REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 58053/2012

8/12/17

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED.

8/12/2017
DATE

SIGNATURE

In the matter between:

PICVEST INVESTMENTS (PTY) LTD Applicant

and

REGISTRAR OF FINANCIAL SERVICES PROVIDERS First Respondent

CHAIRPERSON OF THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD Second Respondent

JUDGMENT

TEFFO, J:

INTRODUCTION

[1] The applicant seeks to review and set aside the decision taken by the first respondent on 4 April 2013 to withdraw its licence to act as a financial services provider. The licence authorised the applicant to render financial services in respect of short-term insurance, shares, debentures and securitised debt.

[2] The decision to withdraw the applicant's licence was taken in terms of section 9 of the Financial Advisory and Intermediary Services Act 37 of 2002 ("*FAIS Act*") and it was confirmed on appeal by the Financial Services Appeal Board ("*the Appeal Board*") on 11 February 2014.

THE PARTIES

[3] The applicant is Picvest Investment (Pty) Ltd.

[4] The first respondent is the Registrar of Financial Services Providers.

[5] The second respondent is the Chairperson of the Appeal Board of the Financial Services Board.

[6] For convenience's sake in this judgment the first and second respondents, will be referred to separately as the first or second respondent. The other party is the Department of Trade and Industry.

[7] The application is only opposed by the first respondent while the second respondent abides by the decision of the court.

[8] The application is brought in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*").

BACKGROUND

[9] The applicant was the promoter and marketer of a series of property syndication investment schemes. In terms of the investment schemes members of the public bought units representing shares and loan accounts in a syndication property-owning company, paying R1 per ordinary share and R999 in respect of a loan account per R1 000 unit.

[10] The applicant had conducted 22 property syndication schemes. The application only relates to the marketing and promotion of shares of property syndication companies known as Highveld Syndications No. 19-22.

[11] Investments were paid into the trust account of Eugene Kruger & Co Incorporated ("*Kruger Attorneys*"), a firm of attorneys based in Pretoria. Registered prospectus were publicly issued in terms of the Companies Act, 61 of 1973 ("*the old Companies Act*") and investors signed written agreements in response thereto. The prospectus provided that monies deposited would remain in the trust account of the attorneys until the company had taken occupation of the properties which properties were referred to in the prospectus, subject to the promoter's discretion to use such monies to pay for the properties.

[12] On 30 March 2006 four months after the applicant was authorised to act as a financial services provider, the Minister of Trade and Industry issued a notice, Notice number 459 of 2006 ("*the Board Notice*") in terms of the Consumer Affairs Act, 1998 ("*CAA*"). Para 2(b) of the Board Notice provided that funds deposited into a legal practitioner's trust account shall only be withdrawn in the event of registration of transfer of the property into the syndication vehicle; or underwriting by a disclosed underwriter with details of the underwriter; or repayment to an investor in the event of the syndication not proceeding.

[13] The applicant instructed Kruger Attorneys to release investor funds when there was no registration of transfer of the properties that had been purchased by the Highveld syndication companies into the name of the syndication company without complying with the provisions of para 2(b) of the Board Notice.

[14] This action by the applicant led to the withdrawal of its licence to act as a financial services provider by the first respondent which decision the applicant seeks to review and set aside.

[15] The second respondent has been joined in these proceedings as an interested party and no relief is sought against him.

[16] The applicant was authorised by the first respondent to act as a financial services provider on 19 November 2005.

[17] On 30 March 2006, the Minister of Trade and Industry issued a Board Notice in terms of CAA.

