

**Before the Financial Services Review Panel**

**2017 FSRP 3**

**In the matter of –**

**K** **Applicant**

**v/s**

**The Financial Services Commission** **Respondent**

1. Pursuant to section 44 of the Financial Services Act, the Chief Executive of the Respondent ordered that an investigation be carried out into the conduct of the Applicant, as a past officer of a licensee of the Respondent.
2. By letter dated 20 March 2014, the Applicant was duly informed that Mr S and Mr D were authorized to conduct the investigation assisted by their team.
3. The Chief Executive issued, on 12 May 2014, a show cause letter to the Applicant, which reads as follows:

*“Following intelligence gathered and pursuant to the investigation carried out at the seat of the Financial Services Commission (the "Commission") on 24 March 2014, the Commission has ground to believe that you no longer satisfy the fitness and propriety requirements as provided under the Financial Services Act 2007 insofar that:*

- *Your conduct during your tenure in a senior position in A has cast doubt on your ability to perform the relevant functions, efficiently, honestly and fairly and the facts gathered during the investigation has [sic] impinged on your character and reputation; and*
- *You have carried out an activity which may cause prejudice to the integrity of the financial system in Mauritius and may also affect the good repute of Mauritius as a financial centre.*

*The basis for my belief is that inter alia:*

1. *Transfer of Euro 202.000 from the account of G to O*

- a. *During the investigation, you acknowledged that you were aware that Mr. D had instructed the transfer of Euro 202,000 on 03 December 2012, from the [Bank Name] account: of G to the bank account of O in [Country] without the knowledge of the management and directors of A based on the verbal instructions of Mr. J.*
- b. *You also acknowledged that out of the Euro 202,000, Euro 180,000 was credited to [AH] in [Country] and the remaining amount was charged as fees by O for this transaction.*
- c. *Based on the above, we have reason to believe that you devised this scheme, together with Mr. D, without the knowledge of A for the benefit of Mr. J and your own benefit. The more so, the Commission has secured intelligence which indicates that you are the beneficial owner of O and not Mr. R and that you have received monetary rewards for this transaction.*

2. *V*

- a. *During the investigation, you informed that V has been set up by Mr. VS and yourself to refer clients to [Country] and other jurisdictions. You informed that V provides its services to GI and AA (licensed as corporate service providers by [Regulator in Foreign Jurisdiction]).*
- b. *You also affirmed that you joined V after your resignation from A in September 2013 and you did not refer any clients to V during your tenure at A. Moreover, you informed that V became operational only after Mr. VS resigned from A in May 2013.*

- c. *However, intelligence gathered by the Commission reveals' that you were appointed as shareholder and first director in V on 07 September 2012 that is during your tenure at A which you concealed to the investigators.*
  
- d. *Furthermore, intelligence secured by the Commission reveals that during his tenure at A, Mr. VS was giving instructions for invoices to be issued under the name of V for services which were rendered by A and A for the setting up of companies. Moreover, the Commission has reason to believe that payments for such services were indeed credited into the accounts of V The Commission notes with serious concern that this tantamount to fraudulent activities conducted V [sic] and as a director of V, this cast doubt on your ability to perform the relevant functions, efficiently, honestly and fairly and impinged on your character and reputation.,*

3. *Money received from Mr. B*

*The Commission has also secured intelligence, that two payments were made to you by Mr. B, one of which amounted to USD 2000 that was credited into your personal bank account and a second payment was made in cash in 2010 during the world cup for payment of fees due to the Commission and the Registrar of Companies which was never made by yourself.*

*The Commission believes that you have improperly handled the client monies by failing to make the necessary payments as per his instructions and you have kept the money for your personal use.*

*Based on the above facts, we have reasonable cause to believe that you no longer satisfy the fitness and propriety requirement as provided in the Financial Services Act 2007 (the 'Act') since:*

- a) *You acted in bad faith by failing to inform the management and directors of ABC Global of the setting up of Overseas; and*
- b) *During the investigation held on 24 March 2014, you concealed many facts and have provided false and misleading information to the investigators.*

*In order to prevent or mitigate damage to the integrity of the financial services industry or to any part thereof, I hereby give you prior notice of my intention to issue a private warning to you pursuant to section 7(1)(c)(i) of the Act.*

*In order to prevent or mitigate damage to the integrity of the financial services industry or to any part thereof, I hereby give you prior notice of my intention to disqualify you from holding office and/or position as officer (as defined in section 2 of the Act) in any licensee of the Commission for a period of 3 years pursuant to section 7(1) (c) (iv) of the Act.*

*You are therefore required to make representations at the earliest but not later than 30 May 2014 as to why the Commission should not disqualify you the [sic] from holding office and/or position as officer in any licensee of the Commission.*

*Your reply along with supporting documents and evidence; if any shall be submitted to the Commission not later than 30 May 2014, failing which the matter will be decided ex parte based on material available on record.* [Underlining is ours.]

