THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 906/2016

In the matter between:

ODINFIN (PTY) LTD **APPELLANT**

and

PIETER REYNECKE **RESPONDENT**

Neutral citation: *Odinfin (Pty) Ltd v Reynecke* (906/2016) ZASCA 115 (21 September 2017)

Coram: Bosielo and Petse JJA and Plasket, Tsoka and Rogers AJJA

Heard: 25 August 2017

Delivered: 21 September 2017

Summary: Delict – Pure economic loss – Loss suffered as a result of debarment in terms of s 14 of the Financial Services Advisory and Intermediary Services Act 37 of 2002 – Whether conduct of employer in debarring employee without complying with the provisions of Promotion of Administrative Justice Act 3 of 2002 was wrongful and gave rise to damages.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Louw J sitting as court of first instance):

1 The appeal is upheld with costs,
2 The order of the court below is set aside and replaced with the following:

'The plaintiff's action is dismissed with costs.'

JUDGMENT

Tsoka AJA (Bosielo and Petse JJA and Plasket and Rogers AJJA concurring):

[1] The narrow issue in this appeal is whether an employer, who is a registered financial services provider in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS Act), acted wrongfully, in the delictual sense, in debarring an employee who was a representative in terms of s 14 of the FAIS Act without affording him procedural fairness as required by s 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and whether such non-compliance entitled the latter to delictual damages.

[2] The facts giving rise to the appeal are common cause. On 12 August 2010 the respondent, Pieter Reynecke (Reynecke), and the appellant, Odinfin (Pty) Ltd (Odinfin), a registered financial services provider (FSP), entered into a written employment contract in terms of which the former agreed to render financial services as a representative on behalf of Odinfin. Three years later Reynecke, so he alleged, became disillusioned with the conditions of his employment and sought new employment with Nedbank Limited (Nedbank), also a registered FSP, without prior written approval of Odinfin. On 15 April 2013, whilst still employed by Odinfin, he entered into a written employment agreement with Nedbank. Although his position was described as 'Financial Planner', his duties were similar to those he rendered to Odinfin. As such he remained a representative in terms of the FAIS Act.

[3] Unknown to Reynecke, on 8 May 2013 Odinfin learnt that he was undergoing an induction with Nedbank. Odinfin confronted him with this information but, instead of owning up, Reynecke denied that he was seeking employment with Nedbank. Instead he falsely misrepresented to Odinfin that he was in Heidelberg writing and selling new policies on behalf of Odinfin when, in fact, he was attending the induction. As Odinfin was aware that this information was incorrect, it requested him to furnish proof that he was indeed in Heidelberg, which he refused to do. Odinfin then contacted Nedbank to verify the information it had received with regard to his employment. Nedbank confirmed the information and in addition confirmed that Reynecke was in fact attending an induction programme.

[4] Satisfied with the information received from Nedbank, Odinfin suspended Reynecke and commenced disciplinary proceedings against him. On 10 May 2013 it served on him a notice of a disciplinary hearing to answer three charges, namely dishonesty, competing with his employer and conflict of interest, all stemming from the conduct summarised above. The disciplinary enquiry was scheduled for 16 May 2013 at 10h00. In response Reynecke tendered a letter of resignation effective from 13 May 2013. Odinfin immediately replied, pointing out to him that in terms of his employment agreement it was entitled to a four weeks' notice period with effect from the 13 May 2013. That meant that as at the date of the hearing he would still be Odinfin's employee and was expected to attend the enquiry.

[5] On the morning of the disciplinary hearing, he was reminded of the hearing. He informed Odinfin that he was not interested and would not be attending the hearing. The hearing proceeded in his absence. After hearing Odinfin's witnesses the chairman of the disciplinary enquiry found Reynecke guilty of the three charges levelled against him. The chairman recommended that his employment agreement be terminated with immediate effect. This Odinfin did.

[6] Section 13(3) of the FAIS Act imposes an obligation on FSPs to maintain a register of their representatives. All representatives are required, inter alia, to comply with the 'fit and proper' requirements set out in s 6A. These include 'personal character qualities of honesty and integrity'. In terms of s 14(1) read with s 13(3) an FSP is required to remove the name of a representative from its register if, inter alia, he or she

is no longer a fit and proper person. In terms of s 14(3) the FSP must inform the registrar of financial institutions of the debarring and the registrar may make known such debarment and the reasons therefor by notice on the official web site or by means of any other appropriate public media.

