

## THE FINANCIAL SERVICES TRIBUNAL

In the matter between:

Case No: FSP29/2024

**CHRISTOPHER THEMBINKOSI KUNENE**

Applicant

and

**MOMENTUM METROPOLITAN LIFE LIMITED**

Respondent

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### DECISION

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Tribunal: Justice F D Kgomo (Chairperson), Adv A T Ncongwane SC and  
Adv N K Nxumalo

Date of hearing: 20 September 2024

Date of decision: 27 September 2024

Appearances:

For the Applicant : In person

For the Respondent : Ms N Pillay

Summary: Application for reconsideration of the decision of the FSP to debar the applicant lodged late, condonation application, inadequate explanation for delay, no prospects of success.

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## **I INTRODUCTION**

- 1 The respondent is Momentum Metropolitan Life Limited ("*Metropolitan*").  
Metropolitan carries on businesses including as a registered life insurer and authorised financial services provider ("*FSP*") as defined in section 1 of the Financial Advisory and Intermediary Services Act, 2002 ("*FAIS Act*").
- 2 The applicant was employed by Metropolitan as a Financial Advisor, his functions included marketing and sales of funeral policies to clients. As such, he was Metropolitan's "*representative*", as defined in section 1 of the FAIS Act.
- 3 In this application, the applicant applies in terms of section 230 of the Financial Sector Regulation Act 9, of 2017 ("*the FSRA*"), for reconsideration of Metropolitan's decision to debar him as a representative. He also applies for condonation of the late lodging of the application

## **II THE FACTS**

- 4 From 1 June 2013 to 1 June 2023, the applicant was employed by Metropolitan as a Financial Advisor, his functions included marketing and sales of funeral policies to clients.
- 5 It seems that early 2022, one of the applicant's clients complained that his colleagues were getting cash-back bonuses from Metropolitan but he had not received any. This led to the applicant advising him to replace his policy with a new policy with a cash-back bonus. Apparently, the client's old policy did not make him eligible for the cash-back bonus.

- 6 The client having accepted the advice, the applicant effected the replacement on 2 April 2022, covering three family members of the client for a premium of R752.
- 7 On 17 June 2022, the policy was upgraded by adding three more people that were covered thereunder. One of the new people covered had the same surname as the client and the other two had different surnames from the client. The premium escalated from R752 to R1 584.
- 8 It seems that in the beginning of February 2023, the client complained to Metropolitan about deduction of premiums that exceeded the agreed premium of around R800. He was apparently advised to submit an affidavit to that effect.
- 9 On 8 February 2023, the client deposed to an affidavit stating that he had not authorised the cancellation of his old policy and that the amount deducted from his account exceeded the agreed amount of R800 and demanded a correction and refund of excess premiums deducted.
- 10 On 1 June 2023, the applicant resigned from the employ of Metropolitan.
- 11 There is a dispute of fact as to the reason for resignation. The applicant's version is that he resigned due to ill health, but Momentum says that he resigned after he had been informed that there was a client complaint against him which was being investigated.
- 12 On 25 July 2023, a forensic report was issued following an internal investigation conducted by Metropolitan into the client complaint.

13 The key finding in the forensic report is the following:

*“1 The client XN policy numbers his 325043039*

- The policy was enrolled 02 April 2022 and the policy owner for the policy is indicated XN with identity number 6509125525083. The policy only covered the extended member Ntokozo Ngcobo for a cover of R45 000 and total monthly premium R200,00, ZN for a cover of R50 000 and monthly premium of R312.00 and AM covered for 50 000 and monthly premium of R240.00.as per Annexure EDF 2 (1-8).*
- The policy was upgraded on 17 June 2022 by adding additional extend members, namely NN for cover of R50 000 and premium of R240.00, SN cover of R50 000 and premium of R240.00 and AN cover of R50 000 and premium R312.00 as per Annexure EDF 3(1-8).*
- The policy was enrolled and upgraded by the financial advisor CK.*
- The Stop Order Authority form as per Annexure EDF 4, captured under the policy are not the full original size of the document. The document only shows a partial signature of the of the client. The same stop order form was also used for the premium upgrade done on 17 June 2022 for R1584,00. The partial signature is not consistent with the client specimen signatures on his Affidavit and smart identity card as per Annexure EDF 1(1-5).*

*...*

#### *iv. CONCLUSIONS*

*Above findings lead to the conclusions that:*

- The above-mentioned client on the balance of probability did not agree to the upgrade done on the policy number 325043039 and did not write the cancellation letter requesting the cancellation of the policy number 13550085087.*
- The financial advisor Christopher Kunene failed in his duty to be honest and act with Integrity in that he enrolled policy applications and submitted a cancellation letter on the pretext that [they were] valid applications whilst he knew, or ought reasonably to have*

*known, that such applications were false, and that the information was incorrect/invalid/ fraudulent consequently contravening the FAIS Act.”*

