IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 61274/2015

30/11/17

In the matter between:

ILSE BECKER	First Applicant
FUSION GUARANTEES (PTY) LTD	Second Applicant

and

THE REGISTRAR OF FINANCIAL SERVICES PROVIDERS	First Respondent
APPEAL BOARD OF THE FINANCIAL SERVICES BOARD	Second Respondent
MR JUSTICE C.T. HOWIE (IN HIS CAPACITY AS CHAIRMAN OF THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD)	Third Respondent
MR D L BROOKING (IN HIS CAPACITY AS A MEMBER OF THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD)	Fourth Respondent
MR J M DAMONS (IN HIS CAPACITY AS A MEMBER OF THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD)	Fifth Respondent
THE REGISTRAR OF SHORT-TERM INSURANCE	Sixth Respondent

JUDGMENT

1.

This is an application for the review of certain administrative action. The Applicants sought in the Notice of Motion that:-

> "*1. The determination by the Second Respondent in which it upheld the decision of the First Respondent that the Second Applicant, through the medium of the First Applicant, carried on unauthorised short-term insurance business by issuing guarantee policies, as defined in Section 1 of the Short Term Insurance Act, 53 of 1998 ("STIA");*"

and claims an order in the following terms:-

> "*2. Condonation, insofar as may be necessary, for the late delivery of this review application as contemplated in Sections 9(1) and 9(2) of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA");*
>
> *3. Reviewing and setting aside the administrative action;*

4. *Remitting the decision by the Second Respondent to the First Respondent for reconsideration together with those issues previously remitted to the First Respondent by the Second Respondent in terms of its order dated 13 January 2015;*

5. *Costs of suit in the event of opposition."*

CONDONATION

2.

2.1 The review application was served on the Respondents on 31 July 2015, some twenty days beyond the 180 day period referred to in Section 7 of PAJA.

2.2 As it has become trite, the question of 180 days is not the sole determining factor, but Section 7(1) of PAJA requires any proceedings for judicial review to be instituted without unreasonable delay, and not more than 180 days from the date of the administrative action in question.

2.3 The manner in which condonation applications should be dealt with has been dealt with in numerous judgments, but in particular in the matter

of *Aurecon SA (Pty) Ltd v Cape Town City 2016 (2) SA 199 SCA at par. 17.* In such judgment the relevant factors were summarised to include, the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised and the prospects of success.

2.4 Whilst some criticism has been levelled at the explanation that has been tendered on behalf of the Applicants for the delay in bringing the review application, such as why Counsel did not deal with the matter for the Applicants more timeously and in particular, in the three month period between 13 January 2015 and 9 April 2014, I consider upon a consideration of all the factors that have been placed before this Court, including the importance of the issues for the parties, that it would be appropriate in the circumstances and in the interests of justice, that condonation be granted for the late filing of the review application.

2.5 I accordingly grant Prayer 2 of the Notice of Motion and condone the late filing of the review application, as contemplated in terms of Sections 9(1) and 9(2) of PAJA.

THE DECISION

3.

3.1 The decision that is under attack is the decision of the Appeal Board of the Financial Services Board. The relevant findings by such Appeal Board for the purposes of this review are:-

3.1.1 That the evidence justified and supported the Registrar's findings that the Second Applicant had acted "*in conflict with Section 7 of the Act as a mediatory in relation to the issue of guarantees on behalf of Zurich and Orange*";

3.1.2 That the Second Applicant had "*carried on short-term insurance business in conflict with Section 7 of the STIA by issuing the Fusion guarantees*" in its own name;

3.1.3 The First Applicant was responsible for the Second Applicant's contraventions of Section 7 of the FAISA and of Section 7 of the STIA;

3.14 That the First Applicant's central role as a key individual and a director of the Second Applicant and in respect of

the contraventions rendered the First Applicant guilty of misconduct which the Appeal Board had considered sufficiently serious to warrant the conclusion reached that the First Applicant had lacked the necessary honesty and integrity required of an authorised key individual.

3.2 It appears that the only finding that has been seriously challenged in the review is that the Second Applicant had carried on short-term insurance business in conflict with Section 7 of STIA. It would appear that should the finding that the Second Applicant had carried on the short term insurance business in conflict with Section 7 be correct, then the role of the First Applicant and her conduct as being the key individual in driving the activities of the Second Applicant is common cause and can be accepted for purposes of this judgment.

