IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No: 1627/12

In the matter between

MANDLA SIMELANE	**1ST APPLICANT**
VISTA INSURANCE BROKERS (PTY) LTD	**2ND APPLICANT**

And

REGISTRAR OF INSURANCE AND RETIREMENT FUNDS (RIRF)	**RESPONDENT**

In re:

REGISTRAR OF INSURANCE AND RETIREMENT FUNDS (RIRF)	**APPLICANT**

And

MANDLA SIMELANE	**1ST RESPONDENT**
VISTA INSURANCE BROKERS (PTY) LTD	**2ND RESPONDENT**

Neutral citation: *Mandla Simelane & Another v Registrar of Insurance and Retirement Fund (RIRF) (1627/12*) [2014] SZHC 68 (9 April 2014)

Coram: **M. S. SIMELANE J**

Heard: **7 March 2014**

Delivered: **9 April 2014**

Summary: **Civil procedure: review of the decision of the Registrar of the Insurance and Retirement Fund refusing to review the Applicants' trading licence as an insurance broker; principles of review; Applicants alleging lack of fair hearing; requisites of the principle of fair hearing; audi alteram portem rule considered; uncontroverted evidence showing that Applicants were heard before the decision of the Registrar; application dismissed.**

Judgment

SIMELANE J

[1] The Applicants filed an application against the Respondent under a notice of motion dated 14 January 2014 for an order *inter alia* as follows:-

> **"(1) Dispensing with the forms, time limits and manner of service provided for in the Rules of Court and granting leave for this application to be heard as one of urgency.**
>
> **(2) Reviewing and setting aside the decision of the Registrar of Insurance and Retirement Funds ("the Respondent") issued on the 12 November 2013 issued against the Applicants;**
>
> **(3) Reviewing and setting aside the decision of the Respondent not to renew Applicants licence to trade, a decision issued on the 30 October 2013;**
>
> **(4) Directing the Respondent to issue a conditional licence and/or licence in the interim pending the finalization of this application;**
>
> **(5) Prayer 4 above to operate with immediate effect pending the finalization of this application;**
>
> **(6) Costs of suit in the event the Respondent opposes the application;**
>
> **(7) Any further and/or alternative relief."**

[2] The Applicants' case is founded on the affidavit of the 1st Applicant Mandla Simelane wherein he states as follows:-

(1) The Applicants seek to review the proceedings that led to the Respondent's refusal to renew Applicants' licence to operate as an Insurance Broker as contained in the letter dated 30 October 2013. It required Applicants to cease operating as a broker in the Insurance Industry.

(2) Applicants contend that the decision prejudged the outcome of the allegations contained in the initiation and hearing of 4 November, 2013.

(3) Applicants are also seeking to review the decision taken by the Respondent dated 12 November 2013 made in terms of section 116 of the Insurance Act. The Applicants' complaint is that the decision was taken by the Respondent who stood as initiator of the charges and proceedings; he was the Applicant and final adjudicator in his own cause as he made the decision against the Applicants.

(4) Applicants contend that the Respondent should have invoked section 25 (2) of the Insurance Act or section 28 (4) of the Act.

Section 25 (1) says **"The Registrar is hereby empowered to investigate any possible violation of this Act."**

Section 25 (2) says **"The Registrar may in consultation with the Minister appoint a committee to conduct the enquiry and the committee shall be chaired by the Registrar or a person appointed by him."**

[3] Applicants further contend that whilst the invitation of the 22 October 2013 and the hearing of the 4 November 2013 on which the Respondent based his decision specifically called Applicants to show cause why enforcement action should not be taken against them for operating without a licence, breach of clause 6 and failure to adhere to the terms and conditions of the licence, the decision covers a lot more than what the charges were about at the hearing of the 4 November 2013.

[4] Applicants submit that they are not attacking the merits of the Respondent's decision but the correctness of the proceedings and submit that there were a lot of irregularities hence they have made a proper case for Review.

[5] Their further contention is that the Respondent did not follow the basic principles of administrative justice and the decision was not taken in a fair manner. The rules of natural justice were flouted.

[6] On the other hand, the Respondent's case is based on the affidavit of Sandile Dlamini, the Registrar of Insurance and Retirement Funds who states as follows:-

(1) That the Registrar was correct in the exercise of his supervisory powers, when he took a unilateral administrative decision to decline the Applicants' application for the renewal of the licence on the grounds that:

(a) The Applicants had failed to submit audited statements which are mandatory in the assessment of whether a particular Applicant qualifies to operate or meets the solvency threshold requirements in order to operate in the Insurance Brokering Industry.

(b) The Applicants had breached an agreement which had been made an order of Court (the breach was material and landed upon the Applicants' *bona fides* and suitability to operate in the Insurance broking industry).

[7] Respondent further submits that the Applicants were serial offenders in terms of failing to comply with peremptory prerequisites for renewal of the licences and conditions of licences.

