Before the Financial Services Review Panel

2016 FSRP 3

In the matter of –

S

Applicant

v

Financial Services Commission

Respondent

DETERMINATION

Introduction

On the 21st January 2015, the Respondent issued a written notification to the Applicant informing her that the Enforcement Committee came to the conclusion that "*she is not fit and proper to hold position as officer in a licensee of the FSC and hereby disqualifies her from holding position as officer in any licensee of the FSC for a period of two (2) years, pursuant to section 52(3) and section 7(1) (c) (iv) of the Financial Services Act*".

She was also informed that:

"[she] may, within 21 days of the issue of this notice, make an application to the Financial Services Review Panel for a review of the above decision of the EC, by registered post, specifying the reasons for the review, in accordance with section 53(4) of the FSA. A copy of the application must be sent, by registered post, to the Financial Services Commission."

Aggrieved by the decision of the Enforcement Committee, the Applicant is applying for a review of the said decision.

The Respondent is resisting the application on the ground that the Applicant did not comply with Section 53(4)(b) of the Financial Services Act.

Both parties were informed that the matter would be considered by the Financial Services Review Panel (the "Panel") on 29 July 2016.

Counsel for the parties agreed to submit written arguments to the Panel by 13 September 2016.

The issues to be determined are:

1. **Does the Respondent have a legal duty to notify the Applicant of her right to apply for review and the procedural formalities to be followed?**
2. **Is non-compliance with Section 53(4) (b) of the Financial Services Act fatal?**

The first issue

Submissions of Counsel

The Applicant argued that the "*written notification does not apprise her of her obligation to notify the FSC of the appeal and that on 09 February 2016, the Applicant being a lay person, acting pursuant to the information in the letter submitted her application as stated in the letter*".

Learned Counsel further contended that "*The Applicant being a lay person she cannot be expected to have read the provisions of the Act. It would therefore be unfair and unjust that she is denied the opportunity and her right of appeal on a mere procedural lapsus*."

Learned Counsel for the Respondent submitted that though the Respondent is under no legal obligation to inform the Applicant of her right to apply for a review of the decision, as per the written notice issued on 21st January 2016, the Respondent did inform the Applicant that:

"[she] may, within 21 days of the issue of this notice, make an application to the Financial Services Review Panel for a review of the above decision of the EC, by registered post, specifying the reasons for the review, in accordance with section 53(4) of the FSA. A copy of the application must be sent, by registered post, to the Financial Services Commission."

At paragraph 11 of his submissions, Counsel for Respondent argued:

"*… that it is absolutely unreasonable and irrational for the Appellant to blame the FSC and seek redress for a procedural lacuna for which she is entirely responsible. The Appellant was working as a Fund Manager and a Money Laundering Reporting Officer and would not*

qualify as a "lay person" since she should be conversant with the relevant provisions of the FSA."

Determination

We have gone through the written notice issued on the 21st January 2016. As pointed out by the Respondent, there is no legal obligation on the FSC to inform the Applicant of her rights under section 53(4) of the Financial Services Act, however the Respondent did mention in the written notice the conditions that the Applicant must comply with when applying for review.

The Panel cannot help observing that the brotherhood of the legal practitioners refers to each other as "Learned" when addressing a court of law. In this day and age it would be a fallacy to presume that as a general rule anyone who does not belong to the brotherhood is a layperson. The Applicant held a very important position in the company, a position requiring that she be well conversant with the law relating to the financial services including the Act. Thus, she does not fall in the category of layperson as submitted by Counsel. In any event, ignorance of law is not a reasonable cause.

We accordingly find that the arguments in support of the first issue are untenable.

The second issue

Submissions of Counsel

Counsel for the Applicant submitted that the failure of the Applicant to forward a copy of the application to the Respondent is but a procedural lapsus. According to Learned Counsel, procedural lapsus should not stand in the way to the Applicant's rights for review.

In this regard, he found support from (1) the comments of the Law Lords in the Privy Council Case Toumany v Veerasamy [2012] UKPC 13: *"The Board has sought in the past to encourage the courts in Mauritius to be less technical and more flexible in their approach to jurisdictional issues and objections [...]."*

And (2) Quesnel & ors v Dorelle [1867] MR 61: "*It would really be a misfortune to this country, if the law stood thus, that for a formal and technical omission of pure procedure, parties could lose for ever and without a remedy, real and substantial rights; that such is not the law, we hasten to say"* quoted with approval in Laurette v State [1996] MR 153.

Counsel for the Respondent argued that if the Applicant were to be allowed to submit a copy of her application to the FSC, when the statutory time limit of 21 days has already lapsed, it would be comparable to an appeal being made outside the prescribed delay. Learned Counsel referred to a number of cases where the Supreme Court held that "*non-observance of the time-limit in making an appeal which is always fatal to an appeal as a matter of public policy unless such non-compliance was due to no fault of the Appellant."*

The Law

Section 53(4) of the Act provides that:

(4) Any licensee who is aggrieved by the decision of the Enforcement Committee under subsection (3) –

(a) may, within 21 days of the issue of the written notification, forward, by registered post, an application to the Review Panel specifying the reasons for a review of the decision; and

(b) shall, at the same time, forward a copy of his application by registered post to the Commission.