[18] On 31 March 2010 the first respondent received a complaint from Imperial Bank that its client, Zelpy 2095 (Pty) Ltd ("*Zelpy*"), had sold various properties bonded in favour of Imperial Bank and according to the prospectus of the applicant, the properties were alleged to have been purchased at three times their valuations at the time. The complaint was referred to the applicant for comment. In a letter dated 12 May 2010 from the applicant to the first respondent, the applicant advised that the seller of the properties had confirmed that he was proceeding to effect the transfer of the properties into the names of the various syndications. Transfer was never effected into the names of the various syndications. The relevant sales were cancelled and without reference to the investors, the syndication companies and the sellers concluded an agreement with Orthotouch Limited in terms of which it would

buy the properties from the syndication companies. The syndication companies were placed under business rescue in terms of the Companies Act, 71 of 2008 ("*the new Companies Act*"). This means investors involved bought shares in companies that were not the owners of the properties which were due to provide them with the promised returns on their investments.

[19] The first respondent conducted an onsite visit into the affairs of the applicant during the period 22 to 25 November 2010 in terms of section 4(5)(a)(i) of the FAIS Act.

[20] The findings made during the onsite visit were disclosed to the applicant and the parties exchanged correspondence between them regarding the findings.

[21] On 17 September 2012 the first respondent gave the applicant notice of his intention to withdraw the applicant's authorisation to act as a financial services provider.

[22] On 15 November 2012 the applicant furnished reasons why the authorisation should not be withdrawn.

[23] On 4 April 2013 the first respondent withdrew the applicant's authorisation to act as financial services provider. In addition thereof, the first respondent also barred the applicant from applying for a licence to act as a

financial services provider for a period of five years. The applicant was therefore prohibited from applying for a new licence before 4 April 2018.

[24] The applicant, aggrieved by the first respondent's decision, lodged an appeal to the Appeal Board on 9 April 2013.

[25] On 23 May 2013 the first respondent furnished reasons for his decision to withdraw the applicant's licence to act as a financial service provider.

[26] On 8 July 2013 the applicant made its submissions.

[27] The Appeal Board heard the matter on 31 January 2014.

[28] On 11 February 2014 the Appeal Board confirmed the decision of the first respondent.

[29] On 5 August 2014 the present application was launched.

THE PARTIES' CONTENTIONS

The applicant

[30] The applicant contends that it was advised by Kruger Attorneys that the Board Notice was not applicable to the marketing of syndications which fell within the ambit of the Companies Act.

[31] It concedes that the investor's funds were only released on the instructions of the licensee, in accordance with the provisions of the applicable prospectus and the relevant agreements. This it was conceded, was in non-compliance with para 2(b) of the Board Notice.

[32] The applicant also contended that while it was accepted at the hearing that there was no provision in the Board Notice excluding the marketing and/or promoting of syndications under the Companies Act from its operation, there was also no provision in the Board Notice or the Companies Act that it was so applicable.

[33] It was further contended that the letter from the Companies and Intellectual Property Commission ("*CIPC*") dated 16 May 2013 (annexure "P8") did not contain any confirmation that the Board Notice applied to the applicant.

[34] The provisions of section 146 of the Companies Act governing the general requirements relating to prospectuses are detailed and onerous precisely to protect investors against, among others, the unscrupulous investment companies, so it was accordingly contended.

[35] The prospectuses dealt pertinently with the right to release investor's funds from the attorney's trust account and did not refer to the Board Notice at all, so it was contended.

[36] It was contended that the CIPC which was responsible for the enforcement of the Board Notice, registered the prospectuses for Highveld Syndications without raising the non-compliance with the Board Notice.

[37] The applicant further contended that the investor's funds were never deposited into the trust account of Kruger Attorneys as contemplated by section 2(a) of the Board Notice. It had been advised throughout that the Board Notice was not applicable and the investor's funds were never deposited or released in accordance with the Board Notice, so it was contended.

[38] The applicant also contended that in giving the instruction for the release of the funds, it acted *bona fide* and on the strength of legal advice obtained from its attorneys. Accordingly and under the circumstances, in view of the legal advice it received, its honesty and integrity could never have been impugned, so it was contended.

