

IN THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

CASE NO: A46/2016

In the matter between:

MABENA DAVID HLUMBANE

APPELLANT

AND

REGISTRAR OF FINANCIAL SERVICES PROVIDERS

RESPONDENT

DECISION

A. INTRODUCTION

1. Mabena David Hlumbane (“the Appellant”) appeals in terms of Section 26 (1) of the Financial Services Board Act, 97 of 1990 (“FSB Act”) against the decision of the Registrar of Financial Services Providers (“the Registrar”) dated 10 October 2016 in

which the Registrar debarred him from rendering financial services for a period of three years.

2. In his grounds for appeal the Appellant contested both the merits and sanction.

3. Very briefly, the Registrar established that the Appellant paid a former employee of the examination authority an amount of R1000 in return for a pass result for the RE1 and RE5 examinations that the Appellant had been battling to pass. On this basis the Registrar found that the Appellant no longer met the requisite character qualities of honesty and integrity expected of all financial service providers.

4. As stated, the Appellant sought to have the Registrar's decision overturned in its entirety. However, at the beginning of the hearing the Appellant capitulated on the merits. The matter proceeded only on the question whether or not the Registrar's sanction was appropriate. Therefore any discussion of the merits will be relevant insofar as it relates to the determination of the period of the Appellant's debarment.

B. SANCTION

5. The Registrar debarred the Appellant for a period of three years. He now seeks to have that period reduced.

6. Section 14A(1) of the FAIS Act permits the Registrar to debar a person, if the Registrar is satisfied on the basis of the available facts and information that the person sought to be debarred no longer meets the requirements contemplated in section 8(1)(a) or has contravened or failed to comply with any provision of the FAIS Act.

7. The FAIS Act entitles the Registrar to debar a person contravening any provision of the FAIS Act. The period of such debarment is clearly a matter for the Registrar's discretion¹. The Registrar must exercise such discretion judicially. Therefore, the appropriateness of sanction will vary according to the facts of each matter. When determining the debarment period, the Registrar must have regard to the severity of the contravention and ensure that such period is consistent with the contravention complained of.

¹ **Mondisa Cindi vs the Registrar of Financial Services Providers A31/2013**

8. In light of the above, the Appellant effectively argues that the sanction metered is not, in the circumstances, commensurate to the conduct that the Registrar complains of.

9. It is important to state at the outset that the Appeal Board will not interfere with the decision of the Registrar unless there are compelling reasons to the contrary. Otherwise such interference may usurp the Registrar's power to determine what is or what is not acceptable and proper conduct. This was the view in the matter of Julius Preddy and Another v The Health Professions Council of South Africa, case number 54/2007 @6

10. That said, the FAIS Act provides for neither maximum nor minimum periods of debarment. This aspect also falls within the Registrar's discretion. In this matter, the Registrar has decided that such period should be three years.

11. The Registrar must exercise this discretion by taking into account, *inter alia*, public interest and the severity of the transgression complained of bearing in mind whatever mitigating factors, if such exists.

12. In simple terms, the Registrar's decision was a statement announcing that the Appellant can no longer be viewed as fit or competent to assist the public to make investment decisions. See **Financial Services Board and Barthram and Another**. The Registrar therefore put up a fence to protect members of the public from the Appellant who has conducted himself improperly. Debarment is the fence.

13. The FAIS Act confers upon the Registrar the discretion to impose a period of debarment, once a finding has been made on the merits, to enable the Registrar to carry her mandate meaningfully. The Board will not interfere with such discretion lightly.

14. In the Appeal Board matter of **Nomvuzo Nkalitshana v Registrar of FSPs**² it was held that: "...the debarment provisions of the FAIS Act aim to protect the interest of clients requiring financial services. The intention is to remove unscrupulous persons from the industry and serve as a deterrent to wrongdoers".

15. Turning to arguments, on the one hand the appellant presented reasons for having the period of debarment reduced. He stated that he is the sole breadwinner and that he has worked in this

² <https://www.fsb.co.za/appealBoard/Documents/Decision-%20Nomvuzo%20Nkalitshana.pdf>

industry for a long time. He put forward his age as an impediment to finding suitable employment. Further he submitted that this industry was the only environment in which he could be gainfully employed. Furthermore, his daughter depends on him for tuition to further her university studies.

16. On the other hand, the Registrar submitted that, first there is no evidence that the Appellant cannot be employed in any other capacity other than as a representative within the industry. Second, the Appellant had not explained the position in respect of contributions of other possible sources of support such as might be derived from his spouse, savings, bursaries, etc. Further, in any event, the fact that the Appellant was the breadwinner and that he has dependants had been considered hence the sanction was not set higher than three years. Thirdly, the Registrar argued further, citing SJ Van der Walt and the Registrar that Appellant's conduct was always going to have a material effect on the Appellant and his family. The consequences of his absence as the breadwinner follow his debarment, which is directly linked to his conduct.

17. We take cognisance of the principle that persons who have had a lapse in their life are capable of mending their ways. The principle speaks to the prospects of rehabilitation of a person who had

been found to not meet the requisite standard of character. Therefore we had to consider whether the Appellant appreciated the error of his ways. Such appreciation would often show itself in expressions of remorse.

18. The importance of the transgressor's appreciation of his wrongdoing was dealt with in the Appeal Board matter of **P Labuschagne v Registrar of FSPs**³ where reference was made to the **Swartzberg v Law Society, Northern Provinces** 2008 (5) SA 322 (SCA) at p 330 B-C: *"It is thus crucial for a court confronted with an application of this kind to determine what the particular defect of character or attitude was. More importantly it is for the appellant himself to first properly and correctly identify the defect of character or attitude involved and thereafter act in accordance with that appreciation. For, until and unless there is such a cognitive appreciation on the part of the appellant, it is difficult to see how the defect can be cured or corrected. It seems to me that any true and lasting reformation of necessity depends upon such appreciation"*.

19. Bearing the above in mind, the Registrar's view was that the Appellant did not show remorse and the period of sanction thus reflects that the Appellant lacked remorse. The Registrar placed

³ <https://www.fsb.co.za/appealBoard/Documents/Decision%202012.pdf>

emphasis on various statements in which the Appellant is either said to have contradicted himself or in which he had given an improbable case.

20. In response the Appellant submitted that he had cooperated fully at the time of the investigation and that he has done all he could to ensure that the matter was not delayed which was shown in his preparedness to accept that the matter must no longer proceed on the merits.

C. **FINDING**

21. Having considered all the evidence before us, it appears that the Appellant has not raised any matters to satisfy the Appeal Board that the Registrar erred in the exercise of her discretion when setting the period of debarment. In fact it appears to us that it could have been argued that the Appellant should be debarred for a period longer than three years particularly given the nature of the conduct that led to the Appellant's debarment. However, as has been stated the power to decide on the appropriate sanction rested with the Registrar.

D. ORDER

22. Accordingly the appeal is dismissed, each party to pay its own cost.

Dated at Pretoria on 20 April 2017

L Dlamini

Mr L Dlamini: Chairperson

N K Nxumalo

Adv NK Nxumalo: Member

Z Mabhoza

Z Mabhoza: Member