THE FINANCIAL SERVICES APPEAL BOARD

Case A78/2013

In the appeal of

CYCLONE MATIBE MAKOLA Appellant

And

THE REGISTRAR OF FINANCIAL SERVICE PROVIDERS Respondent

Appeal panel: Justice LTC Harms (chair), Mr Z Mabhoza and Mr G Madlanga

For the appellant: In person

For the respondent: Mr BJJ Bredenkamp

Hearing date: 12 May 2015

Judgment date:

JUDGMENT

INTRODUCTION

[1] The appellant appeals in terms of sec 39 of the Financial Advisory and Intermediary Services Act 37 of 2002 ('the FAIS Act') against a decision of the respondent, the Registrar. Such an appeal is to be dealt with under the provisions of sec 26 of the Financial Services Board Act 97 of 1990 ('the FSB Act').

[2] The decision appealed against is dated 26 February 2013 and was received by the appellant on 13 March 2013. The decision relates to a complaint against 'ABSA iDirect' and was to the effect that it had 'complied with section 13 of the [FAIS] Act'.

[3] This judgment raises important issues concerning the lodging of appeals and joinder of interested parties in the appeal process and the power of the Appeal Board in relation to condonation.

CHRONOLOGY

[4] The background to the dispute is as follows. The appellant's vehicle was insured by iDirect, an insurance division of ABSA Bank Ltd. The appellant drove the vehicle in East London on 5 September 2009. With him he had as passenger a friend, Mr Fezile Ngubane. His friend did not possess a driver's licence. In the event, the appellant was arrested on an allegation of driving under the influence of liquor and was detained at a police station. His car keys came into the possession of his friend who left with the car and later that evening was involved in an accident. The vehicle was damaged beyond repair. Based primarily on allegations of Ngubane, the loss assessor concluded that the appellant had given him permission to drive the car and as a result ABSA repudiated the appellant's claim arising from the accident since the vehicle had been driven by an unlicensed driver with the appellant's consent. (In what follows no distinction will be drawn between ABSA and iDirect.)

[5] The appellant, who denied that he had given permission, initiated a detailed investigation and analysis of real and presumed facts to establish that he had not given Ngubane permission to drive the vehicle. He laid a complaint with the Ombudsman for Short

Term Insurance. After stating that there were significant disputes of fact on the issue of consent, which were not capable of easy resolution without the leading of oral evidence and the making of credibility finding in relation to the versions put forward by the appellant and his friend, the Ombudsman held on 21 September 2010 that the overwhelming probabilities were that Ngubane had concocted his version and that the appellant had not given him his consent to drive. The insurer was requested to reconsider the repudiation, which it did, and it settled the appellant's claim in full.

[6] During February 2011, the appellant laid his detailed complaint which led to this appeal with the respondent. He fingered two individuals who had acted on behalf of ABSA, namely Mr Qwayi and Mr Bester. The complaint against Qwayi was that he, who as assessor had investigated the claim and had made the recommendation to repudiate, had acted 'contrary to the spirit' of secs 16(1)(a), (d) and (e) of the FAIS Act and the Code of Conduct. The appellant then made a large number of allegations which in sum state that Qwayi had failed to investigate the matter properly. He concluded by submitting that Qwayi was negligent, incompetent, biased and unjust, and that his flawed investigation deprived the appellant of his right to have a bona fide and legitimate insurance claim paid and settled at the earliest possible occasion. This caused him, over and above the value of the vehicle, financial loss and emotional distress.

[7] In the case of Bester, his complaint related to responses to the Ombudsman prepared by Bester on behalf of ABSA. These, too, he said, were contrary to the spirit of sec 16(1)(a) and (d) and the Code because they were negligent, flawed, biased, unjust and contravened regulatory requirements. He alleged that Bester had fabricated information, omitted information, and misstated information. He concluded by stating that Bester's

defiant, negligent, incompetent, unjust, biased, and flawed responses to the Ombudsman perpetuated the 'vicious process' started by Qwayi and rendered the Ombudsman unable to finalise his complaint within a reasonable time.

[8] In his conclusion he requested the Financial Services Board to investigate the conduct of ABSA and its employees or agents in relation to contravention of the Act and the Code.

[9] The appellant also laid a complaint with the FAIS Ombud, presumably at or about the same time. This complaint was dismissed on 24 August 2012, on the ground that the FIAS Ombud was satisfied that the insurer had made a comprehensive investigation into the circumstances surrounding the claim and that the settlement of the claim was fair and reasonable. The Ombud was therefore unable to be of further assistance.

[10] Reverting to the complaint filed with the respondent: On 1 August 2011, the respondent referred the complaint to ABSA and requested a response. It should be noted that the complaint was not sent to either Qwayi or Bester. ABSA responded, but the detail is, for present purposes, not relevant.