[7] After Reynecke's dismissal Odinfin updated its register in terms of s 14(1) read with s13(3) to reflect that Reynecke had lost the status of being a fit and proper person who was honest and had integrity and that he was debarred from providing any new financial services on Odinfin's behalf. As required by s 14(3)(a), Odinfin notified the registrar accordingly. The registrar, as permitted by s 14(3)(b), published the debarment by notice on the official website. At some stage thereafter Nedbank conducted a background check on Reynecke. This revealed that the registrar had noted his debarment. Nedbank then also terminated his employment agreement. Reynecke approached the Commission for Conciliation, Mediation and Arbitration for redress. The parties settled the dispute on the understanding that Reynecke would approach the court to review the debarment.

[8] On 12 September 2013 Reynecke launched a review application in the Gauteng Division of the High Court, Pretoria. Odinfin filed a notice to oppose the application which opposition was later withdrawn. The basis of the application was that Odinfin, in discharging its mandatory obligation in terms of s 14 of the FAIS Act, was performing an administrative act, which in terms of PAJA entitled him to notice and a fair hearing. He alleged that the debarment, having been done without notice and a fair hearing, was

procedurally unfair and as such had to be reviewed and set aside. Reynecke's contention that Odinfin's debarment decision constituted administrative action accorded with this court's subsequent decision in *Financial Services Board v Bathram*.[1] In the present case the high court, apparently without furnishing reasons, reviewed and set aside the debarment. Thereafter Nedbank re-employed Reynecke but by that time he had been without employment and a salary for nine months.

[9] On 4 December 2014 Reynecke launched an action against Odinfin in the court a quo seeking damages for loss of income. His contention was that Odinfin had owed him a duty of care not to proceed to debar him without notice and a hearing. Odinfin filed a plea denying the existence of the alleged duty of care and contending that the alleged loss was 'caused by his own wrongdoing. . .'

[10] The parties seemingly agreed on a separation of issues, with the 'merits' to be decided first. The precise terms of the separation do not appear from the record and the court a quo made no formal order in terms of rule 33(4) of the Uniform Rules of Court. The trial proceeded before Louw J who at the end of the trial found in favour of Reynecke and held that Odinfin was liable for such damages as Reynecke could prove plus costs. Dissatisfied with this finding, Odinfin brought an application for leave to appeal the said order. The application was successful. This is the appeal before us.

[11] Before dealing with the merits of the appeal, there is one issue that need to be addressed. The issue concerns the separation of issues in terms of rule 33(4). Judges

[1] *Financial Services Board v Bathram* (20207/ 2014 [2015] ZASCA 96 [2015] 3 All SA 665 (SCA) .

should not approve a separation just because the parties have agreed to do so. And if a separation is approved, the court must ensure that its terms are clear. The facts of this matter reveal that separation was inappropriate. It was in fact inconvenient to deal with this matter piecemeal rather than all at once. The quantum that was held over for later determination was modest and easily calculable. To dispose of this matter at once rather than piecemeal would at most have extended the trial into a second day. In fact, proceedings only started in the court a quo at 11h23 (because copies had to be made of certain documents) and finished at 14h38. Had the trial been run efficiently, the evidence on all issues would not have needed more than one day. And as I have observed, the terms of the separation were not properly recorded. For example, at the hearing of the appeal counsel were unclear whether causation was part of the merits or the quantum. If Reynecke correctly succeeded on the 'merits', he might still have been unable to prove that things would have turned out any differently if Odinfin had complied with its procedural obligations under PAJA. Having disposed of the two preliminary issues, I turn to the merits of the appeal.

[12] That Reynecke's claim is a delictual claim based on pure economic loss admits no doubt. It being a delictual claim founded on the breach of the provisions of PAJA, for him to succeed with his claim, he must prove:

(a) Conduct,

(b) Wrongfulness,

(c) Fault,

(d) Causation and

(e) Damages

The issue of damages having been held over, this need not detain us further. I have already mentioned that it is unclear whether causation also stood over. I shall assume it did. As to fault, Reynecke did not allege that Odinfin's alleged breach was knowingly wrongful (dolus) or negligent (culpa) so on the merits he had to show not only that the breach of procedural fairness was wrongful in the delictual sense but that it gave rise to strict liability.

