



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES.

(2) OF INTEREST TO OTHER JUDGES: YES.

(3) REVISED.

2025-01-15

DATE

SIGNATURE

Case Number: 2023-058536

In the matter between:

PRUDENTIAL AUTHORITY OF SOUTH AFRICA

Applicant

and

FINANCIAL SERVICES TRIBUNAL

First Respondent

LAND BANK INSURANCE COMPANY SOC LIMITED

Second Respondent

LAND BANK LIFE INSURANCE COMPANY SOC LIMITED

Third Respondent

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 15 January 2025.

JUDGMENT

POTTERILL J

I was asked to pay tribute and I do so willingly thus I commence this judgment with a tribute to counsel who in this matter represented the Prudential Authority together with Advocate Aslam Bava SC and Advocate Nassir Ali. I was informed that he was a hard-working member of this legal team and participated in every aspect of this matter on behalf of the Prudential Authority. This counsel is Advocate Matodzi Mavhungu who sadly passed away in a fatal vehicle collision on the morning of 4 August 2024 at the age of 26.

*He was the youngest of 8 children and his family members lovingly called him “Ntsako” and considered him a beacon of joy. He excelled at school earning him a full scholarship to study at the University of Limpopo [Turfloop campus]. At University, Advocate Mavhungu was both an academic tutor and a student activist, and he co-founded the African Law Projects alongside Advocate Zondeka Makondo, advocating against the financial exclusion of disadvantaged students. He was also a key figure in a landmark case; *Matshidiso and Others v The President of the Republic of South Africa and Others*¹ which underscored his commitment to social justice.*

He completed his LLB with distinction in 2019. He interned at MES Legal Solutions and did his articles serving as a candidate attorney at Melo Attorneys in Pretoria. He was called to the bar in 2021 and completed his pupillage at the Johannesburg Society of Advocates under the mentorship of Advocate Nkhosikhona Gama. He was also trained by Advocate Aslam Bava SC and Advocate Sandile Khumalo SC as part of the Duma Nokwe education programme for pupils – ironically, these two Senior Counsel are the lead Counsel on opposite sides in the current review application before me.

*He was a proud member of the Duma Nokwe Group of Advocates, where he established his practice in 2022. Despite his brief career, he made significant contributions, notably arguing in the case of *President of the Republic of South Africa**

¹ [2016] ZAGPPHC 902 (12 October 2016)

v Zuma and Others² and earning four additional reported judgements in such a short space of time where he acted as lead Counsel.

I am informed that he was a shining star of the Duma Nokwe Chambers and was known for his deep knowledge of the law, education and unwavering humility. His chamber was a refuge for many pupils and juniors as he was always willing to assist those who knocked on his door in every possible way. He was admired by his fellow students at the University of Limpopo, and many of his former classmates consequently trusted him to successfully move their applications for admission as legal practitioners and usher them into the legal profession. "Another Turfie on the roll" soon became his signature phrase, signifying a successful involution from being classmates/friends to becoming colleagues/ "learned friends" - a victory for the University and the legal profession. He also continued to mentor many students and legal practitioners. At the time of his passing, Matodzi was pursuing a Master of Laws in Human Rights Advocacy and Litigation at the University of the Witwatersrand.

I am informed that he insisted and practised a good work-life balance and one of his favourite lines was "life is more than pleadings". Fluent in at least six of the official South African languages, he took pride in being a linguist.

He was a kind, open-minded person who loved learning about different cultures and interacting with people from all walks of life. I am told that one of his nicknames, "MuAfrika" (meaning African), could not be a more fitting representation of the kind of person he was: kind, compassionate, humble, altruistic and overall, a true embodiment of Ubuntu. One of his favourite African proverbs (which ironically still stands as his last status update on WhatsApp), "maa a mutukana a si vhumatshelo hawe", meaning "your background does not determine your destiny" in his mother tongue of Tshivhenda, should serve as an important life lesson to us all.

I trust this tribute to a counsel and his legacy, whose name I see on the papers, but who is sadly not before me, will continue to inspire many more.

² 2024 (1) SACR 32 (GJ)

Introduction

[1] The Prudential Authority of South Africa [the PA] is seeking the review and setting aside of the findings of the Financial Services Tribunal [the FST] that was granted in favour of the Land Bank Insurance Company SOC Limited [LBIC] and the Land Bank Life Insurance Company SOC Limited [LBLIC]. Where both the LBIC and LBLIC are relevant I will refer to them as the respondents. The FST abides the Court's decision.

