BEFORE THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

In the matter between:

DYNAMIC WEALTH MANAGEMENT (PTY) LTD First Appellant
DYNAMIC WEALTH STOCKBROKERS (PTY) LTD Second Appellant

and

THE REGISTRAR OF FINANCIAL SERVICES PROVIDERS Respondent

DECISION

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[1] The appellant companies were licensed financial services providers in terms of the Financial Advisory and Intermediary Services Act, 37 of 2002 (the Act). On 15 September 2010 the respondent notified them that he had decided to withdraw their licences. They have appealed to this board against that decision.

[2] Section 9 (1) of the Act empowers the respondent to withdraw a licence if satisfied "on the basis of available facts and information" that the licensee no longer meets the requirements in s 8 of a fit and proper financial services provider . Before doing so , however, s 9 (2) (a) (ii) requires that he inform the licensee of the intention to withdraw "and the grounds therefor" and give the licensee a reasonable opportunity to make a submission in response. Section 9 (2) (c) obliges the respondent to consider the response whereafter he may decide to withdraw the licence. He must then notify the licensee of that decision.

[3] It is common cause that during 2010 there was a s 9 (2) (a) (ii) notification (the April notice), a response by the appellants (the May response) as well as a notification of the 15 September withdrawal decision. Indeed the record

reveals that all three of those components of the required process were articulated at substantial length.

[4] The appeal is not aimed at the correctness of the decision appealed against. In other words it does not concern the question whether the decision was justified by the evidence. It is confined to a procedural issue albeit that some consideration of the evidence is necessary. What the appellants contend is that in coming to his eventual decision the respondent relied on grounds in respect of which he had not given them the opportunity to respond. They submit that the withdrawal decision was therefore invalid.

[5] What the respondent said in his notification of 15 September 2010 that he relied on, among other things, and which the appellants say constituted new grounds, comprised facts and information (to employ the language of s 9 (1)) which only became available subsequent to the furnishing of the May response. It is common cause that the appellants were not afforded the chance to furnish the respondent with a response regarding such facts and information before he made the withdrawal decision.

[6] The question for our decision is therefore whether the "new" facts and information constituted "grounds" within the meaning of s 9 (2) (a) (ii).

[7] The word "grounds" is not defined in the Act. It is a word in common parlance and has no special or technical meaning. Ordinarily it conveys, in relation to action taken, the reasons for such action : see The Shorter Oxford English Dictionary. It does not mean the same as the evidence or the information supporting such reasons. Rather , whereas the evidence and information constitute the actor's entire case, the grounds for such case, being the distillate of all the evidential material, constitute the bones or the framework of the case. Parliament appears to have thought similarly. Withdrawal is only competent if the requisite "facts and information" are present but

the respondent is not obliged by s 9 (2) (a) (ii) to convey to the licensee the facts and information justifying withdrawal, only the grounds therefor.

[8] The question consequently becomes whether in the new facts and information there was any " ground" in the sense discussed and , if so, whether it was included in the April notice.

[9] The new facts and information have to do with four matters : (a) an onsite inspection by the respondent's representatives in July 2010 ; (b) the 2010 financial statements of a company called Special Investments Limited (SIL); (c) proposals and statements at SIL's annual general meeting in June 2010; and (d), a letter from JSE Limited in June 2010 confirming the allegations made adversely to the appellants by an employee of JSE, Ms A. Clayton,in certain related High Court litigation which preceded the April notice. (A fifth instance mentioned in the appellants' heads was not pursued in argument.)

[10] As to (a),the respondent's case for the licence withdrawal as set out in the April notice included the allegation that the appellants had contravened the collective investment schemes legislation by pooling clients' investments in structures called "Associations" and that, the respondent having queried the legality of these structures, the investments in question were transferred to other institutions. The appellants said in their May response that the transfer had been on clients' instructions . The respondent regarded the transfers as having been effected by the appellants unilaterally and that the whole matter of these investments and transfers was fraught with irregularity. His case from the outset included the complaint that the appellants failed or refused to tell him about the transfers and the reasons for them. The new facts and information in this regard were to the effect that the onsite inspection was permitted by the appellants only in respect of a limited number of files and nevertheless revealed various irregularities.