[13] The test for determining wrongfulness in a delictual sense for omissions was formulated by this court in *Van Eeden v Minister of Safety and Security (Women's Centre Trust*, as *Amicus Curiae*)[2] as follows:

'. . . An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent harm. The court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment based, inter alia, upon its perception of the legal convictions of the community and on considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which have to be considered . . .'

[14] It is trite that the legal convictions of the community and considerations of policy are now determined by the normative values contained in the Constitution.[3]

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[2] *Van Eeden v Minister of Safety and Security (Women's Centre Trust*, as *Amicus Curiae*) 2003 (1) SA 389 (SCA) para 9.

[15] In regard to an omission to comply with the requirements of PAJA, it is apt to refer to what the Constitutional Court said in *Steenkamp N O v Provincial Tender Board, Eastern Cape*:[4]:

'However, a concession that the tender board acted inconsistently with the tenets of administrative justice is neither decisive of the existence of a duty of care nor is it of any avail to the applicant's case. In our Constitutional dispensation every failure of administrative justice amounts to a breach of a constitutional duty. But the breach is not an equivalent of unlawfulness in a delictual sense. Therefore an administrative act which constitutes a breach of a statutory duty is not for that reason alone wrongful . . . Policy considerations of fairness and reasonableness have to be taken into account when imposing a duty of care and ultimately liability to make good the harm suffered by a claimant.'

[16] In *Mashongwa v Passenger Rail Agency of South Africa*,[5] the Constitutional Court in deciding whether a failure of administrative justice amounted to a delict reasoned thus:

'To conclude that an incident of omission, particularly in relation to public duties, is wrongful and impute delictual liability, is an exacting exercise that requires a reflection on a number of important factors. Some of them are: whether the operating statute provides for a delictual claim for damages; whether the legislation's scheme is primarily about protecting individuals or advancing public good; whether the public power conferred is discretionary; whether the imposition of liability for damages is likely to have a 'chilling effect' on the performance of

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[3] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 17.
[4] *Steenkamp N O V Provincial Tender Board, Eastern Cape* 2007 (3) 121 (CC) para 37.
[5] *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) para 22.

government functions; whether loss was foreseeable; and whether alternative remedies such as interdict, review or appeal are available to claimant' (Footnotes omitted)

[17] The issue of delictual liability for breach of a statutory duty was recently considered by this court in *Home Talk v Ekurhuleni Metropolitan Municipality*,[6] where the relevant principles were summarised. I wish to quote two paragraphs from Ponnan JA's judgment (citation of authorities omitted):

'19. Undoubtedly, the appellants were entitled to proper administrative legal proceedings. But, that did not mean that the breach of the administrative duties as set out in the particulars of claim necessarily translated into private law duties giving rise to delictual claims. It must be accepted that an incorrect administrative decision is not *per se* wrongful. It is thus unhelpful to call every administrative error 'unlawful', thereby implying that it is wrongful in the delictual sense, unless one is clear about its nature and the motive behind it. Administrative law is a system that over centuries has developed its own remedies and, in general, delictual liability will not be imposed for a breach of its rules unless convincing policy considerations point in another direction. The breach of every legal duty, especially one imposed by administrative law, does not necessarily translate into the breach of a delictual duty. If the legal duty invoked is imposed by a statutory provision the focal question is one of statutory interpretation. Whether the existence of an action for damages can be inferred from the controlling legislation depends on its interpretation and it is especially necessary to have regard to the object or purpose of the legislation. This involves a consideration of policy factors which, in the ordinary course, will not differ from those that apply when one determines whether or not a common-law duty existed.

. . . .

22. In considering the issue of wrongfulness in the delictual sense, the nature of the Municipality's functions certainly require close scrutiny. But it must be appreciated that the nature of its functions is but one of the circumstances calling for consideration in the case. As always, to determine the issue of wrongfulness, all the circumstances of the case fall to be considered. One of the questions in this case is whether the legislature intended a claim for damages in respect of loss caused in addition to the other administrative law remedies available to the appellants. In *Steenkamp* (para 22), Harms JA observed:

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[6] *Home Talk v Ekurhuleni Metropolitan Municipality* (225/2016) [2017] ZASCA 77 (2 June 2017).