[11] On 13 January 2012, the respondent wrote a further letter to ABSA. It is clear from this letter that the respondent interpreted the complaint to relate to a contravention art 11 of the Code, which deals with the duty of financial services providers to have adequate control measures in place. (It does not deal with the case where adequate control measures fail.) The case was that Bester and Qwayi, whilst investigating and/or analysing the accident and claim, acted in an unfair, negligent and flawed manner and that ABSA misled the

Ombudsman in its submissions which led to a delay of 12 months. ABSA responded immediately.

[12] On 25 January 2012, the respondent informed the parties that after due consideration of the complaint and the responses she decided not to proceed with the matter.

[13] The appellant did not appeal this decision in spite of the fact that he could have done so. One has to assume that he instead made further submissions to the respondent to reconsider this decision. It does not appear that any new facts were brought to the attention of the respondent and it is difficult to understand on what basis the respondent could, without more, reopen the investigation. It was nevertheless done. On 22 June 2012, the registrar wrote to ABSA, without reference to the said decision and without revoking it, alleging that the response referred to above had not been adequate. ABSA responded and subsequently, on 12 October 2012, a meeting was held between ABSA and the respondent. The appellant was given an opportunity to respond further.

[14] After all this to-ing and fro-ing the decision of 13 March 2013, which is under appeal, followed. Since it held that ABSA had complied with sec 13 of the FAIS Act, and if regard is had to sec 13(2)(b) read with para 11 of the Code, it meant that the Registrar was satisfied that ABSA had taken reasonable steps to ensure that its representatives comply with any applicable code of conduct and 'laws on conduct of business'.

[15] The appellant once again took the respondent to task in relation to this decision in emails during April 2013. And the respondent reviewed the second decision, once again without any new facts having been brought to her attention. As before, it is not understood

on what basis this review took place. In any event, the respondent dealt with the appellant's points in a letter of 19 April 2013.

[16] The appellant noted his appeal some four months after the decision, namely on 9 July 2013. He also lodged a condonation application requesting condonation for his failure to appeal within 30 days of becoming aware of a decision as required by sec 26(2) of the FSB Act. In both instances he cited the Registrar as the only respondent. Not one of ABSA, Qwayi or Bester was given notice of the appeal proceedings or the condonation application.

[17] The respondent was obliged to furnish her reasons for the decision within 30 days (reg 2(3)). Instead, and in spite of her quoted statement on 19 April 2013 that the matter was 'closed', she, in consequence of legal advice obtained 'reopened' her investigation on 6 March 2014 without conceding, she said, that her initial decision had been wrong. She also proposed that the appeal procedure be suspended pending her 'final decision.' Once again, her authority to have done so without any new facts and, more particularly, during a pending appeal and without prior notice to all interested parties is not understood.

[18] The reopening took place by means of a letter to Qwayi and forwarded to ABSA on the same date. This, by the way, was the first and only letter to Qwayi. Bester, to date, has never been addressed directly. Qwayi was asked to provide answers to the original complaint – which was then already three years old – in terms of sec 4(2) of the FAIS Act. It provides as follows:

> 'The registrar may by notice direct an authorised financial services provider, representative or compliance officer to furnish the registrar, within a specified

period, with specified information or documents required by the registrar for the purposes of this Act.'

[19] As appears from the letter itself, the respondent knew at the time that Qwayi was not an authorised financial services provider, representative or compliance officer and the request based on sec 4(2) was accordingly out of order. He could, obviously, have been asked to provide information on a voluntary basis but that was not done. Qwayi answered on 26 March. His answer added nothing. The respondent all along knew what his version was and it had been considered by her already prior to the letter of 19 April 2013.

[20] The next inexplicable step in this drawn-out saga was a request by the respondent for directions from the Chairman of the Appeal Board on 6 August 2014. More need not be said save that the respondent sought rulings on matters which do not fall within the jurisdiction of the Chair but relate to the merits of the case. The then Chairman refused to make such rulings.

[21] The reasons – and they are lengthy – followed on 21 October 2014. Although the respondent dealt with the appellant's allegations in some detail, her conclusion was that on the facts and information available to her, she could not take any regulatory action against ABSA, Bester of Qwayi because none of them had contravened the FAIS Act. It is fairly obvious that the reasons, to the extent that they were based on legal grounds, were ex post facto reasons. The true reasons are probably those given on 19 April 2013, soon after the decision and before legal opinion was obtained.

[22] The appellant's notice of appeal of 6 November has the same number of pages, namely 19, but they are closely typed. His heads of argument are also comprehensive – 52

pages. They deal mainly with factual issues which, in the light of our conclusions that follow, do not require assessment.

LATE NOTING OF THE APPEAL

[23] Section 26(2) of the FSB Act provides as follows:

> 'An appeal must be lodged within 30 days of the person becoming aware of, or ought to have become aware of, a decision, in the manner and on payment of the fees prescribed by the Minister.'

