**Republic of South Africa**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**Case no: 20986/2012**

**In the matter between:**

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| **ELIZABETH COETZEE** | **Applicant** |
| **and** | |
| **FINANCIAL PLANNING INSTITUTE OF SOUTHERN AFRICA (ASSOCIATION INCORPORATED IN TERMS OF S21)** | **First Respondent** |
| **RN KING** | **Second Respondent** |
| **E VENTER** | **Third Respondent** |
| **J LOURENS** | **Fourth Respondent** |
| **J MAREE** | **Fifth Respondent** |
| **M LOUW** | **Sixth Respondent** |

**Court**: Judge Louw *et*Judge Cloete

**Heard**: 2 August 2013

**Delivered**: 5 September 2013

**JUDGMENT**

**CLOETE J:**

**Introduction**

[1] This is an application brought under the common law for the judicial review of the decision of the first respondent, a domestic tribunal sitting as an appeal body (*'the FPI'*) which confirmed the applicant's guilt on two counts and suspended her as a member of the FPI for a period of two years. The second to sixth respondents are cited in their capacities as members of the FPI appeal body.

[2] The matter has a long history but may briefly be summarised as follows. The applicant is a financial services professional. She is a certified financial planner as well as a qualified cost and management accountant. The FPI is a leading independent representative body of professional financial planners in South Africa. Membership is voluntary but members are contractually bound by the FPI's articles of association, its disciplinary rules, its code of ethics and its professional responsibility and generally accepted planning practice (*'GAPP'*). At all material times the applicant was a member of the FPI and thus subject to the aforementioned articles, rules, code and practice.

[3] The applicant provided financial advice to the complainant, the Wagener Familie Trust (*'the Trust'*), duly represented by a Mrs M Wagener (*'Wagener'*) in respect of a financial transaction which occurred on 23 August 2005. On 4 July 2006

Wagener laid a complaint against the applicant with the FPI which I will deal with below. The FPI instituted disciplinary proceedings against the applicant on 9 January 2007. The disciplinary enquiry (chaired by members of the FPI) was held over four days during June and August 2007 and resulted in the applicant being found guilty on three counts. The sanction imposed was suspension from the FPI for a period of ten years together with payment of a fine of R10 000.

[4] The applicant applied for leave to appeal and the disciplinary tribunal granted leave on one count but refused leave on the other two counts. The applicant then approached this court to review the disciplinary tribunal's decision to refuse leave on these counts. The review application was launched on 10 March 2008 and heard by Olivier AJ in June 2010. On 5 January 2011 the learned acting judge found in favour of the applicant and set aside the disciplinary tribunal's refusal to grant leave.

[5] The appeal tribunal hearing followed on 16 May 2011 and 21 and 22 November 2011. The appeal tribunal handed down its findings on 25 July 2012. It upheld the convictions on two of the three counts and altered the sanction imposed by the disciplinary tribunal to suspension from the FPI for a period of two years. The applicant now asks this court to review and set aside the appeal tribunal's findings as well as the altered sanction imposed.

**Background and grounds for review**

[6] On 23 August 2005 Wagener furnished the applicant withwritten instructions to sell shares to the value of R30 million owned by the Trust and to appropriate the proceeds thereof by investing equal amounts in the Stanlib Managed Flexible Fund and the Stanlib Multi-Manager High Equity Fund. Of the amount of R30 million about R25 million represented the *'profit'* that had been made on the Trust's share portfolio during a period of 29 months leading up to January 2005. At that time Wagener had informed the applicant that she feared losing this profit; that she had seen how the share market could fall and that this had happened when her late husband had managed the portfolio himself; and that the worry of such a large share portfolio was keeping her awake at night. Wagener had three children and her wish was that R30 million of the total value of the portfolio at the time, namely R60 million, should be invested in such a way that the Trust would be protected from a loss.

