

THE FINANCIAL SERVICES TRIBUNAL

Case No: FSP61/2022

In the matter between:

NERISA SINGH

Applicant

and

NMI DURBAN SOUTH MOTORS (PTY) LTD

Respondent

Tribunal: Adv W Ndinisa (Chair), Adv M Holland and Mr J Pema

For Applicant:
Attorneys

Adv J Stroebel, instructed by Bekker

For Respondent:

Adv L M Malan SC, instructed by Bowman
Gilfillan Inc

Date of hearing: 2 August 2023

Date of decision: 16 October 2023

Summary: Debarment – sections 13(2)(a) and 14(1) of the Financial Advisory and Intermediary Services Act 37 of 2002 – Labour disputes and debarment follow different processes and laws

DECISION

Introduction

1. The Applicant approaches the Financial Services Tribunal (“the Tribunal”) following the determination on 5 December 2022 by MNI Durban South Motors (Pty) Ltd, the Respondent in this matter.
2. This Application is brought in terms of section 230 of the Financial Sector

Regulation Act 9, 2017 ("the FSR Act"), seeking an order in terms of section 234(1) of the same Act.

3. The Applicant was debarred in terms of section 14(1) of the Financial Advisory and Intermediary Services Act, 37 of 2002 ("the FAIS Act").
4. The debarment resulted from the following allegations made by the Respondent against the Applicant:

"You failed to render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry during the sale of 2 retail units in June 2022 to Mr. N. Habib and Mr. L Beni and 15 vehicles to Hyper check (Pty) Ltd during the period 1 October 2021 to 19 July 2022."

5. The debarment determination dated 5 December 2022 was suspended by the Deputy Chairperson of the Tribunal on 28 December 2022, pending the finalisation of this application for reconsideration.
6. The operation of the debarment determination was suspended following the application brought by the Applicant to that effect in terms of section 231 of the FSR Act.
7. On 14 February 2023 the Respondent delivered the relevant underlying documents on which the determination was based. Further, the Respondent delivered further reasons in terms of the rule 13 of the Financial Services Tribunal Consolidated Rules ("the Tribunal Rules") on the same date.

Grounds for reconsideration

8. The Applicant submitted an affidavit dated 21 December 2022 in support of her application for reconsideration. In this affidavit she detailed the charges that were preferred against her and the summation of what transpired in the internal disciplinary hearing.
9. This matter relates to Woodford Car Hire (Pty) Ltd ("Woodford"), a fleet client of the Respondent. According to the Applicant, a certain protocol is followed where Mr Shane Naidoo, the dealer principal, instructs Mr Moosa Mohammed, the sales person, regarding the structuring of fleet deals. The instruction is then passed to the Applicant. In the process of instruction, the Applicant signs the files to enable Mr Mahommed to produce an invoice. This is what the Applicant referred to as the processing of instructions.
10. The Applicant submitted that it has been a common practice over the years that sometimes a fleet customer purchases motor vehicles for the employees. According to the Applicant, this is known as a fleet deal notwithstanding the fact that individuals are invoiced.
11. Further, the Applicant submitted that she found no anomalies as this was common practice. However, the Applicant made a note in the system which reads: THIS IS A FLEET DEAL CLIENT HOWEVER NEEDED TO INVOICE UNDER PRIVATE NAME"
12. Furthermore, it is the submission of the Applicant that she exercised due diligence by trying to call the telephone number in the file, and there was

no response.