The '30 days' are not court days but calendar days. As mentioned earlier, the appeal was months late and that the appellant applies for condonation. The question is whether this Appeal Board has any jurisdiction to condone the late noting of the appeal.

[24] The point of departure is that this Board does not have any inherent jurisdiction and that its powers have to be found within the four corners of the statutes that govern it. The powers of the Board are set out in sec 26B(15); that of the Chair of the Board in sec 26(3) and 26B(1) and (6); and that of the Chair of a panel in sec 26B(7) and (12) – all of the FSB Act. Nowhere is the power given to ignore statutory time limits, for whatever reason.

[25] If regard is had to the position in the superior courts, it is not without interest that appeals there, too, have to be noted within certain time limits. However, the statute gives courts the power of condonation explicitly. (See the repealed sec 21 (2) of the Supreme Court Act 59 of 1959 and sec 17(2)(b) of the current Superior Courts Act 10 of 2013.) This points ineluctably to the fact that not even courts with inherent jurisdiction may 'ignore' statutory time limits through the exercise of a discretion. It could be added in this regard

that the condonation power of courts in relation to court rules (not statutes) is also not based on some inherent jurisdiction but always on court rules (Constitutional Court rule 32; Supreme Court of Appeal rule 11 and 12; Uniform Rules rule 27).

[26] In a similar situation (in a Publication Appeal Board appeal), Nicholas J held in *Mame Enterprises (Pty) Ltd v Publications Control Board* 1974 (4) SA 217 (W) that a court does not have the power to condone a late appeal where an Act prescribes a time limit for noting. A court cannot, he held, use its condonation powers under the court rules to circumvent a statutory time limit.

[27] It follows that on this ground alone there is no valid appeal before us.

NON-JOINDER

[28] Although strictly unnecessary but because of its practical importance we now consider the other preliminary issue, namely non-joinder. As has been stated above, the appellant's case is against ABSA, Bester and Qwayi. The appellant seeks a setting aside of the decision of the respondent which means that the matter has to be referred back to her for reconsideration. The question is then what the purpose of the referral would be. As to Bester and Qwayi, the appellant could not explain what the registrar could or should do in relation to them and he apparently during argument abandoned his appeal against them. Lest we misunderstood him, we will consider his prior attitude, namely that the respondent should take some or other disciplinary steps against them, probably disbarring them in future. As far as ABSA is concerned, the appellant indicated that the registrar should either institute proceedings against ABSA claiming damages on his behalf or refer ABSA to the

enforcement committee (sec 4(4)9a)(iii) of the FAIS Act and sec 6 and 6A of the Financial Institutions (Protection of Funds) Act, 2001).

[29] All this establishes that ABSA, Bester and Qwayi have a material interest in the outcome of the appeal. As such they should have been cited as respondents at the outset. This basic common-law rule has been restated in the Guidelines para 8.1. (Compare for instance *Mashike and Ross NNO v Senwesbel* [2013] 3 All SA 20 (SCA), [2013] ZASCA 35 at [22].) Non-joinder under such circumstances is fatal simply because any judgment of this tribunal in their absence will be a nullity. (Compare *Vidavsky v Body Corporate of Sunhill Villas* [2005] 4 All SA 201 (SCA) at [14] and *Campbell v Botha and Others* 2009 (1) SA 238 (SCA) at [16] to [18].)

[30] After the appellant became aware of the problem from the respondent's heads of argument, he sent an email on 6 May (four business days before the appeal hearing) to ABSA, Bester and Qwayi. It was in these terms:

> 'I have just been made aware that you might have an interest in the appeal before the Appeal Board scheduled to take place on 12th May 2015. Kindly find the attached notice of appeal against the Registrar's decision that found no wrong doing on your part. Do not contact me should you need clarity on this matter, contact the Registrar of the FSB's or the Secretariat of the Appeal Board.'

[31] The notice of appeal which he attached contained no reference to ABSA, Bester or Qwayi. It did not state the subject matter. It did not contain the Registrar's decision. In sum, it was meaningless. So, too, was the email. There was not an attempt to rectify the matter (assuming it could have been done) by applying for joinder. No explanation for the failure to

join was given and there was no application for condonation (assuming that it could be granted).

[32] The consequence of this is that on this further and independent ground there is no valid appeal before us.

REGISTRAR'S APPLICATION FOR CONDONATION

[33] The respondent filed on 7 May (two business days before the hearing) an application dated 7 April for condonation for the late submission of her reasons. It has already been stated that she was obliged to furnish her reasons for her decision within 30 days after the appeal was noted; that it was noted on 9 July 2013; and that her reasons were filed during October 2014.

[34] The appellant rightfully objected to the lateness of the reasons. He submitted in his heads that the respondent had acted unlawfully and abused her powers. Her explanation relates to the work load of the Office. We will not dwell on the excuses but deal with jurisdiction.