[7] The written mandate furnished to the applicant reflects the Trust's requirements as follows:

> *'Kliënt wil wins neem op aandeleportefeulje om kapitaal verliese te beperk indien beurs sou val. Risikoprofiel tans is te aggressief. Kliënt verlang meer diversifikasie in beleggingsportefeulje met meer konstante bestuur en monitor van portefeulje deur kenners.'*

[8] In her founding affidavit the applicant acknowledged that *'beskerming teen verliese indien die effektebeurs sou val, een van kliënt se behoeftes is, maar nie die enigste een nie'.*

[9] On the applicant's advice the funds to be reinvested were ultimately placed in the aforementioned Stanlib portfolios. Fifty percent was placed in the Stanlib Managed Flexible Fund which is described in its *'fact sheet'* as consisting of *'a mix of listed securities and non-equity securities'* with its share component (referred to as *'value equities'*) comprising 30.20% of the entire portfolio. The other fifty percent was placed in the Stanlib Multi-Manager High Equity Fund which is described in its *'fact sheet'* as consisting of *'high exposure equities'* with its share component (referred to as *'equities'*) comprising 74.22% of the entire portfolio.

[10] Wagener's subsequent complaint to the FPI was essentially two-fold. First, she believed that she had not been fully informed by the applicant of the financial consequences at the time of placement of these two investments. Second, she did not believe that the commission earned by the applicant for the transaction (i.e. 3% or R900 000) was commensurate with the level and quality of financial planning given to her.

[11] The disciplinary regulations of the FPI provide that its appeal tribunal shall consist of five members who are certified financial planner licensees, of which two shall be members of the board of the FPI. It is not in dispute that the appeal tribunal was properly constituted and that its members and in particular its chairperson, Mr Ronald King are experts in the financial advisory service industry.

[12] In reaching its findings the appeal tribunal accepted that the applicant's mandate had been to protect the R30 million against a fall in the share market. It also accepted that the applicant had considered other alternatives before recommending the two Stanlib portfolios to the Trust; and that she had made "full disclosure" to the Trust. The tribunal found that the only issue which needed to be determined on this score was whether the two Stanlib portfolios would have been able to protect the investments against a fall in the share market.

[13] The tribunal found that although *'hierdie aspek nie aan die* [applicant]*gestel is nie'* the answer was one that the tribunal itself could provide, given the information contained in the record of the proceedings and the qualifications and expertise of the members themselves. It concluded that having regard to the manner in which the R30 million had been invested, it would have been clear to anyone who knew something about investments that it would have been impossible for the applicant to have fulfilled her mandate in recommending the Stanlib Multi-Manager High Equity Fund and, to a lesser degree, the Stanlib Managed Flexible Fund. The tribunal thus found that the applicant had failed to execute her mandate properly, diligently and professionally and that she had accordingly breached Principle 201 of the FPI's code of conduct which stipulates that *'an advisor shall exercise reasonable and prudent professional judgement in providing financial services and at all times act in the interest of the client'.*

[14] The tribunal also found that, given that the applicant had placed 50% of the R30 million in a high risk portfolio (i.e. the Stanlib Multi-Manager High Equity Fund), a more appropriate commission would have been fifty percent of the total

earned of R900 000. It thus concluded that the applicant had breached Principle 304 of the code of conduct which stipulates that remuneration charged must be *'fair and equitable for the client and the member'.*

[15] The applicant's grounds for review are as follows:

15.1 The appeal tribunal exceeded its powers in that: (a) it made findings not based on the record and therefore without the applicant having been given an opportunity to be heard; and (b) it confirmed the finding of guilty on the commission issue when a conviction on that count was not even ultimately sought in the disciplinary proceedings (it being contended that there was no evidence placed before the disciplinary tribunal or before the appeal tribunal in respect of that count);

15.2 Alternatively and in any event the appeal tribunal reached a conclusion that no reasonable decision maker would have reached;

15.3 The findings on the two counts together amount to an improper splitting of charges in that the applicant was found guilty on two charges on the same set of facts and no reasonable tribunal would have followed such an approach.

**The legal position**

[16] The onus rests upon the applicant to establish on a balance of probabilities that she was not afforded a fair hearing before the appeal tribunal: see *Pretorius v Graham NO* 1953 (4) SA 300 (NPD) at 304C.

