



Representatives of financial service providers must be honest and have integrity or face being disbarred industry-wide

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On 1 June 2015 the Supreme Court of Appeal (SCA) delivered a judgment in the Financial Services Board vs PGE Barthram and Discovery Life Limited case, emphasizing that representatives of financial services providers (Reps) must be honest and people of integrity or face being disbarred from ever working in the financial services industry. With its decision, the SCA has enhanced the protection of the investing public from dealing with Reps who are dishonest and lack integrity.

Reps are employed by financial services providers to market and sell their financial products (e.g. insurance policies, unit trusts) to the public. In terms of the Financial Advisory and Intermediary Services Act 2002 (FAIS) a financial services provider is required to ensure that its Reps are competent to act and comply with the fit and proper requirements (including personal character qualities of honesty and integrity). Where a financial services provider fails to comply with this requirement, it may be guilty of an offence and be liable on conviction to a fine not exceeding ZAR10 million or to imprisonment not exceeding 10 years or to both such a fine and imprisonment.

The case related to Mr PGE Barthram (Barthram) who was employed by Discovery Life Limited (Discovery) to market and sell its products and policies, and to provide advice and intermediary services in relation to the products and policies provided by Discovery. Discovery conducts its business as financial services provider under FAIS. As a financial services provider, Discovery is required to uphold the qualities of honesty and integrity. Consequently, any person employed by Discovery to render financial services is also required to act with integrity and honesty. As an employee of Discovery, Barthram was obliged to uphold the personal character qualities of honesty and integrity.

Barthram purported to resign from Discovery on 24 hours' notice and commenced employment a day later with Old Mutual Life Insurance Limited. As a consequence, Discovery's chief compliance officer notified Barthram that Discovery had taken a decision to notify the registrar of financial services providers (Registrar) that Barthram had failed to comply with the fit and proper requirements under FAIS for continued appointment as a Rep for Discovery. Following the notice to Barthram, Discovery withdrew Barthram's authority to act on its behalf and removed his name from the register of Reps. In its notice, Discovery marked the reasons for the removal as "honesty and integrity". On receipt of the notice from Discovery, the Registrar listed Barthram on its website as a debarred Rep, stating that Barthram "does not comply with personal character qualities of honesty and integrity". This was a significant step by the Registrar because on the back of Discovery's action/notice, the Registrar disbarred Barthram from working in the industry as a whole.

Barthram tried without success to have his debarment lifted. Barthram then filed an application in the North Gauteng High Court, Pretoria to review and set aside his debarment. Although Discovery opposed the review application, the Registrar did not oppose the application. In deciding in favour of Barthram, the High Court stated that Discovery/the Registrar had failed to recognize the distinction between debarment by the financial services provider (e.g. Discovery) and debarment by the Registrar. According to the High Court, debarment by a financial services provider effectively means that the Rep can no longer represent that particular financial services provider (e.g. Discovery). However, debarment by the Registrar precludes the Rep from rendering financial services on behalf of any financial services provider (meaning the entire financial services industry). In essence, according to the High Court, Barthram should have only been debarred from representing Discovery and not the entire financial services industry.

Realising that the decision of the High Court could have serious adverse consequences for the industry, the Registrar appealed the decision of the High Court to the SCA. One of these consequences was that Reps who had been previously disbarred from the entire industry simply because they had been disbarred by one financial services provider could approach the Registrar and demand reinstatement to the registrar of Reps so that they can work for other financial services providers.

In the appeal, the Registrar argued that the High Court had erred in its finding that the effect of a debarment of Barthram by Discovery was that he was only precluded from rendering financial services to the public on behalf of Discovery. In making a decision, the SCA stated that:

“The court below appears to have misinterpreted the legal effect of a debarment, in holding that it precludes the representative from acting as such only in respect of the debarred financial services provider. The absurdity of such an approach is patent. The debarment of the representative by a FSP is evidence that it no longer regards the representative as having either the fitness and proprietary 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 and it must therefore follow that any person debarred by the employer, must perforce be debarred on an industry-wide basis from rendering financial services to the investing public”. (my emphasis)

The Registrar succeeded in its appeal.

The SCA also considered the cross appeal brought by Barthram on the basis that the principles of procedural fairness had not been observed by Discovery before it disbarred him. In deciding in favour of Barthram the SCA stated that, before a decision is taken to disbar a Rep: (i) the Rep must be given reasonable time in which to assemble the relevant information and to prepare and put forward his representations and (ii) he must be put in possession of such information as well as render his right to make representations a real, not an illusory one. The SCA upheld Barthram’s appeal on this point.

In summary, the case highlights the fact that failure by a Rep to uphold the standards of integrity and honesty will result in a Rep not only being debarred by his employer but by the Registrar on an industry wide basis. In essence, once an employer determines that the Rep is not fit and proper the Rep may be ‘banned’ from ever providing financial services to the investing public in South Africa. However any disbarment must be preceded by due process. Overall, the case enhances protection for the investing public and clarifies the implications of disbarment of a Rep by his employer.