[8] The Respondent's further contention is that the Registrar lawfully and correctly took a decision to declare the Applicants as undesirable persons in the insurance industry and also to debar them from applying for a new licence in the insurance industry for five (5) years until the Registrar is satisfied that the Applicants have been rehabilitated for the following reasons:-

(1) The Applicants had deliberately and wilfully breached the provisions of the settlement agreement which had been made an order of the Court. The settlement agreement was in relation to previous violations by the Applicants.

(2) The Applicants had been found guilty (on multiple occasions) of operating in the insurance industry without a valid licence. They were serial offenders.

(3) The Applicants had breached the Brokers code of conduct (again repeatedly) by failing to discharge their responsibilities with the necessary due care and skill.

(4) The Applicants had breached the Brokers code of conduct by failing to conduct their business in the best interest of policy holders and compromised the integrity of the insurance industry and eroded policyholders confidence in the Industry.

[9] Respondent also states that the decision of the Registrar of 12 November 2013 should be considered against the backdrop of the decision of the Registrar of 17 September 2012, wherein the Applicants were found guilty of a plethora of violations. The principle here is that the previous decision was validly taken and unless that previous decision is challenged and set aside by a competent Court, its substantive validity is accepted as a fact.

[10] Respondent further submits that the decision of the Registrar of 12 November 2013 was taken after the Applicants had been invited to show cause why enforcement action should not be instituted against the 1st Applicant, for operating without a licence (repeat offence) breach of settlement agreement (which had been made an order of the Court), failure to adhere to terms and conditions relating to the licence granted to them.

[11] Respondent further avers that the Applicants having been invited to show cause why enforcement action should not be taken against them were presented with an opportunity to make representations.

[12] Enforcement action includes an intervention to secure compliance or for a party to show cause why an adverse decision may not be taken against them. This was the objective of the hearing namely, to find out:

(a) Why they had broken the law and deficiently operated without a licence.

(b) Why they had breached an agreement that had been made an order of Court.

(c) Why they had failed to comply with the conditions of their licence.

[13] Lastly, the Respondent states that the Registrar exercised his discretion correctly as a Regulator when he made a pronouncement on the suitability to continue operating in the insurance industry.

IN LIMINE

[14] The Respondent has raised a preliminary issue which I deem fit to consider first before adverting to the merits. In this regard, the Respondent submits that the Applicants should have exhausted the internal remedies available to them via section 80 of the Financial

Services Regulatory Authority Act 2010. That legislation provides for an appeal process from the decisions of the Registrar to the Appeals Tribunal before approaching the Court. This contention is clearly flawed for a couple of reasons. Firstly, the internal remedies talked about do not oust the unlimited original jurisdiction of the High Court, as propounded by Section 151 (1) (a) of the Constitution which says:

> **"The High Court has-**
>
> **(a) unlimited original jurisdiction in civil and criminal matters as the High Court possesses at the date of commencement of this Constitution."**

[15] In the case of **Sikhumbuzo Thwala v Philile Thwala Civil Case No. 101/12 para [27]** the Court espoused this inherent jurisdiction of the High Court with reference to the case of **Botswana Railways Organisation v Setsogo and Others (1996) BLR 763 CA, where Amissah JP** declared as follows:-

> **"…in my view, the unlimited jurisdiction conferred by the Constitution on the High Court must mean that the parties can take their dispute to the High Court, if they desire and if they think the dispute is of a nature which is susceptible to settlement by the process of that court."**

[16] The Respondent has not contended that the jurisdiction of the High Court is ousted, which ouster can only be demonstrated by clear and unambiguous words of statute. See **Sikhumbuzo Thwala v Philile Thwala (supra) paras [13]-[19].**

[17] Secondly, a party faced with two avenues of redressing an alleged wrong is quite entitled to pursue any of the two in the absence of an express ouster of any of the avenues shown by clear and unambiguous words of statute.

[18] In any case, the Applicants embarked on a review application which they were entitled to do in terms of Section 33 (1) of the Constitution. An appeal to the Appeals Tribunal is thus unsuited in these circumstances. On these premises the Respondent's objection fails and is dismissed.

THE REVIEW

[19] Before taking further steps let us first recapture the alleged decisions sought to be reviewed and set aside by the Applicants. In the letter of 30 October 2013 which was served on the Applicants on 4 November 2013 the Registrar stated as follows:-

> **"**
>
> **30 October 2013**
>
> **Dear Sir,**
>
> **RE: VISTA INSURANCE BROKERS (PTY) LTD**
>
> **1. Reference is made to the matter mentioned above.**
>
> **2. The Office of the Registrar of Insurance and Retirement Fund (RIRF) is in receipt of your letter dated 30th September 2013 wherein you requested for a renewal of your licence.**

3. Your request for the renewal of your licence has been unsuccessful for the following reasons:

(a) You have failed to submit the requested audited statements for the period ended 30th June 2013 within the prescribed time; and

(b) You breached clause 6 of the acknowledgement of debt and agreement to pay dated 31st October 2012 which was made an order of court on the 12th December 2012.

