IN THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

A25/2015

In the matter between:

JOHANNES CHRISTIAAN VAN DER WALT **FIRST APPELLANT**

INTERMEDIARY SUPPORT SERVICES

SA (PTY) LTD **SECOND APPELLANT**

and

THE REGISTRAR OF FINANCIAL SERVICES

PROVIDERS **RESPONDENT**

DECISION

---

1. INTRODUCTION

[1] This appeal arises from the decision of the Registrar of Financial Services Providers (the Registrar) dated 29 May, 2015 to debar the first appellant Mr Johannes Christiaan Van Der Walt (Mr Van Der Walt) in terms of section 14A of the Financial Advisory and Intermediary Services Act (the FAIS Act)[1] and to withdraw the appellant's approval to act as compliance officer of Intermediary Support Services SA (Pty) Ltd (ISSSA) in terms of section 17 (2)(b) of the FAIS Act. The effect was that he could no longer act as compliance officer as from the date of withdrawal. ISSSA's licence was suspended for a period of 3 months on conditions stipulated by the Registrar. Both the debarment and the withdrawal of authority are for a period of 5 years.

[1] *Act 37 of 2002 as amended.*

[2] The first appellant is Mr Van Der Walt, where second appellant is Intermediary Support Services SA (Pty) Ltd (ISSSA). The respondent is the Registrar of Financial Services Providers (the Registrar).

[3] The detailed facts in this case will appear from the Registrar's reasoning of her decision which will be outlined in due course. It is however necessary first to provide a synoptic background of the facts.

2. BRIEF FACTUAL BACKGROUND

[4] Mr Van Der Walt, was a Director, Chief Executive Officer (CEO) and Public Officer (PO) of Smart Life Insurance Company Ltd (1965/003119/06), (Smart Life), where Smart Life had outsourced its governance and operational consulting services to Mr Van Der Walt and ISSSA as the licensee.

[5] Through Cash Paymaster Services (CPS) Smart Life, whose insurance book included the funeral business, was determined by the Registrar to have sold about 1300 funeral assistance policies (the policies) between September, 2012 and March, 2013, thus rendering intermediary services as defined in the FAIS Act.

[6] Further, the appointment of CPS as ISSSA's juristic representative was terminated by the latter as per the instruction of Mr Van Der Walt in September, 2012 before the sale of the policies. However, none of those CPS employees who had sold the policies had been appointed as representatives of any FSP, as required by the FAIS Act.

[7] As the Registrar determined, at the time CPS started to sell the Smart Life policies, both Mr Van Der Walt and ISSSA were aware, not only that CPS was not a representative of any FSP, but also that they did not have any authority to do so. Therefore, none of the CPS employees who actually sold the policies had been authorised to do so. After Mr Van Der Walt's withdrawal of authority, they did not have the mandate to render any intermediary services generally, nor sell the policies specifically.

3. GROUNDS FOR THE REGISTRAR'S DECISION

[8] The Registrar, based on the facts and information available to her before she made her decision, concluded that,

a) Mr Van Der Walt in his capacity as representative, director and key individual, no longer met the personal character qualities of honesty and integrity required of FSP's in terms of section 8(1)(a) of the FAIS Act, read together with the Determination of Fit and Proper Requirements for FSP's;

b) in his capacity as Compliance Officer, he no longer met the personal character qualities of honesty and integrity laid down in section 8(1)(a), read with criteria for approval of Compliance Officers.

[9] ISSSA as a licensee where Mr Van Der Walt is the key individual, had action taken against them by the Registrar. Stating the reasons for her conclusions, the Registrar makes the points that follow. Because no person may act as an FSP without a licence issued under section 8, any person other than a representative acting on

behalf of an FSP and rendering intermediary services in terms of section 7(1) of the FAIS Act must be licenced to render the services. But because FSP's often render their services through those acting on their behalf as employees or on the mandate of the particular FSP, they must be appointed in terms of the FAIS Act as representatives.

[10] Thus, CPS was appointed representative of ISSSA. However, that appointment had been terminated before the policies were sold. Thus, none of those employees were authorised to do so. It is on that basis that the Registrar concluded that CPS had acted in contravention of section 7(1) of the FAIS Act. They had rendered intermediary services without the necessary licence and authorisation.

[11] Further, an insurer, who has entered into an agreement with an intermediary, with regard to their insurance products must provide the intermediary with a written copy of the agreement, setting out the terms and conditions. That is a requirement of Rule 5.1(a)(i) of the Policy Protection Rules[2] (PPR).

However, Rule 5.1(a) (i) has a significant proviso for the purpose of this case. It states that the insurer may, only on or after the commencement date of the licence enter into the agreement with the intermediary, where he or she has if so required by law, been issued with a licence in terms of section 8 of the FAIS Act. This is also the case where the intermediary is a representative of a licensee, as stipulated in the FAIS Act. Smart Life, of whom Mr Van Der Walt was Director, CEO and PO, and had outsourced its

[2] *ibid*

governance and consulting services to him and ISSSA was thus also non-compliant with Rule 5.1(a) (i).

[12] As Smart Life's PO, Mr Van Der Walt had a statutory duty under section 16(2) of the LTI Act to ensure "as far as it is in [his] power." that Smart Life is in compliance with the LTI Act and all applicable laws. Both Mr Van Der Walt and ISSSA were aware that at the time when CPS started to sell the Smart Life policies, CPS was not authorised to do so. Further, they were also aware that none of the people employed by CPS who sold the Smart Life policies had been duly qualified and authorised by Smart Life or any FSP for that matter, to serve as representatives. Besides, CPS was not an authorised FSP. All of these contraventions by CPS took place during Mr Van Der Walt's watch.

[13] Additionally, the Registrar found, Mr Van Der Walt had complicated the list of contraventions for himself, in the way he later attempted to cover his tracks, presenting contradictory versions of what had occurred, and doing so under oath. That found the Registrar, impacted negatively on his personal character qualities of honesty and integrity.

[14] First, the Registrar found that Mr Van Der Walt tried to conceal the fact that the policies were sold without the necessary legal authority, through his failed attempt to validate the sale of the policies. He had relied on a dormant administration agreement between Smart Life and ISSSA and without the necessary legal authority, created an attachment thereto which would have authorised him to withdraw a commission from the sale of the 1,300 policies.

That dormant administration agreement provided for the sourcing and appointment of intermediaries as authorised FSP's or representatives who will serve as intermediaries for Smart Life. However for it to be activated, the Smart Life had to give its written approval.

[15] Second, not only did that administrative agreement not make provision for ISSSA to be paid a commission for each policy written the Registrar found, the addendum to that agreement, which was an unauthorised creation of Mr Van Der Walt himself, purported to appoint NET1, who was Smart Life's majority shareholder, as the latter's intermediary, to sell the policies. However, for NET1 to do so, it had to be authorised, either as an FSP or as a representative of an FSP. Smart Life's NET1 was neither. Further, the unauthorised attachment to the administrative agreement made provision for commission to be paid to ISSSA which then meant that as ISSSA's juristic representative, NET1 would take the commission. NET1 had been appointed ISSSA's juristic representative much earlier, on 10 February, 2011. But that appointment had been for the specific purpose of opening bank accounts for the beneficiaries of the South African Social Security Agency (SASSA), subject to an agency agreement with a certain Grindrod Bank. However, the Registrar found, the addendum was irregularly created by Mr Van Der Walt, and it was done in a way that entangled him in a web of a conflict of interest: whereas the dormant administrative agreement had been entered into for funeral parlours to serve as intermediaries and provide funeral services to clients who needed funeral assistance policies, NET1 who was a majority shareholder of Smart Life, was purportedly appointed by Mr Van Der Walt for the same purposes, where NET1 was not a funeral parlour.

