THE FINANCIAL SERVICES TRIBUNAL

Case No: FSP48/2022

In the matter between:

TEBOHO WALTER KHOLUMO Applicant

and

FNB PREMIER BANKING First Respondent

THE OMBUD FOR FINANCIAL SERVICES PROVIDERS Second Respondent

Coram: SK Hassim SC (chair),
Adv S Maritz
Adv P Long

Summary: Reconsideration in terms of s230 of FSR - Debarment in terms of s14 of FAIS Act – Condonation – Good cause, interests of justice-Debarment, onus and evidentiary burden under para 8(1) and para 9(1) of Board Notice 194 of 2017- On the facts debarment based on para 9(1) of Board Notice 194 of 2017-adequacy of notice in terms of section 14(3) of the FAIS Act-Relevance of the settlement of labour dispute on debarment.

DECISION

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1. The applicant was employed by the respondent and mandated to act as its representative as defined in section 1 of the Financial Advisory and Intermediary Services Act 37 of 2022 ("*the FAIS Act*"). On 21 April 2021 the respondent decided to debar the applicant in terms of section 14(1) of the FAIS Act. The applicant applies

for a reconsideration of that decision under section 230 of the Financial Sector Regulation Act, No. 9 of 2017 ("*the FSR Act*"). The respondent does not oppose the application. The Tribunal was notified that it abides the Tribunal's decision. The applicant agreed to the application being considered on the record without a formal hearing.

2. A person who is aggrieved by a decision to debar him has the right to apply to the Tribunal under section 230 for a reconsideration of the decision. However, the application must be made within 60 days after the person is informed of the decision.

3. It is common cause that the respondent notified the applicant on 21 April 2021 that a decision had been taken to debar him. The applicant lodged the application for reconsideration on 10 October 2022. This is more than 18 months after he had been notified of the decision to debar him. The applicant seeks condonation for this failure.

4. While section 230(2)(b) of the FSR Act confers upon the Tribunal the discretion to allow an application outside the stipulated time, the Tribunal may only do so if it is satisfied that there exists good cause for allowing an application outside the stipulated time.

5. Because a court has a wide discretion whether to condone non-compliance with prescribed time periods, the courts have refrained from defining what would constitute good cause for entertaining proceedings brought beyond the prescribed

time. The guiding principle is that justice is done.[1] The Constitutional Court held in *Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd*[2] that "*[u]ltimately, the overriding consideration is the interests of justice, which must be considered on the facts of each case. Factors germane to this enquiry may include the extent and cause of the delay; the effect of the delay on the administration of justice and other litigant; the reasonableness of the explanation for the delay; the issues to be raised in the matter; and the prospects of success*".

6. It is well to remember that the termination of a contract of employment and the reasons therefor are not determinative whether a person falls to be debarred under section 14 of the FAIS Act. Depending on the circumstances, it may be relevant.

7. In this case the applicant was charged with dishonesty.[3] He did not attend the disciplinary inquiry to answer the charges of dishonesty levelled against him.

8. It is common cause that the applicant opened a savings account for one of the respondent's customers ("Mr X") without his consent. It is also common cause that

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1 *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A.

2 2021 (3) SA 1 (CC) at para 54

3 The charge was formulated thus:

> "Dishonesty (as per paragraph 4.2.1 of the Banks' Disciplinary Code and Procedures) in that it is alleged that on 27 October 2020 you opened a Savings Account for one of the Bank's customers, Mr [X] without the consent of the customer.
>
> In addition to opening the Savings account, you also did an inter account transfer of R1 000.00 to ensure that the sale is active. Your dishonest intent is that you activated the account as your benefit from sales on your scorecard target and you deceived your manager to think that the sale was legitimate and in line with sales compliance, which confirms that the customer had consented and understood the features and benefits that came with the account.
>
> The above allegation has resulted in the irretrievable breakdown in the trust relationship between the bank and yourself."

the applicant transferred R1 000.00 to that account from another account which Mr X held with the respondent. The applicant claimed in a statement signed by him on 5 November 2020 that instead of opening a savings account on the profile of another customer of the bank he opened the savings account on Mr X's account profile and did so in error. According to him he made the error because he was attending to Mr X and the other customer at the same time. We do not know what this means or how it happened. In our view this does not impact on the issue whether the debarment for dishonesty was warranted because the onus [4] rests on the respondent to show that the applicant should be debarred. While this is not mentioned in the debarment notice, which should contain all the reasons for the decision to debar the applicant, the respondent had rejected the applicant's explanation. [5] This is however not stated, and no reasons have been given for rejecting the applicant's version.