[39] It was contended that after receiving legal advice, the applicant considered that it was acting lawfully. It was giving effect to the provisions of the prospectuses duly registered by the Department. According to it, it acted with the requisite skill, care and diligence. The applicant also contends that the finding of the first and second respondents that fraud should be imputed to the applicant's board of directors, is devoid of any merit and inconsistent with the evidence. It criticises the aforesaid decision of the first respondent on the basis that it was materially influenced by an error of law because according to

it, irrelevant considerations were taken into account, as contemplated in section 6(2)(d) and 6(2)(e)(iii) of PAJA.

[40] The applicant also contended that the appeal should have been upheld on the grounds that it was not legally required to have complied with the provisions of the Board Notice, in view of the fact that it was acting in terms of duly registered prospectuses.

[41] It was further contended that the decision of the first respondent which was upheld on appeal, had devastating consequences for the applicant and its employees. Its business has been stopped since 2013. It could not earn an income. The decision had an interim operation as contemplated in section 26(3) of the Financial Services Board Act 97 of 1990.

[42] It was further contended that the decision taken was harsh, taking into account that the initial decision of the first respondent was premised on a number of alleged statutory contraventions. On appeal the first respondent limited its grounds on misconduct. A lesser penalty of a suspension, for a certain period should have been imposed on the limited grounds remaining on appeal.

The first respondent

[43] It was contended that the applicant failed to ensure that there was a transfer of the property into the syndication vehicle before the funds which

were held in the attorney's trust account could be withdrawn. According to the first respondent the admission by the applicant that it did not comply with the Board Notice, in particular, para 2(b), supports his view and the finding of the Appeal Board that such failure warranted his decision to withdraw the applicant's licence on the ground that it had breached section 2 of the General Code which enjoined it to act with due skill, care and diligence.

[44] As regards the contention that the applicant acted on the advice of its attorney that the Board Notice was not applicable to syndications which fell within the ambit of the Companies Act, the first respondent submitted that the averments must be viewed in the context of two important points made by the Appeal Board. It was pointed out that according to the Appeal Board, the appeal did not really concern Mr Kruger, the applicant's attorney's state of mind, but focused on the state of mind of the directors or officers of the applicant to whom Mr Kruger's opinion was conveyed and who instructed the withdrawal of the investor's funds from the attorney's trust account.

[45] It was contended that the applicant's documents including Mr Kruger's statement, which served before the Appeal Board, were silent on the directors of the applicant or officers who sought and obtained Mr Kruger's opinion as well as the basis upon which those directors or officers accepted and acted on Mr Kruger's advice.

[46] The first respondent also contended that the Appeal Board came to the conclusion that Mr Kruger's advice to the applicant was wrong and accordingly found that his decision to withdraw the applicant's licence was therefore justified. It therefore dismissed the appeal, so it was contended.

[47] According to the first respondent, the Board notice clearly applied to all public property syndications regardless of how they were marketed and/or promoted.

[48] While admitting that the provisions of section 146 of the Companies Act and Schedules 2 and 3 to the Act which governed the general requirements relating to prospectuses were detailed and onerous to protect the investors against unscrupulous investment companies, the first respondent submitted that the aforesaid provisions did not provide clients of the applicant with any protection regarding the withdrawal of their funds from the attorney's trust account as the provisions did not govern such withdrawals.

[49] The first respondent admits that the prospectuses dealt pertinently with the right to release investor's funds from the attorney's trust account and did not refer to the Board Notice at all. He, however, contends that the prospectuses failed to provide the clients of the applicant with any protection regarding the withdrawal of their funds from Mr Kruger's trust account. According to the prospectuses investor's funds could be withdrawn before the Highveld syndication companies had taken transfer of the properties referred

to in the prospectuses, so it was contended. It was submitted that the prospectuses simply failed to meet the requirements of clause 2 of the Board.

[50] A submission was made on behalf of the first applicant that nothing should be read into the fact that the prospectuses were registered by the CIPC which department bore the responsibility of ensuring the enforcement of the Board Notice.

[51] The allegations by the applicant that it never deposited the investor's funds or released them from Mr Kruger's trust account in accordance with section 2(a) of the Board Notice, have been denied by the first respondent. He contends that there is no evidence to support the allegations.