Section 53(4)(b) is akin to Section 37 of the District and Intermediate Courts (Civil Jurisdiction) Act and Section 93 of the District and Intermediate Courts (Criminal Jurisdiction) Act.

Section 37 reads as follows:

37. Time for appealing

(1) (a) Every person appealing shall, within 21 days of the date of the judgment, exclusively give notice in writing of such appeal to the clerk of the Court.

(b) ….

(c) The condition of the recognisance shall be that the appellant shall appear and within a fortnight of giving notice to the clerk prosecute such appeal to its conclusion, and pay such costs as the Supreme Court may award.

(2) ….

*(3) (a) The appellant shall, within a fortnight of the day on which the recognisance is given under subsection (1), lodge his appeal in the Registry and serve notice of the appeal on the respondent. (**Emphasis added**)*

(b) .....

Section 93 reads as follows:

93. Time for appealing

(1) Any person wishing to appeal under section 92 shall lodge a written notice of appeal with the clerk of the Court within 21 days of the adjudication.

(2) The grounds of appeal shall be stated in the notice.

*(3) Within 15 days from the day of lodging the appeal with the clerk, the appellant shall prosecute his appeal before the Supreme Court and service notice of appeal on the respondent and any other party to the appeal. (*Emphasis added*)*

It is here apposite to refer to the case of ***Rosunally B.B & Ors v The Mauritius Revenue Authority & Anor 2012 SCJ 380*** which was an appeal against the decision of the Assessment Review Committee setting aside a motion of the Applicant to amend the representation form in order to set out the reasons for making the representation when such reasons had not been given in the first place.

The Appellate Court made reference to section 19 of the Mauritius Revenue Authority Act which provides as follows:

19. Lodging written representations with Committee

(1) *Subject to subsection (2), any person who is aggrieved by a decision, determination, notice or claim under any or the enactments specified in the Fifth Schedule may, within 28 days of the date of the decision, determination, notice or claim, as the case may be, lodge with the Clerk to the Committee, **written representations specifying the reasons** for asking for a review of the decision, determination, notice or claim, as the case may be (**Emphasis added**).*

(2) *Where a person has failed to make his representations within the time specified in subsection (1) and the Chairperson is satisfied that the failure was due to illness or*

other reasonable cause, the Chairperson may direct that the representations shall be accepted.

(3) Where representations referred to in subsection (1) are received and accepted the Chairperson shall refer the matter to a panel for a hearing and a decision."

The Appellate Court was of the view that the provisions of Section 19(1) are comparable to section 93 of the District and Intermediate (Criminal Jurisdiction) Act which sets out the procedure governing appeals from lower Courts.

The Learned Judges referred to a number of cases where the Supreme Court reaffirmed the well-established principle that:

*"…on appeal non-compliance with any one of the required formalities within the prescribed delay is fatal to the hearing thereof unless such non-compliance was due to no fault of the appellant." (**Emphasis added**)* and were of the view that *"… a close parallelism can be drawn between section 93 of the District and Intermediate Courts (Criminal Jurisdiction) Act which deals with the procedure governing appeals from decisions of lower Courts and the present matter."* (Namely section 19 of the Mauritius Revenue Authority Act)

The Court also cited the following passage from Maxwell on the Interpretation of Statutes 6th Edition at page 655:

*"So, enactments regulating the procedure in Courts seem usually to be imperative and not merely directory. If, for instance, an appeal from a decision be given, with provisions requiring the fulfillment of certain conditions, such as giving notice of appeal and entering into recognisances, or transmitting documents within a certain time, a strict compliance would be imperative, and non-compliance would be fatal to the appeal." (**Emphasis added**)*

And concluded that "*the above principles clearly established that statutory formalities governing appeals are there to be observed and not to be flouted with impunity and the Court will not easily condone the laches of an appellant or his legal advisers resulting in the non-fulfillment of the formalities, unless there are, in the Court's views, sufficient justifications for the exercise of its discretion"*.

True it is that the provisions of section 53 (4)(b) are procedural formalities but they are essential conditions that must be complied with when applying for a review, in the same manner as would be giving notice of appeal to a respondent in an appeal before the Supreme Court within the time limits set out in section 37 of the District and Intermediate Courts

(Civil Jurisdiction) Act or section 93 of the District and Intermediate Courts (Criminal Jurisdiction) Act, as the case may be. The Respondent must invariably know what case it has to meet.

For the reasons given above and in the light of the legal principles referred to, the Panel holds that the failure to comply with section 53(4)(b) of the Financial Services Act is fatal and therefore sets aside the application.

R. Narayen

(Chairperson)

Y. Jean- Louis

(Vice - Chairperson)

S. Lalmahomed

(Member)

1 December 2016