

SUPREME COURT OF SEYCHELLES

Reportable

2024

MC 04/2021

In the matter between:

BRIJESH JIVAN

(rep. by Guy Ferley)

Petitioner

and

FINANCIAL SERVICES AUTHORITY

(rep. by Basil Hoareau)

Respondent

Neutral Citation: *Jivan v Financial Services Authority* (MC 04/2021) 2024 (27 June 2024).

Before: Dodin J.

Summary: Exercise of Supervisory Jurisdiction under 125 of the Constitution

Heard: Written submissions

Delivered: 27th June 2024

ORDER

- i. I grant a writ of Certiorari quashing the decision of the Respondent to revoke the fit and proper status and the directorship of the Petitioner;
- ii. I grant a writ of Mandamus ordering the Respondent to restore the Petitioner’s fit and proper status and ability to serve as director and non-executive director of Aronex Corporation Limited.

JUDGMENT

DODIN J.

[2] The Petitioner is a Chartered Accountant specializing in securities and investments and is a director of Aronex Corporation Limited a company registers under the Companies Act 1972 hereinafter referred to as ‘the Company’. Until 21st January 2021 the Petitioner was a compliance officer of the Company”. The Company was licensed as a securities dealer

pursuant to section 46(1) and (2) of the Securities Act 2007 until 21st January 2021 when the license was revoke by the Respondent. The Petitioner was approved and appointed compliance officer and was approved and employed as a director of the Company pursuant to section 46(4)(b) of Securities Act 2007.

[3] The Respondent is the legal body which is responsible, inter alia, for the issuing and the revocation of permission for person(s) to act as compliance officers, directors and/or non-executive directors for companies registered as Securities Dealers in the Republic of Seychelles.

[4] The Petitioner avers that by a letter date 21st January 2021 the Respondent removed the fit and proper status of the Petitioner and also revoke his non-executive directorship of the Company stating that the reason for the removal was alleged failure to “*demonstrate probity, competence and soundness of judgment in fulfilling your responsibilities as Non-Executive Director and Compliance officer of Aronex*”.

[5] The Petitioner avers that as a non-executive director and compliance officer of Aronex Corporation Limited and holder of a Securities Dealer’s License (SD014) issued by the Respondent, the Petitioner’s role was limited to acting as the Company’s focal point in Seychelles with no direct involvement in the management of the company’s affairs, outside the jurisdiction of Seychelles.

[6] The Petitioner avers that prior to the removal of the fit and proper status of the Petitioner revocation of his non-executive directorship of the Company the following chronological events occurred between the Company and the Respondent though the Petitioner:

- i. On the 6th April 2020 a complaint was received against the Company. The Petitioner requested for more information about the complaint because it was not received through the company’s compliance process. The Petitioner was invited to attend a meeting by the Respondent to discuss, which he obliged and the meeting was convened on the 8th April 2020. On the 21st April 2020, with reference to the meeting of 8th April 2020, the Respondent issued directives requesting information from the

Company of complaints lodged against the Company. The information was provided on the 6th May 2020 in a series of emails.

- ii. On the 6th August, 2020 the Respondent further contacted the Petitioner and the directors of the Company for information regarding a complaint lodged by one Mr. Hani Ghazzal against the Company. The response to queries was provided in a detailed email dated 13th August 2020. A further email was sent to the Respondent with attached Securities Dealer Form which included details of countries the Company offered its services to. Also included was a list of legal opinions from the various jurisdictions the Company operates in.
- iii. On the 18th August 2020 the Respondent issued further directives to the Company. The Company re-iterated its engagement to review its internal compliance procedures and confirmed settlement of 4 out of 7 complaints filed against it.
- iv. On the 23rd August 2020 the Respondent further contacted the Petitioner requesting further information to be provided by the 25th August 2020 to which the Company complied. On the 23rd October 2020 the Company was notified of the suspension of its service by the Respondent and the Respondent issued Directives under section 26(1) Financial Services Authority Act 2013.
- v. On the 27th October 2020 the Company requested for an extension to submit a response to the Respondent. The extension was granted. The response by the Company was submitted whereby it undertook to strengthen its monitoring and control mechanism, review its KYC procedures to ensure compliance and a complete review of all agreements with its service providers to ensure compliances with the terms and conditions of the licenses. The Company requested the Respondent for the opportunity to rectify the deficiencies in its compliance measure and procedures.

