

THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: FSP21/2024

In the matter between:

UVASHEN KISTENSAMY

Applicant

and

OUTSURANCE

Respondent

DECISION

Tribunal: S Mahabeer SC
P Maseko
PR Long

Date of Decision: **27 September 2024**

INTRODUCTION

1. The applicant, a financial services representative, was employed by the respondent, a financial services provider, as a broker. He performed financial advisory services to clients and prospective clients of the respondent.
2. The applicant was debarred by the respondent in terms of section 14 of the Financial Advisory and Intermediary Services Act 37 of 2002 ('the FAIS Act') on

13 December 2023. Accordingly, the applicant applies to this Tribunal for a reconsideration of his debarment in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 ('the FSR Act').

3. The application for reconsideration was brought out of time and the applicant seeks to have the lateness condoned.

GOOD CAUSE SHOWN?

4. In terms of section 230(2) of the FSR Act an application for reconsideration must be made:

(a) *if the applicant requested reasons in terms of section 229, **within 30 days after the statement of reasons was given** to the person; or*

(b) *in all other cases, **within 60 days after the applicant was notified of the decision, or such longer period as may on good cause be allowed.*** (Emphasis added)

5. The applicant did not request from the respondent reasons for the decision to debar him. The applicant therefore had 60 days from the date of being notified of his debarment to apply to this Tribunal for a reconsideration of his debarment.
6. The applicant was debarred on **13 December 2023**; however, he only applied for reconsideration of his debarment on **20 March 2024**, outside the 60-day

period prescribed by section 230(2)(b) of the FSR Act. Accordingly, in seeking condonation for his lateness, the applicant must demonstrate good cause.

7. In terms of Rule 31 of the Tribunal Rules, read with section 230(2)(b) of the FSR Act, an application for condonation must be succinct and must show **good cause**. In deciding whether good cause has been shown, the basic principle is that the Tribunal has a discretion. The following principles serve as a guide:

- 7.1 The discretion has “*to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides*”.¹

- 7.2 Among the facts usually relevant are “*the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case*. Ordinarily these facts are interrelated; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. ... What is needed is an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay”.²

¹ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (AD) (‘Melane’) at 532C.

² *Melane* at 532 B—E.

8. The applicant must give a full explanation for the delay, which must be reasonable and cover the entire period of the delay.³

9. The applicant's reasons for the delay are expressed as follows:

“With regards to my late application. It was only brought to my attention in February 2024 that I have already been debarred and my name reflects on the FSCA website. Upon applying for positions at other companies they proceeding to do their relevant checks and that's how it was brought to my attention.”

10. Accordingly, the applicant claims that he became aware of the respondent's decision to debar him in **February 2024** in the course of applying for employment with other companies when those companies, in the course of the application process, sought to establish the applicant's status as financial services representative.

11. The veracity of the applicant's reasons for his lateness and his knowledge of the debarment must be examined in the context of the timeline of events which appear from the record of proceedings:

11.1 On **15 November 2023**, the applicant resigned from his employment with the respondent with immediate effect. On the same day, the respondent sent an email to the applicant requesting that he sign a termination

³ Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC) at para 22.

agreement which is attached to the email. The applicant was informed therein by the respondent that despite his resignation, the respondent intended to commence proceedings for the debarment of the applicant. The grounds for debarment were expressly cited with the reasons therefor, which included fraud, dishonesty, breach of the respondent's gifts and conflicts of interest policy, and not following standard operating procedures. The applicant was afforded 5 days to provide written submissions as to why he should not be debarred.

- 11.2 In both the email attaching the termination agreement and the agreement itself, the applicant was requested to provide, *inter alia*, his personal email address and cell phone number.
- 11.3 The termination agreement was signed by the applicant **on 15 November 2023** with his personal email address duly provided therein.
- 11.4 On **27 November 2023**, the respondent directed an email to the applicant notifying him of the fact that the respondent had not received the applicant's written submissions within the 5-day period.
- 11.5 On the same day, 27 November 2023, the applicant in an email (sent from his personal email address) provided his written submissions. He, in essence, admitted his guilt stating:

'My reasons for doing what I did was purely for self-gain at the time which I did not think about. I understand it is a prosecutable offence and debarment however I appeal to you the decision maker to humbly allow me to continue providing for my family.'

- 11.6 In an email dated **28 November 2023**, the respondent conveyed its decision to debar the applicant.
- 11.7 On **30 November 2023**, the applicant sent an email to the respondent stating that he was starting a new job on 1 December 2023 and requested the respondent to reconsider the debarment. Accordingly, in an email dated 30 November 2023, the respondent afforded the applicant an opportunity to make further representations within a 5-day period.
- 11.8 In an email dated **7 December 2023**, the applicant provided his further written submissions.
- 11.9 On **13 December 2023**, the respondent's debarment committee sent an email to the applicant confirming the respondent's decision to debar the applicant. On the same day, another email was sent to the applicant from the respondent's compliance officer with a letter confirming the respondent's decision to debar the applicant.

12. Since the applicant's resignation, all correspondence from the respondent was directed to his personal email address as provided by him in the termination agreement. It was from this same email address that the applicant had directed correspondence to the respondent.
13. When asked by the Tribunal during the hearing why the applicant had received all correspondence sent to him by the respondent except the two emails conveying his debarment, the applicant could not proffer an explanation. And when asked by the Tribunal why the applicant had delayed from February 2024, when he claims to have been made aware of his debarment, until 20 March 2024 to institute the application for reconsideration, the applicant again could not explain the delay.
14. The explanation proffered by the applicant for his lateness and non-compliance with the FSR Act lacks particularity and is wholly inadequate. If the explanation for such flagrant non-compliance is manifestly inadequate or there is no explanation at all, good cause is not established, and the prospects of success need not be considered.⁴ This is such a case.
15. The respondent submitted that the applicant ought within the particular circumstances of this dispute to be directed to pay the costs of the application. We are not, however, inclined to grant that order given that exceptional circumstances have not been established.

⁴ *Darries v Sheriff, Magistrate's Court, Wynberg, and Another* 1998 (3) SA 34 (SCA) at 44H-I.

ORDER

16. Accordingly, we make the following order:

- a) The application to condone the late filing of the application for reconsideration is dismissed.

DATED AT SANDTON ON THIS THE 27th DAY OF SEPTEMBER 2024

A handwritten signature in black ink, consisting of a large, sweeping loop followed by a few smaller, less distinct strokes.

PR Long (obo the Tribunal)