4. You are therefore requested to cease operating as a broker in the Insurance Industry as your licence expired on the 30th September 2013.

Yours faithfully

Sandile S. Dlamini
Registrar of Insurance and Retirement Funds "

[20] In the decision of 12 November 2013 the Registrar held as follows:-

"5.2 The 1st Respondent is found guilty of breaching section 14 (1) of the Insurance Act, 2005 and 35 (1) of the FSRA Act, 2010 by operating in the insurance industry without a valid licence.

5.3 The 2nd Respondent is in breach of provisions of clause 6 of the acknowledgement of debt agreement which was made an order of court by the High Court of Swaziland and therefore is in contempt of court.

5.4 The Respondents are in breach of the Brokers Code of Conduct for Insurance Brokers by failing to discharge their responsibilities with the necessary due care and skill.

5.5 The Respondents are in breach of the Brokers Code of Conduct in that they failed to conduct their business in the best interest of policyholders and compromised the integrity of the insurance industry and eroded policyholder's confidence in the industry.

5.6 The Respondents are declared as undesirable persons who are not fit and proper to transfer insurance and retirement funds industries in terms of Regulations 14 (3) (d) of the Regulations 2008 as read with RDI 13 of the Insurance Directive 13 of 2008.

5.7 In declaring the Respondents as undesirable persons, the Registrar also pronounce Respondents are debarred from applying for a new license in the insurance or retirement industries for a period of five (5) years or until the Registrar is satisfied that the Respondent rehabilitated.

5.8 The Respondents should cease operating as a broker in the insurance industry as from 30 September 2013

5.9 The decision may be made an order of Court in accordance with provisions of section 116 of the Insurance Act, 2005."

[21] Since the matter before me is a Review Application, it is pertinent that we consider what the law is on Review? This was aptly captured in the case of **Ernest Mazwi Mngometulu vs Lucky Groening N.O. and Two Others High Court of Swaziland Case No. 2107/2010 at pages 10-13,** wherein the Court said the following:-

"In the case of Manqoba Dlamini v Busisiwe Grace Dlamini (born Sibandze) NO Civil Appeal No. 12/2007, Banda CJ (as he then was) stated the law on this subject matter in the following words:-

> **"[12] The remedy of review is directed at correcting any irregularity or illegality in the process of making that decision. As LA Rose Innes states in his Book Judicial Review of Administration Tribunals in South Africa at page 201.**
>
> **'Review is a remedy directed at correcting any irregularity of a procedural nature or any illegality in the proceedings of a tribunal. The Court of review is not concerned with the merits of the decision arrived at by the administrative body, provided that the procedures and method adopted by that body are regular, the review court does not enter into the correctness in susbstance of the decision that was made…'**

Similarly, in Johannesburg Consolidated Investment Co. v Johannesburg Town Council 1903 TS 111 at 114-16 Innes CJ declared thus:-

> **'If we examine the scope of this word as it occurs in our statute and has been interpreted in our practice, it will be found that the same expression is capable of three separate and distinct meanings. In its first and most usual signification it denotes the process by which, apart from appeal, the proceedings of inferior Courts of Justice, both civil and criminal are brought before this Court in respect of grave irregularities and illegalities occurring during the cause of such proceedings……" see Magano and Another v District**

Magistrate Johannesburg and Others (2) 1994 (4) SA 174 (W) at 175 G-J.'

Furthermore, in the Text Civil Practice of the Supreme Court of South Africa (4th Edition) page 929, the learned authors Herbstein and Van Winsen, set out the following as the grounds upon which proceedings can be brought, under review namely:-

'(a) Absence of jurisdiction on the part of the Court.

(b) Interest in the cause, bias, malice or corruption on the part of the presiding judicial officer.

(c) Gross irregularity in the proceedings.

(d) The admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.' "

[22] It is clear from the above that the remedy of review is directed at correcting any irregularity or illegality in making a decision.

[23] What then is the complaint of the Applicants? The Applicants contend that the Registrar was the Complainant, Prosecutor and the Adjudicator in making the administrative decision in issue and that they were not given a hearing before the decisions were made. They also complain that the letter dated 30 October 2013 prejudged the hearing of 4 November 2013 and the subsequent decision of 12 November 2013. This, according to the Applicants, is not reflective of the tenets of justice on fair hearing and administrative justice.

[24] The right of fair hearing is embodied in the Kingdom of Swaziland Constitution, 2005, per Section 21 (1) which says:-

"In the determination of civil rights and obligations or any criminal charge a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law."

[25] The right to administrative justice is envisaged by Section 33 (1) of the Constitution which says:-

"A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including the requirements of fundamental justice or fairness and has a right to apply to a court of law in respect of any decision taken against that person with which that person is aggrieved."

[26] It is common cause that the Registrar adjudicated. The question is can the Applicants in the circumstances of this case be said to have been denied a fair hearing?

