Before the Financial Services Review Panel

2016 FSRP 6

In the matter of –

C

Applicant

v

Financial Services Commission

Respondent

The Applicant was at all material times a director of R, B, L, F and T companies, all licensees of the Respondent.

By letter dated 24 August 2016, the Enforcement Committee notified the Applicant that the companies had –

(a) infringed the Code on the Prevention of Money Laundering and Terrorist Financing (the "Code");
(b) breached section 29 of the Financial Services Act 2007 (the "FSA");
(c) acted in breach of regulation 57 of the Securities (Collective Investment Schemes and Closed-end Funds) Regulations 2008 (the "CIS Regulations 2008");
(d) contravened regulation 59 of the CIS Regulations 2008;
(e) failed to comply with regulation 63 of the CIS Regulations 2008;
(f) failed to comply with regulation 34(j) of the CIS Regulations 2008;
(g) breached regulation 34(e) of the CIS Regulations 2008;
(h) breached section 105(1) and 105(1)(g) of the Securities Act (the "SA").

In the light of the breaches committed, the Enforcement Committee concluded that the *"Applicant is not a fit and proper person to hold position as officer in any licensee of the FSC and has no alternative other than to disqualify him from holding position as officer in any licensee of the FSC for a period of five (4) years, pursuant to sections 7(1)(c)(iv) and 52 (3) of the FSA."*

The Applicant was informed, (1) of his right to apply to the Financial Services Review Panel (the "FSRP") for a review of the decision of the EC; and (2) the procedural formalities in accordance with section 53(4) of the FSA. The Applicant was also informed that an application to the FSRP should be addressed to:

The Secretary
Financial Services Review Panel
FSC House
54 Cybercity
Ebene 72201

On 14 September 2016, copies of documents bearing reference [**Edited for Confidentiality**] addressed to the FSRP, delivered to the Financial Services Commission, were remitted to the Secretary of the Financial Services Review Panel. On 15 September 2016, another set of the documents was forwarded by registered post and delivered to the Secretary of the Panel on 16 September 2016 (This is set out in Annex 1 of Applicant's written submissions).

By letter dated 07 October 2016, the Respondent was requested to submit a show cause letter with copy to the Applicant.

The Respondent objected to the application on the ground that the Applicant failed to comply with the provisions of section 53(4) (b) of the Act inasmuch as the Applicant did not submit a copy of his application by registered post to the Respondent.

The Respondent further argued if the Applicant were allowed to submit a copy of his application to the Commission at this stage (after the lapse of the statutory limit of 21 days), it would be comparable to an appeal made outside delay.

The Respondent found support from a long list of cases where the Supreme Court held that *"it is a well settled 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"* and moved that the application be set aside.

The gist of the Applicant's submissions are as follows:

(a) The objections put forward by the Financial Services Commission have no foundation at all, and they are untenable, frivolous and vexatious and should not be a bar to this application.

(b) The Applicant denied the objections raised and submitted that section 53(4) of the Act has been duly and lawfully complied with inasmuch as C has through his lawyers in South Africa submitted the Application, with copy the FSC to the Review Panel in accordance with section 53(4) and a copy thereof has been received by the Review Panel and the Commission respectively;

(c) The Application was duly sent by registered post to the Review Panel.

(d) The Application was further sent by e-mail to the Review Panel with copy to the Commission by the Applicant's legal representative Mr. D in Cape Town, South Africa on 14th September 2016.

(e) The application for review to the Review Panel under Section 53 cannot, by comparison or in any manner whatsoever, amount to 'an appeal outside delay' as wrongly assimilated and submitted by the Respondent inasmuch as the 21 days delay prescribed in section 53(4) (a) applies to the Review Panel and not to the Commission.

(f) The case law referred to has no bearing at all to the present Application inasmuch as the Panel is not an appeal court or body but a Review Panel set up under the Act, whose decision itself is subject to judicial review pursuant to section 67 of the Act.