[16] The Board of Smart Life, the Registrar also found, although aware of the existence of the dormant administrative agreement, was oblivious of the unauthorised addendum created by Mr Van Der Walt. That did not stop Mr Van Der Walt from attempting to claim commission from the unauthorised sale of the policies. Purporting to legalise the addendum authorising him to receive the commission, he signed it on behalf of Smart Life, of whom he is the CEO and PO, thus completing the conflict of interest web for himself.

An employee of ISSSA, a Ms Chalmers then signed the addendum on behalf of her employer ISSSA without the necessary authority, causing another conflict of interest situation for her. Moreover, the Registrar found, Mr Van De Walt knew well that NET1was never intended to sell funeral assistance policies. Rather, the purpose of NET1's appointment, he knew well, was to provide intermediary services according to the arrangements made with Grindrod Bank. Specifically, NET1 was to provide intermediary services by opening bank accounts with Grindrod Bank for SASSA beneficiaries.

[17] The Registrar points out how Mr Van Der Walt, under oath, admitted to the inspectors who had interviewed him after matters at Smart Life had come to light, how in desperation to legitimise the sale of the Smart Life policies, he had to rely on the administrative agreement and the addendum he had to create himself, so as "to try and create a veneer of legitimacy about this business...". Thus he had to portray the sale of the policies as legitimate, now that Smart Life had purportedly authorised ISSSA to appoint intermediaries, where the latter had in turn appointed NET1 to sell the policies. In fact, however, the NET1 employees who had been appointed to sell

policies rather than focus on the opening of bank accounts, had never been appointed as ISSSA representatives, contrary to the requirement that the appointment of a juristic representative requires that every natural person acting as representative of that juristic representative must be duly appointed and that must be reflected on the particular FSP's register of representatives.

[18] Mr Van Der Walt and ISSSA then later, requested Smart Life, to pay the commission for the months of December and January, based on the purported validation of the unauthorised structure. The result was that the CPS employees who sold the policies, were not duly authorised to do so, conduct that reflected the dishonesty and lack of integrity on the part of Mr Van Der Walt. Whereas he contended that it was NET1 employees who sold the policies, the inspector's report reflected that the employees who sold the policies were in fact those of CPS, who thus did so without the necessary authority.

[19] In an attempt to justify his actions when he responded to the Registrar's notice of intention, Mr Van Der Walt made statements contradicting those he previously made, including those made under oath to the inspectors.

The Registrar, illustrating the contradictions, cites Mr Van Der Walt's contentions in his response to the allegations made against him. Among others, he had indicated that the information given to him was that with CPS being a little more than a shelf, the intention was that CPS employees would be the ones selling the policies. However, with time and in particular after he had left Smart Life, it became clearer, he said, that the policies were in fact to be sold by NET1, Smart Life's majority shareholder. It

was envisaged, he submitted in an affidavit deposed on 15 April 2013, in proceedings against Smart Life before the High Court, that the idea was that the CPS infrastructure, including its staff who pay out government benefits at the relevant SASSA pay points across the country, would simultaneously promote and sell long-term insurance policies to SASSA beneficiaries.

[20] Responding to the Registrar, Mr Van Der Walt further placed reliance on the administration agreement between Smart Life and ISSSA, which he contended was valid and of full force and effect, saying that his structure was fully compliant with the applicable laws. That, despite having attested under oath to the inspectors that the unauthorised structure he had created was merely "a veneer of legitimacy".

[21] Mr Van Der Walt did not stop there. When the Registrar confronted Smart Life with the fact that it cannot, because it had no authority to underwrite almost 5000 funeral policies sold by CPS employees during March 2013, as the company had been prohibited by the Registrar of Long-Term Insurance to conduct business with effect from 25 February 2013. He then approached KGA Life, after 5 March 2013, the same date that the Smart Life Board had asked him to resign his position with the company, offering them to underwrite all the policy applications still in his possession. KGA Life declined the offer. However, Mr Van Der Walt kept the policy applications and only returned them in September, 2013.

[22] This response, viewed by the Registrar as an "about turn", where the only explanation, it was concluded, seemed to have been that the relationship between Mr Van Der Walt and the Smart Life Board had completely broken down by the time he

was asked to leave Smart Life, and therefore appeared to be willing to expose Smart Life's non-compliance. But then later when he was himself confronted by the Registrar with his own role regarding those questions of non-compliant, he adopted a totally defensive stance, contending that NET1 and not CPS had sold the policies.

[23] That, the Registrar noted, was in direct contradiction to what he had earlier stated under oath to the inspectors

[24] To the inspectors, and under oath, Mr Van Der Walt had expressed the strong view that without a doubt, at the time that CPS rendered the intermediary services, "they may very well have given advice as well", although they did not have the authority to do so, whether in terms of the FAIS Act or under the mandate of Smart Life.

[25] In particular, he expressed the view that Smart Life did not give CPS the mandate to sell the policies. He had given Smart Life a copy of the administrative agreement to sign, he reported, but at the time he was speaking to the inspectors, the agreement had not "yet" been signed. Knowing that an unsigned agreement would create trouble for them with the Regulator, he told the inspectors, "in desperation," he had to rely on the agreement, as an attempt to create the veneer of legitimacy.

Confidently, the inspectors provided Mr Van Der Walt with the opportunity to comment on their draft report in respect to this part of the report, and he still remained steadfast that "yes", CPS not only but collected, but accounted for premiums "in circumstances where it was not adequately licenced in terms of section 7(1) of the FAIS Act".

[26] It was the Registrar's view that because the policy applications were made to Smart Life, the applications belonged to Smart Life and Mr Van Der Walt had no authority to make the offer to KGA Life without Smart Life's knowledge and authority. It was dishonest and it displayed a lack of integrity.

[27] Mr Van Der Walt told the inspectors how and why he made the offer to KGA Life. As soon as he realized that he still had those policies in his possession after he had left Smart Life, seeing that there were so many of them, he was concerned. At first he thought he could give them to someone else to process or underwrite, he said, but he made offer to KGA Life anyway, contacting them, but they declined the offer and in hindsight, he thought it was a good thing. But then thereafter, he forgot all about the policies still in his possession he stated, until sometime in September 2013, when the inspectors inquired about them. When he responded to the Registrar's notice of intention to debar however, he denied ever approaching KGA Life with the offer to process or underwrite the policy applications.

[28] In his attempt to create the impression that he forgot all about the applications until September, 2013, considering the objective facts, the Registrar found that Mr Van Der Walt had been aware that the applications were with him when he approached KGA Life in March 2013. So also in June 2013 when he was interviewed by the inspectors. And so too in September 2013, when the inspectors inquired about them.