[52] The first respondent also denies that the applicant acted *bona fide* when it withdrew the investor's funds from Mr Kruger's trust account before the transfer of the properties into the Highveld Syndication companies' names.

[53] While the first respondent admits that the prospectuses which permitted the release of the investor's funds had been approved, he denies that the applicant's honesty and integrity could never have been impugned. He contends that the directors of the applicant acted with a dishonest state of mind when they closed their minds to seeking further guidance other than to rely on a "*brief oral assertion*" by Kruger which provided no motivation for the advice, which advice was wrong.

[54] The allegations that the applicant acted lawfully with the requisite skill, care and diligence and that it was giving effect to the provisions of the prospectuses duly registered by the Department, have been denied by the first respondent. The first respondent also denies that the Appeal Board made a finding that the applicant's board of directors acted fraudulently. He contends that the Appeal Board stated that fraud had not been alleged or found in the matter. It found that the applicant's officers acted with the dishonest state of mind when they withdrew the investor's funds from Mr Kruger's trust account in the context of having closed their minds to further and better advice, so it was contended.

[55] The first respondent denies that the applicant was not legally required to have complied with the provisions of the Board Notice. He contends that the directors of the applicant should have made further inquiries which would have proved that it was legally required to comply with the Board Notice.

[56] The first respondent denies the allegations that the decision to withdraw the applicant's licence which was confirmed on appeal, had devastating consequences for the applicant and its employees. He contends that the submissions were never raised before it and/or the Appeal Board. They are raised for the first time before this Court. It was submitted that the above contention does not constitute a basis for reviewing and setting aside the decision of the Appeal Board. It was also submitted that whether or not the first respondent's decision had devastating consequences for the applicant and its employees, it is irrelevant. He contends that if his decision

really had such devastating consequences for the applicant and its employees, the applicant was expected to have exercised its right to bring an application in terms of section 26(3) of the FSB Act to have his decision suspended pending the hearing of the appeal by the Appeal Board. Such an application was never launched by the applicant, so it was accordingly, contended.

[57] The first respondent denies that he would not have taken the same decision on the two grounds he relied upon at the appeal hearing. He contends that the argument never featured at the appeal hearing. It is raised for the first time before this Court. He admitted that at the appeal hearing, he no longer relied on the grounds mentioned in his notice of withdrawal. He was adamant that he chose to justify his decision only on the grounds that the applicant no longer met the fit and proper requirements and had failed to comply with the FAIS Act. He contended that he would still have reached the same conclusion on the limited grounds.

THE ISSUES

[58] Was the action taken by the first respondent and confirmed by the second respondent to withdraw the applicant's licence to act as financial service provider justified?

[59] Was the action influenced by an error of law?

[60] Were irrelevant considerations taken into account or relevant considerations not taken into account when the decision was taken?

THE LAW

[61] Section 8(1) of the FAIS Act provides:

> *"An application for an authorisation referred to in section 7(1), including an application by an applicant not domiciled in the Republic, must be submitted to the registrar in the form and manner determined by the registrar by notice on the official website, and be accompanied by information to satisfy the registrar that the applicant complies with the fit and proper requirements determined for financial services providers or categories of providers, determined by the registrar by notice in the Gazette, in respect of –*
>
> *(a) The personal character qualities of honesty and integrity;*
>
> *(b) competence;*
>
> *(bA) operational ability; and*
>
> *(c) financial soundness."*

[62] Section 9(1) provides:

> *"The registrar may, subject to subsection 2 and irrespective of whether the registrar has taken or followed, or is taking or following, any step or procedure referred to in section 4, at any time suspend or withdraw any licence (including the licence of a licensee under provisional or final suspension) if satisfied, on the basis of available facts and information, that the licence –*
>
> *a) does not meet or no longer meets the fit and proper requirements applicable to the licensee, or if the licensee is a partnership, trust or corporate or unincorporated body, that the licensee or any key individual of the licensee does not*

meet or no longer meets the fit and proper requirements applicable to the licensee or the key individual; ..."