(g) The objections raised by the Respondent have no basis at all and are "*premature and are raised before the wrong forum with a view not to answer or provide its stand to the Applicant's Application in breach of al principles of natural justice."*

In his conclusion, the Applicant reiterated that he had complied with the procedural requirements when submitting his application and that the application was not made outside the prescribed delay under section 53(4) (a). The Panel has a discretion to accept to hear the

Application pursuant to section 39 (*Extension of Time*) of the Interpretation and General Clauses Act (IGCA) as amended which reads as follows: "*Where a time is prescribed or allowed for doing any act or thing or taking any proceeding and power is given to a Court, public body , public officer or other authority to extend such time, such power may be exercised although the application for extension is made after the expiration of the time prescribe of allowed*".

In its reply to the submissions of the Applicant, the Respondent raised a second preliminary objection in that the application to the Panel has been made outside the statutory time frame of 21 days and went on to submit that *"s39 of the IGCA is operative when the applicant requests for an extension. In the AS [Applicant's submissions], the Applicant does not request for an extension of time."*

Determination

Albeit the Review Panel is only an administrative body and not an Appellate Court, we are at a loss to follow the reasoning of Learned Counsel that the case law quoted by the Respondent has no bearing at all to the present application.

The contention of the Applicant that the preliminary objection raised by the Respondent *"is premature and raised before the wrong forum with a view not to answer or provide its stand to the Applicant's Application in breach of all principles of natural justice"* is devoid of merits.

Before accepting to hear an application for review, first and foremost the Panel must be satisfied that the procedural threshold requirements have been complied with.

The Panel proposes in the first place to determine the second preliminary objection raised, namely whether the Applicant submitted his application within the prescribed delay of 21 days.

In his letter dated 24 November 2016, Learned Counsel for the Applicant informed the Panel that he would submit arguments on the reply of the Respondent on 28 November 2016. As at 30 November 2016, the Panel has not received his arguments.

Pursuant to section 53(3) of the Act, the Enforcement Committee notified the Applicant of its decision on 24th August 2016 and informed him of his rights to apply for a review of the decision.

A purported application for review was despatched to the Secretary of the Panel on 14th September 2016 and another set of the same documents was forwarded by registered post to the Secretary of the Panel on 14th September 2016 at 15:10 PM and delivered on 16th September 2016.

Did the Applicant forward the application within the prescribed delay?

The Law

Section 53 (4) of the Act reads as follows:

(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 (**Emphasis added**)*

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

In **Emamally R.Z. v. The State & ors 2004 SCJ 294**, the Appellate Court held that the word "*within*" under section 93 of the District and Intermediate Courts (Criminal Jurisdiction) Act implies that the date of the adjudication is included as the given date from which the specified period of 21 days should start to run.

Section 93 of the District and Intermediate Courts (Criminal Jurisdiction) Act 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. (**Emphasis added**)*

The Court found support from Section 38 of the Interpretation and General Clauses Act.

Sections 38(1)(b) and 38(1)(d) of the Interpretation and General Clauses Act provide–

38. Computation of time

(1) In computing time for the purposes of any enactment or document-

(a) ...

(b) where there is a reference to a number of days between 2 events, whether expressed by reference to a number of clear days or "at least" a number of days or otherwise, the days on which the events happen shall be excluded in calculating the number of days;

(c) ...

(d) where there is a reference to a period of time specified to run from a given date, the period of time so specified shall be calculated so as to include the given day.

Thus, in order to comply with the requirements of Section 53(4) of the Act, an Applicant should forward his application by registered post *within 21 days* of the written notification. The first day to be included in the computation of the 21 day period is the 24 August 2016 and the statutory time frame for the application would lapse on 13 September 2016. (Moothen v The Queen 1981 MR 374).