[29] Having provided him with the opportunity to respond to the letter of intention to debar him, withdraw his approval as compliance officer and withdraw the

authorisation of ISSSA, the Registrar, based on the information before her, including Mr Van Der Walt's responses,[3] she was satisfied that Mr Van Der Walt, in his capacity as representative, director and key individual, was non-compliant with the Determination of Fit and Proper Requirements for Authorised Financial Services Providers. That was the case in that he no longer met the character qualities of honesty and integrity. Thus, he was debarred for a period of 5 years from acting as an FSP. He was also debarred from applying for a licence to act as an FSP for a period of 5 (five) years from the effective date of debarment.

[30] Mr Van Der Walt's approval to act as a compliance officer in terms of section 17(2) of the FAIS was also withdrawn and in that regard, the prohibition took effect from the date of withdrawal of the approval. The Registrar at the same time, gave notice of the intention to suspend ISSSA's licence, imposing certain general terms of conditions for the suspension and also for the lifting of the suspension.[4]

[31] Focussing on Mr Van Der Walt's responses to the notice of intention to debar him and withdraw his authorisation, the Registrar, in a letter dated 29 May, 2015 stated the reasons for her findings and sanctions.

[32] Addressing first, Mr Van Der Walt's role in CPS's contraventions, she found that CPS was in clear contravention of section 7(1) of the FAIS Act in that, although its appointment as a juristic representative of Smart Life was terminated in September 2012, its employees continued to render intermediary services on behalf of Smart Life,

---

[3] *In his initial response to the Registrar's letter of intention, Mr Van Der Walt alluded to the possibility of amplifying his response and was invited to do so. Additional aspects were submitted in a letter dated 6 February 2015, adding that no further responses would be submitted in writing. However Mr Van Der Walt added that he reserved the right to add further responses should the matter proceed to oral hearing.*

[4] *See pp. 38-40 and 104-105 of the record.*

selling between November 2012 to March 2013. Thus, none of the employees who sold the policies had been authorised to do so. In the result, Smart Life had contravened Rule 5.1(a) (i) of the Policy Protection Rules of the Long-term Insurance Act (the LTI Act)[5].

[33] By relying on an unsigned and dormant administrative agreement with an invalid addendum and purporting to validate the structure which sold the policies, Mr Van Der Walt knew well that CPS had no authority to sell the 1,300 policies on behalf of Smart Life.

As the Public Officer of Smart Life at the time, Mr Van Der Walt had a statutory duty under section 16(2) of the LTI Act to ensure compliance, but he and ISSSA failed to do so. Further, rather than informing the Registrar of the illegalities at CPS, Mr Van Der Walt and ISSSA proceeded to claim commission for the months of December and January, relying on the purported agreement between CPS and Smart Life which he signed without authority to do so. In so doing, concluded the Registrar, he created circumstances of serious conflict of interest.

[34] Thus, concluded the Registrar, Mr Van Der Walt's conduct was contrary to the general duty of FSP's and representatives in terms of section 2 of the General Code of Conduct[6], again showing a lack of honesty and integrity.

[35] On 29 May, 2015 Mr Van Der Walt noted an appeal against the decisions of the Registrar, taken in terms of section 14A (1) (a) of the FAIS Act, stating the grounds therefore.

---

[5] *Promulgated in government Notice R1129 in Government gazette 26854 of 30 September, 2004*
[6] *Published under Board notice 80 in government Gazette 25299 of 8 August 2003, as amended.*

The ISSSA did not file a separate notice of appeal with its own separate grounds, but indicated support for the notice filed by Mr Van Der Walt, based on the fact that the decision of the Registrar to suspend ISSSA's licence was based on the contraventions relating to Mr Van Der Walt's conduct while he was a Director, CEO and PO at ISSSA. Thus, there was no need for ISSSA to make a separate case in this matter.

[36] Stating his grounds of appeal, Mr Van Der Walt made detailed, comprehensive and substantial submissions which in the most part, were explanations and denials of the statements he made to the inspectors under oath and defending himself against the Registrar's conclusions in relations to his character qualities of honesty and integrity.

[37] Furthermore, the Registrar's finding that Mr Van Der Walt had contravened section 7 of the FAIS Act should not have been made in that he could not compel CPS to sign the agreement authorising the sale of the policies. Also, there was nothing more that he could do to prevent CPS from acting unlawfully after he had been debarred from rendering further financial services to Smart Life.

[38] Once he had terminated the appointment of CPS as a juristic representative of ISSSA in September, 2012, any one of them (i.e either Mr Van Der Walt or ISSSA) could have prevailed on CPS or its employees from contravening the relevant provisions of the FAIS Act.

Besides, submitted Mr Van Der Walt, Smart Life did not require an agreement to be compliant because it had to be compliant with Rule 5(1) (a)(5) of the PPR anyway.

[39] Also, he submitted, it was erroneous to have found that Mr Van Der Walt as compliance officer of Smart Life should have been required to ensure that Smart Life was compliant with the provisions of section 16(2) of the LTI Act, in that,

- it was within the power of Mr Van Der Walt as Smart Life's public officer, to exercise control over CPS or its employees or prevent them from contravening the FAIS Act;
- Mr Van Der Walt was aware that CPS was selling assistance policies, on behalf of Smart Life;
- Mr Van Der Walt tried to cover-up the alleged contraventions by CPS or gave contradictory versions under oath, attempting to do so;
- Mr Van Der Walt tried to validate the structure of the distribution of the policies by CPS by relying on a dormant administrative agreement and its addendum;
- the administration agreement was inactive and failing to find that it did not affect the validity.

[40] Also, the Registrar should not have found that,

- Mr Van Der Walt had created and relied upon the addendum under circumstances of irregularity and where a conflict of interest existed. But even if there was a conflict of interest, it did not affect the validity of the agreement.

[41] Again, he submitted, the Registrar should not have found that the validity of the agreement was affected by the fact that the Board of Smart Life was not aware of the agreement or its addendum, or authorised it. Rather, the finding should have been

that as CEO, Mr Van Der Walt was entitled to conclude an addendum without the Board's authority. Thus the Registrar did not take into account that at no stage was there a dispute regarding the validity of the agreement.

[42] Further, it should not have been found by the Registrar that,

- the addendum was created by Mr Van Der Walt with the intention of selling policies, while he knew well that the intention was to render intermediary services based on an arrangement with Grindrod Bank;
- NET 1 sold policies on behalf of Smart Life and it was therefore required that every employee who sold any of the polices be authorised to do so and not finding that a Smart Life call centre had been instructed to re-sell all the policies. In that regard, the Registrar should have considered the evidence on affidavit by S Boshoff and T Msimango;
- there was anything wrong with claiming commission from Smart Life, as there was a right to do so and it was provided in the agreement and its addendum. Therefore there was no reflection of any dishonesty and lack of integrity.

[43] The Registrar should not have found anything contradictory in his statement to the Registrar of Long-term Insurance (the Insurance Registrar) that the main distribution of the Smart Life policies was to be by CPS, using its infrastructure, including its employees who work at government benefit payment sites and that these employees would simultaneously promote and sell long-term insurance products.