- vi. On the 18th November 2020 the Respondent issued further directives to the Company. The Company re-iterated its engagement to review its internal compliance procedures and confirmed settlement of 4 out of 7 complaints filed against it.
- vii. On the 22nd December 2020 the Respondent issued a letter of intention to, inter alia, revoke the fit and proper status of the Petitioner and its non-executive directorship status.

[7] The Petitioner avers that base of the matters related above, the Respondent's decision was unreasonable, irrational and so outrageous that no sensible Authority Acting with due appreciation of its responsibilities would have come to. Further, the Petitioner avers that:

- (a) As Compliance officer the Petitioner cannot reasonably be expected to verify each and every transaction carried out by an agent of the Company especially in the case of an agent/sub-agent who is not even based in the jurisdiction of Seychelles.
- (b) The Petitioner's role as non-executive director of the company was recognized by the Respondent to be limited to the activities of the Company in Seychelles and as such he could not be reasonably expected to monitor all the activities of the Company outside the jurisdiction of Seychelles.
- (c) The Petitioner has used his best endeavour and voluntarily assisted the Respondent to obtain all information the Respondent had request from the Company.

[8] The Petitioner further avers that the Respondent's decision was unlawful and illegal and procedurally improper for the following reasons:

- (a) The Petitioner was approved and appointed under section 23(2) and (3) of the Financial Services Authority Act 2013 and considered Fit and Proper with the Competency Standard in line with section 46(5) of the Securities Act 2007.
- (b) The Petitioner prepared a compliance procedure manual which was approved by The Respondent. The said manual provides for the

effective oversight of the systems and controls of the Company which forms part of the legal obligations of the Petitioner as Compliance officer.

- (c) G4 Shift Services Ltd an independent contractor of the Company which allegedly, through a sub-agent, gave wrongful advice to some customers is outside and beyond the jurisdiction of Seychelles.
- (d) The company has above 6000 clients and only about 10 were affected by the alleged wrongful action of the G4 Shifts Services Ltd and/or its sub-agents.
- (e) The Petitioner cannot reasonably be expected to be responsible for each and every action of an independent contractor of the Company. The Petitioner's role as defined in section 23 (2) and (3) of the FSA Act 2013 is limited to what can be reasonably expected of him. Therefore, the Petitioner's probity, competence and soundness of judgement in fulfilling his responsibilities as compliance officer could therefore not be called into question. There was no wilful neglect on the part of the Petitioner.
- (f) Further the purposes of the Security Authority (the Respondent) under section 3 Securities Act 2007 are *inter alia*, to license person engaged in securities-related businesses and to monitor and supervise conduct of such by licensee under the act, and further;
 - (i) the duties of the Securities Authority under section 4 Securities Act 2007 are to regulate the securities market within the jurisdiction of Seychelles and
 - (ii) Section 45 (1) (2) (3) confers power of the Securities Authority to license Securities Dealers to carry out securities dealings in Seychelles.
- (g) It is in light of the provisions in (f) above that the Petitioner was approved as a non-executive director to monitor the activities of the Company in Seychelles. The Complaints culminating in the revocation of the Petitioner as a non- executive director/compliance officer relate to activities of third parties outside Seychelles only.

- (iii) The Petitioner avers that the decision of the Respondent was disproportionate, excessive and unfair in all the circumstances of the case:
 - (a) the Respondent could have given a warning to the Petitioner or
 - (b) appoint an examiner to examine the alleged neglect and misconduct on the part of the Petitioner.
- (iv) The decision of the Respondent was a breach of the rule of natural justice in that the Petitioner was not provided with all the details of all the complaints made against the Company to enable him to provide a defence thereto before the decision was taken to revoke the fit and proper status and non-executive director status of the Petitioner.

[9] The Petitioner moved the Court for the following relief:

- a. A writ of *Certiorari* to quash the decision of the Respondent;
- b. A writ of *Mandamus* compelling the Respondent to restore the Petitioner's fit and proper status and ability to serve as director and non-executive director.
- c. For any other orders that the Court deems fit in the circumstances of the case.