[11 The new matter did not contain or constitute a new ground for the licence withdrawal. It merely provided further evidence pertaining to the ground already advanced in the April notice that the creation and abandonment of the Association structures involved unlawful and irregular conduct by or on behalf of the appellants.

[12] Coming to (b), the matter of SIL, the appellants were alleged by the respondent to have used investors' funds to lend to borrowing clients as bridging finance. This not only contravened the banks legislation, but the bridging finance portfolios thus established were converted into the company, SIL, whereby the investing clients whose money was used in this way had their claims to repayment of their investments exchanged for unlisted shares. They received no meaningful rights, no income and , because SIL was illiquid, they had questionable prospects of their capital being repaid. This was the respondent's case in the April notice. The new facts and information did not establish a new ground. They merely served to provide evidence that by the time to which the financial statements related its financial position, and concomitantly the position of the unfortunate investors concerned, had worsened.

[13] As regards (c),the second aspect involving SIL has to do with proposals made at its second annual general meeting in June 2010 , coupled with statements on behalf of the first appellant seeking its exoneration as regards the plight of the investors referred to. The proposals were aimed at achieving some measure of recovery of the investors' money and the exculpatory statements sought to blame , inter alia, the world economic situation and the dishonesty of certain (unnamed) attorneys. In addition reliance was placed on the investors having given the first appellant discretionary mandates which ,so it was said, effectively authorised ,among other things, the establishment of SIL.

[14] Here again, the new facts and information constituted no new ground. They comprised evidence relating to the same ground as in the case of (b).

[15] Finally, as to (d), the appellants' activities of which the respondent complained involved their having operated what they called the "JSE Platform" . In the April notice the respondent alleged that in doing so the appellants had transgressed various regulatory provisions, including rules of the JSE. In the May response it was asserted that the alleged problem entailed a misunderstanding which had been resolved with the JSE. The new information relied on by the respondent was that the JSE rejected the appellants' version and adhered to the account which had been given in the earlier stages by Ms Clayton. Plainly the new information concerned the JSE Platform ground and raised no new one.

[16] That disposes of the appellants' case as put forward in their heads of argument.

[17] Nonetheless it remains to mention that their counsel sought to advance two further points, only one of which was raised in their grounds of appeal.

[18] The first, which was not so raised , was that the respondent was in error in rejecting the appellants' attempt to rely on their having been given a discretionary mandate by investors. Counsel urged that the respondent ought to have taken legal advice on the effect of the mandates and his conclusion adverse to them in this respect was misdirected. However , because the appeal has been confined to an attack of a procedural nature and has not included an attack on the correctness or otherwise of the withdrawal decision, it is not open to the appellants to take the point in question.

[19] The second supplementary point was that the respondent erred in law in attaching terms to the licence withdrawal . Two of such terms came in for criticism in particular. One required his being kept informed of the progress of the unwinding process, as he called it , which ,in accordance with the other terms imposed, he required the appellants to take. The other was that the investors who now found themselves as shareholders in SIL were to be regarded as investors in the first

appellant.

[20] All that is said in the grounds of appeal in this connection is that because the respondent did not suspend the licences but withdrew them he was "not entitled" to attach terms. Obviously this is a point as to the legal competence to attach terms, not a point as to the competence or efficacy of any particular term. The latter line of argument is not open to the appellants having regard to what their grounds state. The respondent was not alerted to it and was not obliged to be prepared to deal with it. And as far as the attachment of terms to a withdrawal is concerned, s 9 clearly provides for such power in ss (2) (d) and ss (4) (b). The attack on the imposition of terms must therefore fail.

[21] For the aforegoing reasons the appeal cannot succeed.

[22] As to costs , the appellants asked for the costs of an earlier application by the respondent for the introduction of further evidence in terms of s 26B (12) of the Financial Services Board Act, 97 of 1990, which application was not proceeded with. They are entitled to such costs. It is not in dispute that the costs of the appeal must follow the result .

[23] The appeal is dismissed with costs. The costs of the discontinued application to supplement the appeal record must be paid by the respondent.

Dated this 18th day of June 2011.

C.T.HOWIE

CHAIR

J.D.PEMA

MEMBER

D.L.BROOKING

MEMBER