Thus, the Registrar should not have drawn the distinction between what was intended and what was actually taking place on the ground.

[44] Again, Mr Van Der Walt contends, the Registrar should not have concluded that he should not have relied on an agreement and addendum that had not yet been "consummated" when its "consummation" did not affect its validity. Therefore, he submitted, he and Smart Life were not precluded from relying on it. Thus, the Registrar should have found that the agreement was not only valid, but also enforceable.

[45] In the context of the above submissions, contended Mr Van Der Walt, the Registrar should not have found that the policies were sold by CPS and not NET1, nor should she have concluded that he changed his stance in that regard.

[46] When the Registrar found that he had acted improperly, making himself guilty of dishonest conduct and lacking integrity, that conclusion was erroneous, Mr Van Der Walt submitted.

[47] His reasons for that submission are as follow:

To find that his conduct was dishonest and lacked integrity was mistaken, he submitted. That is particularly so in light of the differing views held between himself and Ms S Visser of KGA Life (Ms Visser) says Mr Van Der Walt. The Registrar could not have arrived at that conclusion without a proper hearing, he submitted. That is particularly so, considering Ms Visser's version does not support the Registrar's findings, was extremely vague, where she could not remember the facts; was not corroborated by Charles Van Der Walt who was also at the meeting they attended with Mr Van Der Walt, nor by the correspondence attached to her affidavit.

[48] For the above reasons, the Registrar should have found that the only reason Mr Van Der Walt approached KGA Life, was to secure employment for Smart Life employees. That finding, he contends, would have been consonant with his version. But even on Ms Visser's version, she could not draw the conclusion that the applications were offered for sale, or that he was going to benefit therefrom.

[49] Further, the Registrar's finding that the policy applications he had in his possession belonged to Smart Life and had any commercial value was erroneous. Instead, the Registrar should have made the finding that they belonged to no one or that they were of no value at all.

[50] Additionally, the Registrar's finding that his version, to the effect that he had simply forgotten all about the policy applications in his possession, was improbable and dishonest was also incorrect. Even though he was aware that he still had the applications with him when he had his meeting with Ms Visser of KGA Life, that he forgot about the forms in his possession until he was reminded about them, was not improbable and dishonest at all. Thus, his version should have found favour with the Registrar because on the probabilities, it was acceptable. This is so because,

(i) It is indisputable that the applications had no value and he was entitled to believe so;

(ii) His employment with Smart Life had been terminated and he had to find a new source of income, so that was the focus of his attention. Not application forms;

(iii) He at no stage denied that he had the 1,300 policy application forms in his possession and actually returned them in September 2013, at his own volition;

(iv) He did not take the policy forms from Smart Life, they were handed to him by Smart Life employees with the contents of his office stuff after the termination of his employment and

(v) Further, he owed Smart Life no legal duty to return the applications. But then, even if there was an obligation on his part, he would only have had a duty to return the forms within reasonable time.

[51] In his heads of argument, submitted on 13 November 2015, Mr Van Der Walt submits that as the suspension of ISSSA's authorisation arises from the action of the Registrar taken against him, should he succeed in this appeal, the decision and sanction against ISSSA cannot stand.

[52] It is noteworthy that section 26B(12)(a) (i) of the Financial Services Board Act[7] provides that,

> "... the Chairperson of a panel designated to hear an appeal may on application by-
>
> (i) the appellant concerned, and on good cause shown allow further oral and written evidence or factual information and documentation not made available to

[7] Act 97 of 1990

the decision-maker prior to the making of the decision against which the appeal is lodged".

[53] It suffices to say that Mr Van Der Walt does not argue for the submission of a section 26B (12) (i) (a) application. Rather, he makes the central submission that there are material and fundamental facts where there is "a genuine dispute of facts in this matter", and the Registrar should not have made findings against him without first putting in place a particular procedure, to resolve the dispute of facts, including further interrogation and cross examination of the relevant witnesses. Thus, he submits the Registrar erred in basing her decision on disputed material facts which have not been resolved. Further, the Registrar's decision based on the disputed facts "is contrary to probability and unsustainable" and therefore erroneous. For that reason, he argues, he is entitled to have the issues decided on the basis of *his* version and the appeal must thus be upheld.

[54] Further, he submits, should the Appeal Board find that the factual dispute forming the bases of the Registrar's decision should first have been resolved, the matter must be remitted to the Registrar, appropriately directing her as to first the procedure to adopt, so as to resolve the disputed facts before re-determining the matter, he submits.

[55] Further, he identifies the disputed facts as those set out in the Registrar's notice of intention dated 4 December, 2014 (Notice of Intention), read with his responses filed on 19 January, 2015 (the initial response) and the letter amplifying his response,

dated 16 February, 2015 (the final response), in particular paragraph 1.1 and 1.2 of the Registrar's reasons.

[56] Other facts to be included in this basket of disputed facts, he adds, are those contained in the Registrar's Record of Decision, of the date 6 July, 2015, specifically, with all related documents considered.

[57] In essence, submits Mr Van Der Walt, he is aggrieved by the decisions of the Registrar, finding him not fit and no longer proper for purposes of rendering the compliance function, as required in section 8(1)(a) of the FAIS Act.

[58] Under section 14A and 17 (2) (b), it is required in similar terms, contends Mr Van Der Walt, that before making decisions and acting in terms thereof, the Registrar must "be satisfied that the action is warranted and based on available facts and information". Thus he submits, the Registrar must in terms of section 9(2) first inform the licensee of her intention to take the particular action and provide a reasonable opportunity for a response. It is his contention, however, that "submission" is not limited to those in writing, but may also be oral, made up of facts and information relevant to the decision taken against the licensee. That, he argues provides an opportunity for disputes of fact to be settled before a decision, acting against the licensee is taken.

[59] That is a requirement of the Promotion of Administrative Justice Act, 3 of 2000 (the PAJA), which trumps the FAIS Act, he submits. This PAJA requirement he contends, ensures procedurally fair decisions[8].

[60] Mr Van Der Walt submits however, that what is fair depends on the circumstances of each case.

[61] Conceding that what is fair depends on the circumstances of each case, he in addition, contends that the Registrar's decisions, based on the "disputed facts" violated his right to his dignity and reputation, protected in section 10 of the Constitution, the right to practice and choose a profession, a trade and occupation, guaranteed in section 22 of the Constitution.

[62] Finding support in precedence set in the relevant PAJA jurisprudence, he further contends that the case law determine that as a general rule an administrator, when making findings of fact "such as where there is a clear dispute of fact on the central material issues", in particular where the honesty and integrity of a person are at stake, it would be necessary to interrogate the dispute of fact through appropriate procedures, failing which, the dispute of fact cannot be determined against a person who is the subject of the administrative action.

[63] Contending that section 3 of PAJA imposes mandatory requirements of fairness when taking administrative action, including providing a reasonable opportunity to make representations, which is particularly relevant in this case. Thus, he further

[8] See Zondi v MEC for Traditional and Local Government Affairs and Others, 2005 (3) SA389 CC at para. 101.

contends, the question as to what constitutes a reasonable opportunity is central to this appeal.