3.3 The main thrust of the argument on behalf of the Applicants was an attack on whether or not the documents that were issued by the Second Applicant at the behest of the First Applicant constituted undertakings within the meaning of a guarantee policy or whether or not the Second Applicant's undertakings were merely suretyships.

3.4 The primary response to this on behalf of the various Respondents was that the undertakings issued could constitute both suretyships and guarantees, as dealt with in terms of STIA.

3.5 It was further submitted on behalf of the Applicants that the Second Applicant's undertakings unambiguously constituted "*conditional bonds*" in the sense described by Brandt JA in *Minister of Transport and Public Works, Western Cape & Another v Zanbuild Construction (Pty) Ltd & Another 2011 (5) SA 528 (SCA) at par [13].*

3.6 A further submission was then made that when an analysis of the guarantee is made of the dispute in the Minister of Transport *supra*, such becomes clear authority for the proposition that the Second Applicant's guarantees are Deed of Suretyships.

3.7 A "*guarantee policy*" is defined in STIA as:-

> "*A contract in terms which a person, other than a bank, in return for a premium, undertakes to provide policy benefits if an event contemplated in the policy as a risk relating to the failure of a person to discharge an obligation, occurs, and includes a reassurance policy in respect of such a policy.*"

3.8 When one considers the business model of the Second Applicant it does not appear to me that such business model in fact involved the issuing of suretyships on behalf of its clients. The Registrar found that the agreements which the Second Applicant concluded with his clients did not meet the requirements of credit agreements under Section 8 of the National Credit Act and that the Second Applicant's guarantees were in any event not suretyships in terms of the National Credit Act.

3.9 It would appear to me that the submission on behalf of the Respondents that whether or not they could also constitute suretyships was not decisive of the matter is correct. The issue was whether or not they constituted guarantees, as defined in terms of STIA.

3.10 It was further submitted on behalf of the Applicants that it is clear that "*no premium*" was paid or was payable by the employer for the benefit of the security provided by the Second Applicant's guarantees. I cannot agree with such submission. It appears from the Second Applicant's own contemporaneous correspondence and other business, the accounting records, including the Second Applicant's own debit notes, that the Applicants consistently and unambiguously referred to payments that were received from its clients as "*premiums*" and in

terms of its business and contractual models treated such payments as "*premiums*".

3.11 The rejection by the Appeal Board that these constituted "*administration fees*" as argued by the Applicants in terms of Section 8 of the National Credit Act appears to be well-founded and I cannot find fault with such approach.

3.12 On such basis, and as has been found above, the findings by the Appeal Board and the conclusions which flowed therefrom that:-

3.12.1 The "*guarantees*" the Second Applicant issued on behalf its underwriter could plainly only fall within the ambit of the term policies as contemplated in the STIA definition of guarantee policy;

3.12.2 That the Fusion guarantees were in precisely the same terms as the guarantees previously issued by Orange, a registered short-term insurer;

3.12.3 That the Second Applicant's guarantees were in fact "*guarantee policies*" as contemplated by STIA;

cannot be faulted.

4.

4.1 It would appear to me that when one considers all of the above that the approach adopted by the Second Respondent, the Appeal Board followed a correct and proper reasoning and that the conclusions its reached were also in accordance with such correct and reasoned approach.

4.2 The attack therefore on the decision by the Applicants on numerous grounds to be found in Section 6 of PAJA cannot hold water and in the circumstances the application stands to fail.

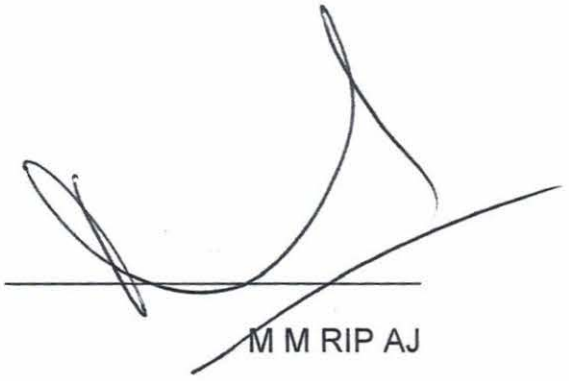
4.3 As to the question of costs, both the Applicants and Respondents used Senior Counsel, which in my view was justified considering the complexity of the matter and the importance of the matter to the various parties.

5.

In the circumstances, I make the following order:-

5.1 The application is dismissed;

5.2 The Applicants are ordered jointly and severally to pay the costs of the application, such costs to include the costs consequent upon the employment of two Counsel.



M M RIP AJ

8 November 2017