- 14 On 27 July 2023, Metropolitan issued a notice of debarment inquiry inviting the applicant to attend the inquiry on 15 August 2023 at 11:00 on MS Teams. The debarment inquiry was sent to the applicant’s last-known address at XXX. The applicant denied that he received the notice of debarment inquiry because he had already left that address and gone back to KZN.
- 15 However, on 14 August 2023 – a day before the debarment hearing, the applicant sent an e-mail to Metropolitan seemingly making written representations in response to the charges, stating the following:

*“XXXXXX replacement by YYYYYYY, on the 31/10/2022 is where everything was done, Mr XN ID number XXXXXXXX, staying at XXX ABCD Street, Benoni 1501.*

*It's been a long servicing Company XY SA, I have a lot of clients, not only X, He's also my home brother, we [are] both from Newcastle in KZN. I'm so disappointed and he [was] also shocked, when he heard about this. Needs analysis was not done properly, my client was misled at Spring branch by one of the Metropolitan advisors. Errol ask me to explain myself about this. He never told me about there was a case that was pending against me.*

*Due to my medical condition, I was supposed to resign on 2020 after I was hospitalized for a long period. Due to the love of MMI, I try all my best to service my clients. On 2023 June, I decided to throw [in the] towel, because of life was not good at all, that was a reason for my resignation, not that I [was] running away. Even when you check the reason of leaving, when I resign there's no case that was pending against me, if it was any, I [was] never going to resign.*

*072XXXXXX CompanyXY SA is under retrenchment, so please let's consider that for sake of financial strain and the pressure that our economy and also clients now are under. Oom P, right now I'm at home in KZN, taking care of life, just to cut it short, the client was misled or confused by telling him to write an affidavit, instead of advice”*

16 On 15 August 2023, the debarment inquiry was held virtually on MS Teams. Because the applicant was unable to join on MS Teams, he was telephoned by Mr VD (the chairperson) and the inquiry took place telephonically.

17 It seems that during the hearing there was a dispute as to whether the client gave authorisation for the upgrade to his policy on 17 June 2022 by addition of the three more people to be covered thereunder. It was agreed that the client had to be telephoned to confirm whether or not he requested the upgrade. The telephone to client was made later by the relevant official of Metropolitan who communicated what the client said to the applicant by letter dated 15 August 2023. The letter stated the following:

*"I spoke with XN this afternoon and he confirmed that he doesn't know the extended family members (NN, SN and AN) that are covered on his policy YYYYYY.*

*He confirmed that he did request for a cashback benefit however he never requested you to add any new members on the policy YYYYYY.*

*Please can you provide evidence where the client requested that you add on new members on the policy."*

18 On 17 August 2023, Metropolitan issued a provisional debarment notice notifying the applicant that he had been debarred for the following reasons:

*"We considered your submission via telephone call and during the enquiry. The client was called on 15 August 2023. The client did state that he wanted the CashBack benefit, but he denied that he asked for the 3 dependents to be added. In your telephonic conversation with the key individual, you mentioned that the client accepted that specific upgrade (where the 3 dependents were added) telephonically. Upon our investigation on 17 August 2023, we established that the upgrade was not done electronically, but that the same stop order with a partial signature of the client, was uploaded with every upgrade done on this policy.*

12. *You entered this transaction with the intention that Metropolitan pay you commission to which you were not legally entitled.*
13. *Your actions have caused both reputational prejudice and monetary loss to Metropolitan.*
14. *You were always aware that your actions were contrary to Metropolitan rules and a deliberate misrepresentation of the truth.*
15. *It is thus alleged that you have:*
  - (a) *Committed fraud.*
  - (b) *Misrepresented the true situation to Metropolitan."*

19 In terms of the debarment policy of Metropolitan, the applicant had ten days to submit further representations to the chairperson for consideration in determining whether to issue final debarment.

20 On 28 August 2023, the applicant submitted a hand-written affidavit on a police station template, stating the following:

*"Good day*

*Hope you are well Mr PvD. With due respect as you and your team for the hard work that you have been doing, great job.*

*According to Mr X's feed back I do value it and also thanks to him (client). Policy YYYYYY was both me and him agreed that we also do an upgrade on the same policy. But mostly confusing is this R700 and he said the premium was around R800 this time. The main policy is about extended family that he said he doesn't know. My question is why did he cancel the policy which they were busy doing investigation because he knows the people but he said he never added them. Please consider ... all the facts, this client is ... under financial problems."*

21 On 1 September 2023, Metropolitan issued a debarment notice notifying the applicant that he had been debarred on the basis that he upgraded the client's policy without client's authorisation in order to fraudulently get a commission.