13. Further, the Applicant stated that as a responsible Financial and Insurance Consultant ("the F&I Consultant"), she did ask questions and one of the questions to Mr Mahommed is why are they invoicing as retail and not fleet. The response was that an instruction received from Mr Naidoo was that the two vehicles were for employees of Woodford, and should be registered in their names. According to the Applicant, Mr Mahomed indicated that this was done to afford the employees of the fleet customer to enjoy the fleet discount provided by the Respondent.
14. Furthermore, the Applicant submitted that there is no standing procedure established by the Respondent in respect of transaction processed as fleet. The Applicant stated that this was confirmed by Mr Bradly Lynch (regional manager), Mr Shabangu and Mr Derryl Chetty in the disciplinary enquiry confirmed same. Further, the Applicant stated that Mr Lynch amplified her version by stating that F&I Consultant are not rendering financial services to fleet customers.
15. Further, the Applicant referred to the settlement agreement reached on 19 October 2022 in respect of the labour dispute which was referred to a dispute resolution centre and the fact that the Respondent indicated that the termination of employment of the parties was the expiry of contract, not dismissal. The Applicant challenged the debarment on, amongst other things, the basis that she left her employment due to contract expiry.

Background

16. The Applicant was employed by Barloworld Motor Retail SA, a division of Barloworld South Africa (Pty) Ltd. ("Barloworld") with effect from 1 April 2015. Barloworld was acquired by Respondent on June 2021 and the Applicant's employment contract, amongst others, was transferred to the Respondent.
17. The Respondent is a financial services provider, offering vehicle finance services and related financial services. This is in terms of the FAIS Act.
18. The Applicant was employed in a position of F&I Consultant and her duties fall within the purview of the FAIS Act. She was regarded as an authorised representative of the Respondent. Consequently, she was authorised to give advice and intermediary services in respect of Short-Term Personal Lines and Short-Term Commercial Lines.¹
19. The record reflects that the Applicant was expected to comply with the FAIS Code of Conduct by following the compliance manual and procedures of the Respondent. Further, the Applicant undertook to act honestly, fairly and with due skill, care and diligence and in the best interest of the Respondent's clients and integrity of the financial services industry.²
20. The Finance and Insurance Division of the Respondent has a governance policy which states, amongst other things, that it is necessary for the Key

¹ Record, Part B, page 9

² Record, Part B, page 9

Individuals and the F&I Consultants to abide by the FAIS Act, the fit and proper requirements and especially the FAIS General Code of Conduct. The governance policy also states that non-compliance could lead to dismissal, and/or debarment.³

21. The letter dated 6 July 2022 from SMahomed Attorneys, acting on behalf of Mr. Habib, marked the genesis of this matter. SMahomed attorneys informed the Respondent that Mr Habib received a call from VW South Africa, congratulating him for purchasing a VW Polo from VW Barons Pietermaritzburg. Needless to state that this was unknown to Mr. Habib. This sale took place on 22 June 2022.
22. After the aforesaid incident, the Respondent conducted its investigation in the matter. Barons Pietermaritzburg, Audi Centre Pietermaritzburg and Barons Burban are dealers which are operated by the Respondent.
23. According to the reasons submitted by the Respondent, new vehicles may only be sold by franchise dealerships. This is in terms of the original agreement between the Respondent and the manufacturers, namely Volkswagen South Africa and Audi South Africa.
24. The Respondent submitted that a certain number of its employees were involved in a misconduct that involved Woodford, which is one of the fleet clients of the Respondent. The misconduct related to the circumvention of the original agreement between the Respondent and the manufactures.

³ Record, Part B, page 30

According to the Respondent, the Applicant is one of the employees implicated.

25. The investigation revealed, amongst other things, that the vehicle associated with Mr Habib had been invoiced, licenced and registered in his name. Woodford paid for the vehicle. Further, Woodford was also involved in the transaction related to Mr Beni.
26. Further, the Respondent submitted that Woodford spent R8.8 million on vehicle sales with Barons Pietermaritzburg and Audi Centre Pietermaritzburg. This spent included the transactions for Mr Habib, Beni and the vehicles sold to Hyper check (Pty) Ltd.
27. The allegations against the Applicant are that the Applicant had recorded the sales but failed to perform any verification in respect of Habib and Beni. It is noted that the Applicant only inserted a special note which has been referred to herein above.
28. Further, as part of the further reasons submitted by the Respondent, it is submitted that the Respondent has what is known as 'Know Your Client' procedures and confirmations ("KYC obligations"). The F & I Consultants were provided training in that regard.
29. The Respondent explained that for deal files invoiced to an individual or to the bank for a finance deal, in-person FICA identification and verification is required for the buyer on the invoice, for the person responsible for payment and for the person collecting the vehicle.