[2] The PA is a statutory body established in terms of section 32 of the Financial Sector Regulation Act 9 of 2017 [the FSR-Act] and under the administration of the South African Reserve Bank. Of relevance in this matter is that it performs the prudential and regulatory supervision of Insurance companies. The LBIC is a short term insurer which was registered in terms of the since repealed Short Term Insurance Act 53 of 1998 [STIA]. The LBLIC was registered as a long term insurer in terms of the since repealed Long Term Insurance Act 52 of 1998. Both are still so registered in terms of the Insurance Act 18 of 2017 [Insurance Act]. The respondents are wholly owned subsidiaries of the Land and Agricultural Development Bank of South Africa SOC limited with the Government being the only shareholder.

[3] The PA imposed administrative penalties on the LBLIC and LBIC for contraventions of s14(1) and s16(1) of the Insurance Act and on LBIC for contravention of s23(1)(a) of the Insurance Act. These sections are discussed later on in the judgment. The penalty imposed on LBLIC was R2,064,000.00, with R1,376,000.00 of that suspended for a period of three years from the date of imposition subject to the respondents not committing a similar offence during this period. The balance of the penalty, R688 000.00 was to be paid within 14 days of the imposition. LBIC was also imposed a penalty of R5 million of which R3 million was suspended for a period of three years for imposition on condition that LBIC did not commit a similar offence during the period of suspension. The balance of R2 million was to be paid within 14 days of the imposition.

[4] In terms of s230(1) of the FSRA the respondents approached the FST to reconsider the decisions of the PA. In a nutshell the FST found that the respondents did not contravene s14 of the Insurance Act. Pertaining to the contravention of s23(1)(a) it found the PA was not entitled to take any regulatory action against LBIC rendering the PA's decision *ultra vires*. The LBLIC did not seek a reconsideration of the decision pertaining to s16, but submitted the penalty imposed was unreasonable. The FST reduced the penalty to R250 000.

[5] The PA brought this legality review against the decisions of the FST submitting that the findings were irrational, influenced by an error of law and the FST exceeded its powers and/or exercised its powers incorrectly. Furthermore, that the findings were so unreasonable that no other Tribunal could come to such findings. It was also submitted that there was no rational connection between the findings made and the purpose of the FSR-Act, the Insurance Act and the PA's standards captured in GO1 4.

Locus standi of PA

[6] On behalf of the respondents it was argued that the PA does not have *locus standi* to bring a review. It contended that the FST was the successor to the Financial Services Appeal Board [FSAB] and has the same powers as the FSAB. Since it has the same powers the finding in *Registrar of Pension Funds v Howie NO and Others*³ [Howie-matter] is applicable and the PA, akin to the registrar of the FSBA, has no *locus standi* to review the FST's decision. Reliance was placed on paras [23] and [24] of the judgment that reads as follows:

“[23] In order to determine the nature of that interest one must go back to the purpose behind the establishment of the Appeal Board and its powers under s 26B(15) of the FSB Act. The purpose is clear. It is to enable persons affected by decisions of the Registrar to challenge those decisions before a specially constituted body. The Appeal Board is to decide, on the information before the

³ (222/2015) [2015] ZASCA 203; [2016] 1 All SA 694 (SCA) (2 December 2015)

Registrar, what decision the Registrar should have made. And, once the Appeal Board has spoken, either the Registrar's decision stands, because it has been confirmed, or it is substituted by the Appeal Board's decision. In the latter event the Appeal Board's decision stands in the place of the decision of the Registrar. In effect it becomes the Registrar's decision. That much is clear from the fact that it does not direct the Registrar to act differently, but directs that its own order be given effect.

[24] Recognising that the Registrar has *locus standi* to challenge the decision by the Appeal Board would upset the statutory relationship between the two as set out in the FSB Act. It would be inconsistent with the purpose of creating the Appeal Board and has the potential to undermine it in performing its function. If one of the parties affected by it is unhappy with a decision by the Appeal Board they are free to review it. Recognising an independent right in the Registrar would permit of challenges to a decision accepted by the parties affected thereby. The Registrar does not point to any aspect of her regulatory functions that would be detrimentally affected if she cannot challenge decisions by the Appeal Board. Whilst the absence of authority to support the Registrar's position is not of itself fatal it provides a further pointer to the conclusion that the Registrar does not have *locus standi* in this situation."

[7] The wording of s235 of the FSB-Act that "any party" unhappy with a decision of the Registrar did not include the "decision-maker" [the Registrar] and the PA, as the decision-maker, likewise cannot bring a review as it would upset the statutory relationship between the PA and the FST by potentially undermining the FST and negating the purpose for which the FST was created affecting its ability to function. The Act provides that when an aggrieved party brings a reconsideration application to the FST it is exercising an internal remedy as provided for in s7(2) of the Promotion of Administrative Justice Act 3 of 2000 [PAJA].

[8] On behalf of the PA it was submitted that the PA has *locus standi* because in the FSR-Act, unlike the FSB-Act, it specifically includes "the decision-maker" as a

party that can bring a review. Attention was drawn to the fact that s26(2) of the FSR-Act reads as follows:

“Any person aggrieved by a decision by the executive officer [the Registrar] under a power conferred or a duty imposed upon him by or under this Act or any other law may within in the period and in the manner and upon payment of the fees prescribed by the Minister by regulation, appeal against such decision to the board of appeal.”