9. That being said there is no dispute that the savings account was opened without the customer's consent. And the applicant does not assert that Mr X consented to the electronic funds transfer to the savings account.

10. In a letter dated 15 December 2020 the applicant was informed that he was found to have contravened paragraph 4.2.1[6] of the Disciplinary Code and Procedure and had therefore been summarily dismissed. He was informed furthermore that his personal

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4 *Cf.* *Nokulunga Mkhatshwa v Old Mutual Life Assurance Company (SA) Ltd*, Case No. FSP26/2011.

5 Record: p. 30, last column of the template captioned "TEMPLATE FOR THE BUSINESS UNIT/FSP PANELS TO RECORD THEIR DECISION".

6 The respondent delivered a Record but did not include the Disciplinary Code and Procedure.

details would be placed on the Banking Council's Register of Employee Dishonesty (REDS).

11. On 15 February 2021, the respondent sent to the applicant by e-mail the notice contemplated in section 14(3)(a)(i) of the FAIS Act (*"the notice of intention to debar*").

12. The respondent notified the applicant that it intended to debar him because he did not meet or, no longer met, the fit and proper requirement of honesty, integrity and good standing as provided for in the "*Determination of Fit and Proper Requirements for Financial Services Providers, 2017*", published in terms of section 6A of the FAIS Act in Board Notice 194 of 2017 ("*the Board Notice*"). The facts recorded for this conclusion were that (i) the applicant opened a savings account without a customer's consent (ii) he transferred funds from an existing account of the customer to the savings account to activate the sale; (iii) he activated the account to enhance or meet his sales performance target (his scorecard target) and thereby deceived his manager into believing that firstly, the sale was legitimate and secondly, that the applicable protocols for the opening of an account had been complied with such as the customer's consent to opening the account and ensuring that the customer understood the features and benefits attached to the account.

13. The applicant referred the employment dispute to the Commission for Conciliation Mediation and Arbitration (CCMA). The date of the referral is not reflected in the

record. Be that as it may, on 12 March 2021 the parties entered into a settlement agreement in terms of which amongst others, the applicant withdrew the referral to the CCMA and the respondent accepted the applicant's voluntary resignation. Both the applicant and respondent recorded that they did not admit liability to the other nor the allegations against them. It is worth highlighting that the settlement agreement was entered into after the notice of intention to debar had been sent. The settlement agreement is highly relevant to the fate of this application. More about this later.

14. On 16 March 2021 the respondent issued to the applicant a certificate of service which records that the applicant had resigned voluntarily.

15. On 21 April 2021 the respondent informed the applicant in writing that he was debarred in terms of section 14 (1) of the FAIS Act with effect from 21 April 2021. The reasons for the decision were a *verbatim* repetition of the grounds set forth in the notice of intention to debar the applicant.

16. The applicant admits that he was notified on 21 April 2021 that the respondent had decided to debar him. The application for the reconsideration of the respondent's decision was brought eighteen months late.

17. The applicant has not clearly set out the reasons why he did not apply for the reconsideration of the decision to debar him within 60 days after 21 April 2021. This does not surprise me. The applicant has not been legally represented. Neither at the time when the reconsideration application was brought, nor any time thereafter. For

this reason and in the interests of justice we have adopted a lenient approach and have drawn conclusions from the limited facts before us. It appears that the applicant decided to bring the application for reconsideration when he realised that notwithstanding the certificate of service recording that he had resigned voluntarily, he could not secure employment in the financial services industry because of the debarment. He appears then to have realised the effects of debarment on him and that informed his view that it was not warranted in his case. He seems to have been under the impression that because the settlement agreement recorded "voluntary resignation" as the reason for termination of employment, and the certificate of service being consistent therewith, he was free to seek employment in the financial services industry. Incidentally, the settlement agreement expressly barred the employment of the applicant in the First Rand Group for a period of five years.

18. It is not implausible that it was only when the applicant realised that the doors of all financial service providers were closed to him that he decided to challenge the debarment.

