Before the Financial Services Review Panel

2016 FSRP 4

In the matter of –

H

Applicant

v

Financial Services Commission

Respondent

Facts and Submissions

The Applicant was a Director of R, a licensee of the Respondent.

By letter dated 24 August 2016, the Enforcement Committee notified the Applicant that during her directorship, R had:

" i. *breached section 105(1) (c) of the Securities Act 2005 (the "SA"), since its directors have served their own interests to the detriment of those of the investors;*

ii. *infringed section 105(1) (g) of the SA insofar as breaches committed by Lancelot Global PCC and Four Elements PCC, two funds under its administration were not reported to the Financial Services Commission (the "FSC");*

iii. *failed to act in accordance with regulation 34 (d) of the (Collective Investment Schemes and Closed-end Funds) Regulations 2008 (the 'CIS Regulations 2008'), since it did not take all reasonable steps and exercise due diligence to avoid the assets of the collective investment schemes to which it provided CIS management services from being invested in contravention of the CIS Regulations 2008;*

iv. *breached regulation 34(e) of the CIS Regulations 2008 insofar as there were grounds to believe that in Two Seasons PCC, there was significant manipulation of the Net Asset Value ("NAV") which was being calculated using predetermined NAV figures while the offer document stated otherwise;*

v. *failed to comply with regulation 34(j) of the CIS Regulations 2008 since RDL failed to keep such books, records and other documents as set out in the Eighth Schedule to the CIS Regulations 2008 as were necessary for the proper recording of its business transactions and financial affairs and the transactions which it executed on behalf of the collective investment schemes ("CIS") under its management or participants in those CIS; and*

vi. *infringed regulation 63 of the CIS Regulations 2008 pursuant to which all transactions carried out by or on behalf of the collective investment scheme must be at arm's length, especially when the transactions involved the directors of the collective investment scheme as the other parties. The number of related party transactions entered into and the terms thereof were not carried out at arm's length but seemed to favour the borrowers to the detriment of the collective investment scheme. For instance, substantial amounts of money had been loaned out without any collateral, loans had been given interest free, failure by borrowers to repay the loans did not carry any penalty and repayment period for the loans had been repeatedly extended."*

The letter dated 24 August 2016 went on to state that:

" 3. Having duly considered your written representations and in light of the above breaches, the EC has concluded that you are 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 you from holding position as officer in any licensee of the FSC for a period of five (5) years, pursuant to sections 7(1) (c) (iv) and 52(3) of the Financial Services Act 2007 (the "FSA").

4. You are hereby informed that you may, within 21 days of the issue of this notice, make an application to the Financial Services Review Panel (the "FSRP") 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 FSC.

5. An application to the FSRP should be addressed to the following:
The Secretary
Financial Services Review Panel
FSC House

54, Cybercity
Ebene, 72201"

On 20 September 2016, the Applicant forwarded a letter by registered post to the Secretary of the Financial Services Review Panel ("Review Panel"). The said letter was delivered to the Secretary on the same date. The Applicant enclosed duplicate of a purported application for review of the decision of the Enforcement Committee dated 13 September 2016 and addressed to the Enforcement Committee. The Applicant requested the Panel, "*to consider this application*".

On 21 September 2016, the Applicant despatched a copy of the grounds of appeal to the Secretary of the Review Panel and made reference to the purported application for review submitted to the Enforcement Committee on 13 September 2016, with copy enclosed. The original was forwarded by registered post on 21 September 2016 and delivered on 22 September 2016.

By letter dated 7th October 2016, the Panel requested the Respondent to submit a show cause letter.

The Respondent objected to the purported application on the ground that the Applicant failed to comply with Section 53(4)(b) of the Financial Services Act in as much as she did not forward a copy of her application by registered post to the Respondent. It was further argued that if the Applicant were allowed to submit a copy of her 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.

Learned Counsel for the Respondent referred to a long line 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".*

The Applicant submitted that she has complied with the provisions of the Act in that her application was sent to the Commission within the 21 day timeframe, on 13 September 2016.

However, upon receipt of her application, the Commission replied on 15 September 2016 that the letter was addressed to the wrong person and that she should readdress her application to the correct person. According to her, the law does not state that a particular person must receive such correspondence. The application was received after the 21 day timeframe because she had to readdress her application to the Panel. She found support from Margaret Toumany & John Mullegadoo v/s Marday Naiken Veerasamy (2012) UKPC 13.

The Applicant relied on the provisions of section 53(5) which confers a discretionary power on the Panel to entertain an application outside the statutory delay provided the Applicant satisfies the Panel that she has a reasonable cause. Section 53(5) of the Financial Services Act reads as follows:

"(5) Where a licensee is unable to make an application within the period of 21 days referred to in subsection (4)(a) and he proves to the satisfaction of the Review Panel that his inability to do so was due to illness or any other reasonable cause, the Review Panel may accept to hear the belated application on such terms and conditions as it may determine."

The Applicant further submitted that the addressee issue constitutes other reasonable cause inasmuch as she did submit the grounds of appeal within the time frame set out by law to the Commission.

The Applicant did not address the objection raised regarding non-compliance with the procedural formalities when applying for review namely a copy of the application should be forwarded by registered post to the Respondent.

The issue that falls to be determined in whether the Applicant complied with the procedural formalities set out under the Financial Services Act.

Determination

Section 53(4) of the Financial Services 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 Court (Civil) jurisdiction and Section 93 of the District and Intermediate Court (Criminal) jurisdiction.

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 ***Rosunally B.B & Ors v The Mauritius Revenue Authority & Anor 2012 SCJ 380***, which was an appeal against a decision of the Assessment Review Committee setting aside the motion of the Applicant to amend the representation form 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 referred to above).

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 procedural requirements 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 Applicant conceded that the purported application before the Panel was forwarded outside the statutory delay but relied on the provisions of section 53(5) which confers a discretionary power on the Panel to entertain an application submitted outside the statutory delay on the ground of illness or any other reasonable cause. According to her, she has complied with the requirement of the law.

Section 53(5) of the Act reads as follows:

"(5) Where a licensee is unable to make an application within the period of 21 days referred to in subsection (4)(a) and he proves to the satisfaction of the Review Panel that his inability to do so was due to illness or any other reasonable cause, the Review Panel may accept to hear the belated application on such terms and conditions as it may determine."

The Panel observes that the Enforcement Committee took the pain to clearly spell out the steps to be taken when applying for a review and mentioned the address of the Review Panel in case the Applicant decided to apply for such review of the decision. In these

circumstances, the Applicant has but herself to blame if she submitted the purported application to the Enforcement Committee. It is indeed puzzling that the Applicant submitted her purported application to the very body whose decision she is seeking for a review.

That the Applicant sent her application in the first place to the Enforcement Committee is of no avail to her. As already found, the Applicant could only blame herself for the laches.

We therefore hold that the Applicant failed to show that the inability to forward a copy of the application was due to illness or any other reasonable cause. In the circumstances, we are not in a position to exercise our discretion in her favour.

The application is purely and simply set aside.

R. N. Narayen

(Chairperson)

Y. Jean- Louis

(Vice - Chairperson)

S. Lalmahomed

(Member)

1 December 2016