Contrary to this wording, the FSR-Act provides in s235 as follows:

“Any party to proceedings on an application for reconsideration of a decision who is dissatisfied with an order of the Tribunal may institute proceedings for a judicial review of the order in terms of the Promotion of Administrative Justice Act or any applicable law.”

[9] It was further contended that if one then has regard to the definition of “party” in the FSR-Act it is clear that the PA has the *locus standi* to bring a review application. Section 1 defines party as:

“party to proceedings on a reconsideration of a decision by the Tribunal, means-

- (a) the person who applied for the reconsideration: and
- (b) the decision-maker that made the decision.”

In terms of s218 a decision maker includes the “financial sector regulator “ with section 1 of the FSR-Act defining a financial sector regulator as including the PA.

[10] The Court was implored to find that it is undeniable that the Legislator intended that the decision-maker can institute review proceedings.

Decision on *locus standi*

[11] The FSB-Act provided for an appeal whereas the FSRA provides for a reconsideration. Furthermore, the Acts regulating the two bodies are vastly different. The FSB-Act had 30 sections and its purpose was defined in one sentence. The FSRA has close to 300 sections and its purpose is not only to “provide for the establishment of a board to exercise supervision over the business of financial institutions; and for matters connected therewith” as provided for in the FSB-Act. It was promulgated to *inter alia* “establish a system of financial regulation by establishing the Prudential Authority and the Financial Sector Conduct Authority, and conferring powers on these entities ...” It was seen as a new dawn for the financial services sector as the new “Twin Peaks” regulators were established; the PA and the Financial Sector Conduct Authority [FSCA].

[12] The fact that a reconsideration is seen as an internal appeal in terms of s7(2) of PAJA confirms that a party can, if dissatisfied with a decision of the FST, review the decision in terms of PAJA. The question is who is this party that can bring a review in terms of PAJA or any other law. When comparing the FSB-Act and the FSRA-Act the wording of s26 made it clear that a party dissatisfied can appeal against the decision of the Registrar, thus excluding the Registrar as the Registrar would be hard pressed to be dissatisfied with its own decision. In contrast the wider wording of s236 of the FSB-Act has not limited it to other parties reviewing the PA's decision, but a “party to proceedings” of the reconsideration. Parties to the proceedings in terms of the Act includes the decision-maker, herein the PA and thus it can also bring a review application.

[13] The Legislature chose to include the decision-maker thus widening who can apply to review a decision of the FST. The question is whether despite this express provision I must adhere to the ratio in the Howie-matter. The Supreme Court of Appeal therein distinguished between a Registrar appealing and a review and found that a review by a Registrar is possible; as in this matter. But, herein the legislature has expressly included the Registrar which was not the factual situation in the Howie-matter. I have no reason or legal basis not to adhere to the express provisions of the FSR-Act.

[14] Furthermore, in the Howie-matter “the Registrar did not point to any aspect of her regulatory functions that would be detrimentally affected if she cannot challenge decisions by the Appeal Board. Whilst the absence of authority to support the Registrar’s position is not of itself fatal it provides a further pointer to the conclusion that the Registrar does not have *locus standi* in this situation.”⁴ In the matter before me the PA set out that the “unintended consequence of the Tribunal Ruling is that section 14 of the Insurance Act is rendered factually unenforceable and only serves to undermine the standards that the Applicant is mandated to uphold, as per section 105 of the FSRA.” And, “As it stands, an offending party may choose to delay reporting any changes to the applicant with no adverse consequence attributable.” On behalf of the PA it was argued that the ruling of the FST has the unintended effect of stripping the PA to wield the necessary tools to enforce sections 14 and 16 of the Insurance Act and section 23 of the STIA. This unforeseen consequence has rendered these statutory provisions factually unenforceable.” Thus, in terms of the Howie-matter, this is a further basis to conclude that the PA has *locus standi*.

[15] I accordingly find that the PA has *locus standi* to bring the review application.

Did the LBLIC and LBIC contravene s14 of the Insurance Act?

[16] Section 14(1) provides:

“The appointment of any of the following key persons must be approved by the Prudential Authority and takes effect only if the Prudential Authority approves the appointment.”

In terms of section 14(1)(a) a director is a key person.