19. We accept that there was a long delay in the applicant applying for a reconsideration of the respondent's decision. However, delay is but one of the considerations in deciding whether to condone non-compliance with prescribed time frames; it is not an overriding consideration. The interests of justice require us to consider the importance of the issues to be determined as well as the prospects of success on the merits. We turn to these considerations as well as the interests of justice and the

importance of the case to the applicant and the prejudice he stands to suffer if condonation is refused.

20. The application for reconsideration (like the application for condonation embodied therein) is very sparse. However, considered holistically two grounds for the reconsideration of the respondent's decision emerge.

21. The one is that the finding of dishonesty was not warranted because the applicant had made an honest mistake, and that the applicant's honesty finds support in that there has never been any complaint of dishonesty against him, and this despite the applicant having been entrusted with the codes to the safes housed in a branch.

22. The other is that debarment was inappropriate because it is too severe a consequence for the applicant's conduct. In this regard, the applicant pointed out that neither the respondent nor the customer suffered any loss and that despite the certificate of service recording the reason for the termination of the employment contract as "voluntary resignation", the applicant is unable to secure employment in the financial sector and is unemployable because of the debarment. Of course the fact that a debarred person is unemployable in the financial services industry is permitted by the FAIS Act and is therefore irrelevant to whether the debarment should be reconsidered by the Tribunal. After all it is the very object of a debarment that the person concerned is not active in the industry.

23. The applicant suggested (and we put it no higher than this) in the reconsideration application that the notice of intention to debar him did not come to his attention. However, this cannot be correct. The record delivered by the respondent contains a WhatsApp message from the applicant confirming that he had received the notice. According to the record this happened on 10 March 2021. To the extent that the applicant's case is that he had not received the notice, that is controverted by the WhatsApp message.

24. There can be no contest that the applicant is prejudiced by the debarment. The debarment affects, and has affected, the applicant's prospects of obtaining employment. The applicant expressly states in the reconsideration application that he is struggling to make ends meet. While the applicant could obtain employment in various employment sectors, his experience lies in the financial services sector. He can compete in that market and command a better salary than in other sectors. While it is so that a period of 1 year has lapsed since the applicant was debarred, and he therefore qualifies for reappointment under Board Notice 82 in *Government Gazette* 25299 of 8 August 2003 the debarment will remain a blight. The interests of justice therefore require that the applicant's application for a reconsideration of the respondent's decision to debar the applicant is decided.

25. Section 14(2)(a) of the FAIS Act expressly enjoins the financial services provider to ensure that the debarment process is lawful, reasonable, and procedurally fair. We are not satisfied that the debarment process was lawful, reasonable, or procedurally

fair. [7] We are of the view that on its merits, the application for reconsideration must succeed. We turn to discuss this.

26. It is clear from the notice of intention to debar as well as the notice of debarment that the respondent intended to debar the applicant and did debar him, not because of *prima facie* evidence [8] that the applicant was not an honest person, lacked integrity or good standing. The case for debarment rested in paragraph 8(1) of the Board Notice, and not paragraph 9(1) thereof. To us this suggests that the applicant was debarred because the respondent was satisfied that the evidence against the applicant proved dishonesty. This is however not supported by the record.

27. The record contains a document captioned *"Template for Business Unit/FSP FAIS Panels to record their decision*" (*"the Template")* which suggests that the respondent was debarred because there existed *prima facie* evidence as contemplated in paragraph 9(1) of the Board Notice that the applicant is not an honest person, one of integrity and good standing. This is evident from what the panel which considers whether the respondent should debar its representatives recorded on the Template. The response to the question whether the panel was comfortable that the conduct being assessed related to honesty, integrity or good standing is recorded "*Yes-as per evidence opening the savings account as well as transferring the funds of R1 000.00 to activate*. To the question which subsection of section 9(1) of the Board Notice

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7 s. 14(2)(a) FAIS Act.

8 *Cf.* paragraph 9(1) of the Board Notice.

read with section 8 thereof was breached, the response is recorded *"[H]e has been removed from an office of trust for theft, fraud, forgery, uttering a forged document, misrepresentation, dishonesty, breach of fiduciary duty or business conduct"*. This shows that the respondent had found that the applicant's conduct fell within the scope of paragraph 9(1)(e) of the Board Notice.

