THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No 1079/2013

In the matter between:

ELIZABETH COETZEE **APPELLANT**

and

FINANCIAL PLANNING INSTITUTE OF SOUTH AFRICA (ASSOCIATION INCORPORATED UNDER SECTION 21) **FIRST RESPONDENT**

R KING **SECOND RESPONDENT**

E VENTER **THIRD RESPONDENT**

J LOURENS **FOURTH RESPONDENT**

J MAREE **FIFTH RESPONDENT**

M LOUW **SIXTH RESPONDENT**

Neutral citation: *Coetzee v Financial Planning Institute of SA* (1079/13) [2014] ZASCA 205 (28 November 2014).

Coram: Navsa ADP, Leach, Saldulker, Swain JJA *et* Mocumie AJA

Heard: **12 November 2014**

Delivered: **28 November 2014**

Summary: Disciplinary hearing – charge not requiring same degree of formality as criminal trial – particularity of factual information underlying allegations required – test whether information sufficient to enable accused to know what case to meet – appellant adequately informed of particulars of charge – appeal dismissed.

ORDER

On appeal from: The Western Cape High Court, Cape Town (Louw and Cloete JJ, sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Swain JA (Navsa ADP, Leach, Saldulker JJA *et* Mocumie AJA concurring):

[1] This appeal has its origin in disciplinary proceedings instituted by the first respondent, the Financial Planning Institute of Southern Africa (FPI), against one of its members, the appellant, Ms Elizabeth Coetzee, as long ago as 19 June 2007.

[2] Those proceedings culminated in a finding that Ms Coetzee had contravened certain sections of the code of conduct of FPI with the result that her membership of FPI was suspended for ten years. She was also sentenced to a fine of R10 000.

[3] Aggrieved at the outcome, Ms Coetzee appealed to the appeal tribunal of FPI, which set aside the findings of the disciplinary committee but substituted those findings with a finding that she was guilty on two of the charges advanced against her. The sanction imposed was varied to the suspension of her membership in FPI for a period of two years. The second to sixth respondents were the members of the appeal tribunal.

[4] Ms Coetzee's dissatisfaction with the appeal tribunal's finding resulted in the institution of review proceedings before the Western Cape High Court. In this application she sought an order reviewing and setting aside the findings of the appeal tribunal and its substitution with an order that she was not guilty on these charges. The High Court (Louw and Cloete JJ) dismissed the application with costs.

[5] Ms Coetzee then sought and was granted leave to appeal to this court on the ground that one of the charges which formed the basis for her conviction before the appeal tribunal, had not been drafted with sufficient particularity. As a consequence she alleged that in the absence of a properly formulated charge she had not had a proper hearing, neither before the disciplinary committee nor the appeal tribunal. An order is sought in the present appeal setting aside the decision of the court a quo and substituting the order of the appeal tribunal with an order that she is not guilty on all of the charges. As will become apparent, the validity of the second charge is inextricably linked to the validity of the charge which is challenged on appeal.

[6] The issues before this court are: whether the charge on which the appellant was found guilty was properly put to her and whether she was afforded the opportunity to defend herself on that charge.

[7] Before examining the charges advanced against Ms Coetzee, it is necessary to examine the historical background to the disciplinary proceedings to place them in context.

[8] The complainant in the disciplinary proceedings, Ms Wagener, is an elderly widow who at the time of the institution of proceedings was 77 years of age. It is clear from the record of the disciplinary proceedings that she has no business acumen or experience and spent her life as a wife and mother to her children. She left financial matters in the hands of her late husband who passed away in 2002. He had, by all accounts, successfully managed the investments of the Wagener Family Trust (the Trust) in the form of a share portfolio. Mr Sparg, a chartered accountant, who gave evidence before the disciplinary committee described the portfolio as consisting of ‘blue chip’ shares. They had been held by the trust for a long time, made up a diversified share portfolio, and were all producing tax favourable dividends that comfortably funded the beneficiaries’ monthly requirements. According to Mr Sparg the structure of the investments in these shares was ideal from a tax point of view and as a long term investment. This evidence was not challenged by Ms Coetzee.

