THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

CASE A26/2015

IN THE MATTER BETWEEN

QMALA CC	(1st Appellant)
JEM SWANEPOEL	(2nd Appellant)
ELIZABETH COETZEE	(3rd Appellant)

And

REGISTRAR OF FINANCIAL SERVICE PROVIDERS	(1st Respondent)
HANNES SWART	(2nd Respondent)

For the appellants: Ms JEM Swanepoel assisted by Ms E Coetzee (in person and on behalf of the CC)

For the Registrar: Mr SR Rossouw

The 2nd respondent: In person

Appeal Panel: LTC Harms (Chair), Mr D Brooking and Mr J Damons

Hearing: 12 February 2016.

JUDGMENT

This appeal relates to the decision by the Registrar of Financial Services Providers ("the Registrar") under sec 9(1) of the Financial Advisory and Intermediary Services Act 37 of 2002, to withdraw the authorisation of Qmala CC ("Qmala") and to debar it from reapplying for a licence and its two members, Ms JEM Swanepoel (known as Marie, "the second appellant") and Ms Elizabeth Coetzee ("the third appellant") from rendering financial services, all for a period of four years.

The second and third appellants are mother and daughter and they each hold 50% of the interest in and are the key individuals and representatives of Qmala.

The Registrar's decisions were based on three interrelated grounds, namely that the appellants: (a) no longer complied with the fit and proper requirements set out in section 8 of the Financial Advisory and Intermediary Services Act, 2002, more specifically the personal character qualities of requirements relating to honesty and integrity sec 9(1)(a); (b) did not, when applying for a licence, make full disclosure of all relevant information to the Registrar, or had furnished false or misleading information (sec 9(1)(b)); and (c) had contravened or failed to comply with the provisions of the Act in a material manner (sec 9(1)(c)).

The facts and information underpinning these grounds relate in general to the conduct of the appellants with regard to the affairs of three trusts, namely the Wagener Family Trust, the Niel Swart Family Trust and the Debyni Trust.

The decision was conveyed to the appellants on 12 May 2015, and they lodged an appeal against the Registrar's decision on 1 June 2015.

During November 2015, Mr Hannes Swart was joined as the second respondent in the appeal in spite of the objection of the appellants. They did however not dispute that he, as beneficiary in especially the Niel Swart Family Trust, had a material interest in the appeal.

Something need be said about the record on appeal. The Registrar filed a voluminous record and at the request of the Chair, the appellants' then attorneys of record and the Registrar prepared a core bundle. We nevertheless had access to the main bundle and regard to the few documents therein to which the appellants wished to refer. However, they sought to refer to other documents, which they alleged were relevant, and which they said the Registrar had in her possession or should have obtained before making her decision. The problem is that the appellants did not make application for rectification of the record and, as said, their attorney agreed to the core bundle. Also, when they were informed of the Registrar's intention to debar them, they chose not to respond to the allegations relating to the Niel Swart Family Trust and the Debyni Trust and did not submit their defence or version. The other documents referred to (irregularly) during argument did not appear to have any bearing on the real issues in the case. The argument was, unfortunately, not directed to matters relevant to the material issues in the case and concentrated on peripheral material.

In what follows, we make liberal use of the heads of argument of the Registrar where, in our view, the facts were stated fairly and correctly.

During 2006, the Wagener Family Trust laid a complaint with the Financial Planning Institute ("FPI") against Coetzee in respect of a financial transaction which had occurred on 23

August 2005. At the time she was a representative of another financial services provider and, importantly, a member of the FPI and subject to its disciplinary rules and code of ethics.

Disciplinary proceedings were instituted by the FPI against her, which culminated in a finding on 15 August 2007 that she had contravened certain sections of the FPI's code of conduct. She was inter alia found guilty of having failed to execute the mandate given to her by Mrs Wagener "properly, diligently and professionally", and that she overreached her client by charging an excessive, unfair and inequitable fee. She was suspended from the FPI for a period of ten years and was fined an amount of R10 000. The disciplinary board justified the period with reference to the poor quality of the financial advice which had been given to the client. It added that if it had the necessary jurisdiction it would have imposed a bigger fine; and if the charge sheet had been properly drafted it would have imposed a life-long ban on membership instead of suspending her for the maximum period permitted.

Coetzee noted an appeal against the findings of the disciplinary board but on 17 July 2008, while the appeal was pending (it was only finalised during 2012), Qmala, represented by its two said members, applied for authorisation as a financial service provider. The application form indicated that Coetzee would be the (or a) key individual. It required, inter alia, answers in respect of two pertinent questions.

The first was whether she, in a period of five years preceding the date of application, had been found guilty by any professional or financial services industry body of an act of dishonesty, negligence, incompetence or mismanagement.