28. If the circumstance/s listed in paragraphs 9(1)(a) to (o) exist, then although the onus remains on the financial services provider to prove that its representative is not honest, of integrity or of good standing, the evidentiary burden rests on the representative. The representative (i.e., a person in the position of the applicant) would have to disturb the *prima facie* evidence if he is to resist debarment. Where paragraph 9(1) of the Board Notice is not applicable, the financial services provider carries the evidentiary burden.

29. The decision to debar the applicant was based on what the respondent considered to constitute *prima facie* evidence that the applicant did not meet the requirements of paragraph 8(1) of the Board Notice. It was not based on evidence before it that proved that the applicant was dishonest. The applicant had as far back as 5 November 2020 in a written statement denied that he was dishonest and tried to explain how his "honest mistake" came about. In the circumstances, the respondent had to produce evidence to support its claim that the applicant acted with "dishonest intent". The record contains the applicant's statement of 5 November 2020 in which he denies dishonesty. There is however no evidence in the record proving the applicant's

"dishonest intent". If there was such evidence, it would have been in the record and referred to in the reasons given for debarring the applicant. It follows from this that there was no evidence that the applicant is not an honest person or that he lacks integrity and does not have good standing.

30. A financial services provider who intends to debar a person is obliged by Section 14(3)(a)(i) of the FAIS Act to notify the person whom it intends to debar of its intention to do so and must also disclose the grounds and reasons why it intends to do so.

31. The respondent did not inform the applicant that it was intending to register a debarment on the ground that he had been "*removed from an office of trust for theft, fraud, forgery, uttering a forged document, misrepresentation, dishonesty, breach of fiduciary duty or business conduct"* and that this was *prima facie* evidence of dishonesty and a lack of integrity and good standing.

32. There is nothing in the notice of intention to debar that suggests that the removal of the applicant falls within the ambit of paragraph 9(1)(e) of the Board Notice. There is a broad charge of dishonesty and the attempt to deceive his manager which could constitute a misrepresentation. But there is no mention in the notice of intention to debar of the applicant having been removed from an office of trust nor of the applicant having committed theft, fraud, a forgery, having uttered a forged document or having breached a fiduciary duty or business conduct.

33. The applicant was never called upon to answer the charge that there was *prima facie* evidence that he did not meet the requirements of honesty, integrity, and good standing. The notice of intention to debar did not afford to the applicant the opportunity to respond to a case based on paragraph 9(1)(e) of the Board Notice.

34. It was therefore not competent for the respondent to debar the applicant on the basis that there existed *prima facie* evidence that the applicant was not an honest person, lacks integrity and is not of good standing. In our view this is inimical to a "lawful, reasonable and procedurally fair" debarment process decreed by the FAIS Act. The applicant was never called upon to answer the charge that there was *prima facie* evidence that he did not meet the requirements of honesty integrity and good standing. This alone constitutes a sufficient basis for the reconsideration application to succeed.

35. Apart from these deficiencies in the notice of intention to debar, the grounds to debar the applicant when the notice of intention to debar was sent were no longer valid when the decision to debar the applicant was made. By that time, the parties had entered into a written settlement agreement in which they agreed that the employment relationship was terminated by a voluntary resignation (which means that the applicant was not dismissed) thereby implying that the termination was not as a result of a dismissal; and the respondent accepted that there was a dispute whether the allegations of dishonesty were true. The notice of intention to debar had been overtaken by other events, namely the settlement agreement.

36. There are other reasons why the debarment process was not "lawful, reasonable and procedurally fair".

37. The parties entered into a settlement agreement in terms of which:

    37.1. The respondent accepted that the applicant did not concede that he was dishonest. [9]

    37.2. The respondent agreed that the termination of the contract of employment was the result of a voluntary resignation. [10]

    37.3. The respondent furthermore agreed [11] to remove the applicant's personal details which it had placed on the Banking Council's Register of Employee Dishonesty (REDS) when it dismissed the applicant.

38. The reasonable inference from the respondent accepting that the employment relationship terminated due to voluntary resignation is that the respondent accepted that the employment contract terminated for a reason other than misconduct. Following the settlement agreement and in compliance with the obligation in terms of paragraph 2[12] of the settlement agreement, the respondent issued a certificate of

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9 Both parties agreed in paragraph 9 that "*[The]settlement agreement is reached without admission of any liability on the part of either party and without admitting any allegations that may have been levelled against either party."*

10 Clause 2 of the settlement agreement reads as follows:
"*The parties agree that the Applicant's termination of his contract of employment will be a s a result of voluntary resignation which will be reflected in the full Certificate of Service.."*

11 In paragraph 3 of the settlement agreement the respondent agreed that it "will remove the Applicant from REDS"

12 See footnote 10

service in which it represented to prospective employers that the employment relationship was terminated voluntarily and by implication that the termination was not the result of a dismissal for misconduct.

