

THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

In the matter between:

FAITH LYDIA MOHUSHI

APPELLANT

and

REGISTRAR OF FINANCIAL SERVICES PROVIDERS

RESPONDENT

DECISION

INTRODUCTION

1. This is an appeal in terms of section 39 of the Financial Advisory and Intermediary Services Act, No. 37 of 2002 (FAIS Act) read with section 26 of the Financial Services Board Act, No. 97 of 1990 (the FSB Act), against the decision of the Registrar of Financial Services Providers (the Registrar) dated 9 September 2011 to debar Ms Faith Lydia Mohushi (the Appellant) from rendering financial services for a period of five years in terms of section 14A of the FAIS Act.

BACKGROUND

2. The facts of the matter appear from the brief history set out below.
3. The appellant was employed by Old Mutual Life Assurance Company (SA) Ltd as its representative from May 2005 to October 2010. In 2009 the appellant submitted a form to Old Mutual known as the Group Schemes Recurring Application Form (the form). Ordinarily this form is completed and signed by a would-be client who has been successfully solicited by the representative of Old Mutual.
4. Once the form has been duly completed and signed with the assistance of the representative, it is submitted to Old Mutual for processing by the representative on behalf of the client. Old Mutual would thereafter issue the policy and deduct premiums in accordance with the information contained in the form.
5. In this instance the representative, who is the appellant in this matter, avers that on 5 October 2009, in the ordinary course of business she solicited a client for Old Mutual, one Briel Mola (Mola) whom she assisted to complete and sign the form which she later submitted to Old Mutual.
6. However, shortly after the policy was issued, Mola approached Old Mutual to have the policy cancelled. The reason that Mola gave for the cancellation was that he neither signed the form nor authorised the appellant to sign the form on his behalf. Mola in fact denies ever meeting with the appellant or giving her any information in respect of the policy.
7. Old Mutual launched an investigation into the matter and gathered information that it forwarded to the Registrar on 13 March 2011.
8. On the basis of the *prima facie* conclusions of the information that Old Mutual gathered, the Registrar issued a Notice of Intention to Debar the appellant (the Notice) in terms of 14A of the FAIS Act.
9. The Notice is dated 15 June 2011.

10. The appellant had until 6 July 2011 to respond to the Notice and to provide reasons why she should not be debarred.
11. The appellant collected the Notice from the post office on 29 August 2011, obviously after the date on which the appellant had to respond to the Notice.
12. On 9 September 2011, some 3 months after the date on which the appellant had to reply to the Notice, the Registrar, still having not received a response from the appellant, decided to debar the appellant for a period of 5 years in terms of 14A of the FAIS Act on the basis of the unchallenged information available to it.
13. The Registrar's decision was communicated to the appellant on 9 September 2011 and the appellant was advised that she had the right to appeal such decision in terms of section 26(1) of the FSB Act which required the appeal to be lodged by 9 October 2011.
14. The appeal was only lodged on 28 January 2013.

MATTERS FOR DECISION

15. The board has been asked to consider two matters.
 - 15.1 Firstly, appellant has applied for Condonation (the Application) for the late filing of the appeal. It is common cause that in the event that the application for Condonation is unsuccessful that it would not be necessary to make a finding on the merits.
 - 15.1 Secondly, in the event that the Application succeeds, the board must decide whether or not the Registrar's decision to debar the appellant was justified.
16. I deal with these in turn.

APPLICATION FOR CONDONATION

17. It is an established principle of law that in order to succeed with the Application the appellant must show good cause for her failure to comply with the provisions of section 26 (2) of the FSB Act.
18. Section 26 (2) of the FSB Act required the appellant to lodge her appeal with the Registrar within 30 days of the Registrar's decision or 30 days from the date on which the appellant became aware or ought to have become aware of the Registrar's decision.
19. The granting of condonation is a discretionary measure that must be exercised judicially after a careful balance of a body of factors.
20. Such factors, as per Khampepe ADJP, in **Harold Arthur Thompson v National Health Laboratory Services**,¹ include: The degree of the appellant's non-compliance, the explanation therefor, the importance of the case and the prospects of success.
21. Further, the preceding case reveals that what is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. However, where there is no reasonable and satisfactory explanation for the delay, the prospects of success are immaterial.
22. In *casu*, the appellant received the Registrar's Notification of Debarment (the Notice) on 9 September 2011. This meant the appellant had until 9 October 2011 to lodge her appeal.