[27] Speaking about the principle of fair hearing in the case of **Ernest Mngometulu (supra) at pages 19-20,** the Court stated as follows:-

"The poser here is: what then is fair hearing? To my mind fair hearing is synonymous with fair trial, and implies that every reasonable and fair minded observer who watches the proceedings should be able to come to the conclusion that the court or other tribunal has been fair to all the parties concerned. The rule of fair hearing is not a technical doctrine, it is one of substance. The question is not whether injustice had been done because of lack of

hearing. It is whether a party entitled to be heard before deciding had in fact been given the opportunity of a hearing. Once an appellate or reviewing Court comes to the conclusion that the party was entitled to be heard before a decision was reached, but was not given the opportunity of a hearing, the order or judgment thus entered is bound to be set aside. This is because such an order is against the rule of fair hearing one of the twin pillars of natural justice which is expressed by the maxim audi alteram partem."

[28] Let us first deal with the alleged decision contained in the letter dated 30 October 2013, which I have reproduced in para [18] above. I am inclined to agree with the Respondent that this letter was in response to the Applicants' letter dated 30 September 2013 wherein they sought a renewal of their licence as follows:-

"30 September 2013

Attn: Mrs. M. Lukhele
Dear Mrs Lukhele

RE: BROKERAGE LICENCE NO. IB/7022/09

We refer to our earlier telephone conversation.

As you are aware, our extended license expires today. Accordingly we hereby apply for renewal of said license for a further twelve months as at 1st October 2013. However, as explained over the telephone, we are not yet in a position to furnish your office with our audited financial statements.

We have been advised that the audited statements are likely to be ready for collection by Monday 7th October 2013. In the circumstances we respectfully request an extension to Tuesday 8 October 2013 so that we may submit the statements together with arrangements for payment of the levy for the period commencing 1st October 2013.

In addition, we are aware that we are in arrears with payment of the penalty fine imposed by your office last year. Here again we respectfully beg your indulgence in that owing to severe financial constraints we are presently not in a position to meet our obligations.

Accordingly here again we would ask for an extension to 31st October 2013 by which date we will be in a position to bring the account up to date. We apologise sincerely for these requests for extension but you will be aware that owing to the deepening economic recession, business has been particularly difficult for the smaller intermediary.

However, we are optimistic that by end of the first quarter in 2014 business will have improved significantly and meeting our obligations to your office will not be as much of a challenge as it is at present.

In the meantime we would ask you to bear with us and thank you sincerely in anticipation of your assistance.

Yours sincerely,

MANDLA S.L. SIMELANE
Managing Director **"**

[29] It is clear that the letter of 30 October 2013 which was served on the Applicants on 4 November 2013 was in response to the above letter as

is clearly demonstrated in para [2] thereof. It touched on the issues raised in the said letter of 30 September 2013. The Registrar as a Regulator of the insurance industry and in the exercise of his supervisory powers as such, was quite at liberty in refusing to renew Applicants' licence, to state his reasons for said refusal as he did in para [3] and to request the Applicants to cease operating as a broker in the Insurance Industry since their licence expired on 30 September 2012. The Registrar was also entitled to proceed as he did in the face of the fact that the Applicants breached the settlement agreement which had been made the order of Court. I will elaborate on this issue in a moment. The mere fact that his reasons for refusal to issue the licence touched on some of the issues to be deliberated at the hearing of 4 November 2013, did not render the course of the Registrar illegal or irregular. His letter was purely in response to the request initiated by the Applicants themselves. Suffice it to say that the review which the Applicants seek on the basis of the letter of 30 October 2013 lacks merit. There is no irregularity or illegality found in respect of that letter. Applicants' complaint in this regard fails and is dismissed.

[30] Regarding the rest of the grounds of review raised by the Applicants, it is common cause that the Respondent invited Applicants to a meeting to make representations. The meeting was held on Friday 10 August 2012 and pursuant to that meeting, the Registrar on 17 September 2012 issued a decision in terms of which the Applicants were found guilty of the following transgressions:-

"(1) Operating a broker business without a licence.

(2) Operating without valid professional indemnity and fidelity guarantee cover.

(3) Violating of section 63 of the Insurance Act of 2005 Act by not remitting premiums within sixty days of receipt to the insurer which also resulted in the use of policy holder premiums."

[31] The Applicants were then ordered to pay a sum of E60 000-00 (Sixty Thousand Emalangeni) as administrative penalties. The Registrar made an application in terms of Section 116 of the Act to have the decision made an order of the Court. The application for the Registrar's decision to be made an order of Court culminated in the parties concluding an agreement of settlement which was then made an order of Court.

[32] The relevant portions of the agreement of settlement state as follows:-

"

AGREEMENT OF SETTLEMENT

1. PREAMBLE:

1.1 The Applicant has instituted proceedings against the first and second Respondents in the above matter to register of the Decision of the Registrar of Insurance and Retirement Funds as set out in the Notice of application to be made an order of court.