4. On 16 June 2014, the Applicant replied as follows:

*“I acknowledge receipt of your initial letter dated 12 May 2014, bearing reference [Edited for confidentiality], the contents of which are noted with concern in as much as it does not reflect a true state of my explanation.*

*However, in order to dispel any suggestions that I may have acted in breach and/or fraudulently, I wish to place the following on records.*

*I was appointed as General Manager of A and have acted as such until I voluntarily resigned in May 2013. However, at the request of the Board of Directors, I continued my services until September 2013 so as to enable the Board of Directors to recruit another General Manager, thereby acting in good faith and for the smooth running of the Organisation.*

*The Board of Directors was not and is not acquainted with Global Business activities and I was mandated and empowered to look after the day to day management of the company.*

*Further to your request, I attended the meeting at the office of the FSC and answered questions that were put to me in good faith with a view to enlighten the commission as well as reassuring you that I conducted the affairs of the company in all loyalty and honesty.*

*The Board of Directors was, fully aware and acquainted with the transactional activities since I was apprising them of the day to day affairs of the business activities.*

*Therefore, I take strong objections to the conclusion of the commission in as much as your reasoning seems to be based on one sided facts and the wrong interpretation of my explanation. I have also noted that your findings are based on 'having reasons to believe' and that your decision also seems to be based on "casting of doubts", which are contrary to the fundamental principle of the constitution.*

*I would therefore humbly request that you review your decision from me holding office and/or position as Officer for a period of three(3) years in pursuant to section 7(1) C (iv) [sic] of the Act, which I consider to [sic] excessive, unfair, unjust and unreasonable in the present circumstances.*

*I further wish to confirm that I have already initiated proceedings to wind up the two companies, namely, AC and V respectively.”*

5. The Chief Executive referred the matter to the Enforcement Committee.
6. By letter dated 24<sup>th</sup> December 2014, the Enforcement Committee requested the Applicant to submit his written representation if any within a period of 21 days.
7. The material part of the Applicant's written representations, dated 21 January 2015, reads as follows:

*“Therefore, I wish to reiterate my previous averments whereby the two (2) companies, namely, AC and V are in the process of winding up and this ought to be concluded forthwith.*

*I therefore wish to place on records that I have acted in good faith all along and those concerned at the A were always informed of the day to day running of the business.*

*I therefore take strong objection against any allegation with a view to bring disrepute to my professional career and reserve my rights to any cause of action as I may be advised.”*

8. By way of notice issued on 16 March 2015, the Respondent informed the Applicant that the Enforcement Committee had:

*“a. concluded that you are not fit and proper to hold office or position in a licensee of the FSC; and*

*b. disqualified you from holding position as officer in any licensee of the FSC for a period of five (5) years pursuant to sections 52(3) and 7(1)(c)(iv) of the FSA 2007.”*

9. Pursuant to Section 7(5) of the Act, the Chief Executive caused a public notice to be published on the Respondent's website on 17 April 2015.

10. The Applicant is seeking a review of the decision of the Enforcement Committee on the following grounds:

*(i) The Chief Executive has abused her power by being the Judge and party to the present matter and acted on hearsay;*

- (ii) *The Chief Executive has acted in breach by substituting herself for the Board of the Commission and the Enforcement committee and acted contrary to the provisions of the FSC Act;*
- (iii) *The Chief Executive took it upon herself to impose a public notice, which was never imposed and / or reaffirmed by the Enforcement committee and failed to wait for the prescribed delay for review before causing same to be published, thereby causing inconvenience, disrepute and prejudice to our client.*
- (iv) *Undue delay in dealing with the present matter to the detriment of our client and contrary to rule of justice and fairness.*
- (v) *Investigations being wrongly carried out and evidence of partiality by Investigators, Chief Executive and Enforcement committee.*
- (vi) *FSC acting in breach of the provisions of the Act and our client became a victim for lack of a proper Board of the Commission and composition of the Review panel;*
- (vii) *For all other reasons which our client intends to depone and assisted by Counsel before the Review Panel.*

11. Both parties submitted a statement of case as requested.

12. We have carefully considered the statement of case of the Applicant. We find that he has comprehensively set out his version of the facts in his statement of case.

