THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

Case number: A5/2015

In the matter between:

THE LOUIS GROUP (SA) LIMITED

t/a LOUIS GROUP FINANCIAL SERVICES Appellant

and

REGISTRAR OF FINANCIAL SERVICES PROVIDERS Respondent

Appeal panel: LTC Harms (deputy chair), Adv N Nxumalo and Adv W Ndinisa.

For the appellant: Adv J-H Roux SC and Adv PS van Zyl instructed by Thomson Wilks Inc (Mr Wille).

For the respondent: Mr SR Rossouw.

Hearing date: 3 March 2016.

Judgment date: 7 March 2016

Summary: Surrender of FSP licence under sec 11 of FAIS Act – lapsing – non-compliances with sec 38 – stokvel exception – nature of Registrar's discretion – power on appeal

JUDGMENT

This is an appeal by the appellant, The Louis Group (SA) Ltd t/a Louis Group Financial Services, in terms of sec 39 of the Financial Advisory and Intermediary Services Act 37 of 2002 , against a decision of the Registrar of Financial Service Providers dated 15 December 2014, withdrawing the appellant's authorisation to act as a financial service provider ("FSP").

Section 9(1) of the Act entitles the Registrar to withdraw a licence if the licensee no longer meets the "fit and proper requirements applicable to the licensee" – in this case those in respect of "operational ability" and "financial soundness" (sec 8(1)) – or has failed to comply with any provision of the Act.

The attack on the decision is based on alternative grounds. In the first instance, it is said that the relevant licence had lapsed before the Registrar's decision to withdraw because the appellant "voluntarily and finally" surrendered the licence to the Registrar in terms of sec 11(1)(d); in other words, there was no licence to withdraw. The argument in the alternative is that the Registrar erred in her findings relating to "operational ability" and "financial soundness" and non-compliance with the Act.

SECTION 11

Section 11 provides, to the extent relevant, as follows:

(1) A licence lapses — (*d*) . . . where the licensee voluntarily and finally surrenders the licence to the registrar.

(2) The registrar must be advised in writing by the licensee, any key individual of the licensee, or another person in control of the affairs of the licensee, as the case may be, of the lapsing of a licence and the reasons therefor and the registrar may make known any such lapsing of a licence by notice on the official web site and, if necessary, by means of any other appropriate public media announcement.[1]

The appellant conducted the business of both product provider and financial service provider (FSP).

During 28 to 30 January 2013, two staff members from the Registrar's office made an on-site visit to the appellant to conduct an audit to establish whether it as FSP was in compliance with the relevant legal requirements.

During this period, more particularly on 29 January, Mr Brian Louis, the (or "a") director of the appellant, wrote a letter to the Registrar (which was sent on 1 February) in which he stated that the appellant had decided to terminate "forthwith" its registration as an FSP with the Registrar. He added that all clients would be informed of the decision and would be advised to appoint a new broker to deal with their portfolio. In the meantime, he said, the appellant would remain responsible under its current FSP obligations for management and transfer of the existing client base "until we have effectively discharged our statutory duties and performed our contractual obligations". He concluded by saying that the compliance company of the appellant had already been instructed to proceed with the surrender of the licence.

[1] At the relevant time, February 2013, ss (2) provided for "notice in the Gazette" instead of the current "notice on the official website".

The appellant went into business rescue on 26 February.[2] This was followed by a letter of 18 April, from the appellant's attorney stating that it was no longer necessary for the Registrar to institute proceedings against the appellant in the light of letter of 29 January and because of the business rescue order.

The Registrar responded on the same date, declaring that she would not accede to the "lapse request" while the matter was still pending. It would appear that the Registrar also refused to accept the tendered licence.

There is nothing on record which explains the inaction on behalf of the Registrar until, it would appear, the auditors of the appellant advised the Independent Regulatory Board for Auditors on 17 June 2014 of a "reportable irregularity" allegedly committed by the appellant.

One may assume that this report gave rise to the Registrar's notice of intention to withdraw the appellant's authorisation as FSP. It is dated 9 October 2014, and was addressed to both the appellant and its business rescue practitioner.[3] The appellant's attorney, but not the business rescue practitioner, responded. This did not satisfy the Registrar and she, on 14 December 2014, withdrew the appellant's authorisation.