[35] The obligation on the Registrar to provide reasons flows from the Regulations in respect of Appeals to Appeal Board, 2011, promulgated by the Minister under the FSB Act. These regulations do not contain a power to condone and the reasoning in relation to the late filing of an appeal notice applies *mutatis mutandis*. (Section 4(1) of the FAIS Act, which permits the Registrar to extend periods when anything is required or permitted to be done by the Registrar in terms of the FAIS Act within a particular period does not apply because the regulations are under the FSB Act.)

[36] Although the registrar's application for condonation has to be struck from the roll on jurisdictional grounds, it did not have any practical effect. Reasons were strictly not called for because there was no valid appeal. In addition, absent reasons, a Board of Appeal can have regard to the record and deal with any factual or legal matter that appears from the record. The only problem is that an appellant may be disadvantaged because he or she may only become aware of the argument of the Registrar after heads are filed and this may lead to unnecessary postponements. In the instant matter the appellant's argument was in any event based on the late reasons and without them he would not have been able to make much of an argument. However, for purposes of this judgment we did not take her late reasons into account.

JURISDICTION OF THE REGISTRAR

[37] The problem in this case is that the Registrar at the outset failed to determine whether she had any jurisdiction to consider the complaint. Her jurisdiction has to be found in the FAIS Act and nowhere else. The first matter that she had to establish was whether the appellant as complainant had made out a prima facie case under the Act. Instead, her office immediately immersed itself in an intractable factual dispute which eventually drowned the office in paper replete with acrimonious debate.

[38] As noted, the original complaint was filed against Qwayi and Bester: the former because of the way he acted as assessor and the latter because of his interaction with the Ombudsman. Neither provided any financial services and whatever they did, it did not fall under the FAIS Act. The complaint was that they had acted contrary to the 'spirit' of sec 16(1) of the Act and the Code of Conduct. Section 16 is simply the empowering provision for

issuing a code of conduct and is irrelevant. The Code, to the extent that it applied to Qwayi and Bester, applies to the rendering of financial services – which the appellant admits they never provided.

[39] No complaint was lodged against ABSA – only a request that they should be investigated. As mentioned, it was assumed, and the appellant argued, that ABSA did not have proper control measures in place as required by reg 11. But these control measures had to be in place for the rendering of financial services as defined in the FAIS Act.

[40] The appellant did not in his complaint or in his grounds of appeal indicate which law had been contravened by the two persons mentioned. The Registrar accordingly had no reason to believe that they had contravened a provision of the FAIS Act (sec 4(4)). To bypass the problem the appellant relied in his heads of argument on a so-called admission by ABSA that Qwayi and Bester had not 'materially contravened' the FAIS Act. What ABSA did was to use the language of sec 14(1) of the Act. Absent a material contravention the section does not come into play. The admission was accordingly of no value. In addition, since the 'admission' was not made by Bester of Qwayi, it does not bind them.

[41] In the heads of argument and during oral argument the appellant further relied on sec 40(1)(c) of the Consumer Protection Act 86 of 2008, as a law 'applicable on conduct of business' (sec 13(2)(b) of the FAIS Act). It provides that a supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer.

[42] It is not necessary to deal with the facts because sec 28(2)(b) of the FSB Act provides a complete answer: the Consumer Protection Act does not apply to any function, act, transaction, goods or services that is or are subject to Financial Services Board legislation (such as the FAIS Act) or to the board or a registrar referred to in Financial Services Board legislation.

[43] The appellant sought to hold ABSA liable on the principle of vicarious liability. The principle has general application but presupposes that the 'agent' had committed a relevant wrong. Since the two 'agents' did not contravene the FAIS Act or the Code, the reliance on vicarious liability was misplaced.

CONCLUSION AND COSTS

[44] In the result the appeal stands to be dismissed and the two applications for condonation must be struck from the roll. It is accordingly not necessary to consider the other legal and factual issues raised.

[45] Costs usually follow the event but we have decided not to penalise the appellant with costs because of the lapses in the administration of the matter by the Registrar as set out earlier. In addition, the allegation that the appeal could be fatally defective was not brought timeously to the attention of the appellant. There is also the fact that the Registrar failed to comply with sec 3(2)(b)(iv) of the Promotion of Administrative Justice Act, 3 of 2000. It requires adequate notice of any right of review or internal appeal, where applicable. None was given. The appellant did not suggest that he did not know of his rights in this regard but the statute has to be complied with. And as a matter of fairness, especially if

parties appear in person, they should be made aware of the existence of the Guidelines in any decision.

ORDER

1. The applications for condonation are struck from the roll.
2. The appeal is dismissed.

Signed on behalf of the panel at Pretoria on 18 May 2015 by LTC Harms