[9] Ms Wagener testified that after the death of her husband she was approached by the mother of Ms Coetzee, a Ms Swanepoel, who told her she was not to worry as they would look after her. She had known Ms Swanepoel for fifteen years and said the latter had given her late husband good advice. At the time of her husband's death the family trust had been administered by PSG, but Ms Swanepoel advised her to replace PSG with Sanlam for whom she was an agent, which Ms Wagener did.

[10] A representative of Sanlam then advised her to sell a portion of the Richemont shares held by the trust and replace them with Anglo American shares, which she did. As a result the income of the trust almost doubled, and she left the administration of the trust to Ms Coetzee. Ms Coetzee then advised her that Liberty had approached her to join them. According to Ms Wagener, Ms Coetzee then said that she wanted to sell R30 million worth of the shares and reinvest the money in low risk investments such as property linked investments. This was because the share market was going to correct sharply downwards in the future.

[11] The version of Ms Coetzee, however, was that she had established from representatives of Old Mutual that although the market would still grow, they expected that at some stage there would be a correction. Ms Wagener was worried by this information which caused her to have sleepless nights. Ms Coetzee then advised Ms Wagener to use R25 million of the profit made by the trust to diversify the investment of the trust either with Stanlib or Bastion. Ms Wagener then chose to invest an amount of R30 million in the Stanlib Managed Flexible Fund and the Stanlib Multi Management High Equity Fund. According to Ms Coetzee, Ms Wagener told her that she was no longer worried about the trust losing money. Ms Coetzee admitted that she received a commission of R900 000 for investing the trust's funds in the Stanlib policies and that her continuing commission on the investment increased to 0,5 per cent per annum. Previously it had been 0,15 per cent per annum, when the portfolio was transferred to Sanlam. Simply put, the volatility of the equity market was a risk she sought to avoid and it was in this regard she sought Ms Coetzee's advice.

[12] Problems, however, arose when, according to Ms Wagener there was no drop in the share market and her auditors advised her that only R12 million had been reinvested in low risk investments. The rest of the money was in investments which did not have a lower risk profile than the shares originally held by the trust. A complaint was then laid with FPI by Ms Wagener in an affidavit, in which she alleged that Ms Coetzee had advised her to invest in less risky assets, specifically property investments, but had then indirectly reinvested the majority of these funds in the share market.

[13] Ms Wagener's complaint was dealt with in terms of clause 4.7 of the disciplinary regulations of FPI which provide that in the event of a complaint being laid against a member, the chief executive officer 'shall cause to communicate the essence of the complaint or charge to the member involved and request him to respond thereto within 21 days . . . '. Should a disciplinary hearing follow the regulations make no provision for the presentation of a formal charge to the member involved. The regulations simply provide that the duly appointed disciplinary tribunal 'shall determine the procedure to be followed'. It is, however, obliged to hear the evidence against the accused member first and thereafter the evidence for the accused member. The tribunal is also obliged to allow cross-examination and re-examination of witnesses.

[14] As a result the FPI, in compliance with clause 4.7 of the regulations, addressed a letter dated 4 July 2006 to Ms Coetzee advising her of the formal complaint and stating:

'The complaint deals in detail with the advice given to Ms Wagener regarding the reinvestment of the gains from the increase in the Sanlam Private Investment share portfolio into less risky assets, specifically property investments. These funds allegedly [was] not invested in a property investment by you, but reinvested in the Johannesburg Stock Exchange.'