⁴ Par 24 of the Howie-matter

In terms of section 63 of the Insurance Act the Prudential Authority is empowered to prescribe prudential standards and it has done so in terms of Prudential Standard GO1 4 with 4.4 reading as follows:

“Notwithstanding that primary responsibility for assessing fitness and propriety of key persons and significant owners resides with the insurer, the Act requires the Prudential Authority to approve significant owners and certain key persons. Under section 114 of the Act, the Authority is required to approve directors and auditors before they are appointed. Fitness and propriety is the central consideration of any such approval. In the case of other key persons, insurers are required to notify the Authority within 30 days of an appointment, or of changes in circumstances that may adversely affect the fit and proper status of a key person (see section 15 of the Act). Insurers are also required to notify the Authority within 30 days of the termination of an appointment of a key person (see section 16 of the Act).”

[17] It was common cause at the reconsideration hearing that 4 directors had been appointed to the boards of the respondents between March and April 2020. This was done without the approval of the PA. The respondents sought retrospective approvals for the appointments a year later which the PA granted retrospectively in June 2021.

[18] The PA set out that they granted approval as “condonation” purely to prevent unbusinesslike results; i.e. to solve a practical problem. The respondents set out that the COVID lockdown had interfered with their functioning as well as the fact that it had lost all members of their Compliance Control Function which created gaps in its compliance processes. It also had extended certain directors appointments to avoid a lack of a quorum. All of these factors caused the delay in complying with s14.

[19] The FST in 5 short paragraphs dealt with this issue. It set out the stances of the parties and then provided the reasons for its decision as follows:

“The PA submitted that the wording of the section does not support the Applicants’ interpretation that the appointment only takes effect on approval but can occur earlier.

The PA’s submission is undermined by its willingness to grant retrospective approval, more than a year later, of the appointments. Assuming, as we must, that the approvals were properly granted by the PA, this approach undermines the contention that the approvals must be granted prior to appointment and supports the Applicants’ argument on this issue. In these circumstances, the PA’s approach has the result that the appointments and their approvals coincide.”

The FST found that there was no contravention of s14 of the Insurance Act.

[20] On behalf of the PA it was argued that s14 has the purpose to ensure that persons holding key positions meet the necessary standards of necessary prudential oversight. This cannot be obtained if these key persons are allowed to serve in positions before the PA grants approval. This leads to a factual appointment but without having legal effect. This fundamentally undermines the regulatory framework designed to protect the integrity of financial institutions.

[21] It was submitted that PA’s position has consistently been that approval must be sought prior to the appointment of key persons as required by section 14 in conjunction with the GO1 4. It was conceded that such compliance may not always be achievable or practical with the result that key persons may be appointed without seeking the necessary approval from the PA. This practically would happen when, as with the respondents, their internal organisational processes were not structured in a way that facilitates the seeking of prior approval. In those cases the PA will then on the facts and considering the practicalities of the situation, ratify the appointment.

[22] It was argued that if retrospective approval is sought it must be done within a reasonable period and if regard is had to the time periods in the Insurance Act then 30

days would constitute a reasonable period. The conclusion was that if an insurer fails to seek the PA's approval before appointing key persons and further fails to seek retrospective approval within a reasonable must be deemed to have contravened s14 of the Act.

[23] Furthermore, when retrospective approval is granted it does not cure the respondents' breach of s14 but merely gave effect to the purpose of s14(1)(a) to prevent unbusinesslike results. It was argued that retrospective approval may be granted to regularise an appointment after the fact, but it did not retrospectively legitimise a period during which a key person served without proper approval.

[24] On behalf of the respondents the argument was simple. There can only be approval after an appointment was made. The PA cannot approve a non-existent appointment. An appointment was not to be confused with the legal effect of the approval. Section 14 simply does not set out that before an appointment is made there must be approval. In this matter the Minister, as the shareholder of the respondents, appoints members to the board of the respondents. It could never be argued that the Minister must first approach the PA for approval before the appointments are made.

[25] Moreover, a retrospective approval, deems the approval to have been granted on the date of the approval and therefore there can be no breach of s14 of the Insurance Act.

[26] The PA had admitted that s14 did not expressly provide that there must be approval from the PA before appointment. It now relies on a reasonable period within which approval must be sought. This argument renders the point made that GO1 4 states prior approval must be obtained moot. Furthermore, the argument now raised about a reasonable period was not argued before the FST and boils down to *ex post facto* rationalisation.

Decision on s14

[27] The SFT's short reasons for its decision on this issue is for good reason. S14, on no interpretation, reads that there must be approval of directors by the PA before appointment. GO1 4 ascribes wording to s14 that simply does not exist and does not aid the PA. But, logically and practically, there cannot be approval before appointment.

[28] The argument now raised, that was not before the FST, that approval must be sought within 30 days, is arbitrary. The fact that approval was not sought within 30 days cannot be deemed to be a contravention of s14; there is no such provision in the Act or in the GO1 4. But, even more damning is that approval was granted retrospectively. The effect of this is that approval and appointment occurred in conjunction.