[63] At paragraph 16 of its judgment in *Financial Services Board v Barthram* (20207/2014) [2015] ZASCA 19 (1 June 2015) the court said the following:

"*... The debarment of the representative by a Financial Services Provider (FSP) is evidence that it no longer regards the representative as having either the fitness and propriety or competency requirements. A representative who does not meet those requirements lacks the character qualities of honesty and integrity or lacks competence and thereby poses a risk to the investing public generally. Such a person ought not to be unleashed on an unsuspecting public representative debarred in terms of s 14(1), must perforce be debarred on an industry-wide basis from rendering financial services to the investing public.*"

[64] Section 10(1)(c) of the General Code provides:

"*Subject to the provisions of any other applicable Act, a provider who receives or holds financial products or funds of or on behalf of a client must account for such products or funds properly and promptly and –*

(a) ...

(b) ...

(c) where the provider, or a third party on behalf of either of them, is in control of such financial products or funds, take reasonable steps to ensure that they are adequately safeguarded."

ANALYSIS

[65] It is common cause between the parties that the applicant did not comply with the Board Notice when it gave an instruction to Kruger Attorneys to release the investor's funds from their trust account.

THE BOARD NOTICE

[66] Paragraph 2 of the Board Notice reads:

> a) "*Investors shall be informed, in writing, that all funds received from them prior to transfer/finalisation shall be deposited into the trust account of a registered estate agent, a legal practitioner or a certified chartered accountant and provided that such trust account is protected by legislation, individual investors are to be given written confirmation thereof. It shall be clearly stated who controls the withdrawal of funds from that account. …*
>
> b) *Funds shall only be withdrawn from the trust account in the event of registration of transfer of the property into the syndication vehicle; or the underwriting by a disclosed underwriter with details of the underwriter, or repayment to an investor in the event of the syndication not proceeding.*"

THE CONSEQUENCES OF THE FAILURE TO COMPLY WITH THE BOARD NOTICE

[67] After the withdrawal of the investors' funds from the trust account of Kruger Attorneys, the sellers of the properties concerned were paid without ensuring transfer of the properties in return for such payment. Transfer was never obtained. The sales were cancelled and without reference to the

investors, the syndication companies and the various sellers entered into an agreement with a company called Orthotouch Limited in terms of which it would buy the properties from the syndication companies. The latter were later placed under business rescue. The investment funds were consequently in a company which did not own the properties unencumbered. The investors never got the promised returns on their investments.

IS THE BOARD NOTICE APPLICABLE TO PROSPECTUSES GOVERNED BY SECTION 146 OF THE OLD COMPANIES ACT?

[68] According to the applicant when it instructed its attorneys to release its investors' funds from their trust account prior to the transfer of the properties, it acted in accordance with the applicable prospectuses and the relevant agreements. It contends that by so doing it acted in accordance with section 146 of the old Companies Act read with Schedules 2 and 3 thereto. Consequently it was not bound by the Board Notice, so it was contended.

[69] The Board Notice was issued in terms of section 12(6) of the CAA. In terms of section 1 of the CAA, the Act includes "*any notice published or given thereunder and any regulation*". It was correctly argued on behalf of the first respondent that the Notice must be seen in the light thereof as legislation of general application and of equal force to the Companies Act.

[70] The purpose of the Board Notice was to combat unfair business practices in property syndication schemes. It lays down minimum disclosure requirements for disclosure documents pertaining to property syndications. Paragraph 2 of the Notice requires a property syndication disclosure document to inform investors amongst other things that all funds received from them must be deposited into the trust account of, *inter alia*, a legal practitioner, and that funds must only be withdrawn from that account in the event of transfer of the property into the syndication vehicle; or underwriting by a disclosed underwriter, with deals of the underwriter, or repayment to an investor in the event of the syndication not proceeding. Non-compliance is punishable with a criminal conviction, coupled with a R200 000,00 fine or 5 (five) years imprisonment or both.