¹ Case No: JA 09/07 [2009] ZALAC 11 (18 September 2009)

23. The appellant lodged her appeal on 28 January 2013, some 15 months after the time prescribed by the FSB Act.
24. The appellant reasons for lodging the appeal late can be gleaned from her letter to the Registrar dated 24 January 2013 and from the Response to the Registrar's Reasons as well as from the record.
25. The position regarding the appellant's account for the delay can be summed up as follows:
 - 25.1 On 23 August 2010 the appellant fell ill, as a result of which she collapsed and was taken to Louis Pasteur Hospital;
 - 25.2 On 27 August 2010 (four days later) the appellant was discharged from Louis Pasteur and was given medication for stress;
 - 25.3 The appellant's condition required further treatment which she subsequently received from Johannesburg General Hospital and from Edenvale Hospital during 2011 and 2012;
 - 25.4 The appellant continued to receive treatment after being discharged from hospital on 27 August all of which she received as an outpatient;
 - 25.5 At all material times the appellant received and continues to receive assessments and treatment for stress;
 - 25.6 The appellant could not recall the details or dates of her treatment save to state that treatment started towards the end of 2010.
 - 25.7 It is common cause that the appellant's medical condition created no psychological oddities or physical impediments that could be said to affect her "normal" functions or that prevented the enjoyment of ordinary amenities of life.

26. In totality the appellant submitted that she could not lodge the appeal on time due to ill health.
27. Now, turning to the position of the Registrar regarding the Application.
28. The Registrar opposes the Application on the basis that, firstly the Appellant has not shown good cause in that the reasons furnished by the Appellant do not give neither a full nor a proper account for the delay. Secondly, the Registrar argues that the period of delay of 15 months in lodging the appeal is excessive.
29. Further, the Registrar cites Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)². In this case the Constitutional Court held that the appellant must give a full explanation which must cover the entire period of delay. Naturally, the Registrar argues that this requirement has not been satisfied.
30. There is not much difficulty regarding the second point, namely, that the period of delay is excessive. The appellant readily concedes that point. Therefore, the determinant for the Application is whether or not good cause has been shown to the extent that the excessive delay is also properly explained.
31. The following authorities assist in guiding the evaluation of the various factors that this Board has to take into account in the quest to determine whether, in this instance, good cause could be said to have been shown.
32. In **Van Wyk's case** the appellant's delay was for a period of eleven months. The explanation for the delay was that throughout the period of eleven months the appellant was considering whether to appeal the decision of the Supreme Court of Appeal. In addition the appellant alleged that she did not have sufficient funds.
33. The Constitutional Court held that she had not provided a reasonable explanation for the delay. It held that after an inordinate delay, a litigant is entitled to assume

² 2008 (2) SA 472 (CC).

that the losing party has accepted the finality of the order. The Court concluded that to grant condonation would undermine the principle of finality and not be in the interests of justice.

34. In Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others³, Dengetenge had been informed that its appeal had lapsed and that an application for condonation and the reinstatement of its appeal was necessary. Dengetenge failed to take any steps to remedy the situation for approximately six months.
35. In dismissing the application for condonation, the court held that: (a) Dengetenge had failed to advance an acceptable explanation for the delay; (b) the respondents who had been granted prospecting rights over the properties (*aquo*) and had already expended large sums of money in exercising those rights, had been severely prejudiced by Dengetenge's delay in prosecuting the appeal; and (c) there were no prospects of success on appeal.
36. Significantly the court also held that:

"condonation is not to be had merely for the asking; a fully detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the compliance is time-related then the date, duration and extent of any obstacles on which reliance is placed must be spelt out."
37. It is abundantly clear from the above authorities that the appellant in this matter is under a duty to explain the excessive delay for her failure to lodge the appeal timeously. Her endeavors must be directed not only at merely mentioning the cause of her inability to comply with the requirements of section 26 (2) of the FSB Act but also to draw a connection between the alleged cause and the eventual effect that such cause had on her ability to comply.