13. The Respondent also has submitted a comprehensive statement of case with all relevant annexures that include correspondences from the Applicant, the Respondent and the Enforcement Committee, as well as the minutes of the investigation carried out by Messrs. S and D duly signed by them and the Applicant.

14. On 17 January 2017, the Applicant replied to the statement of case of the Respondent.

15. We have duly considered the averments in the application, the statements of case of both parties and all the annexures. We find that the matter can be determined on the strength of the annexures, the averments in the application and the statements of case.

16. We propose to determine the first three grounds, which challenge the decision of the Chief Executive, together.

17. At paragraph 1.4 of his application, the Applicant averred that –

*“It is to be noted that the Chief Executive, who appointed the Authorised Investigators came to the conclusion presumably on the findings of the Investigators that our client had acted in bad faith and concealed facts and provided false and misleading information to the investigators.*

*Further, she also gave notice of her intention to impose Administrative sanction by issuing a private warning pursuant to Sec 7(1)(c)(i) of the Act and to disqualify our client from holding office and/or position as Officer for three (3) years pursuant to Sec 7(1)(c)(iv) of the Act.*

*It is humbly submitted that the Chief Executive has acted ultra vires by being Judge and party and abusing her power with her firm intention of imposing sanction contrary to the provisions of the FSA Act.*

*Further, the Chief Executive acted in breach by not submitting her observations, comments and recommendation to the Board of FSC as provided for in the Act under sec 44(5).*

*The Chief Executive made an abuse of her power by being Judge and party and imposed sanction, which was outside her prerogative and substituted herself for the Board and the Enforcement committee.”*

18. At paragraph 1.8, he stated that at no point in time did the Enforcement Committee impose any sanction to issue a public notice.

19. At paragraphs 13-15, the Applicant reiterated what he had averred in his application.

20. The Respondent averred at paragraph 23 of its statement of case that:



*“(i) it acted in accordance with the statutory powers given to it under the Act, and  
(ii) the decision to take regulatory action against the Applicant was taken by the Enforcement Committee, an internal committee set up by the Board under Section 52(1) of the Act and which does not include any persons involved in investigations.”*

21. And at paragraph 25, the Respondent stated that, *“the regulatory action in relation to the Applicant was taken by the Enforcement Committee.”*

22. Under Section 44 of the Act –

*“(1) Where the Chief Executive has reasonable cause to believe that a licensee –*

*(a) has committed, is committing or is likely to commit, a breach of –*

*(i) any of the relevant Acts;*

*(ii) any condition of his licence, authorisation or registration; or*

*(iii) any direction issued by the Commission under a relevant Act;*

*(b) has carried out, is carrying or is likely to carry out, any activity which may cause prejudice to the soundness and stability of the financial system of Mauritius or to the reputation of Mauritius or which may threaten the integrity of the system;*

*(c) has failed or is failing to take such measures as are required pursuant to the Financial Intelligence and Anti-Money Laundering Act 2002,*

*the Chief Executive may order that an investigation be conducted into the business or any part of the business of the licensee or its associate.” [Underlining is ours]*

23. The Chief Executive, upon intelligence gathered, ordered an investigation to be carried out into the conduct of the Applicant as a Past Officer of a Licensee of the Respondent. She acted within the powers conferred upon her when she so ordered. It is here apposite to refer to Section 54(3) (b) of the Act which reads:

*“the Review Panel shall not hear an application relating to a decision to conduct an investigation under any relevant Act.”*

24. The Chief Executive referred the matter to the Enforcement Committee under Section 53 of the Act. Here again, the then Chief Executive acted within her statutory powers.

25. Section 7(5) of the Act provides:

*“(5) The Commission may publish a bulletin at such intervals as it thinks fit for the purpose of giving public notice of –*

*(a) any decision or determination by the Commission or the Review Panel under any of the relevant Acts;*

*(b) any statistical report or analysis; and*

*(c) any other information the Commission deems relevant.”*

26. Under the above provisions, it is clear that the Commission may publish any decision or determination. Therefore, the Chief Executive was only discharging her duties when she gave public notice of the decision of the Enforcement Committee. As rightly submitted by the Respondent, the publication of the public notice is not a sanction imposed by the Chief Executive.

