

APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

CASE NO: A30/2015

In the matter between:

PROACTIVE LIFESTYLE MANAGEMENT CC

Appellant

BHUPESH NATHOO

and

REGISTRAR OF FINANCIAL SERVICE PROVIDERS

Respondent

DECISION

INTRODUCTION

1. This is an appeal in terms of Section of 26(1) of the Financial Services Board Act 97 of 1990 as amended ("The FSB Act") in which Bhupesh Naroatham Nathoo ("appellant") challenges the outcome of the decision of the Registrar of Financial Services Providers ("the Registrar") dated 26 May 2015.

2. On the said date the Registrar withdrew the authorisation of Proactive Lifestyle Management CC (“the entity”) and debarred the appellant. The appellant holds a 70% member’s share in the entity and he is its sole key individual.

3. The Registrar’s decision was based on the findings that the appellant no longer met the personal character qualities of honesty and integrity. Accordingly the Registrar debarred the appellant in terms of section 14A of the Financial Advisory and Intermediary Services Providers Act 37 of 2002 (“the FAIS Act”).

ISSUE FOR DECISION

4. The appellant conceded the merits of the Registrar’s decision but challenges the sanction imposed. This appeal therefore deals with the merits only in so far as they relate to sanction. What this Board has to decide is whether or not the period of debarment imposed by the Registrar was appropriate.

THE APPEAL

5. During 2014 Old Mutual conducted an investigation into allegations that the appellant had submitted fictitious business in respect of policies for one Ms

Ivana Singh ("Singh") and one Ms Kimosha Govender ("Govender") both of whom were clients of the entity. At the time a certain Mr Sbusiso Dlamini ("Dlamini") was employed by the entity.

6. It transpired during proceedings that Dlamini facilitated the conclusion of the policies for these clients as a representative of the entity. However, Dlamini was not registered to conduct work as a financial services provider or as a representative in terms of the FAIS Act.
7. As part of the investigation, Old Mutual obtained an affidavit from the appellant. The affidavit was commissioned before the SAPS Durban Central on 18 February 2014.
8. In this affidavit the appellant stated, amongst other things, that he had personally met with Govender and Singh and obtained their details for policy application purposes.
9. The appellant further stated that Dlamini was one of his employees who assisted with the delivery and collection of documents from clients, but that Dlamini did not consult with clients on his or the entity's behalf.

10. One year after signing the affidavit referred to above, the appellant made a statement to the Registrar responding to the Registrar's letter of 22 December 2014. The appellant furnished this statement as part of the Response to Possible Debarment. It is dated 19 February 2015. The significance of this statement is that the appellant admitted in it that it was Dlamini who met with Singh and Govender and not himself.

11. There were other discrepancies pointed out between the affidavit and the statement. We do not intend dealing with those here save to say they were not challenged by the appellant. As has been stated, merits are not in dispute. It suffices to say the Registrar found that the appellant was dishonest in that he made certain misrepresentations in an affidavit.

12. That, in short, are the facts relevant to determine the appropriateness of sanction.

SANCTION

13. The appellant contends that his debarment should be "lifted" in order to allow him to work for Old Mutual under supervision. If granted, the order that the appellant seeks would translate to him having "served" a debarment period of

about six and a half months which is the period from date of the Registrar's decision, 26 May 2014 to date of appeal, 8 December 2015.

14. The Registrar submitted that if the Board orders a variation of the debarment period that such period should not be less than three years. The Registrar contended that the appellant's misconduct was a serious transgression and that a period less than three years may in fact send the wrong message to the financial services community.

ANALYSIS

15. Section 14A(1) of the FAIS Act allows 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.
16. The FAIS Act entitles the Registrar to debar a person contravening any of its provisions. The period of such debarment is also a matter for the Registrar's discretion, which the Registrar is obliged to exercise judicially. The appropriateness of sanction will therefore depend on the facts of each case. As such in determining the debarment period, consideration must have been

given to whether such period is consistent bearing in mind the circumstances of the contravention complained of.

17. We recognise the fact that when the Registrar expresses displeasure regarding the manner in which the appellant has conducted himself, the Registrar's assertion against such particular conduct must be taken seriously unless there are compelling reasons evincing a necessity to rule otherwise¹. Therefore a clear basis must exist to justify interference with the Registrar's discretion.

18. We refer to the matter of Mondisa Cindi v Registrar of Financial Services Providers² ("Cindi") in which this Board had to evaluate somewhat similar considerations. In that matter the Board, in determining the appropriateness of the period of debarment took into account both mitigating and aggravating circumstances.

19. It is important to note that in Cindi, unlike in this case, the Appeal Board found that the Registrar took inordinately long to act against Cindi. The fact of the delay was therefore applied in mitigation. There is no such delay in this case consequently that consideration is not pertinent.

¹ Julius Preddy and Another v The Health Professions Council of South Africa 54/2007 [2008] SASCA 25

² Mondisa Cindi v Registrar of Financial Services Providers A31/2013

20. Consideration must be given to whether or not the appellant, in his quest for a reprieve, realises that he was wrong. In the matter of Pieter Labuschagne v the Registrar of Financial Services³ reference was made to the decision in Swartzberg v Law Society, Northern Provinces 2008 (5) SA 322 (SCA) at p. 330 B-C. These authorities emphasise the importance of the transgressor's appreciation of his or her wrongdoing:

" ... it is for the appellant himself to first properly and correctly identify the defect of character or attitude involved and thereafter to 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..."

21. In Cindi the Appeal Board accepted the fact that the appellant did not dispute her dishonest conduct and had made a confession during the appeal as indicators of remorse and an appreciation of wrongful conduct. Cindi immediately admitted her wrongdoing and surrendered herself to the hands of the process.
22. The appellant admitted the wrongfulness of his conduct and expressed his regret for what he had done. This was highlighted in the fact that the appellant stated his preparedness to work only as a representative under someone else's supervision and not to operate on his own. We were satisfied that the appellant showed remorse and that he appreciated the error of his ways.

³ The determination was handed down on 3 September 2012.

23. The above factors are pertinent in determining an appropriate period of debarment as they directly relate to the prospects of rehabilitation of a person found to have failed the requisite personal character qualities of honesty and integrity.
24. We also observed that Cindi dealt with offences regarding three complaints. It appears also that Cindi dealt with misconduct under noticeably more grievous circumstances than is the case in this matter. The Honourable Appeal Board in Cindi reduced the debarment period from five to three years.
25. The appellant personal circumstances were also taken into account, in particular the fact that the appellant is 53 years old and is the sole breadwinner who has no expertise in other fields outside of the financial services sector (from which he has been disbarred).

CONCLUSION

26. Having reviewed the evidence before us we find that the period of sanction imposed by the Registrar on 26 May 2015 does not appropriately reflect the appellant's conduct complained of. Accordingly the period of sanction ought to be reduced.

ORDER

27. The following order is therefore made:

1. The appeal is upheld;
2. The period of sanction is reduced from five years to two and half years (thirty months) calculated from date of the Registrar's decision;
3. Each party to pay its own costs.

SIGNED AT PRETORIA THIS 24 DAY OF DECEMBER 2015

L Dlamini

L DLAMINI
CHAIRMAN

D Brooking

D BROOKING
PANEL MEMBER

L Makhubela

L MAKHUBELA
PANEL MEMBER