³ 2013 (2) SA 251

38. The evidence before this Board is that the appellant was ill as a result of which she was hospitalized until 27 August 2010. That is about 13 months before the appellant received the Registrar's Notice of Debarment.
39. What did not come up during argument is the fact that on 25 October 2010, before being hospitalized, the appellant received a Notice of Debarment from Old Mutual which *ex facie* bears her name and signature.
40. The Notice from Old Mutual is for "non – conformance with part III of the FAIS Fit and Proper Determination". Therefore to the extent that the appellant was, at the time the Registrar's Notice, already aware that she had allegedly breached the provisions of the FAIS Act, one would have hoped for an explanation for the delay that presented a reasonable sequence of events between the appellant's discharge from hospital to atleast a date closer to 9 October 2011.
41. The appellant gave no discernable *nexus* between the illness and the deadline for lodging the appeal. The explanation for the absence of the nexus lacked on both the papers and the supporting medical evidence as well as from the evidence.
42. The appellant was also generously indulged during proceedings to give her representative instructions on issues where instructions seemed to provide and inadequate response to questions raised.
43. The appellant did not come remotely close to providing a reasonable explanation of events in respect of her treatment after she had been discharged save to say she was being treated for stress.
44. There was no account of the effect, extent or gravity of her medical condition given on the papers or elsewhere nor was it shown that such condition could be said to interfere with her mental faculties or ability to appreciate the consequence of her failure to comply with the provisions of the FSB Act.
45. The excessive period of the delay therefore remains unexplained.

46. The grounds on which the Registrar sort to debar the appellant are grievous. As such one would have expected a person in the position of the appellant to treat the matter with a degree of urgency and without any traces of dilatoriness, more so having received a Notice of Debarment from her employer on 25 August 2010.
47. On the one hand the appellant's conduct on the face of the failed attempt to explain the delay (which herself admits to being excessive) displays a flagrant disregard for the legal processes.
48. On the other hand the Registrar, as a creature of statute, is under a duty to promptly respond in circumstances such as expressed on the grounds for debarment. The Registrar has executed its functions expeditiously and in accordance with what the FSB Act prescribes.
49. In the circumstances, the scales are tilted against the granting of the Application.
50. Given that there is no discernable explanation for the delay, the prospects of success are immaterial.
51. The Application accordingly fails and consequently the appeal.

COSTS

52. Costs are a discretionary matter for the Board to decide.
53. In deciding the issue of costs, consideration was given to the fact that the appellant may have genuinely believed that she had a reasonable prospect of success particularly as she never had the chance to ventilate the issues prior to debarment.
54. In the circumstances costs should not be borne by the appellant as the unsuccessful party as would ordinarily be the case.

ORDER:

55. For these reasons the following Order is made:

55.1 The Application for Condonation is dismissed.

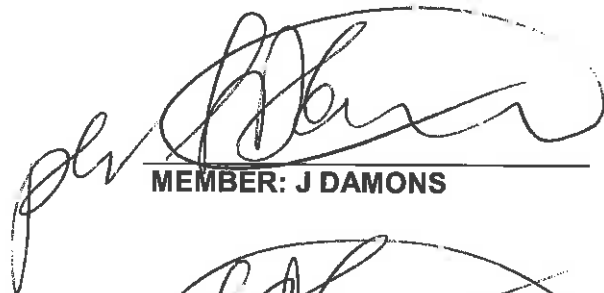
55.2 The Appeal is accordingly dismissed.

55.3 Each party shall bear its own costs.

Dated at Durban on this 18th day of July 2013.



CHAIRMAN: L DLAMINI



MEMBER: J DAMONS



MEMBER: D BROOKING