The second question was whether she had any additional information, which should be brought to the Registrar's attention, which may have an impact on the evaluation by the Registrar of her good character and integrity.

The answers given in respect of both questions were in the negative and consequently not only incorrect but also dishonest in the light of the then existing findings of the disciplinary body.

The appellants sought to escape the consequence of their failure to disclose these facts on a number of grounds. In the first instance, the argument was that Coetzee had not been found guilty of negligence. As mentioned, she had been found guilty of giving poor advice which, in terms of the question posed, was clearly a matter of incompetence. In addition, someone who fails to execute a mandate properly, diligently and professionally is by definition negligent and as appears from the notice of appeal which she filed through her attorneys, that is how the findings were understood.

The second argument was that the disciplinary board was wrong in its findings. In this regard we were subjected to a lengthy argument on the failings of the disciplinary board – which misses the point. These findings were extant at the time and they would or could have had an impact on the evaluation by the Registrar of the character and integrity of Coetzee. She was obviously entitled to inform the Registrar that she disputed the findings but that did not justify the negative answers.

The third argument appeared to be one related to the doctrine of *functus officio* or maybe some or other kind of estoppel. To understand the argument, it is necessary to mention

some further background facts. An internal appeal from a decision by the disciplinary board requires its leave. As mentioned, she noted an appeal but the disciplinary board did not grant leave in respect of all the grounds. This led to an application for review to the high court of the decision refusing leave on all grounds. The Registrar had in the meantime given notice of an intention to withdraw Qmala's authorisation because of the non-disclosure. While the review application was still pending a letter was written on behalf of the Registrar on 4 September 2009 in these terms:

> "Kindly be advised that the Registrar has decided not to continue with the intention to withdraw the authorisation of Qmala CC as financial service provider at this stage. However, the Registrar will reconsider the matter upon the finalisation of the case before the whole High Court."

The appellants argue that this statement reflected a binding decision that if Coetzee were to be successful in her application to expand her ground of appeal (which she was) the Registrar would not take any steps against Qmala and, presumably by extension, against its members. That is not what the letter said or suggested. It merely postponed a "reconsideration" by the Registrar to a later date. Apart from what the letter says in clear terms, we know of no principle of law that prevents the Registrar to reconsider a decision not to withdraw an authorisation. It is not as if the Registrar is a court which had found them not guilty.

It follows from this that the appellants did not, when applying for Qmala's licence, make full disclosure of all relevant information to the Registrar; instead, it furnished false and

misleading information. (See also section 2(4) of the Determination of Fit and Proper Requirements, which require of applicants for licences and their key individuals to be candid and accurate and to disclose all facts or information at their disposal which may be relevant for purposes of the Registrar's decision.)

The materiality of the nondisclosure is evidenced by the subsequent events. Coetzee's appeal to the appeal tribunal of the FPI was partially successful but it nevertheless upheld the disciplinary committee's findings on the two grounds mentioned and altered the sanction imposed on her to suspension from the FPI for a period of two years.

A review application of the appeal tribunal's findings in the Western Cape High Court followed. The court found that the process followed by the appeal tribunal was not irregular and that its decision was not irrational. The application was dismissed.

Coetzee then lodged an appeal to the Supreme Court of Appeal, which the SCA dismissed on 28 November 2014. See *Coetzee v Financial Planning Institute of South Africa (Association Incorporated Under Section 21) and Others* [2014] ZASCA 205; 2015 (3) SA 28 (SCA). The facts relating to the complaint against Coetzee and the findings by the FPI's appeal tribunal appear from the SCA judgment and need not be repeated.

One of the issues concerned Coetzee's mandate. In this regard the SCA said the following (para 30):

> "It was common cause that a substantial portion of the reinvestment of the funds via the Stanlib policies was in the share market. It is of significance that in the information furnished by Stanlib concerning the Multi Management High Equity Fund under the

heading 'Investment Strategy' the following appears; 'focus of the portfolio is on capital appreciation rather than capital preservation and this is achieved through high exposure equities'. In the application for review FPI in its answering affidavit referred to this passage and pointed out that in the summary which Ms Coetzee furnished to Ms Wagener, setting out the details of the Stanlib policies, translated into Afrikaans, the whole of the section under 'Investment Strategy' was set out, but this sentence was pertinently omitted. In her replying affidavit Ms Coetzee did not respond to this allegation. The inference is irresistible that this information was expressly omitted so as not to alert Ms Wagener to the fact that a substantial portion of the investment was being invested in high exposure equities. The only reason to conceal this information was because Ms Coetzee knew that the policy in question did not fulfil the terms of the mandate".