[15] By letter dated 9 January 2007, FPI formally advised Ms Coetzee that she would have to appear before a disciplinary hearing. She was also informed of the relevant principles in the code of conduct of FPI, which it was alleged she had

contravened. A number of charges were advanced against her but for present purposes the relevant charges are as follows:

'Kindly take notice that, in terms of the Articles of Association of the Financial Planning Institute of Southern Africa ("FPI") read with the Regulations, Code of Conduct and GAPP[1] thereof, the disciplinary committee of the FPI hereby accuse you of contravening the Code of Conduct and/or GAPP in that you committed one and/or some and/or all of the following:

1. Principle 201 of the Code of Conduct: That you neglected to exercise reasonable and prudent professional judgement in providing financial services and at all times act in the interest of the client, and in particular with Me Margaret Wagener and/or the Wagener Family Trust ("the Complainants"), by

. . .

1.2 Failing to execute the mandate of the Complainants properly, diligently and professionally; and/or

. . .

4. Principle 304 of the Code of Conduct: That you failed to charge remuneration that is fair and equitable for the Complainants and yourself, and without derogating there from, that you charged R1,035,000 plus Value Added Tax as initial financial advisor commission in circumstances where such amount is excessive, not fair nor equitable.'

[16] This letter clearly served the purpose of advising Ms Coetzee of the charges formulated against her, based as they were upon the complaint made by Ms Wagener, the essence of which was contained in the earlier letter from FPI.

[17] In order to determine whether Ms Coetzee was properly informed of the case she was called upon to meet, as set out in paragraph 1.2 of the formal charges, the allegations made must not be considered in isolation, but in the context of the initial letter which set out the essence of the formal complaint.[2] It would be artificial not to do so, because the enquiry is whether Ms Coetzee had adequate knowledge of the facts forming the basis for the charge to enable her to answer that charge. There is authority for the proposition that a charge sheet in a disciplinary enquiry does not have to be framed with the same particularity, or with all the formalities of a charge in a criminal trial.[3] However, the better view is that although the same degree of

[1] Generally Accepted Planning Practice.
[2] *De Villiers v Administrator OFS* 1954 (3) SA 395 (O) at 408H.
[3] *Chislett v Natal Tattersalls & others* 1967 (3) SA 419 (D) at 426G.

formality is not required, the same degree of particularity of the factual information underlying the allegations made, is required to enable the accused to know what case he or she has to meet. This is particularly so where the disciplinary body has the power (as in the present case) to make findings with far-reaching consequences.[4]

[18] The factual information conveyed to Ms Coetzee on a reading of the letter of complaint dated 4 July 2006, together with the charges advanced against her in paragraph 1 and 1.2 of the letter dated 9 January 2007, was as follows:

(a) Ms Wagener was the complainant.

(b) The complaint concerned advice Ms Coetzee had given to Ms Wagener regarding the reinvestment of the gains from the increase in the Sanlam Private Investment Share portfolio.

(c) The advice had been to reinvest these funds into less risky assets, specifically property investments.

(d) In providing this advice Ms Coetzee failed to exercise reasonable and prudent professional judgment and act in the interests of Ms Wagener.

(e) Ms Coetzee failed to execute the mandate of Ms Wagener to invest these funds into less risky assets, specifically property investments, properly, diligently and professionally because they were reinvested in the Johannesburg Stock Exchange.

[19] It is quite clear that the first charge comprises two components; the correctness of the advice given by Ms Coetzee to Ms Wagener to reinvest the profits made, and the failure to carry out the mandate given to her by Ms Wagener. The second charge dealing with the remuneration received by Ms Coetzee is inextricably linked to the first charge. In short, it was alleged that an excessive amount was charged by Ms Coetzee for bad advice and for acting contrary to the mandate.

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[4] *Van Wyk v Director of Education & another* 1974 (1) SA 396 (N) at 400H; *Van Rooyen v Dutch Reformed Church, Utrecht* 1915 NPD 323 at 331. Section 84 of the Criminal Procedure Act 51 of 1977 provides inter alia, that a charge sheet must include such particulars 'as may be reasonably sufficient to inform the accused of the nature of the charge', *R v Moyage & others* 1958 (3) SA 400 (A) at 413C-D. The wording of s 35(3)*(a)* of the Constitution of the Republic of South Africa 1996 that 'every accused person has a right to a fair trial, which includes the right to be informed of the charge with sufficient detail to answer it' embodies this principle.

