# IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

CIVIL CASE NO. 15/14

HELD AT MBABANE

In the matter between:

**MANDLA SIMELANE** **1ST APPELLANT**

**VISTA INSURANCE** **2ND APPELLANT**

v

**REGISTRAR OF INSURANCE & RETIREMENT FUND** **RESPONDENT**

Neutral Citation : Mandla Simelane & Vista Insurance v Registrar of Insurance & Retirement Fund (15/14) [2014] SZSC 85 (03 DECEMBER 2014)

Coram : A.M. EBRAHIM J.A., S.A. MOORE J.A., DR. S. TWUM J.A.

Heard : 11 NOVEMBER 2014

Delivered : 03 NOVEMBER 2014

**Summary : Powers and duties of the Registrar of Insurance and Retirement Funds explained – Registrar rightly refused to renew appellants' licence to trade as a broker – Appellants breach of applicable legal provisions made an order of court – Appellants argued that they were not afforded the right to be heard by the Registrar – There being no merit in the appellants' contention the appeal is dismissed with costs.**

## JUDGMENT

**MOORE J.A.**

INTRODUCTION

[1] Vista Insurance Brokers (Pty) Ltd (hereinafter Vista the 2nd appellant) is a company duly incorporated in terms of the company laws of this Kingdom which carried on the business of Insurance Brokers in Swaziland. Its managing director and principal representative was at all material times Mr. Mandla Simelane who is the 1st appellant. The respondent is the Registrar of Insurance and Retirement Fund who was appointed in terms of section 20 (2) of the Insurance Act No. 7 of 2005. It is common cause that the brokers encountered financial difficulties. Vista experienced compliance problems even before the issue of its first licence to act as brokers in February 2009. Non-compliance with regulatory requirements continued to plague Vista.

[2] After many interactions between the Registrar and Vista the Registrar "took a decision to declare the applicants (Vista and Mr. Mandla Simelane) as

undesirable persons in the insurance industry and debarred them from applying for a new licence in the insurance or retirement fund industry for a period of five years or until such time that the Registrar is satisfied that the applicants are rehabilitated." The appellants then commenced proceedings in the High Court to vindicate what they alleged to be a violation of their legal rights.

[3] The ensuing case came before M.S. Simelane J. who concluded a lucid judgment, which examined the evidence and discussed the law with commendable thoroughness, in this way at paragraphs [44] – [47]:

> *"[44] The Applicants who urged the Registrar's decision in these proceedings, as annexure MS14, have not denied that they made the afore-going 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."*

[4] The appellants were aggrieved. They filed a Notice of Appeal upon the following grounds:

*"1. The Learned Judge* ***a quo*** *erred in finding that the Appellants were not denied the right to a fair hearing prior to the decision by the respondent not to renew their licence communicated to the Appellants in a letter dated 30th October, 2013* ***["MS12"*** *in the record].*

*1.1 The Learned Judge* ***a quo*** *ought to have held that the Respondent's letter dated 30th October, 2013, delivered at the rise of the meeting of the 4th November, 2013, informing Appellants that their licence application was unsuccessful*

*prejudged the hearing or meeting held on the same day the 4th November, 2013.*

*2. The Learned Judge a quo erred in not finding that the procedure adopted by the Respondent leading to the decision of the 12th November, 2013 [MS14 in the record] was inherently flawed in that the Respondent stood as the complainant, initiator of the charges and proceedings, he was Applicant and the final Adjudicator in his own cause.*

*2.1 The Learned Judge **a quo** raised this question as one that required to be decided on at paragraph 23, page 14 of his judgment but did not deal with the issue at all in the judgment in answer to that poser;*

*2.2 The Learned Judge **a quo** ought to have dealt with the issue and found that this procedure as adopted by the Respondent violated the fundamental principles of natural justices and for that reason ought to have reviewed the Respondent's decision.*

*3. The Learned Judge **a quo** erred to have found that the Appellants were given the right to be heard on all charges that led to the Respondent's decision of the 12th November, 2013.*

*3.1 The Learned Judge **a quo** ought to have held that the hearing of the 4th November, 2013 only dealt with issues raised in the letter of the 22nd October, 2013 [MS 11 of the record];*

*3.2 The Learned Judge **a quo** ought to have held that the Respondent's findings in his decision of the 12th November, 2013 were grossly unjust, unfair and unreasonable in that he simply went beyond the invitation and charges contained in the letter of the 22nd October, 2013 and the hearing of the 4th November, 2013 on which the decision is based. The decision covered matters that Appellants were not charged with and matters that they had no opportunity to address at the hearing of the 4th November, 2013.*

*4. The Learned Judge **a quo** erred to have found that the Appellants did not challenge the representation alleged to have been made by the Respondent in his decision of the 12th November, 2013, where the Respondent makes allegations of what the Appellants presented at the hearing.*

*4.1 The Learned Judge **a quo** ought to have found that the Appellants sufficiently challenged the contents of the decision at paragraph 38 to 46 of Appellants' founding papers;*