[17] Article 6 of the FPI's articles of association which appears in both the original and amended versions provides that:

> *'the Board of Directors shall have the right and authority to regulate by way of regulation, the suspension or termination of a Member's Membership and further, to prescribe all the investigative and procedural aspects (taking the rules of natural justice into account) with regard to such investigation and procedures to be followed by the nominated committee.'*

[18] In *Meyer v Law Society, Transvaal* 1978 (2) SA 209 (TPD) at 212H the court explained the applicability of the principles of natural justice to domestic tribunals as follows:

> *'The principles of natural justice which have been recognised by the South African Courts require a domestic tribunal to adopt a procedure which would afford the person charged a proper hearing by the tribunal, and a proper opportunity of producing his evidence and of stating his contentions, and of correcting or contradicting any prejudicial statements or allegations made against him; to listen fairly to both sides and to observe the principles of fairplay; to discharge its duties honestly and impartially; and to act in good faith (see* Turner v Jockey Club of South Africa*1974 (3) SA 633 (A) at 646 and the cases there cited).'*

[19] Procedural fairness requires that a disciplinary tribunal must furnish the individual appearing before it with any information that may be prejudicial to him or her so that he or she can effectively prepare and deal with it: see *Mafongosi and Others v United Democratic Movement and Others* 2002 (5) SA 567 (Tk HC) at para [26], referring to *Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another* 1980 (3) SA 476 (T) at 486D-G where it was found that:

> *'It is clear on the authorities that a person who is entitled to the benefit of the* audi alteram partem *rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing, or allowed representation by an attorney or counsel; he need not be given an opportunity to cross-examine; and he is not entitled to discovery of documents. But on the other hand (and for this no authority is needed) a mere pretence of giving the person concerned a hearing would clearly not be a compliance with the Rule. For in my view will it* [not] *suffice if he is given such a right to make representations as in the circumstances does not constitute a fair and adequate opportunity of meeting the case against him. What would follow from the lastmentioned proposition is, firstly, that the person concerned must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations; secondly he must be put in possession of such information as will render his right to make representations a real, and not an illusory one.'*

[20] In *Huisman v Minister of Local Government, Housing and Works (House of Assembly) and Another* 1996 (1) SA 836 (AD) the appellant had instituted review proceedings in the court *a quo* alleging that further reports, information and input had been obtained for the first respondent prior to the latterconsidering the appeal. He contended that the first respondent had been obliged to inform him of the additional submissions made and that his failure to do so had been a procedural irregularity that had resulted in a failure of justice. At 845F-H the

appeal court found that there was no substance in the appellant's complaint, and reasoned as follows:

> *'Were new* facts *to be placed before the "Administrator" which could be prejudicial to an appellant, it would be only fair that the latter be given an opportunity to counter them if he were able to do so, more particularly were the matter one in which the extant rights of an appellant could be detrimentally affected. That is however not what happened here. No extant rights of the appellant were in danger. He was seeking to have those increased. Mr* Buchanan *could not point to any additional information contained in either the written memorandum submitted by the Town Clerk in reply to that of the appellant, or the documentation in Dercksen's file, of which the appellant had not been aware and with which he had not dealt earlier.'*

[21] Regulation 8.1.3 of the FPI's disciplinary regulations provides that the appeal tribunal shall not hear any evidence except where: (a) new information becomes available and it would be impractical, in the opinion of the appeal tribunal, to refer the matter back to a new disciplinary tribunal; and/or (b) a dispute arises as to a point of procedure followed at the disciplinary hearing and it is not possible to ascertain from the record, in the opinion of the appeal tribunal and on a balance of probabilities, the process that the tribunal followed (both have no relevance in the present matter). Regulation 8.1.4 stipulates that the appeal tribunal shall otherwise decide the appeal by due consideration of the record of the original hearing and the arguments presented to it.

[22] Regulation 8.2 provides that the appeal tribunal shall, in its sole discretion, have the authority to: (a) substitute any finding of the tribunal at the original hearing with a new finding; (b) impose any new appropriate sentence; (c) confirm the

finding or findings of the tribunal; and (d) refer the matter back for a rehearing by a new tribunal on all or some of the original charges.