The appellant argues that the letter of 29 January amounted to a voluntary and final surrender of its licence and that since it complied with the jurisdictional requirements set out in

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[2] Sec 38A of the Act, dealing with business rescue applications by a licensee, was not yet in operation at the time of the order.

[3] Companies Act 71 of 2008 sec 133(1):
"During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except—(*f*) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner."

ss (2), the Registrar cannot refuse to accept the surrender because sec 9 does not give the Registrar any discretion to accept or reject.

It is abundantly clear that the attempted surrender of the licence was motivated by an attempt by the appellant to evade its existing obligations under the Act, to thwart any action by the Registrar under sec 9 or other provisions of the Act, and to save the appellant's business reputation. It does not want the licence but it does not want it withdrawn.

The statement in the letter that the appellant would remain responsible under its current FSP obligations for management and transfer of the existing client base until it had effectively discharged its statutory duties and performed its contractual obligations may sound noble but was from a legal perspective worthless. The Registrar would not be able to oversee the winding down of the business in the interests of the affected members of the public under the Act because her oversight is limited to those instances where financial services are provided, licenced or otherwise, and not where none were to be rendered (in this case, after 1 February).

The Registrar did not during the appeal assert that she had any discretion in terms of sec 11(2). The argument instead was that sec 11 is not a stand-alone provision but must be read as part of the scheme contained in the Act as a whole and read in context and purposively.

It will be recalled that sec 11(2) requires that in surrendering a licence, the licensee must state the reason for the surrender. As appellant's counsel accepted, the reason given by the appellant was a voluntary close of business. However, an FSP cannot simply close its business. To close, it has to comply with sec 38 of the Act, which reads (as far as is relevant):

No — (*d*) voluntary closure of business by any authorised financial services provider, or representative of such provider . . . to close its business, have legal force —

(i) unless a copy or notice thereof has been lodged with the registrar and the registrar has, by notice to the provider or representative concerned, as the case may be, declared that arrangements satisfactory to the registrar have been made to meet all liabilities under transactions entered into with clients prior to . . . closure . . .; or

(ii) if the registrar, by notice to the provider or representative concerned, as the case may be, declares that the application, resolution or closure, as the case may be, is contrary to this Act.

This, in simple terms, means that if an FSP wishes to close its business and surrender its licence, it first has to comply with para (i) of sec 38 and, only once it has the Registrar's declaration, may it surrender the certificate under sec 11. Since the appellant did not ask for (and consequently did not obtain) the required declaration, the attempted surrender was bad in law and the Registrar was correct in discounting it. (It is not necessary to consider para (ii).)

SECTION 19: ACCOUNTING AND AUDIT REQUIREMENTS

It is common cause that the appellant failed to comply with the peremptory provisions of sec 19 relating to financial statements for the financial years 2013 and 2014. The appellant blames its auditor for the failure but that is no excuse. The statutory obligation falls on the shoulders of the FSP.

The important fact is, however, that the Registrar indicated to the appellant and to the business rescue practitioner in the letter of intent that without financial statements there was no basis on which the Registrar could be satisfied that the licensee is financially solvent as required by sec 9 of the Fit and Proper Requirements, especially where the appellant is subject to business rescue, one could add.

In spite of this express indication neither the appellant nor the business rescue practitioner made any attempt to satisfy the Registrar that the appellant was, in spite of the lack of financial statements, financially solvent. In the notice of appeal, the point was made that the Registrar could not rely on the failure to submit audited financial statements for the inference that the appellant was not financially sound. This negates the whole purpose of financial statements. In any event, since the appellant and the business rescue practitioner chose to remain silent on the solvency of the business, the Registrar was fully entitled to conclude that it was not solvent.

SECTION 7(1)

The Registrar found that the appellant had, in contravention of sec 7(1), acted as investment manager for the Louis Group Business Academy Investment Fund ("the Fund") without having been authorised to render intermediary services of a discretionary nature.

The issue arose from the auditor's letter of 17 June 2014, to which reference has been made, when the auditor reported a reportable irregularity to its regulatory board. The letter stated as follows:

> During the course of our audit of the above company for the year ended 28 February 2013, it came to our attention that in terms of the Trust Deed of Louis Group Business Academy Investment Fund ("the fund"), Louis Group (SA) Proprietary Limited is the investment manager for the fund. Louis Group (SA) Proprietary Limited does not have the appropriate licence in

terms of the Financial Advisory and Intermediary Services Act of 2002 to provide investment management services.