*4.2 The Learned Judge **a quo** ought to have found that allegations found in the Appellants' papers were sufficient for purposes of review proceedings which does not pertain itself with the merits of a decision but merely procedural irregularity.*

*5. The Learned Judge **a quo** erred in not making a ruling on prayers 4 and 5 of the Appellants' Notice of Motion. The Appellants had applied for, supported their application and*

*argued in the Court a quo for issuance of a conditional licence pending the outcome of the application.*

*5.1 The Learned Judge **a quo** made no interim ruling despite the fact that Appellants had shown prejudice in the shutting down of their business and still suffer irreparable harm as long as the matter is pending in Courts."*

THE REGISTRAR

[5] The powers and duties of the Registrar are central to the issues to be determined in this appeal. Paragraphs 6 thru 11 of the Respondent's Heads of Argument describe "THE OFFICE OF THE REGISTRAR OF INSURANCE AND RETIREMENT FUNDS" with such clarity that this Court can safely adopt them as an accurate statement of the law. Those paragraphs read:

*"6. The office of the Registrar of Insurance and Retirement Funds is established in terms of Section 20 (2) of the Insurance act of 2005. Its powers and principal functions are derived from the Act and the regulations issued in terms of the Act. Some of the functions set out in the Act, are mandatory in nature, whilst others are of a discretionary nature.*

*7. Section 22 of the Act provides:*

*Subject to the provisions of this Act, the Registrar;*

*(a) Shall supervise and exercise control over the activities of insurers and retirement funds in terms of this Act and any other law of the Kingdom of Swaziland.*

*…..…".*

*8. Section 25 (1) of the Act provides:*

*"The Registrar is hereby empowered to investigate any possible violations of this Act and his powers shall include the investigation or examination of persons not regulated under this Act and the Retirement Funds Act of 2005, in so far as those persons' activities may have a bearing on his investigation."*

*9. Section 15 and 16 of the Act confer powers on the Registrar to licence and determine the conditions of licences for insurers and insurance brokers. There are additional duties and functions contained in the Act.*

*10. The Registrar is charged with the principal responsibility of controlling the insurance industry, for the protection of consumers and the insurance industry as a whole. Joubert, Law of South Africa Volume XII at paragraph 605, when dealing with the obligation of the state to intervene and establish a supervisory office such as that of the Registrar states:*

*"The reasons for state intervention on this terrain are not hard to find. Insurance business attracts vast sums of money from the public. Investments in insurance are often on a long term basis, and many investors try to provide for their old age. By reason of the very nature of insurance business, insurers actually deal with trust money.*

*Moreover, insurance is inherently a hazardous business and disaster may easily strike an insurer, especially if it does not adhere to sound business principles. There can also scarcely be equality of bargaining power between insure and insured: to a large extent persons insured or to be insured depend on the good faith of their insurers. The public is therefore in need of protection, not only as regards the solvency of insurers but also in respect of the unfair contract terms and undesirable trade practices."*

*11. The enabling statute does not prescribe any procedural rules to be followed by the Registrar when executing his duties thereby leaving the Registrar to determine the rules of procedure including how he is to make regulatory decisions. The legislature did not deem it necessary to prescribe the procedure to be adopted by the Registrar. However since the Registrar is a creature of statute, he must act in accordance with the powers expressly or impliedly conferred on him by the enabling legislation."*

INSURANCE BROKERS

[6] Counsel for the Respondents had this to say about Insurance Brokers:

*"12. Insurance brokers are required to be licensed in terms of Section 15 of the Act. In submitting an application for a licence, the broker is obliged to comply with all the requirements of the Regulations and any other requirement imposed by the Act. The Registrar is empowered to determine conditions that have to be adhered to in order for a particular broker to be licensed. Section 15(3), confers on the Registrar, the power to refuse to*

*grant a licences if he considers it to be in the public interest but places a duty on the Registrar to give reasons for his refusal.*

*13. Sections 16, 17 and 18, sets out some of the primary requirements that have to be adhered to by a broker when registering. Insurance directive 2008 dated 14th May 2008, issued in terms of section 118 of the Act sets out further peremptory requirements that have to be adhered to by a broker when applying for registration as an insurance broker."*

This Court agrees.

Section 2 of the Insurance Act 2005 defines an insurance broker thus:

> *'"Insurance broker" means a person, other than an employee of an insurer, who is not an insurance agent, and who, on behalf of any other person, negotiates insurance business including reinsurance as his principal business.'*

Section 14 (1) mandates that:

> "*no person may carry on the business of an insurance broker unless he has been licensed in terms of this Act."*

[7] The obtaining of a licence is not available to an applicant upon his merely asking for the grant or largesse of the Registrar. The Registrar's licence and registration are essential prerequisites to the conduct of the business of an insurance broker. As has been referred to in paragraphs [] above, the

Registrar is precluded from registering a person as being authorized to carry on the business of an insurance broker, and issuing that person with a licence of registration, unless he or she is satisfied that the applicant has complied with all of the stringent requirements of the regulations and any other requirements of the Act.