1.2 The parties have agreed as an addendum to the Notice of Motion dated 26th September 2012. To settle the matter on the under mentioned terms and conditions and they further agreed that the said court shall be asked to incorporate this

agreement in the order to Registrar's decision so that it operates as an order of court.

2. PAYMENT

The Respondents will settle the penalty of E60 000.00 imposed by the Registrar in instalments of E5 000.00 per month commencing on/or before the 31st of October 2012, until the whole amount is paid in full.

3. COLLECTION OF PREMIUMS

3.1 The Respondent is barred from collection within 6 months, premiums forthwith on behalf of insurers, and Respondent is to make necessary arrangements that, forthwith premiums are paid directly to insurers until such time that the Registrar is satisfied that the Respondents have rehabilitated. In the event there are deposits made by the insured into Respondent's accounts, he shall forthwith send same to the insurers.

3.2 The Respondent is to furnish the Registrar Insurance and Retirement Funds with a monthly statement of his trust account from the bank recognized by the office of the Registrar as the bank on which the Respondents trust is held;

4. LICENSE

The Respondent will be issued a conditional license on a four months basis upon the payment of the first E5 000.00, until such a time that the Registrar is satisfied that the Respondent has rehabilitated.

5. COSTS

Each party shall bear his or her own costs.

6. DEFAULT

Should the Respondents default in the due performance of any of his obligations in terms of this Agreement;

6.1 Fails to pay the first E5 000.00 as agreed;

6.2 Fails to pay and/or skip an (monthly) instalment. and

6.3 Continues to collect premiums, then.

6.4 The license as per paragraph 4 will not be issued to the Respondent by the Registrar.

6.5 If the licence has already been issued, the Registrar shall cancel and/or revoke such a licence.

6.6 The applicant shall in addition to any other rights which he may have in law be entitled to enforce the provision of this Agreement of settlement.

6.7 The full balance outstanding in terms hereof will immediately become due and payable by the Respondent.

7. NOVATION

Neither this Agreement of settlement nor any term hereto shall constitute a novation of the present obligation of the Respondent or that of the Applicant to enforce any other lights it might have in law.

8. DOMICILIUM

8.1 The Applicant hereby choose as his *domicilium citindi et executandi* for all purposes in terms hereof.

9. GENERAL

9.1 The clause headings shall not be used in the interpretation of his Agreement;

9.2 No latitude or indulgence granted by the Applicant shall be binding upon the Applicant or be deemed to constitute a waiver or novation of any of the Applicant's rights hereunder, nor shall the Applicant be stopped from enforcing any rights which is may have, by its failure to enforce any of its rights timeously.

9.3 No additions to, alterations variations or consensual cancellations hereto shall be of any force or effect, unless reduced to writing and signed by the Applicant and the Respondent or their agents, duly authorised in writing.

10. ORDER

The plaintiff shall be entitled to make this Agreement of Settlement an Order of Court under the same Case number as above stated whereupon judgment shall be entered by the consent of the parties, without notice to the Defendant."

[33] The agreement of settlement was subsequently made an order of Court on 14 December 2012. The settlement agreement was breached by

the Applicants and the Applicants were thereafter invited by the Registrar to a meeting of 14 May 2013 to explain their failure to comply with the settlement agreement. The Applicants responded through a letter dated 16 May 2013 acknowledging that they had not complied with the terms of the settlement agreement due to financial difficulties. They further stated that they had cleared most of the other obligations, but did not say anything about the clearance of the outstanding premiums. It was after this that the Registrar by letter dated 22 October 2013, called for the hearing of 4 November 2013, after which he made the formal decision of 12 November 2012.

[34] The Applicants have not stated clearly in their papers when they paid the first instalment of E5,000-00 (Five Thousand Emalangeni) . All they say in para 27 of the founding affidavit is that as at 30 September 2013, the Respondent had received the lump sum of E30,000-00 (Thirty Thousand Emalangeni). They are clearly evasive in this respect.

[35] In paragraph 32 of the founding affidavit the Applicants state that the balance of E30 000-00 (Thirty Thousand Emalangeni) outstanding was paid on the date of the hearing which was 4 November 2013.

[36] It is clear from the evidence of the Applicants themselves that they were in breach of the payment terms as detailed in the settlement agreement.

[37] They clearly breached clause 6.2 of the agreement by failing to pay the monthly instalments as at when due on a monthly basis.

[38] In my view, the Registrar was quite entitled in these circumstances to proceed to enforcement of the settlement agreement by retiring in terms of clause 6.4, 6.5 and 6.6 thereof in the face of these breaches.