In one sentence, the SCA held that Coetzee committed fraud on Ms Wagener. Another issue related to the over-reaching referred to earlier. Here the SCA said the following (para 32):

"It is also self-evident that the amount of R900 000 received by Ms Coetzee was excessive and not fair or equitable, because her advice did not reduce the risk of a loss by the Trust in its investments, in the event of a sharp drop in the share market. Moreover, it burdened the trust with substantial capital gains tax and commission".

Confronted with these statements, the appellants submitted that we must reconsider the judgment of the appeal tribunal because it had made findings on the merits, which were incorrect. They also submitted that what the high court and the SCA had said was of no

consequence because they dealt with a common-law review and could not in that context make any factual findings. The argument was that in such a review a court is limited in finding on procedural fairness and not the factual correctness of the findings by the tribunal.

The Registrar acts "on the basis of available facts and information" and if these appear to be credible, she is entitled to base her decision on them (sec 9(1)). We, as Appeal Board, must assess whether we agree or disagree with her assessment. Nothing new was placed before the Registrar, or us, which had not been argued before all the other tribunals and any reasonable functionary is under those circumstances entitled to act on the assumption that the final say of at least the courts would be correct. Coetzee is bound by them. The problem with the submission stems from the fact that the appellants' point of departure as to the charge and findings against Coetzee was incorrect. Any argument based on a wrong premise has to fail.

As to the function of courts of review, it is generally correct that they are not concerned with the correctness of the facts found by the domestic tribunal. Nevertheless, in the course of such investigation courts of review invariably make factual findings, as the SCA did in this case. If, for instance, an applicant was found guilty of some or other misdemeanour by a common-law tribunal, a court of law would invariably consider, in the course of determining whether the rules of natural justice have been complied with, what the facts were. There is no jurisdictional limitation on a court to do so.

We accordingly agree with the Registrar's submission that these facts support and justify the Registrar's conclusion that Coetzee had contravened section 2 of the General Code of Conduct applicable to authorised financial services providers and representatives, i.e. she did

not render the financial service "honestly, fairly, with due skill, care and diligence, and in the interest of clients and the integrity of the financial services industry."

However, that is not the end of the non-disclosure issue (to which Swanepoel as the other member of Qmala was a party) because it in a sense spilled over onto the affairs of the Niel Swart Family Trust. The trust had, on the demise of Mr Swart, three trustees namely his wife, Mrs Swart, Derek Swart (a son) and the second appellant, Swanepoel. Mrs Swart died and had to be replaced. The other two children (the second respondent, Hannes, and Mrs Rademaker) proposed to Swanepoel that they be appointed – appointments had to be made by the remaining trustees. She responded by stating to them that Mrs Rademaker could not be appointed because she was a non-resident, living in the UK. They accepted the advice. But Swanepoel knew that her advice was false. This is apparent from her attempts to justify her advice with reference to convenience and the alleged dislike of the late Mr Swart for his son-in-law.

It went further. She proposed Coetzee as the third trustee without disclosing to her co-trustee or the main beneficiaries of the disciplinary findings against Coetzee which, at that time (2010), had not moved through the internal appeal and court review process. In the event Coetzee was appointed.

We now proceed to consider the alleged irregularities in respect of the affairs of the Niel Swart Family Trust and the Debyni Trust.

The Registrar, in her notice of intention to debar, set out in great detail the facts on which she relied for the conclusion that Swanepoel and Coetzee had breached their duties of

good faith as trustees in respect of the two trusts. The appellants, as mentioned at the outset, chose not to respond to the allegations because, it was said, the Registrar had no jurisdiction over trustees, trusts and estates. This submission was repeated in the notice of appeal and in argument.

The submission is devoid of any merit. The Registrar did not and did not purport to exercise the powers of the Master over them as trustees or executors. She was concerned with the question whether the appellants possessed the personal character qualities relating to honesty and integrity. For that she was fully entitled to have regard to the acts and omissions of the appellants in the course of their fiduciary duties as trustees. A financial service provider could not, by way of example, say that since the Registrar is not an expert in criminal law and that she has no jurisdiction over crimes, she may not in assessing the character of the FSP have regard to theft of a car or a bank robbery committed by the FSP.

The appellants also said that they were still in the process of appealing decisions made against them in relation to the trusts. As will appear, the appeal processes do not affect the objective facts.

The first issue of concern to the Registrar related to the advice given by Swanepoel to Mrs Swart in drawing her will. The background to this is that Mr and Mrs Swart were married in community of property. They drew a joint will in which Coetzee and Swanepoel were appointed executors. Mr Swart had negotiated a reduced executors' fee with them, which was less than 50% of the standard fee, and the agreement was reflected in the joint will. He died during October 2009.