- 22 On 25 April 2024, the applicant lodged an application for reconsideration. In his grounds for debarment, the applicant did not dispute the finding that he upgraded the client's policy without the client's authorisation.
- 23 During the hearing, the applicant denied that the upgrade to the client's policy on 17 June 2022 was effected by him. He initially contended that when the upgrade was effected he had already left Metropolitan and therefore it could not have been him who effected the upgrade. When it was pointed out to him that the upgrade was made in June 2022 and he resigned in June 2023, he conceded that he was still employed by Metropolitan when the upgrade was effected but persisted in his denial that he effected the upgrade to the client's policy. However, his denial that he effected the upgrade is inconsistent with his version in the debarment inquiry and in his affidavit of 28 August 2023, which was that the upgrade was done at the client's request.

### **III CONDONATION**

- 24 The notice of final debarment was issued on 1 September 2023 and transmitted by e-mail to the applicant on the same day using the e-mail address he used for submitting the application for reconsideration, which has also been used in all communications with the Secretariat.
- 25 The application for reconsideration was only submitted on 25 April 2024, some seven months late.
- 26 Rule 8(b) of the rules of this Tribunal ("*the rules*") provides that an application for reconsideration must be made within 60 days after the applicant was



notified of the decision, or such longer period as may on good cause be allowed.

27 Upon receiving the first e-mail from the applicant attaching a completed application for reconsideration form, on 22 April 2024 the Secretariat sent an e-mail to the applicant attaching the rules and drawing his attention to certain defects in the application, as follows:

*“Your e-mail and attachments below refer. Please also see attached correspondence enclosing the Tribunal rules sent to you on 22 April 2024.*

*The application for reconsideration now filed does not, unfortunately, fully comply with the Tribunal rules:*

- 1. We note that no decision letter is attached as required in terms of paragraph 9 of the Tribunal rules;*
- 2. The affidavits do not seem to deal with the reasons for the delay and the request for condonation of the late filing of the application in accordance with paragraphs 30- 33 of the Tribunal rules; and*
- 3. The parties to the application are not cited fully and accurately and the application does not appear to have been sent to the respondent (Momentum Metropolitan Life Ltd) which renders the application fatally defective (see paragraph 11 of the Tribunal rules).”*

28 In terms of rule 31, an application for condonation must show good cause.

29 When he was asked why he waited for so long after the debarment before he brought an application for reconsideration, he stated that he was not aware that he had been debarred because he did not receive the debarment notice. He says he was informed by Assupol, when he applied for a job there, that the FSCA website reflected that he had been debarred.

30 This is not true. The record shows that both the provisional debarment notice and the final debarment were sent to the applicant's e-mail – the same e-mail address he is using for these proceedings. The delivery note produced by Microsoft Outlook shows that delivery to his e-mail address was successfully completed.

31 In *Van Wyk v Unitas Hospital and Another*,<sup>1</sup> the Constitutional Court said:

*"[20] This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.*

*...*

*[22] An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable. The explanation given by the applicant falls far short of these requirements."*

32 For this reason, the applicant has not given a proper explanation for his delay in lodging the application for reconsideration. His assertion that he did not receive a notice of debarment is demonstrably untrue as stated above.

33 Furthermore, the application for reconsideration has no prospects of success because his answer to the main charge relied upon during the debarment

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<sup>1</sup> *Van Wyk v Unitas Hospital and Another* (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC).

inquiry is contradictory to the version advanced during oral argument in the hearing of the application for reconsideration.

- 34 For these reasons, the prerequisites for condonation have not been satisfied. Therefore, the application for condonation cannot succeed.

#### IV CONCLUSION AND ORDER

- 35 There is one aspect that we feel constraint to broach, lest the mistaken impression is created that the Tribunal condoned the egregious unprintable written racial slurs hurled at the Metropolitan's representative.

- 36 In an article in the Sunday Times of 22 September 2024, a senior journalist, Barney Mthombeni, made these insightful remarks on this topic:

*"Racism is a national scourge, a perennial albatross around the country's neck, and there should not be any tolerance of it."*

- 37 To be sure, the applicant did make a lukewarm apology.

- 38 The attention of parties seeking reconsideration of their matters is pertinently drawn to the provisions of s 234 (2) of the Financial Sector Regulation Act, No. 9 of 2017, which stipulates:

*"(2) The Tribunal may, **in exceptional circumstances**, make an order that a party to proceedings on application for reconsideration of a decision pay some or all of the costs reasonably and properly incurred by the other party in connection with the proceedings."* (own emphasis).

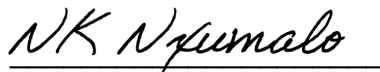
- 39 The step contemplated herein may, of course, only be taken upon the application of a party or the Tribunal *mero motu* on proper notice to the

implicated party to advance reasons why such a sanction should not be invoked.

40 For all the above reasons, the application for reconsideration must be dismissed. We therefore make the following order:

*“The application for reconsideration is dismissed”.*

Signed on behalf of the panel at Pretoria on 27 September 2024.



**Adv N K Nxumalo**  
**With Justice F D Kgomo (Chairperson)**  
**Adv A T Ncongwane SC**