The application forwarded by registered post was delivered on 16 September 2016. Service has been effected in the ordinary course of post (vide section 40 of the Interpretation and General Clauses Act).

The Panel finds, as rightly submitted by Counsel for the Respondent, that the application was made clearly outside the statutory delay.

Learned Counsel for the Applicant referred to Section 39 of the IGCA which provides:
Where a time is prescribed or allowed for doing any act or thing or taking any proceeding and power is given to a Court, public body, public officer or other authority to extend such time, such power may be exercised although the application for the extension is made after the expiration of the time prescribed or allowed.

With all due respect to Learned Counsel for the Applicant, the Panel does not have to seek guidance from the above provision regarding the extension of time inasmuch as section 53(5) confers a discretionary power on the Panel to entertain an application submitted outside the prescribed delay provided the Applicant proves to the Review Panel that his inability to do so was due to illness or any other reasonable cause.

The Applicant made no mention that he was submitting a belated application nor did he show that his inability to make the application within the period of 21 days was due to illness or any other reasonable cause. On the contrary the Applicant maintained all through that he submitted his application within the statutory time frame.

In the circumstances, we are not in a position to exercise our discretionary power provided under section 53(5) of the Act.

The first preliminary objection raised – Non-compliance with section 53(4)(b)

From the submission of the Applicant, it is not clear whether:

(a) copy of the documents dispatched to the Panel on 14 September 2016 was also sent to the Respondent;

(b) copy of the documents dispatched to the Secretary of the Panel was delivered by email to the Panel and to the Respondent;

(c) the application was forwarded to the Respondent by registered post.

Though submitting an application by email or service by an usher is not provided for under the FSA, the Panel considered that clarifications on the matter were called for in view of the tenor of the submissions.

A meeting was scheduled for 21 November 2016 with Counsel for the Applicant. The Respondent was also requested to attend the meeting.

Before the date scheduled for the meeting, the Respondent replied to the submissions of the Applicant. The Respondent maintained that the documents submitted to the Panel were not forwarded to the Respondent.

On 21 November 2016, Counsel for the Applicant moved that the meeting be rescheduled as he was taken up. His request was acceded to and the meeting was rescheduled to 23 November 2016.

On the said date, Counsel for the Applicant was not in a position to clarify the issues and undertook to throw light on the matter on the following day after consulting his client.

In his letter dated 24 November 2016 sent by email on 24 November 2016 and delivered by registered post on 29 November 2016, Counsel for the Applicant:

(i) acknowledged that only one set of document was delivered on 14 September 2016;

(ii) maintained that the application was delivered by email to the Panel and the Respondent and annexed documents (**marked Annex 1 and 2**) in support; and

(iii) averred that he has sent a copy of the application by registered post on 07 November 2016 to the Respondent.

The email address on the annexed documents was fscmauritius@internet.mu. The email address of the Respondent is fscmauritius@intnet.mu and that of the Panel is reviewpanel@fscmauritius.org No wonder the email was not delivered.

The application was forwarded on 14 September 2016 by registered post and delivered on 16 September 2016. Copy of the application was forwarded by registered post to the Respondent on 07 November 2016. Thus, it follows that a copy of the application to the Respondent was not forwarded "*at the same time that the application was forwarded to the Panel*".

Section 53(4)(b) is akin to Section 37 of the District and Intermediate Court (Civil) Jurisdiction Act and Section 93 of the District and Intermediate Court (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 the representation of the Applicant to amend the representation form in order to set out the reasons for making the representation under section 19 of the Mauritius Revenue Authority Act when such reasons had not been given in the first place.

Section 19 of the Mauritius Revenue Authority Act provides:

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 Income Tax Act referred to above).*

The Court 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 under 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. A Respondent must invariably know what case he has to meet.

The application is accordingly set aside.

R. N. Narayen
(Chairperson)

Y. Jean- Louis
(Vice - Chairperson)

S. Lalmahomed
(Member)

1 December 2016