[20] It is common cause that there was only one occasion when Ms Coetzee sold shares held by the trust and reinvested them. It must have been quite clear to Ms Coetzee that what was in issue was the reinvestment of these funds, in the sum of R30 million in the Stanlib Managed Flexible Fund and the Stanlib Multi Management High Equity Fund on 23 August 2005.

[21] In my view the particulars of the facts forming the basis for the charge contained in paragraph 1.2 of 'the charge sheet' were sufficient to enable Ms Coetzee to know what case she had to meet. If Ms Coetzee was uncertain of the nature of the charge advanced against her, her legal representative, Mr Nieuwoudt, would have been entitled to ask for particulars to the charge to clarify the position. The fact that the disciplinary regulations of FPI do not make provision for a request for particulars to a charge, because no provision is even made for a formal charge to be framed, would not in itself justify a refusal to furnish particulars to the charge.[5] On the contrary, the record shows that Mr Nieuwoudt at the commencement of the disciplinary proceedings stated the following:

'Ek weet nie of u werklikwaar wil vereis dat die klagstaat gelees moet word nie. As dit die procedure is dan moet dit gebeur, maar ek kan u verseker ons het die klagstaat gelees en my kliënt is gereed om onskuldig te pleit op al die klagtes soos dit gestel is. As die procedure egter vereis dat dit gelees moet word, dan sal ons daarna luister.'

In essence he confirmed his client understood the case she had to meet.

[22] I am fortified in my view that Ms Coetzee was fully aware of the nature of the charge advanced against her in paragraph 1.2 of the charge sheet and was not prejudiced in the preparation of her answer to this charge, by a reference to the record of proceedings of the disciplinary hearing. Mr Nieuwoudt, before cross-examining Mr Sparg, requested confirmation that the charges dealt solely with the transaction of 23 August 2005. This was confirmed by the evidence leader.

[23] In addition, Mr Nieuwoudt put to Ms Wagener that she told Ms Coetzee that she was worried that all of her money was in the stock market and that if the stock

[5] *Mhlambi v Matjhabeng Municipality & another* 2003 (5) SA 89 (O) para 12.

market fell she would lose money. He also put to her that she sought specific advice from Ms Coetzee, the object of which was to protect herself if the market fell. In other words, Ms Coetzee's legal representative knew that what was in issue was the nature of the advice given to Ms Wagener, the reason why the advice was given and the object the advice sought to achieve.

[24] Mr Sparg gave evidence in the respects set out above, and added that in August 2005 he would not have advised the sale of the existing blue-chip shares as they would have been able to weather a drop in the market and their sale caused substantial tax complications for the trust and its beneficiaries. He added that even if the shares were to be sold, the reinvestment of the proceeds in the Stanlib funds was poor advice as, first, it exposed the trust to substantial capital gain tax and liability for commission and, second, approximately half the proceeds would thereby be reinvested in the equity market and to that extent the desired end of lessening the trust's exposure to the vagaries of the stock-market would not be avoided. At the end of his evidence Mr Nieuwoudt asked for an adjournment to consult an expert in relation to what Mr Sparg had testified, on the ground that this expert evidence lay at the centre of a number of the charges. At no stage thereafter did Mr Nieuwoudt suggest either that he and his client had been taken by surprise by this evidence or that the charges did not encompass these issues.

[25] When cross-examining Ms Wagener, Mr Nieuwoudt referred her to her affidavit where she complained that she was advised by Ms Coetzee to reinvest the gains in less risky assets, specifically property investments, but had reinvested the majority of the funds indirectly in the Johannesburg Stock Exchange. It is clear that he knew precisely what the gravamen of the complaint was.

[26] Mr Nieuwoudt, when leading the evidence of Ms Coetzee, put it to her that she had heard the view expressed in the evidence that the financial advice she had given was very poor, she had had a long time to think about it and she was asked to express her views on the advice she had given. She replied that it was very good advice and that diversification of the funds as invested was a good option. Again it is clear that she understood the nature of the charge against her.