"It appears to me that if the breach of a statutory duty, on a conspectus of the statute, can give rise to a damages claim, a common-law legal duty cannot arise. If the statute points in the other direction, namely that there is no liability, the common law cannot provide relief to the plaintiff because that would be contrary to the statutory scheme. If no conclusion can be drawn from the statute, it seems unlikely that policy considerations could weigh in favour of granting a common-law remedy."'

[18] Reynecke's pleaded case seems to be that Odinfin's wrongful act was the breach of s 3 of PAJA, albeit in relation to administrative action taken pursuant to s 14 of the FAIS Act. Reynecke did not plead that on the facts his conduct did not provide grounds for a conclusion that he no longer met the 'fit and proper requirements' referred to in s 6A of the FAIS Act. The FAIS Act does not prescribe any procedure which an FSP must follow before debarring a representative. Reynecke did not plead, nor does it seem to be the case, that Odinfin breached any statutory duty imposed by the FAIS Act.

[19] The case thus reduces to the question whether administrative action which is procedurally unfair in terms of s 3 of PAJA is delictually wrongful. The answer to that question must turn not on the provisions of the legislation pursuant to which the administrative action was taken (here, the FAIS Act) but on the provisions of PAJA itself. There is nothing in PAJA to suggest that the lawmaker intended there to be a delictual remedy for non-compliance with its provisions in general or its provisions relating to procedural fairness in particular. On the contrary, PAJA deals at some length with the rights of an aggrieved person affected by unfair administrative action, namely judicial review in terms of s 6 and the remedies provided for in s 8. Here Reynecke exercised his right of judicial review and obtained an order setting aside Odinfin's

procedurally unfair administrative action. Although the matter was not formally remitted to Odinfin for decision, Odinfin would have been entitled – perhaps obliged – to decide the matter afresh after observing the requirements of procedural fairness.

[20] In exceptional circumstances a review court may, instead of remitting the matter, make a substituted decision or may order the decision-maker to pay compensation (s 8(1)(c)(ii)). This was not the remedy that Reynecke claimed and it is doubtful in any event whether it was permissible, having regard to this court's decision in *Simcha Trust v De Jong*.[7]

[21] The fact that PAJA does not afford a delictual remedy for damages does not necessarily mean that unjust administrative action will not be delictually wrongful if there was a breach of the statute pursuant to which the administrative action was taken and if such statute on a proper interpretation confers a delictual remedy. In the instant matter, however, Reynecke does not allege that there was a breach of the FAIS Act. And even if there had been a breach of s 14 of the FAIS Act, I do not consider that the FAIS Act envisages a delictual claim for damages. The primary aim of s 14 is not to protect the interests of employed representatives such as Reynecke but to advance the public good. Odinfin had no option but to debar Reynecke once it found him lacking honesty and integrity. The imposition of liability for damages would have a 'chilling effect' on the performance by FSPs of their statutory duty imposed by s 14 and on the administration of the FAIS Act. There is no difficulty in imposing liability where the decision-maker acts

[7] *The Trustees of the Simcha Trust v De Jong & others* [2015] ZASCA 45; 2015 (4) SA 229 (SCA) paras 25-26.

dishonestly or corruptly but our courts have been slow to find that statutes accord delictual remedies for mere negligence.[8] Here Reynecke wanted the court a quo to go even further and impose strict liability.

[22] In the present matter, the interest of the public looms large. It is entitled to know that representatives possess honesty and integrity, otherwise even rogue persons could act as representatives without the public at large knowing. The victims would not only be members of the public but financial institutions as well. A country which allowed rogue persons to act as representatives would be poorer for it. To impose liability for damages for the negligent performance of an administrative function would have a chilling effect on the administration of the FAIS Act.

[23] I conclude that Odinfin's breach of PAJA did not give rise to a delictual claim for damages. Its actions, in the absence of any allegation or evidence of *mala fides,* were not wrongful.

[24] Having regard to the aforesaid, the following order is made –

(a) The appeal is upheld with costs,

(b) The order of the trial court is substituted with the following –

'The plaintiff's action is dismissed with costs'.

[8] See *Simcha Trust* fn 7 above para 30; *South African Post Office v De Lacy & another* 2009 (5) SA 255 (SCA) para 14.

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M Tsoka

Acting Judge of Appeal

APPEARANCES:

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