so.

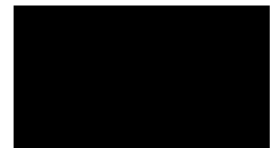
- 33 Whatever the fate of the debarment proceedings, it is incumbent on Ms. Zondi to provide a full and frank explanation to the Legal Practice Council of the circumstances that led to her dismissal. If she was dishonest, or reckless with the truth, while employed at Aon, she would be well-advised to own up to it now and to show that she has learned from her mistakes in the 8 years since they were made. It would be an error of judgement to continue to seek refuge in Aon's ineptitude. I hope both for Ms. Zondi's sake, and for the sake of the profession to which I suspect she would make a fine addition, that Ms. Zondi will choose the correct path.

Order

- 34 For all these reasons –

34.1 The time available to the applicant to launch these proceedings is extended to 17 July 2023.

- 34.2 The second respondent's decision, dated 29 June 2016, to debar the applicant under section 14 of the Financial Intermediary and Advisory Services Act 37 of 2002 with effect from 27 June 2016, is reviewed and set aside.
- 34.3 The question of whether the applicant should be debarred under section 14 is referred back to the second respondent for reconsideration.
- 34.4 The first respondent is directed to expunge its record of the applicant's 29 June 2016 debarment forthwith.
- 34.5 The second respondent is directed to pay the costs of this application.



S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 29 April 2024.

HEARD ON: 17 April 2024

DECIDED ON: 29 April 2024

For the Applicant: Ms. Zondi in person

For the Second Respondent: H Drake
Instructed by Eversheds Sutherland