[64] Further, based on section 3 of the PAJA, he argues, he should have been provided a proper opportunity to ventilate the dispute of facts, and if needs be, through an appropriate process of interrogation. Although Mr Van Der Walt did make such a request, it was declined by the Registrar. However, he submits that, common law may also be invoked to bolster the section 3(2) reasonable opportunity principle, permitting a personal appearance to present and dispute information[9].

[65] The criteria for permitting an opportunity to lead oral evidence, he submits, include the nature of the issues raised, the complexity of the legal and functional evidence, the seriousness of the complaint and whether a formal hearing was requested by the complainant.[10]

[66] It is a well-established principle of fairness in our law that when a dispute of fact cannot be resolved on affidavit, it must be referred to oral evidence (or trial). The principle can also be invoked to give guidance on what constitutes fairness, including cross-examination. Cross- examination, he further submits, provides an opportunity to elicit facts that favour the cross examiner's case and challenges the truth and or the accuracy of the witnesses' version of the facts in dispute. The need for an opportunity he argues, becomes particularly necessary when inferences are drawn about a litigant's character, in particular her or his honesty and integrity.

---

[9] *See ...Hoexter,, Administrative Law ... p.340*

[10] *See SA Jewish Board of Deputies v. Sutherland NO and Others, 2004(4) SA 368(W), per Malan J*

[67] Mr Van Der Walt then concludes, submitting that the information and documents available to the Registrar did not entitle her to reach the conclusions and make the decision, which were severely adverse to him, particularly that the facts were in dispute. The Registrar's decision, taken through an incorrect and unfair procedure he submits, presupposes accuracy of the facts, asserted by others against him. He should have been given a reasonable opportunity through a fair process to test the contrary versions of witnesses who gave information going against him. In the absence the above disputes of facts should not have been decided against him.

[68] Therefore, he prays, the Appeal Board should set aside the Registrar's decisions and sanctions or at the least, remit the matter for reconsideration, together with directions, ensuring that a proper procedure is adopted to ensure a fair hearing with a view to the determination of the disputed facts, addressing the fairness of the decision.

[69] The Appeal Board he argues, has an obligation to assess the evidence in terms of the principles of fairness in our law, and determine whether adverse findings based on material dispute of facts should have been made against him without a fair procedural mechanism for the dispute of facts first, to be resolved.

Thus, he finally concludes, the appeal should be upheld and the decisions and sanctions set aside, with costs.

[70] Responding to the Mr Van Der Walt's submissions and contentions, the Registrar filed her heads of argument on 22 November, 2015, three days prior to the date set aside for the oral hearing before the Appeal Board. That, however, was due to

a request by Mr Van Der Walt for the postponement of the date of submission of his heads of arguments which was granted by the Chairperson of the Board, who is also the Chairperson of the Appeal Panel who heard the matter. The Appeal Panel is highly indebted to the Registrar's counsel for his indulgence in regard to the delay occasioned by the postponement mentioned above. Mr Van Der Walt had filed comprehensive, detailed and substantial heads of argument. That the Registrar could respond and have her crisp and well-constructed heads filed before the oral hearing without the need for postponement was helpful to the legal process.

4. THE ISSUES

[71] The issues in this case are indeed largely questions of fact. And it is indeed on the basis of the facts and information available to her prior to making her decision that the Registrar concluded that in his capacity as representative, director and key individual, Mr Van Der Walt, no longer meets the character qualities of honesty and integrity and debarred him in terms of section 14A (1) (a) of the FAIS Act. The debarment was effective from the date of the debarment, with a further debarment from applying for a new licence to act as FSP for 5 years, effective from the date of debarment. The withdrawal to serve as FSP was in terms of section 17(2) (b) of the Act.

[72] ISSSA as the licensee, was given notice of the Registrar's intention to suspend its authorisation to operate in terms of section 9(2)(a)(i) of the FAIS Act. The suspension was for a period of 3 months, on conditions as indicated, in paragraph 1 above.

[73] In the context of the position of trust that they hold, all FSP's are required in terms of section 8(1)(a) of the FAIS Act, at all times to have and display the personal character qualities of honesty and integrity. That is by now, a well-established principle in the regulatory environment of FSP"s[11].

[74] Expanding on the principle, it has been held that,

> "...to determine the necessary honesty and integrity indeed requires a moral judgment, taking into account a person's conduct in both her private life and her interaction with others. An inference is drawn from her {actions} and motives, not once but over a period of time or through a number of incidents. She must possess the qualities of unqualified honesty, the ability to avoid the conflict of her own interests with those of her clients, placing them above her own"

In other words, section 8(1)(a) requires from FSP's a high standard of honour and incorruptability at all the times[12].

[75] ***In General Council of South Africa v Geach and Others***[13], it was held that the idea of "fit and proper", in the context of advocates of the Supreme Court in South Africa, requires the personal character qualities of honesty and integrity to be displayed at all times in their practice, interaction with their clients and their service in the courts. Similarly, and in the context of their service as FSP's, that conduct is also

---

[11] *See AGM v Registrar of Financial Services Providers, Case No. A45/2014, para. 36.*
[12] ibid
[13] *2013(2) SA 52 (SCA), para. 125-127*

expected of FSP's, conduct which must be objectively assessed,[14] in the context of the facts of each case.

[76] When the Registrar makes a finding that an FSP is not fit and proper to continue to serve in that position, a debarment as sanction is not unusual. And as Mr Van Der Walt notes in his argument, the effect of debarment, even temporarily in my view, is dramatic and may be severe.

In FSB v Barthram, where the debarment was by an FSP, it was found that,

> "the debarment of the representative .... is evidence that (the FSP) no longer regards the representative as having either the fitness and propriety or competency requirements. A representative who does not meet those requirements lacks the character qualities of honesty and integrity or lacks competence and hereby poses a risk to the investing public generally. Such person ought to be unleashed on an unsuspecting public..."[15]

[77] Well-established in the decisions of the Appeal Board[16] is that what is required from FSP's among others, is the soundness of principle, uncorrupted virtue in character, but more particularly, in relation to truthfulness and fair dealing, honesty, sincerity and uprightness which all add up to respect for self in the service provided to clients or customers. These values are critical because what is at stake is more often

---

[14] *See in that regard, Democratic Alliance v President of the Republic d South Africa, 2012 SA 417 (SCA) at para....*

[15] *2015 JDR 2015 (SCA), at para 16.*

[16] *See as an example Hamilton Smith and Co (Pty) Ltd and the Registrar; Future Insurance Brokers.*

than not the well-being of vulnerable people who might stand to loose their life's financial resources, placed with utmost trust in the care of an FSP.

[78] With regard to the position of compliance officers in terms of section 17 of the FAIS Act, where authorised FSP's have more than one key individual and any representatives, they are required to appoint compliance officers to oversee the FSP's compliance function and monitor it, ensuring that the FSP complies with the requirements of the FAIS Act at all times. Needless to say, the requirements of fit and proper are also central to the character qualities required of all compliance officers[17]. In addition, the quality and standards of assessment applied to determine legislative compliance are no different from similar to those of FSP's.