[39] This is because the agreement which had been made an order of the Court, had not been set aside and remained binding on the parties. Adumbrating on this principle of our law in the case of **Clement Nhleko v M.H. Mdluli and Company and Another, Civil Case No. 1393/09, pages 11-13,** the Court stated as follows:-

> **"The application under contemplation for a declaration of rights which enjoins this court to revisit the issue of the said legal fees already determined by the Magistrates Court is neither an Appeal nor a review application. By the nature of the application the applicant enjoins the court to adjudicate upon matters already decided by the Magistrates Court and in respect of which a definitive judgment subsists. I see no rule of practice or procedure which gives me the latitude to proceed as the applicant urges and none is urged by the applicant. This court lacks the jurisdiction to embark on the adventure it is entreated to embark on, in the way and manner it has been approached. I say so because the summary judgment given by the Magistrates court is valid and subsisting and must be presumed to be right until it is set aside by an appellate or reviewing court. So long as the judgment is not appealed against, it is unquestionably valid and subsisting. This is so no matter how perverse it may be perceived. It is binding and must be obeyed by all including this court. This is because a court is powerless to assume that a subsisting order or judgment of another court can be ignored because the former whether it is a superior court in the judicial hierarchy, presumes the order as made or the judgment as given by the latter to**

be manifestly invalid without a pronouncement to that effect by an appellate or reviewing court."

[40] It is trite law that where a party breaches an order of Court, the party affected adversely by the breach is entitled to proceed to the enforcement of the order. This trite principle of law is clearly provided for under clause 6.6 of the settlement agreement. In my view a hearing was no longer necessary prior to enforcement.

[41] This notwithstanding, the Registrar invited the parties to a hearing on 4 November 2013 to show cause before he made the decision of 12 November 2012. The letter of invitation to the hearing which is dated 22 October 2013 states as follows:-

"22 October 2013

Dear Sir,

RE: VISTA INSURANCE BROKERS (PTY) LTD

1. Reference is made to the matter mentioned above.

2. The Office of the Registrar of Insurance and Retirement Funds (RIRF) issued a decision on the 17th September 2012 in which Vista Insurance Brokers (Pty) Ltd was instructed to pay an administrative penalty to the amount of E60 000-00 in twelve instalments of E5 000-00 with the first instalment due on or before 31 October 2012.

3. **An acknowledgement of debt and agreement to pay was also subsequently entered into by Vista Insurance Brokers (pry) Ltd and was further incorporated into the Registrar's decision so that it is registered as an order of court.**

4. **In terms of clause 6.2 of the above mentioned agreement, should Vista Insurance Brokers (Pty) Ltd fail to pay and/or default on a (monthly) instalment, a licence won't be issued to the broker. Clause 6.5 of the agreement further states that if the broker has already been issued with a licence then that licence will be cancelled without any hearing whatsoever by RIRF.**

5. **As of the 30th September 2013, the RIRF has only received E30 000-00 in payments which means that the broker has failed to comply with clause 6.2 of the agreement above as there are still payments outstanding.**

6. **In consideration of the broker's commitment to settle the administrative penalty, the broker was issued with a short licence which was valid from the 1st July 2013 to 30th September 2013. The broker has however defaulted in its commitment.**

7. **Through this communiqué you are invited to a hearing at our offices on Monday 4 November 2013 at 10.00am, to show cause why enforcement action should not be instituted against Vista Insurance Brokers (Pty) Ltd.**

(a) **Operating without a licence with effect from 30th September 2013.**

(b) Breach of clause 6 of the acknowledgement of debt and agreement to pay dated 31st October 2012 which was made an order of court on the 12th December 2012, a copy of which is attached; and

(c) Failure to adhere to the terms and conditions of your licence.

Yours faithfully

Thuli Nkwanyana
For Registrar of Insurance and Retirement Funds "

[42] Even though the Applicants now allege that they were not heard before the decision of 12 November 2013 was made, the record however states the contrary. Applicants themselves in para [31] and [32] of their founding affidavit admitted that they made representations at the hearing in the following words:-

"[31] The Applicants (1st Applicant representing the 2nd Applicant) attended the meeting of the 4th November, 2013. On the issue of operating without a licence from the 30th September, 2013 Applicants submitted that they had filed a renewal application and were waiting for the Respondent's response on the shortlist of requirements as it was the practice and/or at least an acknowledgement of the application by the Respondent.

[32] Concerning the issue of the outstanding administrative penalty imposed by the Respondent and contained in the agreement. Applicants cleared the amount of E30, 000-00 (Thirty

Thousand Emalangeni) outstanding on the date of the hearing. On the last issue of non-compliance with the terms and conditions of the licence. Applicants assumed reference was made to the Swaziland Royal Insurance Corporation outstanding premiums. Applicants explained on the day of the meeting that it had settled the outstanding premiums by taking out a mortgage bond on my house to clear the debt."

[43] Furthermore, in his decision of 12 November 2013, the Registrar summarized the representations made by the Applicants (as Respondents) and those made by Respondent (as Applicant) as follows:-

"RESPONDENTS CONTENTIONS

3.1 The 1st Respondent duly represented by the 2nd Respondent attended the meeting held at the Applicants office on the 4th November 2013 at 10.00 am.