[10] In defence, the Respondent avers that on the 23rd October 2020, the Respondent issued a directive to the Company in accordance with section 26 of the FSA Act. The response by the Company was by way of a letter written on behalf of the Company by Attorney-at-law Samantha Aglae; and the Company in its response to the directive of 23 October 2020, made the following statements:

- (i) that the Company would review its agreements with its service providers to clearly provide that they should not at any time provide advisory services to clients in respect of trade and not make any false or misleading statements contrary to the Securities Act of Seychelles;
- (ii) the Company had identified and was to take all necessary action to rectify deficiencies in its control system and procedures; and
- (iii) the Company was reviewing its internal compliance and due diligence procedural requirements in place prior to the appointment of any agent in order to satisfy itself that the agent in order to satisfy has proper qualifications and will be able to honor the terms and conditions of the contract of agents.

[11] The Respondent avers that the above statements were admissions by the Company that it was contravening the Securities Act, 2008, the Securities (Conduct of Business) Regulations, 2008 and the FSA Act. This is tantamount to an acceptance and an admission by the Petitioner that he was not properly discharging his duties and obligations, as director and compliance officer of the company.

[12] The Respondent denied that it issued a further directive to the Company and also denied the veracity of the statements made by the Company in its response to the letter, of the 18th November 2020, from the Respondent. The Respondent averred that it was a direction that was issued to the Company by a letter dated 18 November 2020. The Respondent further averred that in reaching its decision to revoke the fit and proper status and the non-executive directorship of the Petitioner, the Respondent also relied on the letter, dated 29 December 2020, from the Company sent to the Respondent. The letter has been exhibited as A19 to the affidavit to the Petitioner.

[13] The Respondent further averred that the Respondent's decision was not so unreasonable and irrational in all the circumstances of the case, that no reasonable body would have taken such a decision since;

- (a) the Petitioner failed to discharge his duty, as the compliance officer, to –

- (i) to oversee and ensure that the Company established and maintained adequate systems and controls for ensuring that the company complied with the requirements of, and its obligations under the Financial Services Act 2013 the Securities (Conduct Businesses) Regulations, 2008 (hereinafter the Regulations);
 - (ii) to oversee the implementation of the procedures and compliance manual of the Company; and
 - (iii) to oversee that the Company complied with the requirements of, and its obligations under the FSA Act 2013 the Securities Act and the Regulations including –
 - the relinquishment of control over the manner the Company was operating and conducting its business failing to ensure that there were proper system and control in place in respect of the outsourcing of the operation and function of the Company’s business activities; and
 - allowing and/or causing the Company to contravene Regulations 10 and 26 of the Regulations;
- (b) the Petitioner failed to discharge his duties, as a director of the Company, efficiently and thereby allowing and/or causing the Company to contravene the FSA Act, the Securities Act and/or Regulation including –
- (i) the relinquishment of control over the manner the Petitioner was operating and conducting its business and failing to ensure that were proper system and controls in place in respect of the outsourcing of the operation and function of the 1st Petitioner’s business activities; and
 - (ii) allowing and/or causing the Company to contravene Regulations 10 and 26 of the Securities (Conduct of Business)
- (c) the Petitioner’s role as a compliance officer and/or director of the Company was not to be limited to act of the Company in Seychelles only.

[14] The Respondent further averred that the decision the revoke the Petitioner’s fit and proper status and non-executive directorship was lawful and legal and taken in accordance with the law, including in accordance with the principle of natural justice because;

- (a) the Petitioner had ceased to remain fit and proper to exercise his functions as a director and the compliance officer of the Company, in that the Petitioner had ceased to demonstrate probity, competence and soundness of judgments necessary to discharge the two functions; and
- (b) the complaint received by the Respondent only instigated the investigations against the Petitioner, the Company and other persons, but the decision of the Respondent to revoke its approval of the Petitioner, as compliance officer and a director of the Company, was based on the breach of FSA Act, Securities Act, Regulations and/or the Code For Fit and Proper and Competency Standards (hereinafter the Code) by the Petitioner and the Company, including but not limited to the fact that the Petitioner, in breach of his duties and obligations as a director and the compliance officer of the Company, had allowed the Company to conduct its business in a manner that was detrimental to its client and in contravention of the FSA Act, the Securities Act and the Regulations.