[29] I understand that the PA is aggrieved that the respondents only after a year sought approval and that it seeks to guard against this becoming a practice with directors being appointed and resigning, or being removed, as in this matter, with no regulatory control in that time. The only way to achieve this is by amending s14 via the Legislator, this Court cannot fulfil this function and overreach into that domain. The argument of within a reasonable time was not raised before the FST and there was no decision taken by the FST hereon; there is no decision to review. The Legislator had set out time periods in the Act, for instance s16, but had not resorted to doing the same in s14.

[30] The FST correctly found that the respondents did not contravene section 14 of the Insurance Act.

Could the FST substitute the amount of the administrative penalty for the contravention of s16(1) of the Insurance Act?

[31] Section 16(1) of the Insurance Act provides:

“Termination of appointment of key persons

- 16(1) An insurer ... must notify the Prudential Authority of the termination of the appointment of a key person within 30 days of the termination of such a person."

It was common cause the respondents had not complied with s16(1) in that the respondents had terminated four directors without notifying the PA within 30 days. Before the FST the respondents conceded that s16(1) was contravened in that they only notified the PA in March 2021 while termination occurred during April, August and October 2020. However, the respondents sought reconsideration of the penalty imposed. It was submitted that the penalty was excessive and inappropriate.

[32] The FST found and reasoned as follows:

- "27. The problem we are faced with is that these penalties were imposed in respect of all the contraventions, and it is, accordingly, impossible to determine which portion was to be allocated to the contravention of section 16(1) only. If one has regard to the penalty imposed in the Life Company's case, one would, however, be justified to assume that the amount would have been about R1 million per company, half of which was suspended.
28. The problem with that amount is, though, that taken in isolation, it is excessive. There is no indication that the PA, the company, its shareholder or policyholders were in any way affected by the breach. It is apparent that the PA was more concerned about the general problems with the administration of the Applicant than with the seriousness of the particular contravention. (Even the contravention of sec 23 had no external effect because it did not affect the shareholder, creditors, policy holders, the PA or whoever.) In addition, the two Applicants, in effect, were twice penalised for the same omission.

29. Since the decision to impose an administrative penalty is 'a decision in terms of Chapter 13' as contemplated in section 234(1)(b)(i) of the FSRA, the Tribunal is entitled to set aside the decision and substitute the PA's decision with the decision of the Tribunal. We believe that this is an appropriate instance to do so.
30. Without working through the checklist of sec 167 and considering the respective submissions of counsel, we have decided that a financial penalty is justified but in an essentially lower amount. Penalties are discretionary matters and are not subject to calculation, and in our estimation, a penalty of R250 000.00 would be appropriate."

[33] On behalf of the PA it was argued that although in terms of s234(1)(a) the FST could substitute the PA's penalty determination with its own, that in terms of the law the FST was obliged to remit the penalty determination back to the PA. The FST should not have usurped the powers of the PA and estimated an amount. This led to an arbitrary penalty and it was not rationally connected to the purpose sought to be achieved. The FST thus exceeded its powers and acted improperly by not referring the penalty back to the PA.

[34] It was submitted that from the decision of the FST it was evident that the FST did not comprehend how the PA had calculated and determined the penalties. Furthermore, the contraventions were inherently serious and can therefore be penalised administratively and criminally. Enforcement of these laws is essential to uphold the integrity of financial markets and protect stakeholders. If not upheld, it could erode public trust in the financial institutions and even compromise the overall stability of the financial system.

[35] It matters not that the contravention of s16 did not directly impact the shareholders, creditors and policy holders. Allowing the respondents to flout these

prescripts without consequences could have broader adverse implications for the financial sector. This “external effect” was in any event not a relevant consideration when determining the quantum of the penalty because the impact of these contraventions is often not readily perceivable or palpable, until it’s too late.

[36] On behalf of the respondents it was submitted that the FST acted in complete compliance with the powers it had. In terms of s234(2)(b) the FST can:

“in the case of a decision of any of the following kinds, also make an order setting aside the decision and substituting the decision of the Tribunal:

(i) A decision in terms of Chapter 13:

(ii) ...

(iii) ...”

Administrative penalties are imposed in terms of Chapter 13 of the FSR-Act. Submitting that the FST exceeded its powers is simply wrong.

[37] The PA had not in terms of rule 13 of the Rules of the Tribunal provided the facts and the method of how the penalty was computed. All that was clear was that the PA imposed a penalty comprising a global figure for all the contraventions without stating what penalty was imposed for which contravention.

[38] The FST exercised its discretion taking into consideration the factors set out in s167(2)(b) of the FSR-Act: the nature of the contravention; that the shareholders, the respondents and the PA were not affected; the contraventions did not have an external affect. It found that a penalty was to be imposed but at a lower amount. The FST also considered the arguments of the parties before it.

[39] This Court cannot review the penalty imposed simply because it would have imposed another penalty. Furthermore, remitting it back to the PA without informing this Court what factors it would consider when considering the penalty is wrong.

