FINANCIAL SERVICES TRIBUNAL

CASE NO: FSP14/2018

In the application of:

PHILLIP PIETERS Applicant

and

SAPCOR HARRISMITH (PTY) LTD Respondent

Tribunal: H Kooverjie (chair), J Damons, A Jaffer (Members)

Decision: 17 January 2019

Summary: Application in terms of Section 234(2) of the Financial Sector Regulation Act ("***FSRA***") regarding costs and what constitutes "***exceptional circumstances***".

DECISION

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[1] This application for reconsideration was to be heard on 28 November 2018. However this matter did not proceed as the applicant withdrew his application on 26 November 2018, two days before the hearing. The respondent requested that the applicant be liable for the costs of the late withdrawal of the application and persisted that the Tribunal convenes the said hearing.

[2] Since the matter was not ripe for hearing, both parties were then requested to make written submissions regarding the costs issue.

[3] This Tribunal is required to determine the issue of costs in terms of Section 234(2) of the Financial Sector Regulation Act ("***FSRA***"). Section 234(2) stipulates:

> "***The Tribunal may, in exceptional circumstances, make an order that a party to proceedings on an application for reconsideration of a decision pay some or all of the cost reasonably and properly incurred by the other party in connection with the proceedings.***"

(own emphasis)

[4] The salient facts relevant to the determination of costs are set out henceforth. On 26 November 2018, two days before the matter was to be heard, the applicant withdrew his application.

[5] On 27 November 2018, the respondent informed the Secretariat that it will apply for a cost order in terms of Section 234 and 236 of the FSRA against the applicant and Risco Brokers jointly and severally, the one paying the other to be absolved as the conduct of the applicant and Risco Brokers was "delictual, devious, fraudulent, malicious, frivolous and vexatious". It must be emphasised that at that stage, Risco Brokers was never a party to these proceedings.

[6] We note from the respondent's application that it did not only persist with an application for a cost order but also that the debarment be confirmed. The respondent was confident with the overwhelming evidence it placed before the Tribunal that the applicant and Risco collaborated with each other to defraud the respondent.

[7] At this juncture it is necessary to point out that an order in terms of Section 236 is premature. The reasons are set out later hereunder. Section 236 of the FSCA deals with the enforcement of Tribunal orders and stipulates the following:

> ***"236 (1) a party to proceedings on an application for reconsideration of a decision may file with the Registrar of a competent Court a certified copy of an order made in terms of Section 234 if:***
>
> ***(a) No proceedings in relation to the making of the order have been commenced in a Court by the end of the period commencing such proceedings; or***
>
> ***(b) If such proceedings have been commenced, the proceedings have been finally disposed of;***
>
> ***(c) (2) The order on being filed has effect of a civil judgment and may be enforcement as if you are fully given in that Court."***

[8] As alluded to above, the respondent filed a formal application where it sought *inter alia* the following relief namely that:

[8.1] a cost award on an attorney and client basis be made or in the alternative, a cost order against the applicant due to the contravention of the Financial Sector Legislation and Codes of Conduct.

[8.2] the Tribunal confirm that the cost award be considered to be an exceptional cost award.

[8.3] the cost award should include the late withdrawal of the matter by the applicant and his failure to tender the wasted and litigation costs of the respondent and the Tribunal.

[8.4] the respondent further requested that the applicant's debarment be made an order of the Court and that the Tribunal *mero motu* direct an investigation into the affairs of the applicant and Risco Brokers.

[9] The respondent submitted that the debarment was based on the fraudulent conduct of the applicant. Some of the reasons were that the applicant failed to return the respondent's files which were removed from its office, and the applicant still renders financial services despite being barred and remains in possession of a hard drive with the respondent's clients' information.

[10] Particularly on the costs issue, it was contended that the applicant tenders the wasted costs. Pleading poverty is certainly not a justified ground. Awarding costs on an attorney and client scale was justified as *inter alia* the applicant has opposed his debarment with "***unclean hands***". There is sufficient evidence of dishonesty, fraud and recklessness.

[11] The applicant in response *inter alia* made the following submissions namely that:

[11.1] He was free to withdraw this application which he did two days before the hearing and he does not have to discover his reasons for doing so. Moreover

such withdrawal is in accordance with the "Financial Services Tribunal Rule 72".

[11.2] Furthermore, there are no exceptional circumstances which exist where the applicant should be burdened with a cost order.

[11.3] The applicant submits that he withdrew his application upon receipt of the respondent's supplementary papers but does not admit that the contents thereof caused him to withdraw his application.

[11.4] The applicant further placed the conduct of Ms Aggenbach as well as her affidavit in dispute.