[15] The Respondent averred that the decision of the Respondent was proportionate to the circumstances of the case and the Respondent did not have the powers to appoint an examiner to examine the conduct of the Petitioner, as a compliance officer and/or director of the Company.

[16] The Respondent further averred that its decision was not rendered in breach of the principle of natural justice and moreover in reaching its decision, the Respondent acted in accordance with section 33 of the FSA Act, and the Code, issued by the Respondent and the agreement between G4 Shift Services Ltd and the Company which was, executed, by the Petitioner, on behalf of the Company.

[17] The Respondent moved the Court to dismiss the Petition with costs.

[18] After rehearsing the facts in his closing submission, the Petitioner made the following submission on the law:

“1. The law applicable to this case is to be found in the Seychelles Court of Appeal case:- Seychelles International Business Authority v Agnes Jouanneau & Stella Port-Louis SCA 40 and 41 of 2011 and Lotus Holdings Company Limited v Seychelles International Business Authority 21 of 2012. (consolidated)

1.1 *The duties and responsibilities the compliance officer is found in section 23 (2) “a licensee shall appoint an individual as compliance officer who shall be appointed to oversee the compliance officer set out in subsection (1).*

1.2 *Section 23 (1) the licensee is primarily responsible for establishing and maintaining adequate systems and controls for ensuring compliance with the requirements of and its obligations under (a) this Act and any Financial Services Legislations; (b) any code, direction or guideline issued by the Authority that apply to the licensee.*

1.3 *The Respondent’s decision to revoke the fit and proper and non-executive directorship of the Petitioner is premised on the following “whilst it is the duty of the licensee to establish and maintain adequate compliance systems and control, under section 23 (2) it is the compliance officer who shall be appointed to oversee the systems and control of the licensee relating to compliance”. The Respondent erred in this regards in the interpretation of the law. Under section 23 (1) it is the Licensee which is primarily there for establishing and maintaining adequate systems and controls for ensuring compliance. The Compliance officer’s role under sub-sections (2) and (5) is to implement the systems and control to ensure compliance. In the present case the license had appointed G-4 Services Limited who in turn (without the knowledge of the Licensee (company) appointed sub-agents which carried out the alleged wrongful trading without the knowledge of the company and the Petitioner who was only made aware of the fact when the complaints were received.*

1.4 *The company appointed G 4 Shift as sub-contractor in line with regulation 10 of the Securities Conduct of Business Regulations 2008. G 4 Shift is based in Cyprus and the agreement was signed by the Petitioner after a thorough due diligence was done by the executive directors in Cyprus. This was submitted*

in the additional affidavit at paragraphs 11 and 12. The transactions carried out by the sub-agents of the sub-contractor were not known by the directors of the company nor the petitioner. Upon receiving the complaint immediate action was taken against the sub – agents in questions. The Petitioner submits further that it was not reasonable for the Respondent to impute knowledge of the action of the sub-agents of the sub-contractor upon him.

- 2. In the Agnes Jouanneau et al case (supra) the Authority had revoked the fit and proper status of the Petitioners on the basis of some articles which appeared in newspapers in New Zealand regarding arms dealing by a company of which the Petitioners were associated with. In that case the court consider the reasonableness tests as well as the proportionality principle and concluded “In our view, if the Respondent were “fit and proper” person at the grant of the license, the same tests used to determine the initial status must continue to be applied during the duration of the license. To substitute a different test or to exact higher tests contradict SIBA’s earlier decision to allow them to hold “fit and proper persons status”.... There is no allegation that either the Respondent became dishonest, or lacked qualification, competence or soundness of judgment.” It must however, act within the law in order to decide whether the “fit and proper person status” of the Respondents should be revoked. In this context, it has to demonstrate that the holding of multiple directorships are detrimental to the competent performance of the appellant duties. The SIBA had not done that. There is in fact no allegation of wrong doing of any kind on the part of the 1st Respondent apart from the unproven allegations that she was ignorant of the number of directorships she held or the general power of attorney she had granted. These were mere allegation and do not suffice to meet the proportionality test or eve the Wednesbury reasonability test”. There is strong similarity in this regards to the case of the present Petitioner. There is no allegation of wrong doing or illegality on his part. He was not part of the decision making to outsource to the sub-contractor. As the executive directors and G 4 Shift were based in*

Cyprus the decision to appoint G 4 Shift was taken by the executive directors after due diligence carried out by them in line with regulation 10 Securities Conduct of Business Regulation – 2008.