The decision pertaining to the penalty imposed for the contravention of s16 of the Insurance Act.

[40] The FST acted in accordance with the powers confirmed on it in terms s234(2) of the FSR-Act read with Chapter 13. These sections confer the power to substitute the PA's imposed penalty and impose a new penalty. I was not referred to which "law" the PA was referring that rendered the FST to have exceeded its powers and I know of none. I find the FST did not exceed its powers by substituting the quantum of the penalty, but in fact, acted in accordance with its derived powers.

[41] The question then is whether the FST acted irrationally, or as argued improperly, by not remitting the decision pertaining to the penalty to the PA. because in not doing so the FST usurped the powers of the PA. That while the FST did not have information before it to come to a determination of the amount of the penalty.

[42] I find it prudent to repeat the penalties as imposed. For contravening section 23(1)(a) of STIA and ss 14(1) and (16)1 of the Insurance Act the PA imposed on the LBIC the administrative penalty of R5 million of which R3 million was suspended on certain conditions. The balance of R2 million was to be paid within 14 days from the order.

[43] For contravening ss14(1) and 16(1) of the Insurance Act the LBLIC was imposed a penalty of R2,064,000.00. R1,376,000.00 was suspended for three years on certain conditions and the balance of R688 000.00 was to be paid within 14 days from the order.

[44] The PA did not before the FST, or in the papers before me, divulge what amount of the globular penalty is for which contravention. This is problematic because if, like in this matter, the respondents are found not to have contravened s14(1) what portion

of the penalty falls away? The same problem lies with determining which portion of the penalty is to be allocated to s16. There was no argument from the PA that the FST's reasoning in arriving at a penalty of R250 000 incorrectly accepted that if regard was taken of the penalty imposed on the LBLIC one would be justified to assume that the amount would have been about R1 million per company, half of which was suspended.

[45] There was also no argument from the PA that the FST was wrong in finding that an administrative penalty is a discretion exercised and not subject to calculation. Unless the argument raised for the first time in oral argument before me, that the PA has a table, or formula, as to how to calculate the penalties addressed this point. This was not argued before the FST and it was not in the affidavits of the PA before me. The respondents had no opportunity to answer thereto and the FST was not asked to consider this "formulation." I cannot under review now take this into account. The PA had not provided the facts and the method of how the penalty was computed. I cannot find that the FST acted irrationally when considering the amount of the penalty imposed by the PA for the contravention of s16.

[46] The next question would be whether the PA had taken into account all the factors it should have done and whether it took irrelevant considerations into account when exercising its discretion in imposing a penalty. The FST took into account the factors set out in s167 of the FSR-Act. In argument before the FST counsel for the PA admitted that those are the factors on which it exercised its discretion.

[47] I am satisfied that the FST took into account all the factors necessary when considering the penalty. The external effect is a factor to consider and the PA could not refer to a single negative external impact of this contravention two years after s16 was contravened.

[48] I understand the PA's submissions that these contraventions are serious and that enforcement of the laws is essential to protect stakeholders. There is however no

evidence that stakeholders herein were not protected. The argument that the respondents' non-compliance with s16 cannot have any consequences is incorrect; an administrative penalty has been imposed it may not be to the liking of the PA, but under the circumstances it is rational to what was contravened, the factors to be considered, the argument before the FST and the reasons for the contravention.

[49] I am very aware of the case-law on PAJA cautioning Courts to adhere to the separation of powers principle and to only in exceptional circumstances grant the remedy of substituting the decision-maker's decision with its own decision instead of deferring it back to the decision-maker. Just as such intrusion is provided for in PAJA, the FSR-Act also makes provision that the FST can substitute the penalty. However, contrary to PAJA the FSR-Act has no pre-script that it only be done in exceptional circumstances. In *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* (CCT198/14) [2015] ZACC 22; 2015 (5) SA 245 (CC) (26 June 2015) the Court found that when a court is in as good a position as the administrator to make a decision it can substitute the order. A court can also exercise its discretion when the administrator's decision is a foregone conclusion. A court must consider bias, delay and incompetence of the decision-maker.

[50] This case-law relates to the decision itself. Herein it was common cause that s16 was breached. With the PA not setting out what skill and expertise is necessary to impose a penalty, or what factors were considered the FST acted within its powers to substitute the amount of the penalty and acted rationally. The matter of *New Clicks*⁵ relied on by the PA, albeit in another context found as follows:

"They must give an explanation of how the appropriate fee was calculated. This explanation is crucial to the process of determining an appropriate fee. It explains to the public and the pharmaceutical industry the manner in which the fee was arrived at. It discloses the reasoning process of the Pricing Committee.

⁵ *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae* 2006 (2) SA 311 (CC)

And it enables those who have an interest in the fee to assess whether the Pricing Committee has properly discharged its statutory duty. This explanation should generally be contained in the report of the Pricing Committee making a recommendation to the Minister.”⁶

The PA should have placed facts before the FST as to how the penalty was determined.