3.2 The 2nd Respondent made the following submissions on behalf of the 1st Respondent with regards to the allegations levelled against it:

3.4 Charge 1 – Violating the provisions of section 14 (1) of the Insurance Act, 2005 and 35 (1) of the FSRA Act, 2010

The 2nd Respondent acknowledged as true and correct the allegations leveled against the 1st Respondent, namely violating the provisions of section 14 (1) of the Insurance Act, 2005 by operating without a valid licence from 30th September to date

and apologized for the misconduct. He further stated that this stemmed from the fact that as Respondents they have defaulted in honouring the agreement to pay administrative penalties. He mentioned that he submitted a letter to the Applicant requesting for an application for the renewal of his licence although it was sent on the same day the licence expired and apologized for this as he stated that there were shortcomings from his side and it would not happen again. The 2nd Respondent requested the Applicant to draw up a shortlist of the requirements which entities still needed to submit upon renewal of the licence.

3.5 <u>Charge 2 – Violating the provision of Clause 6 of the acknowledgement of debt agreement to pay</u>

The 2nd Respondent concurred that they were at fault with regards to violating the provisions of clause 6 of the acknowledgment of debt agreement to pay. The 2nd Respondent pleaded that he did not want to put up an argument with regards to this issue and apologized for their actions. He pointed out that they did not have the money to pay the administrative penalties which the Respondents were required to pay. The 2nd Respondent further pleaded with the Applicant stating that the Respondents were faced with an impossible situation as the money that the Respondents were earning was not coming to them but going towards payment of the creditors and that is why the Respondents could'nt keep up with the payment. The 2nd Respondent requested to be given a chance by the Applicant to honour their obligation to pay the outstanding administrative penalties.

3.6 Charge 3 – Failure to adhere to the terms and conditions of the licence.

In respect of failure to adhere to the terms and conditions of the licence, the 2nd Respondent admitted that the Respondents were at fault. The 2nd Respondent stated that the Respondents have failed to submit the requested audited financial statements for the period ended 30th June 2013 within the prescribed time is because the auditor promised to have the audited financial statements ready by the 30th October 2013 but failed to keep to this deadline. The auditors undertook to have the required documents ready by 6 November 2013 and the Respondents promised to have these documents ready by 8th November 2013 at the latest. The 2nd Respondent apologised for this and appealed for leniency and extension from the Applicant so that the Respondent can submit the audited financial statements.

3.6.1 Trust Account

The 2nd Respondent acknowledged that the Respondents failed to furnish the Applicant with a detailed copy of the Respondents trust account bank statement on a monthly basis. The 2nd Respondent stated that there was no money which was being remitted into the trust account and if the Applicant were to find the Respondents collecting premiums it would be a great violation. The 2nd Respondent however was quick to mention that he took a loan with First National Bank in order to meet the obligations of the insurers. A bond was also taken by the 2nd Respondent against his family home and the bank without his knowledge deducted the monthly payments from the 1st Respondents trust account. The 2nd Respondent alleged that he notified the bank about this issue and they were instructed to stop with the deductions. The 2nd Respondent

promised to provide the Applicant with the latest trust account statements as they show that there were no further transactions made which are not supposed to be there. The 2nd Respondent further pointed out that the last time premiums were collected was in January 2013.

3.6.2 Outstanding Premiums

The 2nd Respondent lastly mentioned that they have finally settled the outstanding premiums that were owed to Swaziland Royal Insurance (SRIC) although no proof was submitted to support this statement. He mentioned that this has therefore given the Respondents time to focus more on their business and will be able to pay the outstanding administrative penalties issued by the Applicant. The 2nd Respondent further requested to be given more time to salvage themselves as they have come a long way and the situation with SRIC was a real set back. The 2nd Respondent alleged that from the latest audited financial statements there has been great improvement and it is a sign that the business is getting back on its feet.

In conclusion the 2nd Respondent thanked the Applicant for the opportunity to be heard and asked to be given a chance once again to operate in the insurance industry as the past problems have been resolved.

APPLICANTS CONTENTIONS

4.1 The Applicant has considered both the oral and written submissions on this matter and contends as followings:-

It is clear that the 1st Respondent has been transacting in the insurance industry in total disregard of the governing

legislation i.e. The Insurance Act, 2005 Section 14 (1) states that:

"After the expiry of a period of 12 months after the commencement of this Act no person may carry on the business of an insurance broker unless he has been licensed in terms of this Act."

4.2 The 1st Respondent violated the provisions of section 14 (1) of the Insurance Act, 2005 and section 35 (1) of the Financial Services Regulatory Authority (FSRA) Act, 2010 by operating without a valid licence.

4.3 The 2nd Respondent also failed to honour its commitment to a settlement agreement it entered into. These points to the Respondent's lack of honesty and reliability which are essential for all persons that operate within the insurance industry.