- 3. The Petitioner’s appointment was made under section 23 (2) FSA Act. It is important to note that there is no specific for appointment of a competent officer under the Securities Act. Pursuant to sections 45(4) (f) of the Securities Act it is the Licensee which is obliged to provide compliance. The Respondent acted ultra vires the Securities Act when it transmitted the onus on the Petitioner. At the time the complaint was made the Code For Fit and Proper Competency Standards had not been issued. The Code was issued after 6th October 2020. (Please see code exhibited with the affidavit of the Respondent.)*
- 4. The reason the Respondent gave to revoke the fit and proper status i.e “demonstrate probity, competence and soundness of judgment in fulfilling your responsibility as non-executive director and compliance officer of Aronex” was not grounded in any legislation, code guideline applicable to the Petitioner at the time the alleged complaint were made. The Petitioner submits that consequently there was no legal basis for the decision of the Respondent. The power of ascertain and revoke the fit a proper person’s status contained in section 3 (4) of the International Corporate Services Provider Act read with the criteria for such status as set out in paragraph 3 (Code of Practice Licensees) under the act applies to that act as specifically and not to activities under the Securities Act.*
- 5. The Respondent acted illegally by “revoking” the directorship of the Petitioner. A director can only be disqualified by an order of the court under section 165 (1) of the Companies Act 1972. A director can only be removed pursuant to section 168 of the Companies Act 1972.*

6. *The Petitioner submits that pursuant to sections 3, 4 and 45 the Authority’s jurisdiction is limited to monitoring and supervising activities of securities dealers within the jurisdiction of Seychelles only.”*

[19] The Respondent did not make any closing submission.

[20] Section 33 of the Financial Services Authority Act and section 23 of the same Act provides as follows:

33 (1)The Authority may issue codes and guidelines not inconsistent with this Act or other financial services legislations.

(2) A code or guideline may extend to—

(a) licensees generally, or to specific types or descriptions of licensees;

(b) persons performing such functions on behalf of licensees including directors, senior officers and compliance officers.

(3) Any code or guideline issued under any financial services legislation prior to the coming into force of this Act shall continue in operation as if it was issued pursuant to this section.

(4) Every person shall comply with any code or guideline issued by the Authority.

(5) Any person who contravenes the provisions of subsection (4) commits an offence and is liable on conviction to a fine not exceeding SCR200,000.

23 (1)A licensee shall establish and maintain adequate systems and controls for ensuring its compliance with the requirements of, and its obligations under—

(a) this Act and any financial services legislation;

(b) any code, direction or guideline issued by the Authority that apply to the licensee; and(c)any directive issued by the Commission that apply to the licensee.

(2) A licensee shall appoint an individual approved by the Authority as its compliance officer who shall be appointed to oversee the compliance of provisions of subsection (1).

(3) The Authority shall not approve an individual as a licensee's compliance officer unless it is satisfied that the individual satisfies the Authority's fit and proper criteria.

(4) The Authority may, by notice in writing to a licensee, revoke its approval under subsection (2) if it is of the opinion that the individual no longer satisfies the Authority's fit and proper criteria and in such case the licensee shall appoint a new compliance officer in accordance with this section.