Could the PA impose a penalty on the LBIC for contravention of the now repealed s23(1)(a) of the Short Term Insurance Act [STIA]?

[51] LBIC had admitted that it had increased its share capital in 2015 but due to the time that had elapsed it did not know whether regulatory approval had been sought and obtained in terms of s23 of STIA. PA imposed a penalty for this contravention.

[52] Before the FST LBIC raised that the transitional provisions in Schedule 3 item 5 of the Insurance Act either barred the PA from commencing an investigation or taking regulatory action against it. This reads as follows:

“Continued investigation and enforcement of previous Act.

5(1) Despite the partial repeal of the previous Act –

- (a) any investigation or inspection under the previous Act (the STIA) by the Registrar in respect of compliance with the previous Act and pending immediately before the effective date of 1 July 2018 may be continued by the Prudential Authority, and the Prudential Authority may take any regulatory action under those Acts that

⁶ Para [532] of *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others supra*

- the Prudential Authority deems appropriate in respect of any non-compliance; and
- (b) for a period of three years after the effective date, the Prudential Authority under those Acts that the Prudential Authority deems appropriate in respect of that non-compliance.”

[53] The FST found that *item 5* of the Transitional Provisions permitted the taking of regulatory action under the repealed STIA, but that the STIA

“contained no provision for the imposition of an administrative penalty for a contravention of section 23. To the extent that section 167 of the FSRA provide otherwise, the item is a *lex specialis* which overrides the general provisions of section 167. As a result, no administrative penalty could competently have been imposed by the Prudential Authority on the insurance company for contravention of section 23 of STIA.” It thus found that the PA could not take any regulatory action against the LBIC and the PA's decision was *ultra vires*.

[54] On behalf of the PA it was argued that during STIA's tenure it was a financial sector law as defined in section 1 of the FSRA and as listed in Schedule 1 thereof. The PA was thus entitled to impose an administrative penalty for the contravention of a provision thereof in terms of 167(1) of the FSRA. Furthermore, section 167(4) of the FSRA reading as follows:

“The responsible authority may not impose an administrative penalty on a person if a prosecution of the person for an offence arising out of the same set of facts has been commenced.”

It was submitted that the wording of this section implies that a person contravening a financial sector law can either be charged criminally or be penalised administratively. Section 65 of the STIA, as amended by section 140(c) of Financial Services Laws

General Amendment Act, 45 of 2013 contained such a provision which read:

- “(2) A short-term insurer who contravenes or fails to comply with a condition contemplated in 9(2)(a) or a provision of a notice under section 12(12)(c) or 13(2), or if section 7(1)(a), 15(1), (2), (4) or (5), 19(1) or (3), 23, 25(1) or (2), 28(1), (3) or (4) [,] or 33 [or 49(4) or (6)], shall be guilty of an offence and liable on conviction to a fine not exceeding [R1,000,000] R1 million.”

Although there was no penalty for a contravention of s23 of the STIA the PA was entitled to impose a penalty in terms of s167(1) of the FSR-Act. The PA was obliged to follow another legal route otherwise a breach of a law would go unpunished. There was no criminal proceedings so it could proceed administratively.

[55] The FST's finding that the Transitional Provisions constituted a *lex specialis* that overrides the general provisions of section 167 is at odds with the language and purpose of the transitional provisions. This common law principle of interpretation sets out that when two laws govern the same situation laws governing a specific subject matter supersede a law that governs general matters only. But, it was argued a subsequent general enactment is not intended to interfere with special provisions unless it manifests such intention. Transitional provisions often address the application of the repealed statute to existing situations at the commencement of the new statute and the transitional provisions ought to be interpreted in this light. Prior to the repeal of STIA the PA imposed administrative penalties for contraventions of STIA.

[56] The transitional provisions provide that the PA may initiate an investigation, within a period of three years after the effective date of the transitional provisions, into any suspected non-compliance with the STIA that occurred during the period of three years immediately before the effective date. There was no reasonable basis upon which the FST ought to have interpreted the phrase “regulatory action under the STIA”

to exclude regulatory action that the PA is empowered to take in respect of any financial sector law; not only STIA. If not so interpreted it would lead to a situation where for three years the PA can pursue an investigation but cannot impose an administrative penalty. This would not be a reasonable or sensible interpretation. Support for this contention was to be found in *Eksteen v Road Accident Fund*.⁷ The FST's decision was thus influenced by a material error of law and irrational.

[57] The PA could competently have imposed a penalty because there were jurisdictional facts allowing same; the investigation into the Insurance Company's contravention of s23 of the STIA was commenced within the three-year period after the transitional provisions came into effect and it was found there was a contravention of s23. Furthermore, the FSR-Act read, with the STIA, made provision for an administrative penalty to be imposed for non-compliance with section 23(1)(a) of the STIA. The PA did not act *ultra vires*. The PA could also impose a penalty in terms of ss65 of STIA.