[27] The appeal tribunal found that Ms Coetzee had received an instruction from Ms Wagener to protect the share portfolio against a drop in the share market. It concluded that the advice given by Ms Coetzee to invest in the Stanlib funds was not 'reasonable and professional' judgment because it did not achieve the mandated objective. It is clear that the grounds for Ms Coetzee's conviction are clearly comprehended by the factual information conveyed to her as set out above as part of the charge. There is accordingly no basis for the ground of appeal.

[28] During argument before us counsel for Ms Coetzee sought to expand his argument beyond the issue upon which leave to appeal was granted by the court a quo. He submitted that the common intention of Ms Coetzee and Ms Wagener was to protect the investment of the trust against a fall in the share market, but it had never been proved that the Stanlib investments had not achieved this. Ms Coetzee accordingly had not been given the opportunity to deal with this aspect.

[29] As pointed out by the court a quo, the appeal tribunal, which in terms of the disciplinary regulations of FPI consisted of five members, all of whom were Certified Financial Planner Licensees, relying upon its own expertise and having examined the Stanlib policies, correctly concluded that they did not achieve the desired objective to protect the trust against a drop in the share market. In this regard counsel for Ms Coetzee stressed that the appeal tribunal correctly found that Ms Coetzee had never been confronted with this issue. That view is, however, not correct. Ms Coetzee for the reasons set out above was well aware that the gravamen of the complaint against her was whether the Stanlib policies achieved the desired objective.

[30] It was common cause that a substantial portion of the reinvestment of the funds via the Stanlib policies was in the share market. It is of significance that in the information furnished by Stanlib concerning the Multi Management High Equity Fund under the heading 'Investment Strategy' the following appears; 'focus of the portfolio is on capital appreciation rather than capital preservation and this is achieved through high exposure equities'. In the application for review FPI in its answering affidavit referred to this passage and pointed out that in the summary which Ms Coetzee furnished to Ms Wagener, setting out the details of the Stanlib policies,

translated into Afrikaans, the whole of the section under ‘Investment Strategy’ was set out, but this sentence was pertinently omitted. In her replying affidavit Ms Coetzee did not respond to this allegation. The inference is irresistible that this information was expressly omitted so as not to alert Ms Wagener to the fact that a substantial portion of the investment was being invested in high exposure equities. The only reason to conceal this information was because Ms Coetzee knew that the policy in question did not fulfil the terms of the mandate.

[31] The details of the Stanlib policies were placed before the appeal tribunal by Ms Coetzee. Knowing that the object was to protect the trust against a drop in the share market, and that the complaint was that the Stanlib policies did not achieve this objective, it must have been self-evident to Ms Coetzee in presenting details of the Stanlib policies to the appeal tribunal that she should attempt to show how they achieved this objective, particularly where there was a substantial investment in high exposure equities.

[32] As pointed out by the appeal tribunal it would be clear to anybody who knew anything about investments, confronted with a mandate to protect a portfolio against a fall in the market, that it was impossible to fulfil that mandate by investing in the Multi Management High Equity Fund with its emphasis on high exposure equities. It added that it could be argued that the mandate could be achieved by the Managed Flexible Fund. As correctly conceded by counsel for FPI there would have been no complaint against Ms Coetzee if the funds had only been invested in this policy. There is accordingly no basis for this argument. It is also self-evident that the amount of R900 000 received by Ms Coetzee was excessive and not fair or equitable, because her advice did not reduce the risk of a loss by the Trust in its investments, in the event of a sharp drop in the share market. Moreover it burdened the trust with substantial capital gains tax and commission.

[33] Although two counsel were employed by FPI in this appeal the issues requiring determination were not sufficiently complex to justify their employment.

[34] I grant the following order:

The appeal is dismissed with costs.

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K G B SWAIN
JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	W G Burger SC Instructed by: Muller and Juby Attorneys, Somerset West c/o McIntyre & Van der Post, Bloemfontein
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