The Registrar, in her letter of intention, raised the matter pertinently with reference to this letter and pointed out that the appellant was not authorised as a Category II FSP to render intermediary services of a discretionary nature. The business rescue practitioner did not respond but the appellant did by simply alleging that the Fund was a stokvel and that a stokvel does not require a licence under the Act. The appellant did not address the other factual allegations save by way of a general denial. That the denial was tactical appears for instance from the fact that the scope of the appellant's licence is otherwise common cause on the papers and that this denial, if intended to cover all the allegations, was false.

It is therefore not surprising that counsel limited the argument to the fact that the Fund itself (not the appellant) was a stokvel.

The Financial Services Board Notice relating to the *Exemption of Burial Societies and Stokvels* from the provisions of the Act was published on 2 April 2013 (*Government Gazette* No. 36316).

The Notice exempts burial societies and stokvels from the provisions of sec 7 of the Act "when rendering financial services to or on behalf of its members in respect of an assistance policy."

And it defines a stokvel as "a group of natural persons amongst whom a common bond exists joined together to form an invitation only group savings scheme or rotating credit scheme . . . provided the activities of such group and scheme were designated by the Registrar of Banks as activities that do not fall within the meaning of the 'business of a bank'."

It is a general principle that someone who relies on an exception or exemption has to prove that the requirements of the exception apply. Apart from the question of onus, it is clear that the exemption does not apply to the case or to the appellant even though the Fund itself was a stokvel.

First, the exemption notice post-dates the period during which the transgression took place by two months, and the exemption did not operate retrospectively. The notice applied as from 2 April 2013 while the transgression took place during the financial year ending 28 February 2013. This proves conclusively that the undisclosed legal opinion on which the appellant relied as an excuse was an *ex post facto* one.

That ought to be the end of the matter but there are further reasons. The fact that the stokvel is exempted does not mean that its trustee or administrator is exempted. The appellant is not and could not be a stokvel or a member of one because it is not a natural person. Also, there is no indication that the Registrar of Banks had made the required "designation". Finally, is not suggested that the advice was "in respect of an assistance policy" – it was in relation to "investment management services".

DISCRETION

Excepting one insignificance instance, which need not be detailed, we hold that the Registrar did not err in her factual findings. Counsel, however, argued that we should nevertheless uphold the appeal which, in the light of our findings on the surrender, would mean that the appellant would still be on the register as FSP, a rather senseless result in the circumstances.

The one ground that was advanced was that there had not been due compliance with the *audi alteram partem* rule. As we understand the argument, the Registrar should have done more to elicit information from the appellant and the business rescue practitioner. Why, we were not told. Both were provided with the full facts and given an opportunity to respond. One only did and insufficiently. There was no application for the submission of further evidence.

The second ground was that the Registrar should have exercised her discretion in favour of the appellant by leaving the licence intact. As mentioned, the result would have made no sense because the appellant does not wish to conduct the business of an FSP.

The ability of an appeal body to interfere with such exercise depends on the nature of the discretion. It would appear that the position of the Registrar who has to decide to act under sec 9 is similar to that of a court which has to deal with a legal practitioner found guilty of some or other professional misconduct.

The rule in the latter case is clear. The discretion involved is a strict discretion, which means that an appeal tribunal may only interfere if the discretion was not exercised judicially, i.e., if the functionary failed to bring an unbiased judgment to bear on the issue; did not act for substantial reasons; exercised the discretion capriciously, or exercised the discretion upon a wrong principle or as a result of a material misdirection. See e.g., *Malan and Another v Law Society of the Northern Provinces* 2009 (1) SA 216 (SCA), [2009] 1 All SA 133 (SCA) at [13].

Even if we were to assume that the discretion is a wide one, we fail to see any reason to interfere with the exercise of the discretion by the Registrar especially taking into account the seriousness of the case and the disingenuous excuse in relation to the stokvel Fund. The Registrar has a duty to protect the public and in this instance that can only be done by a withdrawal of the licence.

ORDER

The appeal is dismissed with costs.

Signed on behalf of the panel

LTC HARMS