[23] In *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) at para [52] the Supreme Court of Appeal pertinently drew the distinction between an appeal and a review in the following manner:

> *'[52] During the course of the argument for Phambili we were frequently told that something that the Chief Director had done was "wrong". This is the language of appeal, not review. I do not think that the word was misused, because time and again it appears that what is really under attack is the substance of the decision, not the procedure by means of which it was arrived at. That is not our job. I agree with what is said by* Hoexter *(*op cit *at 185):*
>
> > *"The important thing is that Judges should not use the opportunity of scrutiny to prefer their own views as to the correctness of the decision, and thus obliterate the distinction between review and appeal." '*

[24] A *'splitting of charges'* occurs where: (a) the evidence necessary to establish the one charge also establishes the other charge, i.e. the *'same evidence test'*; or (b) there are two acts, each of which constitutes an independent offence, but only one intent, and both acts are necessary to realise this intent, i.e. the *'single intent'* test: see Hiemstra's Criminal Procedure (Service Issue 6) at p14-5.

**The appeal tribunal's first finding**

[25] In its findings the appeal tribunal mentioned that its opinion on the nature of the two Stanlib investments had not been put to the applicant. However, from what follows, it is clear from the record of the disciplinary proceedings that the applicant was well aware of the complaints against her as well as the nature of the two investments and that she was afforded a full and proper opportunity to deal with them.

[26] In the FPI's letter dated 4 July 2006 the ambit of the complaint was drawn to the applicant's attention as follows:

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

[27] Wagener's evidencewas led with specific reference to the advice given to her by the applicant. In her words the applicant *'…wil daardie profyt neem en herbelê in lae risiko, minder riskante beleggings,want hulle vermoed daar gaan 'n insinking in die mark kom in 2006 en sy wil dit belê in lae riskante beleggings and eiendomsverskanste beleggings…ek het goeie aandele gaan verkoop en ongelukkig het my ouditeure toe vir my gesê net R12 miljoen van daardie beleggings was lae risiko. Die res is nie beter as wat ons gehad het nie'.*

[28] In cross-examination the applicant's legal representative put to Wagener that the applicant *'…gaan sê dat u het vir haar gesê dat hierdie portefeulje groei nou so mooi en u wil nie hê die geld moet val nie… ek bevestig maar net dat my kliënt gaan sê u het vir haar gesê u bekommerd was dat u geld gaan verloor as die beurs sou val…'.*

[29] It was the applicant's own evidence that her mandate was to protect the R30 million against a fall in the share market. She testified that *'toe het sy vir my gesê… ek is bekommerd want die aandele groei en ek het al voorheen gesien hoe aandele ook kan val, en haar man se portefeulje het sy vir my gesê was op 'n stadium R60 miljoen en toe hy dood is was dit weer R40 miljoen. So sy was bekommerd… so ek het begin navorsing doen en ek het na verskillende maatskappye toe gegaan en vir hulle gevra, u weet, wat is hulle siening… Hulle het vir my gesê dat die mark kan nog groei, maar hulle verwag dat iewers daar 'n bietjie van 'n regstelling gaan wees'.* In cross-examination she testified that *'Me Wagener het nie gehou daarvan as haar aandele val nie meneer. Soos sy gesê het vir my baie keer, sy het Skotse bloed in haar en sy wil nie sien hoe die aandele wat gegroei het weer terugval nie'.*

[30] The applicant also testified at some length about the investigations that she had undertaken concerning alternative investments, in particular that she had approached certain well-known leaders in the financial advisory service industry. It was effectively her evidence that she had heeded their views when she had in turn advised Wagener. However, and despite having been represented throughout the proceedings, the applicant declined to call any of these individuals

to testify in support of her defence and her views on the suitability of the investments.

[31] In cross-examination it was put to the applicant that she had defeated the purpose of her mandate by advising Wagener to reinvest in the two Stanlib portfolios. That the applicant was well aware of the nature of the complaint against her is highlighted by her later testimony that *'daar is wel 'n stuk aandele gedeelte, maar as jy gaan kyk na die risikoprofile wat gedoen is, stem dit ooreen met die risiko'.*

[32] It was furthermore the applicant herself who introduced the two Stanlib investment *'fact sheets'* as evidence that she had indeed carried out her professional responsibility. It is the FPI's contention that if regard is had to the aforementioned documents alone, the applicant did not fulfil her mandate on her own version, given that one of the investments had an exposure of 75% in the share market and the other an exposure of 30% therein. It must also be borne in mind that it was the applicant who willingly agreed to have her performance judged by experts in the financial services industry when she became a member of the FPI.