[79] The Registrar, under section 17(2)(a) will approve the appointment of compliance officers in terms of criteria and guidelines she determines, and she may withdraw that approval, applying the provisions of section 17 (2)(a), read with section 17 (2)(c).

[80] In both circumstances of debarment under section 14A and (2) and removal of compliance officers in terms of section 17 (2)(b), the Registrar must herself be satisfied that, based on the available facts and information, based on the applicable legislation the person is no longer fit and proper to provide the specific services.

5. THE DISPUTE OF FACTS

[81] Worthy of reiterating, Mr Van Der Walt's principal complaint is that the Registrar's assessment of the facts and information placed before her were material to

[17] *See Section 6A (1) of the FAIS Act for the fit and proper requirements of categories of providers.*

her decision that he no longer meets the character qualities of honesty and integrity, thus debarring him. However, he contends, there are fundamental disputes of fact regarding his conduct which are an issue. The Registrar therefore erred in determining them on paper only, without setting up a procedure to first resolve the dispute before making her determination. In particular, he asserts, the Registrar should have convened an oral hearing where he should have been afforded the opportunity to formally or informally and under oath, cross-examine the witnesses. The Registrar, he argues, could otherwise not have drawn negative inferences on his character for the purposes of FSP's.

[82] In the result, submits Mr Van Der Walt, the decision of the Registrar was not compliant with section 3(2)(b) of the Promotion of Administrative Justice Act (PAJA)[18], section 3(2)9b)(ii) of the PAJA which provides that in order to give effect to the right to procedurally fair administrative action, an administrator must give the person concerned among others, a *reasonable opportunity* (own emphasis) to make *presentations* (own emphasis).

Thus, it is the reasonableness of the opportunity that will determine the nature of the mechanism to be created to fairly gather the facts and information required to inform the Registrar's decision.

[83] In this case, there is indeed no issue between the parties that the Registrar's decision and resultant imposition of the related sanctions fall within the purview of administrative action and may be subjected to the PAJA. I agree.

[18] *Act 3 of 2000*

[84] Further, and in particular for the purposes of this case, where there is a dispute of facts, it is indeed incumbant upon the decision-maker to first resolve the dispute before the decision is made. And Mr Van Der Walt insists that the procedural mechanism the Registrar should have created, should have been nothing short of calling an oral hearing, where he would have been afforded an opportunity to cross-examine witnesses. Throughout, he asserts that there is a dispute on the facts which informed the Registrar's conclusions, decisions and action taken against him.

[85] Should the findings of the Appeal Panel be that a dispute of facts which the Registrar ought to have resolved prior to making her decision indeed exists, a just and equitable remedy, in the interests of justice must be considered and ordered which could include remitting the matter to the Registrar for reconsideration. Similarly, in the interests of justice, should the panel conclude that there is no dispute of the said facts, it would, be entitled to dismiss the appeal without more.

[86] As we proceed to weigh the arguments relied upon by the parties, the arguments and issues raised by the Registrar will appear from that process. They are brief and crisp, requiring no separate elucidation.

[87] It is common cause between the parties that the decisions and actions taken by the Registrar against Mr Van Der Walt are administrative action and the action was fully compliant with section 3 (2)(i), (iii), (iv) and (v) of the PAJA in that the Registrar had provided adequate notice of, the nature and purpose of the action to be taken, the administrative action itself, notice of the right to appeal against her rulings and the right to have reasons for the action taken.

[88] It is necessary to follow the sequence of events subsequent to the Registrar's notice of intention to take action against Mr Van Der Walt (notice of intention). He was given notice of the nature and purpose of the intended action in a letter dated 4 December, 2014 and had to respond by 13 January, 2015.

[89] A response to the notice was received on 19 January, 2015. By then, Mr Van Der Walt had sought legal advice and correctly so as that response came from his attorneys, Raymond Druker Attorneys, who complained in the same letter, that the period within which they had to respond fell within the end of the year holiday period, making it impossible for them to respond in full by the return date.

[90] Specifically, in his response to the Registrar's notice, Mr Van Der Walt's attorneys drew attention to the likelihood that he might have to come back with a special request, contending that,

> "...the steps you intend taking would be immensely prejudicial to my clients, and they are entitled to a fair opportunity to address fully the contents of your letter. In the premises, I trust you will have no objection to an amplification of the contents of this letter in the future, should my clients consider this to be advisable."

In a letter dated 29 January, 2015, the Registrar, appreciating well the complaint and its context, granted an extension of time until 13 February, 2015 for a further opportunity to amplify their response as requested.

[91] It is more expedient to quote from the attorneys' response to the Registrar's letter, affording them the opportunity to make further representations as indicated

above in para. 89. In that letter dated 6 February, 2015, after making further representations, they concluded,

> "My clients do not intend to add anything on paper for your consideration at this stage. Obviously, in the event the matter proceeds to a hearing, all of their rights and contentions are reserved, including their rights to adduce further evidence if needs be."

Although the Registrar, in her notice of 4 December, 2014 had among the facts and information she relied on, included as annexures, the transcripts of the interviews Mr Van Der Walt held with the inspectors and had indicated that he reserved the right to advance further evidence, it suffices to point out that stage, none of the opportunities availed, had been taken to address fully the issues at his disposal at the time. He opted to reserve his right to raise issues at a later stage, if the matter goes to trial without at any stage applying to submit facts or information in terms of section 26 B(12)(a)(i).

[92] In view of the approach we take in his matter, focussing on the facts and information submitted by Mr Van Der Walt prior to the Registrars' decision and action, we proceed to determine his claims relevant to the dispute of facts and just administrative action.

6. ADMINISTRATIVE ACTION: THE RIGHT TO AN ORAL HEARING AND TO CROSS-EXAMINATION

[93] The Constitution[19] of South Africa, 1996 (the Constitution) protects the right of everyone to administrative action that is lawful, reasonable and procedurally fair, and

[19] *Section 33(1) of the Constitution.*

the PAJA was enacted to give effect to that right among others.[20] Thus Mr Van Der Walt was well within his rights to assert the right to procedural fairness in the administrative action taken against him.

[94] At common law, the general rule has always been that natural justice must be observed before a decision and or action is taken. Generally, to have to convince a decision-maker that a decision was incorrect is much more difficult a task.[21] Thus an opportunity to make representations in that regard would be more effectively utilised than after the fact. For that reason, the Supreme Court of Appeal (SCA) has held that an oral hearing after a decision has been taken is an exception rather than the general rule.[22] The important question is whether an oral hearing is at all times warranted before a prejudicial administration action is taken.

[95] Courts have indeed refrained from laying down hard and fast rules in determining in what circumstances an oral hearing is warranted. Often they have done so in the context of the facts and circumstances of each case.[23]

Against the backdrop of a Constitution with a Bill of Rights which protects the right to just administrative action and in the context of the PAJA itself, the interests of justice must be integral to the consideration of Mr Van Der Walt's claims and assertions. In the circumstances of this particulars case, and in relation to the demand for an oral hearing, the purpose of the oral hearing and the impact it might have on the outcome of the case may be critical.

