

THE FINANCIAL SERVICES TRIBUNAL

CASE NO: PA2/2024

In the matter between:

NAZARENE 040 (PTY) LTD

Applicant

and

THE PRUDENTIAL AUTHORITY

Respondent

Tribunal: Kgomo JP, Pretorius J and Adv M Mphaga SC

Appearance for Applicant: Adv E Mabela

Appearance for Respondent: Adv N Luthuli

Date of hearing: 28 October 2024

Date of Decision: 11 December 2024

Summary: Reconsideration of a decision of the Prudential Authority in terms of Section 230 of the Financial Sector Regulation Act 9 of 2017 (“ the FSRA”)

DECISION

INTRODUCTION

1. This is an application brought by the Applicant; Nazarene 040 (Pty) Ltd in terms of section 230 of the FSRA against the decision of the Prudential Authority dated 11 April 2024.

FACTUAL BACKGROUND

2. On 26 October 2022, the Applicant applied for a licence to conduct micro-insurance business in South Africa to the PA as required in terms of section 23 of the FSRA.
3. On 28 October 2022, the PA acknowledged receipts of the Applicant's application for a licence and advised the Applicant that the application has been assigned and the team responsible for the application at the PA will be Akona Ndlangisa (Analyst) and Lulama Mafunda (Manager). The PA informed the Applicant that it would revert to the Applicant within two weeks after assessing the completeness of the submission.
4. On 30 Nov 2022, the PA advised the Applicant that it had not yet finalised its assessment of the completeness of the application. The PA indicated to the Applicant that it had shared the application with the support team of the PA and the FSCA and once it has been assessed for completeness by both parties, the PA would revert to the Applicant.
5. On 23 January 2023, the PA having assessed the application in concurrence with the FSCA noted that certain documents were outstanding, outdated or insufficient. These outstanding documents and information which included the request for a more recent credit report of Mr Avapfani Mathada ("Mr Mathada") were set out in in the e-mail sent to the Applicant.
6. On 1 February 2023, the Applicant responded to the above request for documents and information by providing *inter alia* the more recent credit report of Mr Mathada dated 31 January 2023.
7. On 8 February 2023, the PA addressed an e-mail to the Applicant expressing its dissatisfaction with the information provided by the Applicant in respect of its business model and its projection to write R22 million in GWP in 1 year.

8. On 4 April 2023 the PA addressed a letter to the Applicant wherein it made reference to a meeting held between the representatives of the Applicant and the PA on 3 March 2023. The PA had assessed the Applicant's application and its supporting documentation, however there were still outstanding issues relating to the application. On 24 April 2023, the Applicant responded to the aforesaid PA's letter.
9. On 22 August 2023 and 14 September 2023 meetings were held between the representatives of the Applicant and the PA to discuss outstanding information and to further request the Applicant to furnish same.
10. On 6 October 2023 the PA addressed e-mails to Mr Loyiso Vuyo Dingiswayo ("Mr Dingiswayo") and Mr Mathada, the key persons of the Applicant, advising them that the PA in its assessment of their fitness and propriety had found several arrear accounts while others were settled. Both Mr Dingiswayo and Mr Mathada were afforded 14 days within which to make written representations or appointments as to why the PA should deem them fit and proper. The written representations of Mr Dingiswayo and Mr Mathada were received by the PA timeously, however, on 5 December 2023, Mr Mathada withdrew his nomination for appointment as an independent Chairperson of the Applicant.
11. On 14 December 2023, the Applicant addressed an e-mail to the PA attaching a *curriculum vitae* of one Dawid Petersen as the individual proposed as the replacement of Mr Mathada as the Chairperson of the Board of the Applicant.
12. On 14 March 2024, the Applicant sent an e-mail to the PA enquiring on the progress of the application and the response of the PA on the proposed replacement of Mr Mathada. The Applicant indicated that a period of 120 days had passed within which the PA should have made a decision and there was no extension of time which was agreed to by the PA and the Applicant. The PA

responded on 15 March 2024 and indicated that the application was tabled at the licensing panel and a decision has been made.

13. On 11 April 2024, the PA communicated its decision to the Applicant to the effect that it has declined its application in terms of section 23(3)(a) of the Insurance Act No 18 of 2017 (“the Act”). The PA stated that it was of the considered view that the application has failed, to meet licensing requirements in section 22 of the Act which include demonstrating that the Applicant has a sound business plan. Furthermore, the PA noted that some the application of the Applicant’s proposed key persons did not meet with the prescribed fit and proper requirements of persons in addition to shortcomings in the governance framework as it relates to the adequacy of the board and its subcommittees. In that regard, the Applicant was considered not to have met the requirements of sections 22(1)(c)(i), 22(1)(c)(ii) and 22(1)(c)(vii) of the Act.
14. In paragraph 8 of the aforesaid letter from the PA dated 11 April 2024, the PA indicated that it was prepared to consider a new application should the Applicant address the adverse findings set out in its letter. Further, the Applicant was advised that should it wish to reapply for a microinsurance licence, it should provide the information as set out in paragraph 8.2(a) to (f) of the letter of the PA.
15. On 5 May 2024, the Applicant applied for the reconsideration of the decision of the PA to this Tribunal in terms of section 230 of the FSRA.