[21] The International Corporate Services Providers Act 2003 provides for duties and regulations for licensees. It does not extend to directors and/or compliance officers. From the evidence before this court, the Petitioner was a non-executive director and compliance officer but never a licensee. As stated in the case of it would seem that judicial review would only be available for licensees. However, it is my considered finding that pursuant to sections 4 and 5 of the Courts Act, this Court has inherent powers to review decisions of the Financial Services Authority, including decisions related to other officers than licensees. See the cases of *Seychelles International Business Authority v Jouaneau & Anor (SCA 40 of 2011) [2014] SCCA 28 (14 August 2014)* and *Lotus Holding Company Ltd V Seychelles International Business Authority (2012) SLR 153.*

[22] The Petitioner is moving the Court for two main remedies, namely:

- i. A writ of *Certiorari* to quash the decision of the Respondent; and

- ii. A writ of *Mandamus* compelling the Respondent to restore the Petitioner's fit and proper status and ability to serve as director and non-executive director.

The Petitioner relies on two main reasons for moving for the above remedies, namely:

- i. That the decision of the Respondent was disproportionate, excessive and unfair in all the circumstances of the case; and
- ii. The decision of the Respondent was a breach of the rule of natural justice in that the Petitioner was not provided with all the details of all the complaints made against the Company to enable him to provide a defence thereto before the decision was taken to revoke the fit and proper status and non-executive director status of the Petitioner.

[23] I have carefully considered the correspondences between the Petitioner and the Respondent during the period leading up to the decision of the Respondent to revoke the fit and proper status of the Petitioner and his non-executive directorship. It is obvious that no investigation was ever carried out and no "hearing" was ever conducted which can be said would have given the Petitioner sufficient right to present his case before the decision was taken. As stated by his Lordship Egonda-Ntende in *Lotus Holding Company Limited v SIBA CS No 121/2010*, (Supreme Court judgment N0:5)

"Under the Judicial Review the Supreme Court does not look at the merits of the decision as such, outside of the 3 main grounds of procedural impropriety, irrationality and illegality. Judicial review is more concerned with the process of decision making of the subordinate court, tribunal or body rather than the merits of the decision so made."

[24] Coming to the grounds of review, the first ground raised by the Petitioner is that the decision was disproportionate, excessive and unfair in all the circumstances of the case.

The Petitioner referred the Court to the famous case of Associated Provincial Picture Houses v Wednesbury Corporation (1984) 1 KB 223, It is now trite law that there is a minimum requirement is that a person gets the chance to present his case before a decision is taken in his regard. See also the case of Ridge v Baldwin [1964] AC 40. I find that the Petitioner was issued with several letters and directives but never allowed to present his case or challenge the decisions being taken in respect of himself or his directorship. I find that response of the Respondent that the Respondent did not have the powers to appoint an examiner to examine the conduct of the Petitioner, as a compliance officer and/or director of the Company to be very much wanting in logic and an abdication of its responsibility to ensure fairness in its decision making processes.

[25] On the second ground that the decision of the Respondent was irrational and unreasonable, I again refer to the case of Associated Provincial Picture Houses v Wednesbury Corporation, [supra], where the stringent test required to find a decision to be unreasonable is that it is a decision

“which is so outrageous in its defiance of logic or of accepted moral that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

See also the cases of Georges v Electoral Commission [2012] SLR 199 and Vidot v Minister of Employment and Social Affairs [2000] SLR 77.

[26] I am mindful that the law does not appear to make it mandatory for the FSA to hold proper quasi-judicial hearings prior to taking decisions in respect of persons or bodies appointed under the relevant Acts. However, that does not absolve it from the duty to act fairly and to come to decisions that would be logical and based on proven facts rather than on uninvestigated complaints. The contention that no proper hearing or investigation were held because the law did not provide for such cannot be sustained where natural justice requires that decisions are based on logic, accepted moral norms and are sensible.

[27] Consequently, I find the decision to revoke the fit and proper status and the non-executive directorship of the Petitioner to be illegal and unfair and in breach of the fundamental principles of natural justice.

[28] I therefore make the following orders:

- i. I issue a writ of Certiorari quashing the decision of the Respondent to revoke the fit and proper status and the directorship of the Petitioner;
- ii. I issue a writ of Mandamus ordering the Respondent to restore the Petitioner's fit and proper status and ability to serve as director and non-executive director of Aronex Corporation Limited.

[29] I award cost to the Petitioner.

Signed, dated and delivered at Ile du Port on 27th day of June 2024.

G Dodin
Judge