Swanepoel advised Mrs Swart to repudiate the will and to draw a new will in which the two were also nominated as her executors however without any reference to the reduced fee. Swanepoel did not allege that she had explained to Mrs Swart what the financial implications of the repudiation would have been. In spite of Swanepoel's protestations, there were no good reasons for the repudiation except that it entitled the executors to fees at a higher rate and to fees on the distribution of some of the same assets on the death of Mrs Swart, barely a year after her husband's death.

The question of undue influence on Mrs Swart to repudiate was hotly debated but the Registrar chose, wisely in our view, not to base her decision on this issue but on the inappropriate advice which, on the probabilities, was not in the interests of Mrs Swart but for the benefit of the appellants only.

The other issues relating to these two trusts were ventilated when the capital beneficiaries launched an application for the removal of Swanepoel and Coetzee as trustees of the two trusts during May 2014.

They, then, surreptitiously removed Derek, the third trustee, and somehow were able to obtain from the Master's office a certificate of appointment of one Fourie as trustee in a matter of days. The underhand action of removing Derek was set aside by the high court. There is no indication on the papers that this order is subject to an appeal. Importantly, the court made a costs order against Swanepoel, Coetzee and Fourie personally and not against the trust.

In her opposition to the setting aside of Fourie's appointment, Swanepoel stated under oath that they had "no intention to pay out any amounts of money to any person or entity other than the beneficiaries of the Trust and the South African Revenue Services."

Coetzee and Swanepoel have since the Registrar's decision been removed as trustees of the two trusts by the high court. The facts found by the high court were facts which had been put by the registrar to the appellants and which, as said, were not responded to or are not in dispute although the inferences to be drawn and the consequences of the actions were. The conclusions of the high court, as Mr Rossouw submitted on behalf of the Registrar, "echo" the findings of the Registrar and were fully justified on the information available to her. The judgment was entered into the record pursuant to sec 26B(12)(a)(ii) after the appellants had made reference thereto in their heads of argument. Those findings include the following.

They adopted resolutions for the trusts during the period when Derek had been dismissed as a trustee. The majority of these resolutions related to remuneration payments for themselves and for the payment of legal fees to attorneys instructed by them to defend the applications by the Swart children. The court found that through their actions they had exposed the trusts to the risk of actual loss in a way not contemplated in the trust deeds.

They caused the transfer during Derek's absence of some R680 000 from the Niel Swart Trust to the Debyni Trust to pay themselves trustee fees of R754 097,87 where, over a period of six years, the Trust's gross income had been less than half that amount and where their trustee functions were nearly non-existent. All this, they said, they were entitled to do because the trusts could lend and borrow money. Apart from abusing their position as trustees of the

creditor trust, the fee was without argument excessive. The appellants did not submit otherwise but relied, startlingly, on their discretion to determine their remuneration.

In the case of the Niel Swart Trust, the trust's assets consisted of a share portfolio which was managed by PSG. Here, too, they did not attempt to justify the quantum which, the Registrar held, was excessive. Their contention was that they were legally entitled to the monies. The court held that the explanation was unconvincing: They allowed themselves to receive payments "under the guise of professional fees" where such monies were paid to their attorneys and their claim for professional fees "shows a want of reasonable fidelity and a lack of proper capacity to execute their duties in a proper manner." We may add that we do not understand how trust money could have been utilised to pay for costs incurred by trustees to defend themselves against their own wrongdoings and, particularly, where costs orders were made against them personally.

Related to the complaints of non-disclosure mentioned earlier, the court was not impressed with the fact that the appellants had not disclosed to the court the FPI's finding or the Registrar's decision to debar them. They, the court said, should "have at least informed this court about the enquiry and its findings" and their failure showed a "want of honesty".

We do not believe it necessary to deal with all the issues in the case because what has been said thus far is more than enough to justify the decision of the Registrar and the appeal on the merits has to be dismissed.

That leaves two matters, namely the period and the question of costs.

Mr Rossouw submitted that the four-year suspension was wholly inappropriate (to which we agree) and that we should extend the period. To comply with the request, we first have to uphold the appeal and then increase the period. But since there is no merit in the appeal we cannot uphold it and hence cannot make an order in the stead of the existing one. The Registrar cannot under the Act appeal her own decision. Compare *Registrar of Pension Funds v Financial Services Appeal Board* (222/2015) [2015] ZASCA 203.

As to costs, the matter was not pressed and instead left to us to decide. If the Registrar is not serious about costs it does not behove us to press the matter.

The appeal is dismissed.

Signed on behalf of the Appeal Board panel at Pretoria on 16 February 2016.

LTC Harms