APPLICANT’S APPLICATION FOR RECONSIDERATION

16. In paragraph 1.3 of its application for reconsideration, the Applicant has set out the grounds upon which it relies for the reconsideration of the PA’s decision by this Tribunal. The first ground raised relates to the fact that the Applicant failed to finalise the licence application within 120 days as stipulated in section 23(3)(a) of the Act.

17. The Applicant complains about the reasons provided by the PA that it had no sound business plan and that its key persons Mr Mathada and Mr Dingiswayo were not fit and proper. The Applicant alleges that it had communicated the withdrawal of Mr Mathada to the PA on 11 December 2023 and advised the PA about his replacement by Mr Petersen on 14 December 2023. The complaint of the Applicant in this regard is that in paragraph 5.1 of the decline letter, the PA mentions that Mr Petersen's information was not considered due to the application being declined. According to the Applicant this is concerning because the decision was only communicated four months after Mr Petersen's information was submitted to the PA.

18. The Applicant alleged that the PA confirmed in the decline letter that it noted Mr Dingiswayo's representations on managing his debts and the Applicant assumes that the PA had no further concerns in that regard. The Applicant disputes the finding by the PA that Mr Dingiswayo did not have the necessary skills, experience and expertise to fulfil the role of CEO. According to the Applicant, the application in issue was a microinsurance license application and microinsurance is a new concept which was entrenched in the Act around 2017 and the most important objective to achieve is inclusion and transformation. To this end the requirements to be licenced as a microinsurer have been relaxed as opposed to the requirements to be licensed as a traditional insurer. To curb the risks associated with insurance business, the benefits which micro insurers can provide have limits.

19. The Applicant is of the view that Mr Dingiswayo's experience is sufficient to fulfil the role of CEO because the application is for microinsurance licence and for the funeral class of business only. In subparagraph 1.3.2 of the its application for reconsideration the Applicant sets out reasons for its dissatisfaction with the findings of the PA by *inter alia* alleging that the PA was unfair and unreasonable to reject the application without outlining the experience that it deems fit for a CEO of a micro insurer and without affording

the applicant an opportunity to look for a CEO that will have experience that the PA deems sufficient. The Applicant alleges that the PA should have considered granting the licence with conditions as provided by section 25(1) of the Act, instead of an outright rejection.

20. The Applicant further complains against the finding of the PA that it had no sound business plan as required in terms of section 22(1)(c)(ii) of the Act. The Applicant refers to meetings where matters regarding expenses and growth were discussed and it provided explanations regarding the queries raised. According to the Applicant the PA was unfair and unreasonable to list the matters regarding lack of sound business plan, an unreasonable business model, unreasonable growth assumptions and unreasonable expense assumptions as reasons for the rejection of its application.
21. The Applicant further alleges that it has been aggrieved by the PA for outlining matters that need to be attended to should the Applicant wish to reapply for a microinsurance licence. The Applicant maintains that the PA was supposed to have raised the said matters as queries and the Applicant would have easily provided responses as they have done in paragraph 1.3.4 of the Applicant's application for reconsideration.
22. The Applicant is of the view that the PA declined its application on matters that were clarified and matters that could have been clarified should the PA have raised such matters as queries. The Applicant requests the Tribunal to uphold its application for reconsideration alternatively, grant such appropriate relief as in accordance with the Tribunal's statutory powers.

HAS THE APPLICANT MADE OUT A CASE FOR RECONSIDERATION

23. The Applicant was advised by way of a letter from the PA dated 11 April 2024 that its licence for a microinsurance has been declined. In paragraph 8.1 of the letter, the PA expressly undertook to consider a new application should the Applicant address the findings made by the PA in its Decision Letter.

24. During the hearing of the application we inquired from the representatives of the Applicant why they did not submit a new application for a microinsurance as per the invitation of the PA in paragraph 8.1 of the Decision Letter in that the granting of a reconsideration would have a similar outcome. A period of approximately five months had elapsed from April 2024 to October 2024 when the application was heard by the Tribunal. Had the Applicant submitted a new application having addressed the concerns raised by the PA in its Decision Letter, such application could have been considered and finalised.
25. In *President of Republic of South Africa v Democratic Alliance*¹ Mogoeng CJ, writing for the majority, held:
- “The President himself says ‘the order of Vally J no longer has any practical effect between the parties and has become academic’. This Court is thus being asked to advise or guide the President. That is the only real purpose to be served by entertaining this appeal. And courts should be loath to fulfil an advisory role, particularly for the benefit of those who have dependable advice abundantly available to them and in circumstances where no actual purpose would be served by that decision, now. Entertaining this application requires that we expend judicial resources that are already in short supply especially at this level. Frugality is therefore called for here.”*
26. Having noted the undertaking made by the PA to re-evaluate the Applicant’s re-submitted application, we are of the view that the Tribunal’s finding in the Applicant’s favour would amount to *brutum fulmen*, as the order would serve no useful purpose. The Applicant could not provide any persuasive argument on the questions posed by the Tribunal on this issue. We are therefore of the view that this application is ill advised, and frugality is also called for here.