30. Further, the Respondent explained that for files invoiced to a company, the minimum is required to verify that the order is valid, the source of the transaction is approved and valid from the company specified on the invoice. Accordingly, the deal must be invoiced in the name of the company. The vehicles in this instance must be registered in the name of the company.
31. The Respondent submitted that although the loading of fleet claims was not the primary responsibility of the Applicant, she was required to review the files and had to raise the alarm when procedures not followed.
32. It is common cause that the Applicant never saw the clients and never verified any supporting documents. In other words, no identifications and verifications of Mr Habib and Mr Beni.
33. Regarding the settlement of the labour dispute, the Respondent submitted that although the Applicant sought to negotiate the withdrawal of the debarment as part of labour matter, this did not happen.
34. The Respondent persisted in its stance that it did not abandon its statutory power and duty in terms of the FAIS Act.

Condonation for the late filing of Augmented Grounds of Reconsiderations

35. On or about 3 July 2023 the Applicant delivered augmented grounds for reconsideration ("Augmented Grounds") together with an application for condonation for the late filing of the Augmented Grounds.
36. In support of her application for condonation, the Applicant submits that

she was represented by Bhamjee Attorneys at the initial stages of this matter and she terminated their mandate.

37. The Applicant submitted that it came to her attention that her attorneys did not file her Augmented Grounds in time and within the 10 days of receiving the further reasons from the Respondent on 14 February 2023. She submits that this was not a fault on her part.
38. According to her submissions, it is of imperative importance and in the interest of justice that the Augmented Grounds be placed before the Tribunal to ventilate all the issues between the parties and properly state her case.
39. Further, the Applicant submitted that the delay is not excessive and the Respondent won't be prejudice as it will have adequate time to consider the content and prepare for the hearing.
40. The Applicant contended that if the late filing of the Augmented Grounds is not condoned, she will suffer great deal of prejudice and that outweigh any prejudice the Respondent could suffer.
41. Further, the Applicant submitted that she has good prospect of success as it is evident in her affidavits filed in this matter. She stated that this matter is of great importance to her.
42. The Respondent opposed the application for condonation and filed its affidavit in that regard on 13 July 2023. The Respondent submitted that on 15 February 2023 the office of the secretariat of the Tribunal informed

the Applicant that since the Respondent has filed the records, the Applicant is entitled to file a notice to amend or augmented reasons on which the application for reconsideration is based, where necessary, by 24 February 2023.

43. On 27 February 2023 the secretariat office of the Tribunal informed the Applicant that it has not received any augmented grounds and the Tribunal will prepare the record. The Applicant informed the secretariat that her first response covered all allegations.⁴
44. The Respondent submitted that on 2 June 2023 the current Applicant's attorneys of record, Bekker Attorneys confirmed that they are on record. On 4 July 2023 the Applicant filed, amongst other things, the Augmented Ground together with condonation.
45. In respect of the degree of lateness, the Respondent submitted that the Applicant is 4 months out of time. The Applicant had till 24 February 2023 to file the Augmented Grounds. The Respondent contended that the delay is substantial and unreasonable in the circumstances of this case.
46. In respect of the reasons and explanation for the lateness, the Respondent submitted that there is no suggestion that the Applicant instructed her erstwhile attorneys to prepare and deliver augmented grounds. Further, the Respondent submitted that the Applicant expressly confirmed on 27 February 2023 that she has no augmented grounds.

⁴ Respondent's Affidavit Opposing Condonation, paragraph 4.6

Furthermore, the Respondent submitted that there is not explanation of a month delay from 2 June 2023 when the current attorneys of record came on record.