---

[20] *Section 33 (3) ibid.*
[21] *Corbett CJ in Attorney General, Eastern Cape v Blom, 1988(4) SA 645 (A).*
[22] *In Nortje v Minister van Korrektiewe Dienste, 2001 (3) SA 472 (SCA) para. 19.*
[23] *See in particular, Chairman, Board on Tariffs and Trade v Brenco Inc 2001(4) SA 511 (SCA), para.19.*

[96] It is the submission of the Registrar that in this case, procedural fairness did not warrant that a formal hearing be convened. Mr Van Der Walt, he further submits, had been afforded ample opportunity to make their submissions, which they did twice, responding to the Registrar's notice of intention. The submissions made in response to the notice were detailed, full and comprehensive and the panel is indebted to the research engaged in t support thee submissions. As it were, the period within which a response had been required, was extended for another 30 days or so, to enable them to amplify their initial submissions, the extension of time they had requested.

[97] Against that background, it was the contention of the Registrar that procedural fairness did not require that a formal hearing be convened. That brings to the fore the question of the purpose of the formal hearing envisaged.

[98] It is convenient at this point to repeat Mr Van Der Walt's basis or reason for his claim. He contended in the main that, because there are disputes of fact on the basis of which the Registrar could not have drawn the negative inferences she did draw regarding his character qualities of honesty and integrity without resolving them, she ought to have convened an oral hearing prior to making her decision and taking action against him, so that he could question and cross-examine witnesses with a view to resolving the existing dispute of facts.

7. WHETHER THERE WAS A DISPUTE OF FACTS

[99] It is common cause that the facts and information relied upon by the Registrar to make her decisions are those reflected in her notice of intention, dated 4 December, 2014 and Mr Van Der Walt's responses, filed by his attorneys on both occasions, that

is, his initial response and the final response submitted after the Registrar had granted the month-long extension of time for a further submission.

[100] Mr Van Der Walt submitted that the purpose of the oral hearing requested, was to question and cross-examine witnesses, so that the dispute of facts may be resolved. He contends that there are material facts relied upon by the Registrar which are in dispute and should have been interrogated before the Registrar made her decisions, the facts, being those contained in the documents mentioned above.

[101] Of material importance for the purposes of the Registrar's decision was the inspectors' report, based on statements made by Mr Van Der Walt, taken from the transcripts of the interviews conducted by the inspectors, [24] under oath and contained in annexures 1 and 2, attached to the Registrar's notice of intention of 4 December, 2014.

[102] The inspectors' report contains statements relating in particular, to compliance issues in the sale of the policies and related matters, which are the subject of this matter and his explanation of the circumstances surrounding questions of compliance in regard thereto, including his own role in the related occurrences at Smart Life. Needless to say, the interview was conducted under oath thus attesting to the truth of the statements he made.

[103] Mr Van Der Walt does not deny that the interview had been conducted under oath and that he had made the statements. What he submits is that the Registrar should have placed the approach she adopted to drawing her conclusions about his personal

[24] *The interview was conducted by the inspectors appointed by the Registrar of Long-Term Insurance, in terms of section 2 read with section 3(1) of the Inspection of Financial Institutions Act, 80 of 1998.*

character qualities of dishonesty and lack of integrity in the context of his explanation regarding the historically "substantial internal conflict, lack of coherence in objectives and an evolving and changing marketing plan foisted upon them by ... Smart Life's major shareholder", and which he was powerless to resist. It was therefore not within his power to control the conduct of the Smart Life Board, he submits. His failed attempts to do so, he contends, ended up in substantial acrimony and litigation between the partners, placing him under great pressure of a disintegrating relationship between him and Belament, who is Smart Life's majority shareholder who overrode his decisions and "dictated the conduct of NET1, Smart Life and CPS."

[104] Moreover, Mr Van Der Walt asserts, the Registrar should not have relied upon the version of facts of his adversaries within the NET1 Group, in " hotly contested litigation and ever-increasing acrimony and should not have made the findings that she did without affording him the opportunity to hear him in person and interrogating the version of his adversaries with regard to the selling of the policies" and the fate of the unprocessed applications, after the Insurance Registrar had directed Smart Life to cease its insurance business from 25 February, 2013.

[105] Indeed those are the issues, in the main, that the Registrar focussed on when assessing Mr Van Der Walt's conduct as a compliance officer. It is his responses as a compliance officer, in the context of the very historical facts and circumstances at Smart Life, NET1 and CPS among others, his relationship with the Board and all others concerned, as reflected in the report of the inspectors, among others, that informed the decision of the Registrar, as already indicated.

[106] Important is that whatever difference there existed in the information taken into account by the Registrar in her decision, there was no dispute of facts. Instead, the two versions of statements he made as reflected in the reports of the inspectors and his own submissions contained in his initial and final responses were simply contradictions between two versions of his own statements made at different points in time. One version is of the information he gave to the inspectors under oath and the other, statements based on his responses to the Registrars' notice of intention to act.

[107] Indeed those are the material facts and issues the Registrar focussed on in her assessment of Mr Van Der Walt's conduct as a compliance officer. She also took into account the context of his responses, which he articulated, relating to the tensions, acrimony and conflict between him and the Smart Life Board. In particular, the issues relating to the absence of authority for the sale of the policies and his own attempts to create a "veneer of legitimacy" in that regard, all with a view to creating an impression of lawfulness, which the Board declined to provide. These were all integral to the facts relied upon by the Registrar. Further, all that information and or facts were statements he made himself.

[108] Thus, the difference between the statements made to the inspectors on oath and his submissions and arguments before the Appeal Panel, can only be characterised as contradictions between two versions of his own statements not a dispute of facts.

[109] A case in point is the information relating to the sale of the policies and the non-compliance of Smart Life through CPS. That information was also central to the

Registrars' decision. His concerns in relation thereto and his approach in the attempts he made to authorise the policy sales for compliance purposes was also decisive.

[110] Mr Van Der Walt first alledges that the finding of the Registrar that CPS sold the 1,300 policies on behalf of Smart Life, between November 2012 and March 2013, in that none of those CPS employees had been appointed representatives of an FSP, was incorrect. Therefore, she should not have concluded that CPS was, as a result, in contravention of section 7(1) of the FAIS Act. His contention is that there was an agreement, with an addendum, concluded between Smart Life and NET1 where the latter would act as intermediary for Smart Life. In that agreement, he and Ms Chalmers signed the agreement in their capacity as representatives of Smart Life and NET1 respectively.

Thus, according to Mr Van Der Walt, because CPS, after having been appointed juristic representative of ISSSA on 27 November, 2011, and that appointment having been terminated on 26 September 2012, the policies could not have been sold by CPS employees as they had by then, no authority. The 1300 policies were thus sold by NET1 employees, issuing the CPS infrastructure, and not CPS employees.

[111] This version is however in stark contradiction to the one presented to the inspectors under oath, on 29 October, 2012. Here he attested that the main distribution of the Smart Life policies was CPS. His current position also contradicts his version of events deposed in the High Court on 15 April, 2013, where he stated that even though the required intermediary agreement, appointing CPS among others, as intermediary,

was prepared but never signed, he did train CPS employees who in fact proceeded to sell 1,000 policies.