[71] The Board Notice defines "*public property syndication scheme*" as including investments and entities which could be companies, close corporations, trust partnerships or individuals whose sole asset(s) are commercial, retail, industrial or residential property and where investors shares in the profits and losses in these properties and/or enjoy the benefit of net rental growth therefrom through proportionate share of income.

[72] A "*promoter*" according to the Board Notice includes a company and its directors who are actively involved in the formation and establishment of a public property syndication scheme.

[73] There can be no doubt that the applicant company was a syndicate promoter as defined in the Notice. In terms of para 6 of the Board Notice such a company can avoid the application thereof of the Board Notice by applying for and obtaining an exemption.

[74] There is no evidence on the papers that the applicant applied for an exemption in terms of para 6 of the Board Notice.

[75] The provisions of para 2(a) and (b) of the Board Notice are peremptory. In the absence of an application for an exemption, the provisions thereof are applicable to the applicant as the syndicate promoter as defined.

[76] In my view even if the provisions of the old Companies Act were aimed at protecting investors against, *inter alia*, unscrupulous investment companies with the detailed and onerous requirements outlined in Schedules 2 and 3, the investors were still at risk to lose their investments. There was still a need to have regulations like the Board Notice to combat the unfair business practices hence the requirement that investors' monies deposited in the trust accounts of the attorneys, etc, have to be clearly marked and only be withdrawn after the transfer of the syndication property into the syndication vehicle.

[77] Had the Board Notice been complied with, the investment funds in the attorney's trust account would only have been paid to the seller upon registration of transfer of the properties into the syndication vehicle. The investment funds would be replaced with the security of the property and its

income stream. If the syndication did not proceed, the funds would have been available to be repaid to the investors. Alternatively the security to the investor would come in the form of undertakings by an underwriter.

[78] The protection offered to investors under the registered prospectuses in terms of section 146 of the old Companies Act pertaining to the release of investors' funds deposited in the trust account of an attorney upon the syndicate company taking occupation of the properties was, in my view, not sufficient.

[79] In my view, the Appeal Board correctly found that the advice given to the applicant by their attorney that the Board Notice was not applicable to the prospectuses registered in terms of the old Companies Act was wrong. A reading of the Board Notice clearly indicates that the entities like the applicant fall within its ambit and the applicant was therefore obliged to comply with it irrespective of whether it relied on the prospectuses which were registered in terms of the old Companies Act.

HAS THE APPLICANT ACTED *BONA FIDE* ON THE WRONG ADVICE OF ITS ATTORNEY?

[80] The applicant contends that it acted without complying with the Board Notice on the strength of the advice it obtained from its attorneys. According to it the prospectus permitting the release of the funds had been approved by the Department of Trade and Industry without raising the issue of non-

compliance with the Board Notice. Even the representatives of the Department were of the opinion that the Board Notice was not applicable, so it was accordingly contended.

[81] I agree that registration of the prospectuses, was not an expression of an approval by the Department. Whether or not the prospectuses were registered by the representatives of the Department without revising the issue of non-compliance is, in my view, immaterial. The fact of the matter is that the Board Notice was applicable and the advice given by the applicant's attorneys to it, was wrong.

[82] It was argued on behalf of the first respondent, correctly so, that the applicant's defence of having acted on legal advice should be see in the context of a financial services provider being a specialist in the financial services industry, subject to strict regulation and high standards of ethics. After carefully considering all the information before it, the Appeal Board said the following at para 18 of its judgment:

> "*The relevant officers of the appellant who received and acted on the advice of Mr Kruger have not proffered evidence in any form in this matter at any stage. The appellant, by which they were employed, carried on business in a particular sphere of commercial activity and it was required of them as its employees or directors to know what the various legal requirements regulating that sphere of activity were: cf (S v De Blom 1977 (3) SA 513 (AD). It was not sufficient for them to shelter behind what would have been nothing more than a brief oral assertion by Mr Kruger, who has not alleged that he motivated the advice when conveying it to the appellant. Unless they were culpably ignorant of what the Notice said, the likelihood is that they were aware of those portions which have been quoted above and which would, in our view, have prompted any responsible person in their position to query how the appellant would possibly be excused from non-*

compliance with the Notice. Other sources of advice than Mr Kruger's given opinion were available. For one counsel's opinion could have been sought. Having regard to the scope of the appellant's operation the cost of briefing counsel was probably affordable."