47. In respect of the aspect of prospect of success, the Respondent submitted that the Applicant's Augmented Grounds do not advance the Applicant's prospect of success to have the debarment reconsidered. The Respondent persisted that the settlement agreement in the labour dispute does not exonerate the Applicant.
48. The Respondent submitted in respect of the aspect of importance of the case to the parties and stated, amongst other things, that the Applicant consider this matter to be important to her and yet she delayed with no proper explanation.
49. On the date of the hearing of the matter, the chairperson of the panel directed that the parties proceed to make submissions on the aspect of condonation and the main application, and that the ruling on condonations will be considered when the decision of the application is made.
50. The principles applicable to applications for condonation are trite and as enunciated in *Melane v Santam Insurance Co Ltd*.⁵ The degree of lateness, the explanation therefor, the prospects of success and the importance of the case are factors that are considered.
51. As submitted by the Respondent's counsel during the hearing of the

⁵ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A).

matter, the Applicant does not explain when it came to her knowledge that she was out of time with her response and what steps she took to file the applicant's Augmented Grounds since the appointment of her new attorneys of record. We agree with the Respondent that the Applicant also does not explain the delay from the date of appointment of her current attorneys of record. This does not assist the Applicant.

52. It is not explained when the erstwhile attorneys were instructed to prepare the Augmented Grounds. What is apparent from the record is that the Applicant informed the secretariate of the Tribunal that her response covers all allegations against her. Again, this does not advance the condonation case of the Applicant.

Legal Principles and analysis

53. The relevant provisions of the FAIS Act pertinent to this matter are found in section 13(2)(a) which states that:

*“An authorised financial services provider must—
(a) at all times be satisfied that the provider's representatives, and the key individuals 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; and
(ii) any other requirements contemplated in subsection (1)(b)(ii).”*

54. Section 2 of the General Code of Conduct⁶ states that an FSP must at all times render financial services honestly, fairly, and with due skill, care, and diligence in the interests of clients and the integrity of the financial services industry.

⁶ General Code of Conduct for Authorised Financial Services Providers and Representatives, 2003

55. Regarding the settlement agreement which relates to the labour dispute, we agree with the submissions of Respondent's counsel that such settlement agreement do not impact of the debarment processes as envisaged in section 14 of the FAIS Act.⁷ Debarment and labour disputes are two separate processes governed by different laws.⁸
56. It is common cause that the Applicant is a representative of the Respondent. As a F&I Consultant, the Applicant is required give advice and perform intermediary services in respect of Short-Term Personal Lines and Short -Term Commercial Lines Insurance.
57. The Respondent referred to a "Know Your Client" procedure concerning identifications and confirmations in relations to clients, and submitted that F&I Consultants were trained in relation to such obligations. The Respondent submitted that the Applicant failed to conduct any of the required KYC obligations.
58. The lack of identification and verifications impact 22 vehicles where, according to the Respondent, no rebate was claimed.
59. The Applicant submitted in respect of the loading of the vehicles in the VW SA Platform, that it was not F&I Consultant's responsibility to ensure that fleet claims are captured. She submitted that she was not trained in that regard.
60. Further, the Respondent submitted that the Applicant tries to suggest that

⁷ See paragraph 3.8.9(c) of Guidance Notice 1 of 2019 (FAIS)

⁸ Malesela Thomas Thako v African Bank Limited, FSP2/2020, at par 3

there was no protocol, rule or standard regarding fleet sales that she allegedly breached. The Respondent, in response, stated that a basic rule and process, stemming from the Respondent's obligations under FICA, is that the identity of the purchaser of a vehicle must be verified. The Respondent persists that the Applicant failed to do this, both in relation to Mr Habib, Mr Beni, and in relation to the Hypercheck vehicles.