[12] Having considered both submissions I am not convinced that the applicant was transparent with this Tribunal. The applicant proffers no explanation as to why he withdrew the matter, except to state the following in paragraph 12 of the heads of argument namely:

> "***In fact the applicant had prospects of success but simply elected to withdraw his matter.***"

[13] The applicant persists that no exceptional circumstances exist in terms of Section 234 of the FSRA. The following was submitted in paragraph 13 of his heads of argument:

> "*It is submitted that circumstances out of the ordinary are most definitely not being presented to this Tribunal, nor will an order for cost against the applicant serve the purpose of keeping fairness between the parties as the applicant is currently unemployed and in fact will be for a great while due his withdrawal, whilst the respondent still does business as usual.*"

[14] Furthermore his argument in paragraph 14 of the heads of argument, has relevance namely:

> "*Even if this Tribunal finds for some reason that the applicant withdrew his application due to the supplementary affidavit of the respondent, it is submitted that the applicant elected to withdraw same right after filing of the affidavit and instead elected not to place a burden on this Tribunal having to listen to arguments where in fact the applicant did not have the intention to see his application through.*"

[15] Hence a costs order against the applicant would not constitute fairness between the parties.

[16] In considering Section 234 of the FSRA, it is necessary to consider what the Legislature deemed to be "***exceptional circumstances***". I find the below-mentioned authorities instructive.

The Supreme Court Appeal in **Avnit v First Rand Bank Ltd [2014] ZASCA 132**, considered this concept. In his judgment, Mpati P referred to **Norwich Union Life Insurance Society v Dobbs 1912 AD 395**, where Innes ACJ said at 399:

"The question at once arises, what are "exceptional circumstances"? Now it is undesirable to attempt to lay down any general rule. Each case must be considered upon its own facts. But the language of the clause shows that the exceptional circumstances must arise out of, or be incidental to, the particular action; there was no intention to exempt whole cases of cases from the operation of the general rule. Moreover, when a statute directs that a fixed rule shall only be departed from under exceptional circumstances, the Court, one would think, will best give effect to the intention of the Legislature by taking a strict rather than a liberal view of applications for exemption, and by carefully examining any special circumstances relied upon."

(my emphasis)

[17] Thring J in **MV AIS Mamas Seatrons Maritime v Owners, MV AIS Mamas 2002 (6) SA 150 (C) at 157 E – F**, stated:

1. *"What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare of different: "besonder", "seldsaam", "uitsonderlik", or "in hoëmate ongewoon".*

2. *To be exceptional the circumstances concerned must arise out of, or be incidental to the particular case.*

3. *Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.*

4. *Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different: the secondary meaning is markedly unusual or especially different.*

5. *Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given*

to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional."

[18] Having considered both parties' written submissions, I am of the view that this is an instance where "***exceptional circumstances***" exist. These are circumstances which are out of the ordinary. Generally a Tribunal would not penalise a party with a costs order. It can only do so if exceptional circumstances exist. It is common cause the applicant withdrew two days before the Tribunal hearing. It is obvious that by this stage both parties would have engaged with their legal representatives and prepared for the hearing. The only reasonable and plausible conclusion one can arrive at, is that the withdrawal was due to the supplementary affidavit filed by the respondent.

[19] The applicant proffers no other plausible explanation. If he maintains that he has prospects of success in this matter, then the practical thing was to request for a postponement in order to address the allegations in the supplementary affidavit. Instead the applicant withdrew his application.

In **Germishuys v Douglas Besproeiingsraad 1973 (3) SA 299 NC, Van Rhyn J at 300D** stated:

"Where a litigant withdraws an action...very sound reasons...must exist why a defendant or respondent should not be entitled to his costs. The plaintiff or applicant who withdraws his action is in the same position as an unsuccessful litigant, because, after all his claim or application is further at the defendant, or

respondent, is entitled to all costs associated with the withdrawing plaintiff's or applicant's institution of proceedings."

[20] The respondent was certainly prejudiced in not being able to finalise the proceedings.

[21] However a cost award on an attorney and client scale is not justified. It is trite law that punitive orders are given under exceptional circumstances. Such a costs order is warranted when *inter alia* a party is found guilty of dishonesty or grave misconduct and abusing processes. In order to determine such conduct, the merits would have to be ventilated, which this Tribunal has not adjudicated upon yet.

[22] Having regard to Section 234(2) in exercising my discretion, I find that this is an exceptional instance where the applicant should tender the wasted costs reasonably and properly incurred by the respondent. I reiterate that the applicant has placed a weak explanation as to why he withdrew his application at such a late stage.

[23] Insofar as the debarment of the applicant is concerned this Tribunal is not in a position to confirm the debarment of the applicant. The respondent is required to follow due process and request the Registrar to confirm same. The merits have not been considered by the Tribunal in the proper forum. Consequently it is not in a position to confirm the debarment. Section 153 of the FSRA stipulates the following:

"The responsible authority is entitled to make the debarment order, such authority is the Financial Sector Conduct Authority."

[24] Wherefore the following order is made:

(1) the applicant is ordered to pay the costs of the application reasonably and properly incurred by the respondent on a party and party basis in terms of Section 234 (2) of the FSCA.

(2) such costs are to be taxed by the Taxing Master of the High Court.

Signed at **PRETORIA** on this **17th** day of **JANUARY 2019** on behalf of the Tribunal.

CHAIRPERSON
H KOOVERJIE SC