¹ [2019] ZACC 35; 2020 (1) SA 428 (CC); 2019 (11) BCLR 1403 (CC).

27. In its application for reconsideration the Applicant did not take issue with the finding of the PA in paragraph 7 of its Decision Letter, that the Applicant's proposed audit committee did not comply with requirements of the Prudential Standard GOI 2 (GOI2). The PA noted that the Applicant intended to appoint two additional independent non-executive directors if the licence is granted it, nevertheless, concluded that the application failed to satisfy the requirements of section 22(1)(c)(vii) of the Act.
28. We agree with the PA's submission that having not challenged the finding of the PA in its application, the Applicant cannot belatedly raise this issue in its heads of argument for the first time. Notably, the Applicant only proposed one individual, Mr Mathada as a member of the audit committee who was at the same time proposed as the Chairperson. However, during the assessment of the application he was found not to be fit and proper and ultimately withdrew his candidacy as Chairperson.
29. Section 22(1)(c)(vii) of the Act is couched in peremptory terms and requires an applicant for a licence to demonstrate that it will be able to comply with governance framework requirements of the Act. As at the stage of the assessment of the application, the Applicant failed to comply not only with the governance framework requirement but with the Prudential Standard GOI 2. The applicant's application for reconsideration must therefore fail on this ground alone.
30. In its heads of argument, the Applicant submits that the PA should not have rejected its application but granted a conditional approval based on the Applicant's intention to comply. This submission is untenable, in that section 25(8) of the Act relied upon by the Applicant in its heads of argument does not make any provision for the conditional approval sought and that the conditions that are imposed in section 25(8) of the Act are not at all relevant to the licensing requirements under section 22 of the Act.

31. The dictum in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others**², finds application and it is in all fours with the Tribunal's decisions in **Fern Finance v FSCA** and **Mwale v The Prudential Authority**, where the Constitutional Court held:

[45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.

32. As it is apparent from the background set out above, the PA in assessing the Applicant's application took a more developmental approach (as submitted by the PA in its heads of argument) by not assessing the application based on the information and supporting documents as at the stage of its submission on 26 October 2022.
33. The PA continuously communicated with the Applicant regarding the shortcomings of its application by way of correspondence and meetings. The reasons for declining the Applicant's application have been clearly set out in the Decision Letter and the Tribunal cannot interfere with the exercise of discretion of the PA in declining the Applicant's application. The grounds

² 2004 (4) SA 490 (CC)

raised in the Applicant's application for consideration constitute disagreement and difference of opinion with the PA. The Applicant has failed to adduce any cogent or persuasive reasons why the Tribunal is justified to interfere with the PA's exercise of discretion in the absence of a material misdirection. It ought to defer to a functionary in the circumstances set out in **Gauteng Gambling Board v Silverstar Development Ltd and Others**³ where the Supreme Court of Appeal held:

"[29] An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognize its own limitations."

34. The Applicant's argument that the PA failed to consider the application within the 120 day period in terms of section 23(3)(a) of the Act is self-defeating and has no merit. The Applicant objects to the PA's failure to assess Mr Dawid Petersen as a replacement to Mr Mathada, however, the information of Mr Petersen was only provided on 14 December 2023 long after the 120 day period had expired. Section 23(3)(b) of the Act provides that if the PA requested additional information in terms of section 60(4)(a)(i) then the period between the date on which the additional information was requested and when the information was provided to the PA is not computed for the purpose of determining the 120 days referred to in paragraph (a).
35. As stated above, the PA has on numerous occasions requested information from the Applicant, some of which was provided by the Applicant. It is apparent that the period of 120 days was interrupted on numerous occasions. The Applicant can therefore not raise the same as a ground for reconsideration in the circumstances.

³ 2005 (4) SA 67 (SCA)

36. Consequently, it is for the above reasons that we find that the Applicant has not made out a case for reconsideration of the decision of PA in terms of section 230 of the FSR Act. There is no basis for us to interfere with the decision of the PA dated 11 April 2024, as we are satisfied on the facts before the Tribunal and applying the law that the Applicant has not made out a case for reconsideration.

ORDER

The application for reconsideration is dismissed.

Signed on behalf of the Tribunal on 11 December 2024 by **Adv M Mphaga SC**
(Panel Member) with the panel consisting of:


