

IN THE FINANCIAL SERVICES TRIBUNAL

CASE NUMBER: FSP70/2019

In the matter between:

MIHLALI NTONGANA

Applicant

And

STANDARD BANK OF SOUTH AFRICA LTD

Respondent

Tribunal: Mr. JM Damons (chair), Mr. J Pema and Mr. NK Nxumalo

For the Applicant: In Person

For the Respondent: Mr. H Chauke

Hearing: 25th March 2021

Decision: 13th April 2021

Summary: Application for reconsideration of a decision in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 ("FSRA") – application to reconsider the debarment decision for a representative – a representative's dishonesty, negligence or incompetence must be sufficiently serious to impugn the honesty and integrity of the representative.

DECISION

INTRODUCTION

1. In this matter, the applicant applied for reconsideration of the debarment decision dated 14th October 2019¹. After the debarment decision, the applicant filed an application for the reconsideration of a decision in terms of section 230(1) of the FSRA².
2. The applicant in this matter is Mr. Mhlahli Ntongana (Mr. Ntongana / the applicant) a former Financial Services Representative (FSR) of Standard Bank of South Africa Ltd an authorized Financial Services Provider (FSP) and the respondent in this matter.
3. The reconsideration application was filed with this Tribunal on the 13th November 2019. The application was opposed by the respondent. This matter is thus considered on the written and oral submissions presented by the parties.

FACTUAL BACKGROUND AND COMPLAINT

4. The gist of the matter concerns an incident wherein it was alleged that the applicant acted in a dishonest manner. The actual charges preferred against the applicant, which charges were the basis of the debarment were formulated as follows:

“Alleged dishonesty on your part in that on the 5th of July 2019 you confirmed to your line manager that you were at work whereas it was later found that you had absented yourself from work without authorisation. You failed to tell the truth to you line manager about your whereabouts.”

¹ See record of proceedings part A page 5 - 6

² See record of proceedings part A page 1 - 2

Alleged dishonesty on your part in that on the 5th of July 2019 you made a false statement by reporting sales that did not exist, and continued to mislead your line manager for over a month when she followed up on the accounts confirmed to have been opened on the said dates.”³

5. The applicant pleaded guilty to these charges during the disciplinary hearing and was accordingly found guilty of both charges. He was summarily dismissed from his employment with the Standard Bank⁴. Standard Bank also proceeded with the debarment process and after same, Mr. Ntongana was debarred.
6. It must be stated that the facts in this matter are not in dispute. The applicant acknowledges the misconduct and that he pleaded guilty.

CONDONATION - LATE FILING OF THE RESPONDENT'S HEADS OF ARGUMENTS

7. The respondent filed its heads one day late. In the heads the respondent did apply for the condonation of its heads. The Tribunal considered the grounds upon which the condonation was sought. The Tribunal found that the delay of a day was very minimal and further that the respondent did show good cause for the late filing of the heads. Accordingly, condonation for the late filing of the heads was granted.

GROUND FOR THE RECONSIDERATION

8. From the application filed by the applicant, the grounds for the reconsideration do not clearly come forth. However, on perusing the entire record, one can draw a conclusion that the applicant argues that the debarment was harsh. That seems to be the only ground put forth by the applicant.

³ See record of proceedings part B page 9

⁴ See record of proceedings part B page 33 - 35

9. The respondent argued that because the applicant was found guilty of dishonesty (and that he pleaded guilty to the charges of dishonesty), it thus follows that he has contravened the requirements of a fit and proper person to hold the position of a representative. It was specifically argued that the respondent had been satisfied that based on the available facts and information, Mr. Ntongana no longer met or complied with the requirements of being fit and proper⁵. It was based on these false statements and the admission of guilty tendered by the applicant, which according to the respondent formed the basis of the debarment.

LEGAL FRAMEWORK AND ANALYSIS

10. In terms of section 14(1) of the FAIS Act, an FSP is obliged to debar a representative from rendering financial services if the FSP is satisfied based on available facts and information that that representative no longer complies with inter alia the fit and proper requirements.