39. By agreeing that the termination of the contract of employment was the result of voluntary resignation, the respondent effectively agreed that a dismissal for dishonesty was not warranted. In other words, the respondent agreed to the reversal of its finding that the applicant did not meet the requirements of honesty, integrity and good standing. This in our view was tantamount to a finding that the applicant was not dishonest and, is a person of integrity and good standing. Neither paragraph 7 [13] nor paragraph 9 [14] of the settlement agreement changes this.

40. Under these circumstances it is unfair and unreasonable for the respondent to have reverted to its pre-settlement position and find that the applicant is dishonest, lacks integrity and is not of good standing. The applicant is either dishonest, or he is not. The same conduct cannot be both honest and dishonest.

41. We are cognisant that the applicant accepted that the respondent did not admit the allegations against it and that the settlement was without the respondent admitting liability. But the allegations giving rise to the dismissal were allegations by the respondent against the applicant and not the other way around.

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[13] "This agreement does not affect or apply to any obligations or rights that the Respondent may have, or any process or any action by or to be taken in terms of section 14 [of the FAIS Act]".

[14] See footnote 9 above.

42. After the applicant had disputed dishonesty and the respondent accepted this, the respondent would have had to prove that what the applicant had done was not an honest mistake, but that the mental element of dishonesty was present. No reasons for rejecting the applicant's version are recorded on the Template. The responses of the three panel members to the question on the Template "*What is the panel decision makers' views on the response and any evidence provided by the person"* are recorded to be the following:

    42.1. "*Response insufficient to explain behaviour and offset seriousness thereof*".

    42.2. "*Answer not in line with context of what transpired by evidence to answer that this could have been an honest mistake*."

    42.3. "*Not aligning evidence with reason provided*".

43. Considering that the applicant had not responded to the notice of intention to debar, the version from the applicant before the panel could only have been the statement made by the applicant on 5 November 2020. The responses of the panel members are too cryptic for them to have any value. Once the finding of dishonesty following on the disciplinary hearing was, for want of a better word, set aside when the respondent accepted that the employment was terminated due to voluntary resignation, the panel would have had to independently find that on the evidence the applicant's conduct was dishonest. For this purpose, it would have had to consider

the evidence and find support therein that it is implausible that a mistake such as that contended for by the applicant could have happened.

44. One would have expected the respondent in these circumstances to respond to the reconsideration application and at least explain why the applicant's explanation for the "honest mistake" is not plausible. The respondent elected not to participate in the proceedings, neither a response to the reconsideration application, nor written submissions, were submitted. The respondent has not defended its decision and has delivered a notice abiding the Tribunal's decision.

45. What is disturbing is that even though the settlement agreement forms part of the record submitted by the respondent, there is no reference to it on the Template which is meant to serve as a record of the decision-making process. The terms of the agreement settling the employment dispute were relevant and should have been considered, and there is no indication in the record that this was considered when arriving at the decision to debar the applicant.

46. The proverbial nail in the coffin for the respondent is its undertaking in the settlement agreement to remove the applicant's personal particulars from the Banking Council's Register of Employee Dishonesty (REDS) which were entered by it when it dismissed the applicant. The undertaking to remove the applicant's name from REDS is not insignificant. If the respondent believed that the applicant was dishonest,

lacked integrity and was not of good standing it would not have removed his name from REDS.

47. Even though the respondent reserved the right to act in terms of section 14 of the FAIS Act, what the settlement agreement reveals when considered holistically is that the respondent had moved away from its earlier position that the applicant had been guilty of dishonesty. The panel either ignored this or inadvertently overlooked it.

48. On the papers before the Tribunal, we are not satisfied that the panel's decision was substantively and procedurally fair or reasonable.

49. Consequently, the Tribunal makes the following order:

    (a) The late application for reconsideration is condoned.

    (b) The debarment is set aside.

Signed on behalf of the panel by the panel chair at Pretoria on 21st April 2023

SK Hassim SC