[33] In addition the questions put to the applicant during the appeal tribunal hearing show that her attention was repeatedly drawn to the issues at hand and that she was given more than sufficient opportunity to respond thereto. The record of the aforementioned proceedings also reflects that the applicant was prepared to

answer the concerns raised and herself referred to passages in the disciplinary record where she had dealt with the same issues.

[34] It was also never the applicant's case that she was inexperienced or ill-equipped to have furnished the advice to Wagener that she did. On the contrary, the tenor of her evidence was that she considered herself to be an expert in the field of financial planning; and indeed, in her founding affidavit in the present proceedings she set out in detail her own professional views on why she considered the two Stanlib funds to have been suitable.

[35] It is against this background that the only reasonable conclusions to be drawn are that: (a) the appeal tribunal did not make its findings on the basis of new facts as alleged by the applicant but instead on the record of the proceedings of the disciplinary tribunal coupled with its own expertise; and (b) the requirements of the *audi alteram partem* rule were met. There is also little doubt that the appeal tribunal applied the standard of a reasonable professional in considering whether the applicant had executed her mandate properly, diligently and professionally. Indeed one of its findings was that the applicant had failed to meet even the minimum standard required; and it thus follows that this ground for review must fail.

[36] Insofar as the applicant contends that the appeal tribunal reached a conclusion that no reasonable decision maker would have reached, it is only necessary to refer to what the Supreme Court of Appeal had to say in *Bato Star Fishing* (*supra*) at para [53], namely that *'Judicial deference is particularly appropriate*

*where the subject-matter of an administrative action is very technical or of a kind in which a court has no particular proficiency. We cannot even pretend to have the skills and access to knowledge that is available to the Chief Director. It is not our task to better his allocations, unless we should conclude that his decision cannot be sustained on rational grounds. That I cannot say.'* In my view these sentiments apply equally in the present matter.

**The appeal tribunal's second finding**

[37] The applicant is correct that there was no suggestion in the evidence before the disciplinary tribunal that the actual percentage levied as commissionwas excessive. However, the applicant overlooks two important factors.

[38] First, whilst the main criterion in Principle 304 is that whatever remuneration is charged must be fair and equitable to both the client and the member, it also stipulates that *'an advisor may be remunerated in various ways depending on the level of advice that he or she is rendering…'*. The source of the complaint was the level of advice furnished by the applicant to the Trust, and not the percentage levied of 3%, which, it appears, is of itself not excessive in the industry.

[39] Second, whether or not the case putter had pressed for a conviction on this count in the disciplinary proceedings is irrelevant. The appeal tribunal has the power, in its sole discretion, to confirm the finding or findings of the disciplinary tribunal in terms of regulation 8.2.

[40] It is clear that the appeal tribunal confirmed the finding of the disciplinary tribunal on its own independent evaluation of the record of the disciplinary proceedings which led it to conclude that the quality of the advice furnished by the applicant fell far short of the standard required. It must also be remembered that the matter before us is a review and not an appeal. The decision made by the appeal tribunal can only be assailed on the basis that it cannot be sustained on rational grounds or an irregularity in the procedure by means of which it was arrived at. I am not persuaded that the decision was irrational or that there was any procedural irregularity on the part of the appeal tribunal in making the finding that it did and it follows that this ground for review must also fail.

**Splitting of charges**

[41] It is the applicant's contention that the appeal tribunal erred in relying upon the same facts in order to find that she had contravened two separate principles of its code of conduct. The evidence necessary to establish the first charge that she did not carry out her mandate properly, diligently and professionally differs from the evidence to establish the second charge that she did not charge a fair and equitable remuneration. There was also no single intention to commit the two contraventions. The intention to give unprofessional advice is not the same as the intention to charge remuneration that is excessive.

**Conclusion**

[42] **In the result the following order is made:**

**The application is dismissed with costs.**

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**J I CLOETE**

**LOUW J:**

**I agree.**

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**W J LOUW**