11. Section 13(2)(a) of the FAIS requires that an authorised financial services provider must:

“(a) at all times be satisfied that its representatives and the key individual of such representatives, are when rendering a financial service on behalf of the provider competent to act and comply with:

(i) The fit and proper requirements”

12. The requirements of a fit and proper person are as per the publication under section 6A of FAIS Act. Section 6A(2) states that “fit and proper requirements” include “personal character qualities of honesty, integrity and competence”. In this matter, the applicant was debarred on the grounds of dishonesty. As

⁵ See respondent’s heads of arguments at page 5, unmarked par 4 and 5

argued by the respondent, the finding of guilt challenged applicants personal character qualities of honesty and integrity.

13. It is a fact that the applicant was found guilty of dishonesty. In fact, he pleaded guilty during that hearing to the charge of dishonesty. Therefore, the question will be whether such dishonesty is one that disqualifies him from holding a position of a representative. In determining such, it would be important to consider the gravity of his conduct.

14. In dealing with the enquiry into the fit and proper requirement, with relation to dishonesty, I draw guidance from the decision of this Tribunal in **Fahdia Osman v First National Bank a Division of Firstrand Bank Limited**⁶. In that matter, the learned Chair stated amongst other the following:

“25 When considering one’s character, one cannot always determine same by having regard to one’s act or one class of act. A character analysis is necessary to draw one’s conclusion. It can therefore not be gainsaid that in determining honesty and integrity, it is necessary to know as much as possible about that person

26 In this instance reference is made to Hamilton Smith & Company v The Registrar of Financial Markets (at p.5), where the Appeal Board expressed as follows:

“To determine whether a person is of good character and integrity involves a moral judgement. In arriving at that judgment it is necessary to have regard to the matter in which the person concerned has conducted himself not only in his private life but also in his dealings with those

⁶ Fahdia Osman v First National Bank a Division of Firstrand Bank Limited Case no: FSP44/2020

with whom he has come into contact professionally or in the course of his business. A distinction is sometimes drawn in this context between character and reputation”

15. It is very important to understand that in that *Fahdia Osman v First National Bank a Division of Firstrand Bank Limited’s* matter, the Appeals Tribunal was also dealing with a debarment of a representative on allegations of dishonesty. The learned Chair went further and stated that:

“31 *It must be emphasized that a single act of dishonesty, negligence, incompetence or mismanagement may not by itself constitute prima facie evidence or absence of honesty and integrity. **Such dishonesty, negligence or incompetence or mismanagement must be sufficiently serious to impugn the honesty and integrity of the person concerned**” (own emphasis)⁷*

16. Having said that, one will question if the conduct of the applicant is one that is serious enough to impugn his honesty and integrity so as to disqualifying him from holding a position of a representative?
17. Having considered the dishonest conduct for which the applicant was debarred for, this tribunal is of the view that such conduct is not sufficiently serious that same impugn on the honesty and integrity of the applicant. The fact that a person acts in a manner that may be dishonest does not mean that such dishonesty can necessarily justify or disqualifies a person from the requirement of fit and proper. An employee can lie to his or her employer about the time he arrived at work. Such would be dishonesty but same cannot justify a debarment. Dishonesty which justifies a debarment should be serious and have a bearing on his functions and duties as an FSP.

⁷ Also see *Hamilton Smith & Company v The Registrar of Financial Markets*, Case no: FSP4/2018 dated 24 October 2018

18. It should also be borne in mind that debarment was meant to protect the public from unscrupulous persons. An employee who lies about his whereabouts at work would have acted in a dishonest manner, but such cannot justify a debarment. The FAIS Act is not concerned with dishonesty in respect of matters falling outside its scope. Therefore, it cannot be invoked by employers to debar their employees for dishonesty pertaining solely to their labour relationship such as employees' lying about their absenteeism or meeting performance targets. Nor can it be invoked by a disgruntled wife whose FSP husband has committed dishonesty that betrays their marital relationship.
19. On this basis, this Tribunal is not convinced that the applicant's conduct complained of is sufficiently serious so as to justify the debarment or that the dishonest conduct pertains to matters regulated by the FAIS Act. For these reasons, there was no basis for the debarment.
20. Accordingly, in terms of section 234(1)(b)(ii) of FSR Act, this Tribunal makes the following orders:
- 19.1 The debarment of the applicant is hereby set-aside; and
- 19.2 No order as to costs

Signed at PRETORIA on the 15th day of APRIL 2021 on behalf of the Tribunal



CHAIRPERSON
JM DAMONS