[58] In the supplementary heads and in oral argument counsel for the PA also argued that in a penalty could be imposed in terms of s66 of STIA. Although it was not raised in the papers, or before the Tribunal, submitted it could do so in terms of the law.

[59] On behalf of the respondents the argument went that they were informed by the PA that the penalty was imposed in terms of s167. This was also the argument before the FST. The PA could not on review shift the goal posts and now rely on other sections as foundation for the penalty imposed.

⁷ (873/2019) [2021] ZASCA 48; [2021] 3 All SA 46 (SCA) (21 April 2021)

[60] It is common cause that the FSR-Act commenced on 1 April 2018 and that the LBIC was no longer registered under STIA when the penalty was imposed in 2022 for a breach in 2015. It could not impose a penalty in terms of s167 as the Act itself does not allow for retrospective application. In fact, counsel for the PA conceded as much at the FST hearing that no Act has retrospective effect when the general principle of no Act having retrospective application was canvassed with counsel for the PA.

[61] Section 66 of STIA has no application because the contravention there is for documents not submitted and not for not obtaining approval to increase share capital. Reliance on s65 is also misplaced because it simply does not provide for an administrative penalty but only for a fine if a party is found guilty of an offence.

Decision on the penalty imposed in terms of a contravention of s23 of STIA.

[62] From the record of the proceedings before the FST it seems that it was accepted that LBIC had breached s23 in not seeking approval to increase its share capital. The only issue the FST had to decide was whether the penalty imposed was done in terms of the applicable law at that time that the penalty was imposed.

[63] There is no doubt that the letter informing the LBIC of the penalty expressly states that the penalty is imposed in terms of s167 of the FSR-Act. It is undeniable that the FSR-Act cannot be applied retrospectively. The question then is whether the transitional arrangements provided that the PA could penalise for contraventions of the repealed STIA in terms of s167 of the FSR-Act. I find it prudent to repeat the transitional provisions:

5(1) Despite the partial repeal of the previous Act –

- (c) any investigation or inspection under the previous Act (the STIA) by the Registrar in respect of compliance with the previous Act and pending immediately before the effective date of 1 July 2018 may be continued by the Prudential Authority, and the Prudential Authority may take any regulatory action under those Acts that the Prudential Authority deems appropriate in respect of any non-compliance; and
- (d) for a period of three years after the effective date, the Prudential Authority under those Acts that the Prudential Authority deems appropriate in respect of that non-compliance.”

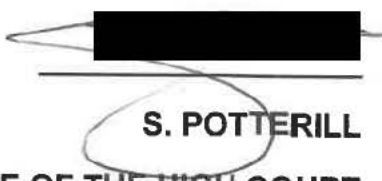
“Those Acts” thus require interpretation and can only be interpreted as being the repealed STIA still applicable for regulatory action by the PA for three years. The PA simply did not make use of this in the three years. But, the transitional provisions are not the fly in the ointment; the problem is that STIA did not have provision for the imposition of an administrative penalty for a contravention of s23. On no interpretation of ss 65 or 66 of STIA could an administrative penalty be imposed. S 65 does not relate to a contravention of s23 and s66 refers to a penalty imposed for a criminal sanction. But, more importantly the PA made it clear to the LBIC that it imposed the sanction in terms of s167 of the FSR-Act.

[64] Section 167 cannot be utilised retrospectively. As already stated, even if the STIA was not repealed, the PA would be confronted with taking administrative action but not being authorised to impose an administrative action. This unfortunate scenario cannot be blamed on the Transitional Provisions with a plea to ascribe some interpretation thereto to assist the PA. To solve this lacuna is not the utilisation of s167 against the entrenched principle that Acts have no effect retrospectively. There was no argument that s167 could have been utilised retro-actively.

[65] I am satisfied that the FST was correct in finding the PA acted *ultra vires* when it imposed the penalty for the contravention of s23.

[66] I make the following order:

The application is dismissed with costs, with costs to include the costs of three counsel. Senior Counsel on scale A and the other two counsel on scale B.



S. POTTERILL
JUDGE OF THE HIGH COURT

CASE NO: 2023-058536

HEARD ON: 30 October 2024

FOR THE APPLICANTS: ADV. A.A.S.A. BAVA SC
ADV. N.S.H. ALI

INSTRUCTED BY: GMI Attorneys

FOR THE 2ND AND 3RD RESPONDENTS: ADV. S. KHUMALO SC
ADV. L. MBATHA
ADV. M. MTSHALI

INSTRUCTED BY: Malatji & Co Attorneys

DATE OF JUDGMENT: 15 January 2025