[8] An applicant who is a prospective licencee must be presumed to know all of the relevant laws, regulations and codes which govern the grant of licences. The would be broker must be fully prepared to provide the Registrar with all of the material which the law requires to be at his disposal so that he can make an informed decision whether to grant or refuse the application. An applicant cannot demand to be heard by the Registrar in the preparation of his application. Section 15 (2) of the Act even allows the Registrar - all else being in order - "to refuse to grant a licence to an applicant if he considers this to be in the public interest". In these circumstances only, however, the Registrar must observe the proviso that he "shall, in writing, inform the broker of the reasons for his refusal." Those written reasons must be given after the refusal and not before. The draftsperson's use of the word 'broker' rather than 'applicant' in the final phrase of the preceding sentence clearly indicates that the Registrar is empowered to refuse the renewal or re-issue of a pre-existing licence.

[9] A licencee cannot rest upon his laurels. He must so conduct his business affairs that a renewal of his licence is merited. He cannot conclude that renewal is there for the asking regardless of the fact that he may have failed to merit renewal by failing to meet the panoply of requirements necessary for re-issue and re-registration.

[10] In the South African case of **Pretoria N. Town Council v A.1 Ice-Cream Factory** [A.D.] [1953 (3)] 1, Schreiner J.A. discussed the topic of renewal of licences in this way at page 12 B - E:

> *"It was indeed suggested in **Yoffe v Koppies District Licensing Board**, 1948 (3) S.A. 743 (O) that cases like Akkersdyk's case are distinguishable from cases like **Yoffes's** and, therefore, from the present case by the fact that the applicants in the English cases had, apparently, held licenses in previous years and were seeking renewals; this, it was suggested, rendered the enquiry essentially different from that which has to be undertaken when a new license is being sought. I do not agree with this view. No doubt the claim to a renewal will often be morally stronger than that of a new licence. This is not infrequently recognized in statutes. But, in the absence of statutory provision, the distinction seems to me to be one of degree rather than kind. The claim of one who has held a licence for a long*

*time is prima facie stronger than that of one who has held it for only a short time, just as a trader who has sunk considerable capital in his business has prima facie a stronger claim than one who has not. But in the absence of differential statutory treatment (of which there is none in relation to hawkers under the Ordinance), there is no vital distinction between a new licence and a renewal."*

[11] The principle enunciated by Schreiner J.A. that "the claim of one who has held a licence for a longtime is *prima facie* stronger than that of one who has held it for only a short time, just as a trader who has sunk considerable capital in his business has *prima facie* a stronger claim than one who has not" is based upon the premise that an applicant for renewal has performed satisfactorily in the past. By that same principle, an applicant for renewal, who has been a self-confessed repeat offender in the past, may well find himself going up-hill, as did the appellants in this case, when their previous transgressions, aggravated by financial paucity, become part of their profile.

[12] Statutory requirements have been carefully laid down in nearly every country where commercial activity takes place because bitter experience has shown that, starting with the South Sea Bubble, a number of spectacular

corporate failures have taken place over the years, and still continue to take place, which have resulted in catastrophic losses to insured persons and to investors. The Registrar would be failing in his duty to insured persons, to investors, and to the public if he did not apply the law relating to insurance brokers in a fair but firm and businesslike manner.

CONCLUSION

[13] This is a case of well-meaning but financially strapped appellants who lacked the financial viability and robustness, together with the entrepreneurial acumen, which are so critically essential for carrying on the business of an insurance broker. Those characteristics are also essential for the protection of insured persons, the insurance industry, the public, and the reputation of this Kingdom as a center for the conduct of business and commerce. The appellants fell afoul of several regulations. They were justly penalized. They failed to pay those penalties as required. They pleaded for mercy. They were guilty of the egregious misconduct of conducting business without a valid licence. The plea of the first Appellant that he stood to lose his home if the licence was not renewed is of no moment. He had himself put his home in jeopardy in a vain attempt to shore up the fortunes of the

collapsed broker. The imminent loss of his home provided further evidence of the parlous state of the appellants' finances.

[14] It became obligatory for the Registrar to take appropriate action. Indeed, he would have exposed himself to accusations of serious dereliction of duty if he did not act as he did. As M. S. Simelane J. so aptly put it, the appellants are merely clutching at straws. The straw upon which they so desperately still clutch is that the Registrar did not grant them a hearing. There is abundant material upon the record that, in so far as he may have been required to do so, the Registrar gave ample notice of the hearing conducted on the 4th November 2013 and afforded the self- confessed transgressors every opportunity to urge everything they could in mitigation. A chronology of relevant transactions bears this out. The appellants contention that they were not given a hearing is unmeritorious and must accordingly be rejected. The findings of the *court a quo* cannot be faulted.

ORDER

[15] It is therefore the order of this Court that:

i. The appeal be and is here by dismissed with costs:

ii. The orders of the Trial court be and are hereby affirmed.

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S.A. MOORE

JUSTICE OF APPEAL

I agree

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A.M. EBRAHIM J.A.

JUSTICE OF APPEAL

I agree

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DR. S. TWUM J.A.

JUSTICE OF APPEAL

For the Appellants : Mr. S. Masuku

For the Crown : Mr. Z.D. Jele