27. The public notice was published on 16<sup>th</sup> April 2015. The Applicant was notified of the decision on 16<sup>th</sup> March 2015. The decision of the Enforcement Committee took effect after 21 days from the date the notice of the decision was issued [Section 53(4) of the Act]. The public notice was published under Section 53(6) within the parameters of the law. We find that the Respondent did comply with the provisions of the Act and that the contention of the Applicant that the Chief Executive abused her power by being “judge and party” is devoid of merit. The contention of the Applicant that the Respondent did not inform him of his rights to apply for a review of its decision is also devoid of merits.

28. We accordingly hold that Grounds (i), (ii) and (iii) must fail.

29. We shall now proceed to consider the remaining grounds.

**Ground (iv)**

30. In substance the contention of the Applicant with regard to ground (iv) is as follows:

- (a) as requested by the Chief Executive, he submitted his written representations on the 16 June 2014 but did not hear from the Respondent until the 24 December 2014, when he was informed that the matter had been referred to the Enforcement Committee;
- (b) the matter had been referred to the Enforcement Committee six months later;
- (c) on 27 August 2015, he sought the authorization of the Panel to submit a belated application for a review of the decision of the Enforcement Committee and having not heard from the Panel his Counsel, by letter dated 24 November 2015, enquired where matters stood;
- (d) nine months later, the Secretary to the Panel informed him that his request to submit a belated application has been granted;
- (e) there had been undue delay and procedural impropriety in the handling of the matter, and meanwhile, the public notice issued by the Chief Executive has been causing him much inconvenience and prejudice, thus preventing him from holding office contrary to his fundamental rights.

31. It is the Respondent's case that:

- (a) there has not been any undue delay and in support of its contention set out a chronology of events, which runs as follows:

24 March 2014	Investigation conducted
12 May 2014	Show cause letter to the Applicant
16 June 2014	Representations from the Applicant
30 October 2014	Referral to the Enforcement Committee
24 December 2014	Enforcement Committee invited the Applicant to make representations
21 January 2015	Representations from the Applicant
16 March 2015	Decision by the Enforcement Committee

(b) the Applicant is restricted in holding office in a licensee of the Respondent by virtue of the decision of the Enforcement Committee and not by virtue of the public notice; and

(c) the Applicant may hold office in any entity not licensed by the Respondent.

32. We have gone through the chronology of events. We find that the time taken by the Respondent does not constitute any undue delay. In any event, as rightly submitted by the Respondent, the Applicant was disqualified from holding office in any licensee of the Respondent but he could still work in any company which is not a licensee of the Respondent.

33. True it is that, at the time the Applicant requested for an extension of time to submit a belated application for review, the Review Panel was not constituted. But as soon as the Panel was constituted, it considered the application and acceded to the request of the Applicant and the case was proceeded with. The Respondent cannot be held responsible if the Panel was not constituted. It is not within the powers of the Respondent to appoint members of the Panel.

34. Ground (iv) accordingly fails.

#### **Ground (v)**

35. With regard to Ground (v), it is the Applicant's case that:

(a) no formal complaint was put to him nor was he made aware of the alleged intelligence gathered which led to the investigation;

(b) there were no record of the minutes of the proceedings of the investigation;

(c) the investigators were authorized to carry out the investigation by the Chief Executive to whom they were accountable;

- (d) in such circumstances, the investigators did not act independently;
- (e) the matter was referred to the Enforcement Committee six months after the then Chief Executive had already reached a conclusion and imposed an Administrative sanction contrary to established procedure in the Act;
- (f) the Enforcement Committee “copied the facts and made their observations verbatim as the one of the Chief Executive in her letter dated 12 May 2014, which showed the partiality and bias of the finding of the Enforcement Committee”;
- (g) the investigation was biased and carried out unprofessionally inasmuch as the Respondent had already decided to impose a sanction on the Applicant;
- (h) the Enforcement Committee failed to inform him of his rights to appeal to the Panel within a prescribed delay as provided for in the Act;
- (i) the Chief Executive issued a public notice on the 16 of April 2015, disqualifying him;
- (j) such a sanction was never imposed by the Enforcement Committee;
- (k) the Chief Executive had acted with partiality and had not only been biased but acted in breach of the Act.

36. The Respondent contended that:

- (a) at the stage of investigation there was no requirement to (i) put any formal complaint or any charges to the Applicant, (ii) give the Applicant an opportunity to comment on such charges at that stage of the process, no charges had been determined for the simple reason that the matter was being investigated;
- (b) a contemporaneous record of the questions put to the Applicant, and the answers given by him, were made and he signed same;

- (c) the show cause letter conveyed to the Applicant the sanction contemplated, “required” him to submit his written representations but the letter did not contain any decision taken by the Respondent;
- (d) sufficiently particularised charges were put to the Applicant and in the show cause letter, he was requested to submit representations to the Chief Executive of the Respondent;
- (e) the Applicant reiterated the representations made to the Chief Executive in his written submissions to the Enforcement Committee;
- (f) the Chief Executive acted in accordance with the statutory powers conferred upon her under the Act;
- (g) the regulatory action in relation to the Applicant was taken by the Enforcement Committee, an internal committee set up by the Board under Section 52(1) of the Act and the Committee does not include any person involved in investigations;
- (h) the Chief Executive had neither reached a decision in respect of the Applicant nor imposed an administrative sanction on the Applicant;
- (i) the facts set out in the show cause letter formed the basis of the referral from the Chief Executive to the Enforcement Committee, and “*the Enforcement Committee, having found those facts proved reiterated those facts in the letter to the Applicant and there is nothing sinister in the Enforcement Committee having repeated these facts in its letter*”;

37. We are in presence of a copy of the proceedings of the investigation carried out. The proceedings were handwritten. The format is in two columns. The first one sets out the questions by the Investigators and the second one, the answers of the Applicant. Both the Investigators and the Applicant signed at the bottom of each page.

38. We agree with the Respondent that at the stage of investigation, there was no requirement to (i) put any formal complaint or any charges to the Applicant, (ii) give the Applicant an opportunity to comment on such charges.
39. Indeed the whole purpose of the investigation is to situate whether the intelligence gathered calls for further actions.
40. We have gone through the record of the investigation. We find that the questions put by the Investigators were pertinent, straight forward, very fair and are in no way biased or partial.
41. We find it appropriate for the sake of completeness to reproduce the record of the investigation at Annex 1.
42. The Chief Executive had to take cognizance of the investigation and the intelligence gathered before taking any action. She issued a show cause letter to the Applicant based on the investigation and the intelligence gathered and finally referred the matter to the Enforcement Committee. In the show cause letter, the Chief Executive set out the gist of the intelligence gathered and the answers which the Applicant gave to the Investigators in the course of the investigation and required that his *“reply along with supporting documents and evidence; if any shall be submitted to the Commission not later than 30 May 2014, foiling which the matter will be decided ex parte based on material available on record.”*
43. The written representations of the Applicant did not address the salient points raised in the show cause letter nor did Applicant produce any documentary evidence as required. In the circumstances, we find that the Chief Executive was not in any way biased or partial in the manner she dealt with the Applicant’s case. She had, throughout, been acting within the powers conferred upon her by the Act.
44. The Enforcement Committee invited written representations from the Applicant as required under the Act. The Applicant simply reiterated the written representations he submitted to the Chief Executive. We fail to see any element of bias or partiality in the way the Enforcement Committee dealt with the case. With regard to the

complaint of the Applicant that the Enforcement Committee copied the contents of the show cause letter, given that the Enforcement Committee has invariably to base itself on a referral from the Chief Executive, no adverse inference can be drawn from the fact that the Enforcement Committee reproduced salient aspects of the referral. We are of the view that the Enforcement Committee was in no way biased or partial.

45. In the light of our findings, ground (v) must fail.

**Ground (vi)**

46. The first part of this ground namely that “*FSC acting in breach of the provisions of the Act*” is vague and cannot be acted upon.

47. We further fail to understand what Applicant meant by “lack of a proper Board of the Commission”, as the Board was at all material times properly constituted.

48. True it is that at the time when the Applicant requested for an extension of time to submit his application, the Review Panel was not constituted, but as soon as the Panel was constituted, it considered the application, acceded to the request of the Applicant and the case was proceeded with. The Respondent cannot be held responsible if the Panel was not constituted. It is not within the powers of the Respondent to appoint the members of the Panel and the Chairperson.

49. Ground (vi) must also fail.

**Ground (vii)**

50. Under Section 53(4) (a) of the Act, an Applicant seeking a review of the decision of the Enforcement Committee is required to specify the grounds for a review of the decision. What Applicant stated under ground (vii) cannot, by any stretch of imagination, be construed as a ground for review.

51. Ground (vii) must also fail.



52. Since, all the grounds have failed, the relief sought cannot be granted. The application is accordingly set aside.

**Mrs. R. N. Narayen**

(Chairperson)

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**Mr. Y. Jean- Louis**

(Vice - Chairperson)

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**Mr. S. Lalmahomed**

(Member)

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**Date: 15/03/2017**

**ANNEX 1 – RECORD OF THE INVESTIGATION**

**[Edited for confidentiality]**

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