4.4 The Applicant has taken the Respondents mitigating factors and wishes to make the following findings:-

- **The 1st Respondent's offence is a gross violation of the Insurance Act, 2005 and is inexcusable. This was a blatant disregard of the law in that the Respondents operated without a valid licence. The Respondents applied only by letter and did not submit all the necessary documents for the Applicant to consider the application for a renewal. The Respondents only applied for the renewal of the licence on the day that the licence lapsed after being reminded by the Applicant to apply. The 2nd Respondent was also guilty through his own admission.**

- **The Respondents had admitted that he failed to pay the administrative penalties contrary to the provisions of clause 6 of the acknowledgement of debt agreement. The Applicant finds that the 2nd Respondent acted inappropriately and was in contempt of court as the agreement was made an order of court. According to this agreement the 1st Respondent's licence should have been cancelled immediately upon the first default by the Respondents but the Applicant showed leniency by giving the Respondents more time to make payments.**

- **Having been granted a licence to operate as an insurance broker the Respondents have failed to adhere to the conditions of the licence. A broker cannot be excused for operating in the industry without a licence and not complying with the terms and conditions issued with the licence. The conduct of failing to adhere to the conditions of the licence shows that the Respondents were in total disregard of the stipulated terms and conditions. The Applicant finds that the 1st Respondent acted negligently and without the necessary due care and skill with which brokers are at all times supposed to exhibit in the operations of their brokerage business.**

<u>REGISTRAR'S DECISION</u>

Having taken cognisance of all the mitigating and aggravating circumstances, the Applicant concludes that the Respondent's actions are harmful to the public interest and to the stability of the insurance industry. In light of the foregoing transgressions the Applicant makes the following decision:

5.1 The Applicant takes cognizance of the mitigating factors pertinent to the 1st Respondent and duly notes that:

(i) The 2nd Respondent is remorseful for his actions which took place while he was executing his duties as a principal representative of the 1st Respondent.

(ii) The 2nd Respondent is committed to fully complying with all its statutory obligations in terms of the various Laws that govern the industry it operates in.

(iii) The Respondents subsequent to the hearing settled the outstanding administrative penalties.

Having fully taken cognisance of all the factors mentioned above, the Registrar accordingly rules as follows:-

5.2 The 1st Respondent is found guilty of breaching section 14 (1) of the Insurance Act, 2005 and 35 (1) of the FSRA Act, 2010 by operating in the insurance industry without a valid licence.

5.3 The 2nd Respondent is in breach of provisions of clause 6 of the acknowledgement of debt agreement which was made an order of court by the High Court of Swaziland and therefore is in contempt of court.

5.4 The Respondents are in breach of the Brokers Code of Conduct for Insurance Brokers by failing to discharge their responsibilities with the necessary due care and skill.

5.5 The Respondents are in breach of the Brokers Code of Conduct in that they failed to conduct their business in the best interest of policyholders and compromised the integrity of the insurance industry and eroded policyholder's confidence in the industry.

5.6 The Respondents are declared as undesirable persons who are not fit and proper to transfer insurance and retirement funds industries in terms of Regulations 14 (3) (d) of the Regulations 2008 as read with RDI 13 of the Insurance Directive 13 of 2008.

5.7 In declaring the Respondents as undesirable persons, the Registrar also pronounce Respondents are debarred from applying for a new license in the insurance or retirement industries for a period of five (5) years or until the Registrar is satisfied that the Respondents rehabilitated.

5.8 The Respondents should cease operating as a broker in the insurance industry as from 30th September 2013

5.9 The decision may be made an order of Court in accordance with provisions of section 116 of the Insurance Act, 2005."

[44] The Applicants who urged the Registrar's decision in these proceedings, as annexure MS14, have not denied that they made the aforegoing representations in the different heads of complaint as appear in that annexure. They did not even bother to challenge this representation as alleged by the Registrar. It is trite that where

evidence whether *viva voce* or in an affidavit remains uncontroverted and unchallenged it is taken as admitted and as establishing the facts alleged therein. In the circumstances, the Registrar's decision showing that the Applicants were heard on the different heads of complaint which formed the basis of his decision, is taken as established.

[45] In any case, this Court exercising its review powers is bound and restricted to the record of proceedings. In the absence of the Applicants challenging any part of the record as not true, I am bound by the record including the totality of the Registrar's decision of 12 November 2013 which clearly shows that the Applicants made representations at the hearing of 4 November 2013 on the issues which formed the basis of the decision of 12 November 2013. See **Ernest Mazwi Mngomezulu v Lucky Groening N.O. and Others (supra) pages [21]-[22].**

CONCLUSION

[46] In conclusion, the Applicants cannot be said to have been denied a right to a fair hearing. In my view, they are merely clutching at straws.

[47] In the light of the totality of the foregoing, I am of the considered view that this application lacks merits and should be dismissed in its entirety.

ORDER

[48] I hereby order as follows:-

1. Applicants' application be and is hereby dismissed.

2. Costs to follow the cause.

M. S. SIMELANE

JUDGE OF THE HIGH COURT

For the Applicants : Mr. S. Masuku

For the Respondent : Mr. Z. Jele