61. The Applicant contended that when she signed the file relating to the transaction of Mr Habib, it was for purposes of enabling Mr Mahomed to do invoicing on the same. It is common cause that the Applicant did not speak and see any of the clients invoiced, including Mr Habib and Beni. According to the Applicant, when she signed the invoice, she did not see any FICA documents and never saw their signatures prior delivery.
62. The signing of a file by the Applicant without seeing documents regarding a client concerned and without talking to any of the clients or customers, as it happened in Mr Habib and Beni is, in our view, falling short of standards stated in section 2 of the General Code of Conduct. Such a conduct does not demonstrate a representative who acts fairly, with due skill, care and diligence and in the interests of clients and the integrity of the industry.
63. The Applicant admitted that she signed the file and the offer to purchase and that was done for purposes of invoicing only.⁹ This conduct, in our view, does not appear to be in line with due skill, care and diligence and

⁹ Augmented Grounds, paragraph 22

not in the interests of client and the integrity of the financial services industry.

64. The Applicant contended that she did not complete the record of advice and never signed to confirm same. In fact, the Applicant submitted that she signed the file prior to any of the documents were in the file. It is the reason she cannot be held accountable for the differences between the clients' signatures in the documents and the identity document's signature.¹⁰
65. The Applicant appears to have been trained for purposes "Know Your Client" procedure and the purpose of such training is, in our view, to ensure verifications and identifications of clients.
66. The parties were invited to submit brief heads of argument on specific questions which sought to understand, *inter alia*, the application of the FAIS Act to the conduct leading to the Applicant's debarment.
67. The Applicant respectfully submitted, amongst other things, that it does not appear that the Applicant rendered services in respect of the transaction referred to in the notice of debarment and that there are no factual or legal basis provided justifying that the Applicant does not comply with or meet requirements referred to in section 13(2)(a) of the FAIS Act.
68. The Respondent respectfully submitted that the conduct that led the

¹⁰ Augmented Grounds, paragraph 23

Respondent to conclude, in good faith, that the Applicant is no longer fit and proper to act as a representative need not have occurred within the course of providing financial services as contemplated in the FAIS Act. According to the Respondent, it need only have been satisfied, on the basis of available facts and information (which could encompass any number of factors, including extrinsic factors), that the applicant did not meet, or no longer complied with, the fit and proper requirements. Reference was made to section 9(1) of the Determination of Fit and Proper Requirements, 2017, which lists incidents which indicate that a person is not honest, or lack integrity or good standing.

69. We therefore agree with the submission of the Respondent that, on a proper construction and interpretation of the FAIS Act and the Fit and Proper Requirements, the Applicant's conduct cannot be considered in isolation with reference to whether or not she was actually rendering financial services at the time of the 'offending' conduct. Instead, her conduct must be considered holistically.

Conclusion

70. The Applicant's application for condonation is refused for the reasons that the Applicant did not provide reasonable and acceptable explanation for the delay from the date of delay, being 24 February 2023 to date when of filing of the Augmented Ground, being 4 months later.
71. The Respondent contended that the degree of delay, which is four months, is substantial and unreasonable in the circumstances of this

matter.

72. The lack of explanation, when it came to the Applicant's knowledge that she was out of time with her response (Augmented Grounds) and, what steps she took to file the Applicant's further affidavit since the appointment of her new attorneys of record, do not assist the Applicant.
73. In respect of complying with fit and proper requirements, the Respondent submitted that the Applicant, as a F & I Consulted was trained in a "Know Your Client" procedure concerning identifications and confirmations in relations to clients. We agree with the Respondent's submissions that the Applicant failed to conduct the required 'Know Your Client' process and confirmations in relations to Mr Habib and Mr Ben. It appears from the record that the Applicant merely followed orders.
74. The failure to conduct the 'Know Your Client' procedure did not only impact the two individuals referred to herein above, it affected more sales of vehicles.
75. The fact that the Applicant never saw the clients and never verified the supporting documents do not assist her application for reconsideration.
76. For the above stated reasons, we are of the view that the application for reconsideration is not successful.

ORDER:

- (a) The application for condonation for the late filing of the Augmented Grounds for reconsideration is not successful.
- (b) The Application for reconsideration is dismissed.

Signed on the 16th day of October 2023


Adv W Ndinisa (Chair of the panel)

With the panel consisting also of:

Adv M Holland (member of the panel); and

Mr J Pema