[83] The wording of the Board Notice is clear. There can be no doubt that an entity like the applicant which has been in the industry for so long prior to the issuing of the Board Notice and being a specialist in the Industry would not have realised that the Board Notice was not applicable to it if its directors and employees read the Board Notice and applied their minds to it. In consideration of what the applicant's failure to comply with the Board Notice caused to the investors who innocently invested their funds on the understanding that they would get something in return, it cannot be accepted that the applicant's directors and/or employees who gave instructions to their attorneys to release the funds prior to the transfer of the properties into the syndication vehicle, acted *bona fide* by relying on the wrong advice obtained from their attorneys.

[84] Being a specialist service provider, the applicant could have gone an extra mile and ensured that its directors also read the Board Notice and obtain further legal opinion. Wrong advice does not excuse its actions. The applicant also contended that its honesty and integrity could never have been impugned. The actions of the applicant's board of directors when they released or gave instructions for the release of the investors' funds without first ensuring the transfer of the property into the syndication vehicle as was required of them in terms of the provisions of paragraph 2(b) of the Board

Notice, in my view, put their integrity and the honesty into question. It also put their fitness and proprietary or competency requirements in question. A representative who does not meet those requirements lacks the character of honesty and integrity or competence and thereby poses a risk to the investing public generally (*Financial Services Board v Bathram*). I did not come across a finding by the Appeal Board in its decision to the effect that the applicant's board of directors acted fraudulently as alluded to by the applicant. The Appeal Board found that fraud had not been alleged on the facts before it. The contention that the decision of the first respondent as confirmed by the second respondent was influenced by an error of law, has no merit in my view. It cannot therefore be said that irrelevant considerations were taken into account. Under the circumstances the decision of the first respondent and confirmed by the second respondent in this regard, is in my view correct and cannot be faulted.

SHOULD THE SANCTION BE INTERFERED WITH?

[85] The applicant contends that because the initial decision of the first respondent was based on many other grounds which have fallen away, the decision taken would not have been taken or a lesser penalty of a suspension for a certain period on limited grounds remaining on appeal, would have been provided for. According to it the first respondent's decision as confirmed by the second respondent is not rationally connected to its wrongdoing in contravention of section 6(2)(f)(ii) of PAJA. I do not agree. In my view the limited grounds remaining on appeal as discussed in the judgment touched on

the fit and proper requirements of the applicant to act as a financial services provider and it was found that the applicant contravened the provisions of FAIS Act and was no longer fit and proper to act as a financial services provider.

[86] In *Logbro Properties CC v Bedderson NO and others* 2003 (2) SA 460 (SCA) paras 21 and 22 at 471 A-D the SCA dealt with the doctrine of judicial deference as follows:

> "... *a judicial willingness to appreciate the legitimate and constitutionality-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate ... It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for - and the consequences of - judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies.*"

[87] Without even considering the doctrine of judicial deference referred to in the papers, I am of the view that the sanction imposed was appropriate under the circumstances.

[88] Consequently the review application fails.

[89] In the result the following order is made:

89.1 The application is dismissed with costs, which costs include the costs of senior counsel.

M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

Counsel for the applicant	D A Preiss SC
Instructed by	Eugene Kruger & Co Inc
Counsel for the respondent	J Motepe
Instructed by	Roodt & Wessels Inc
Date heard	21 April 2017
Date handed down	8 December 2017