[112] However, in his response to the Registrar, dated 19 January, 2015, he indicates despite his statements to the inspectors, that after NET1 was appointed representative of ISSSA and before the sale of the policies were proceeded with, the Human Resources Manager at NET1 confirmed that the people who would sell the Smart Life policies were all employees of NET1 who would only be using CPS infrastructure.

If that was the case, it was however only an intention.

[113] Significant is that there was an agreement between the parties that the sale of policies commenced in November 2012, a time when the employees who sold the policies had not been employed by CPS. Mr Van Der Walt was aware of that fact. Notwithstanding , he made the statements to the inspectors, under oath, indicating that CPS had collected and accounted for premiums of the policies they had sold without the requisite authority in terms of section 7(1) of the FAIS Act, at all relevant times. He repeated it subsequently, in the interview with the inspectors on 6 September, 2013 when he indicated that it was common cause that CPS sold about 1300 funeral assistance policies.

What Mr Van Der Walt thus submits as a dispute of fact is therefore in real terms, two contradicting versions of his own statements – one that he made under oath to the inspectors and the other he made generally, in his submissions contained in all his responses.

[114] Further, regarding the offer he made to KGA Life to underwrite about 5000 Smart Life policy applications in his possession, where he had no authority from Smart Life to do so, he also presented two contradictory versions at the said different times. In his statement to the inspectors on 6 September, 2013 made under oath, he indicated that the idea of the offer was simply to give someone else to process the applications, after his realization that he still had those policy applications with him. However, in his response, particularly in the letter from his attorneys, he indicates that his approach to KGA Life was to secure employment for Smart Life branch managers. His offer to KGA Life to underwrite only about 2000 of the policy applications was, he submitted, only to show the viability of the business capability. Here, the Registrar made no assumptions of her own. She relied for her decision on the contradictions in the information provided by Mr Van Der Walt himself. On that basis, she made her own assessments.

[115] As for how he ended up with the Smart Life policy applications in his possession, without the necessary permission, for so long after the termination of his employment, first in his interview with the inspectors on 10 June, 2013, under oath, he indicated that it was deliberate. His idea was to keep the policy applications with him to ensure they are not processed, reflecting the mistrust and somewhat acrimonious relationship with Smart Life which had developed by that time. Then, in the interview of 6 September, 2013, he stated that when he cleared his desk as he was leaving Smart Life, he must inadvertently have taken them along when he removed his own boxes from his desk, contrary to another third version, indicating that Smart Life staff must

have loaded the box of applications with his own into his vehicle, when he left his office at Smart Life.

[116] That is the general pattern of contradiction that is reflected throughout, between the statements Mr Van Der Walt made in the interviews he held with the inspectors under oath, and the assertions, arguments, submissions and contentions he made in response to the Registrar's notice of intention. It is that contradictory information which informed the conclusions and decisions of the Registrar.

[117] As already indicated, at no stage did Mr Van Der Walt seek to invoke the provisions of section 26B(12)(a)(i) of the Financial Services Board Act,[25] applying, on good cause shown, for the admission of further and or new evidence and or factual information after the Registrar had made her decision even though he had the opportunity to do so. Rather, he argues before the Appeal Panel that, based on his submissions that because there exists disputes of fact in the information relied upon by the Registrar when she made her decisions, and because the Registrar had failed to put in place a procedure to resolve the dispute, her decision must bet set aside. Further, he submits, for the Registrar to make a decision on the basis of disputed facts is wrong and contrary to the principle of probabilities and is therefore unsustainable. For that reason too the appeal must fail and the Registrar must be ordered to pay the costs.

As an alternative, he submits, the Appeal Panel must remit the matter to the Registrar, directing her appropriately, to find a mechanism to resolve the dispute of facts. In

[25] *Act 97 of 1990.*

particular, he submits that an oral hearing be conducted so that he may be afforded an opportunity to cross-examine witnesses.

[118] First, based on our assessment above, we find that there is no dispute of facts in this matter. The decision and actions of the Registrar were based on the assessment of the contradictory versions of information presented by Mr Van Der Walt, in the reports of the inspectors relative to his responses to the notices of the Registrar.

[119] However, even if there was any dispute of facts, in the context of this case, Mr Van Der Walt was granted ample opportunity to raise the submissions relating to questions of such a conflict and interrogate them prior to the finalisation of the Registrar's decision, and the Registrar might herself have been open to considering the creation of an appropriate mechanism to resolve the dispute, if any. That is an important requirement of the right to administrative justice.

[120] That however, is not to say the Registrar would necessarily have called for an oral hearing, where an opportunity for cross-examination, which is typical in judicial rather than administrative proceedings, would have ensued. Where a party has had a real opportunity to make her or his case, cross-examination, which tends to over-judicialise administrative processes, may be considered as an exception rather than a rule.[26] Besides, as in this case, if Mr Van Der Walt had been given an oral hearing and permitted to call witnesses, he would indeed not have had the legal capacity to cross-

[26] *See the New Constitutional Administrative Law; v. II; Cora Hoexter (with Rosemary Lyster),*

examine his own witnesses. The exercise would therefore have been futile,[27] serving no significant purpose, if at all.

[121] Although the conduct of Mr Van Der Walt could easily border on the frivolous and even vexatious, in the context of the facts of this case, in particular in the context of the Registrars' sanctions and in view of the right he has to exhaust the legal processes in pursuit of rights protection, we are inclined in the interests of justice, not to order that costs follow the result.

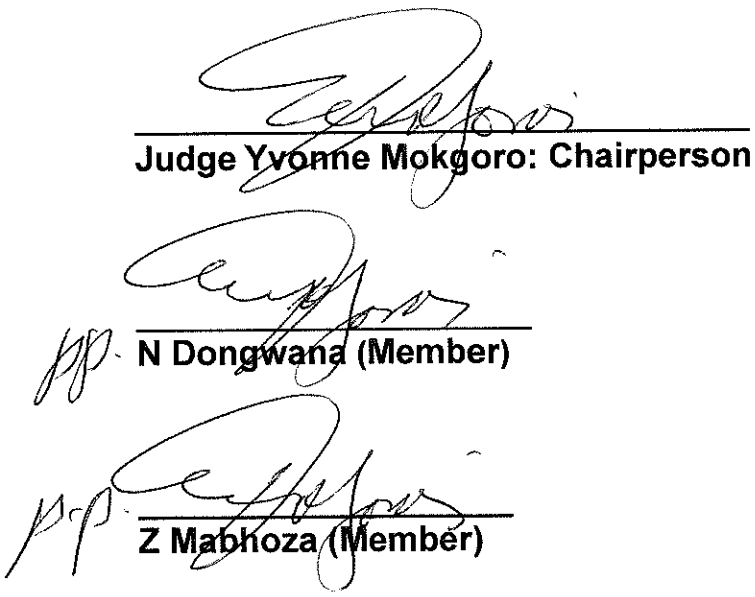
[27] *See Contract Support Services, 1999 (3) SA, 1133 (W).*

THE ORDER

1. The appeal is dismissed.

2. There is no order as to costs.

Signed at Pretoria on this 16th day of February, 2016.



Judge Yvonne Mokgoro: Chairperson

N Dongwana (Member)

Z Mabhoza (Member)