

IN THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

IN THE MATTER BETWEEN:

CASE NO: A5/2016

BENU MANAGEMENT CC T/A MAJOLA BROKERS

1ST APPELLANT

L H BENU

2ND APPELLANT

AND

REGISTRAR OF FINANCIAL SERVICES PROVIDERS

RESPONDENT

DECISION

INTRODUCTION

1. In a letter dated 16 February 2016 the Registrar of Financial Services Providers (Registrar), in terms of section 14A(1)(a) read with section 9 of the Financial Advisory and Intermediary Services Act No. 37 of 2002 (FAIS Act), debarred the second appellant, Luvuyo Honourbrook Benu from rendering financial services for a period of five years. The second appellant is the key individual and the sole member of Benu Management CC T/A Majola Brokers, the first appellant entity, whose licence the Registrar also withdrew.

2. On 3 March 2016 the second appellant lodged an appeal in his own person and on behalf of the entity against the Registrar's decision dated 16 February 2016.
3. For the sake of convenience, first and second appellant will be interchangeably referred to as "*the appellant*".
4. It is common cause that the licence withdrawal and debarment followed the requisite notifications sent to the appellant. These include the Registrar's notice of intention to withdraw and debar dated 22 October 2015, notice of suspension of authorisation dated 16 September 2015 and notice of intention to suspend authorisation dated 31 July 2015.
5. Withdrawal of authorisation was informed by the reasons for the debarment as well as the appellant's failure to pay the prescribed levy and interest thereon, under section 15A of the Financial Services Board Act, 1990 ("FSB Act"), in an amount of R7 002,65.
6. Debarment was due to the Registrar's finding that the appellant submitted a fictitious 1Life Funeral Plan (policy number FP5072299) in the name of Anna Nomawabo Mbadu ("Ms Mbadu") to 1Life without Ms Mbadu's knowledge and consent.
7. The Registrar alleged that on the facts and information available to her, 1) the appellant no longer satisfied the requirements contemplated in section 8 of the

FAIS Act read with Board Notices 91 of 2006 and 106 of 2008, more particularly the fit and proper requirements relating to personal character qualities of honesty and integrity; and 2) the first appellant failed to comply with the provisions of the FAIS Act.

ISSUE

8. We were presented with two matters to decide. The first was of a preliminary nature and it related to certain evidence the appellant sought to introduce. The second was the main issue; whether the Registrar's decision dated 16 February was correct.
9. We deal with these in turn.
10. The first issue relates to evidence that the Registrar argued did not form part of the facts and information available to her at the time of the decision under appeal. The evidence complained of consisted of certain documents subsequently submitted and statements made on the appellant's grounds of appeal.
11. In this regard, the Registrar requested that we strike out from the appeal record:
 - 11.1 the letter of withdrawal of case number 590495, dated 2 March 2016, attached to the appellant's notice of appeal which the appellant argued were signed by Ms Mbadu; and
 - 11.2 statements made at points 3 and 4 of the appellant's grounds of appeal submitted to the Appeal Board Secretariat on 27 April 2016.

12. It is common cause that during April 2016 the appellant launched an application for admission of further evidence in terms of section 26B(12)(a)(i) of the FSB Act (the application). In the application the appellant sought to introduce, *inter alia*, Ms Mbadu's letter of 2 March 2016 and information relating to one Tito Mburu (allegedly being the appellant's administration officer who fraudulently submitted the fictitious 1Life policy using the appellant's agent and broker codes and forged his signature). The application was opposed by the Registrar and was dismissed by the Deputy Chairperson of the Appeal Board on 27 May 2016.
13. The matters that the appellant now seeks to introduce are similar matters to those contained in the application.
14. The Appeal Board dismissed the application as stated. That being the case, the Registrar's request is upheld. Therefore, the appeal proceeds on the basis of the facts and information available to the Registrar on 16 February 2016 when the Registrar made its decision.
15. That then leaves us with the issue of whether the Registrar's decision to debar the appellant was correct. We deal with this in two parts.
16. First, we look at the withdrawal of authorisation due to the appellant's failure to pay the prescribed levy and interest, under section 15A of the Financial Services Board Act, 1990 ("FSB Act"), in an amount of R7 002,65. Second, we deal with the debarment due to the Registrar's finding that the appellant submitted a fictitious 1Life Funeral Plan (policy number FP5072299) in the name of Ms Mbadu to 1Life without her knowledge and consent.

A. Withdrawal of authorisation due to the appellant's failure to pay the prescribed levy and interest, under section 15A of the Financial Services Board Act, 1990

17. It is common cause that the appellant failed to pay the prescribed levy and interest in the amount of R7 002,65 and that this was the reason for the withdrawal of the appellant's licence. Levies remain unpaid. The appellant failed to properly deal with this aspect both on the papers and during the hearing.
18. On the evidence available before us, particularly the fact that the appellant has more than twenty years' experience as an FSP, we are satisfied that the appellant was fully aware of the requirements relating to payments of levies. He admitted to not paying the levy. He was also ready to accept that this meant the Registrar had a clear basis on which to withdraw his authorisation to conduct business as an FSP.
19. The appellant's explanation for not paying the levy rested on the fact that he had no money to do so. We deal with the finding on this issue later for reasons that we become more apparent below.

B. Debarment due to the Registrar's finding that the appellant submitted a fictitious 1Life Funeral Plan (policy number FP5072299) in the name of Ms Mbadu to 1Life without her knowledge and consent

20. It seems to us that although non-payment of levies was a contravention of the Act, a greater concern was the fraud allegation against the appellant.
21. The Registrar's submissions in this regard were that, in June 2015, 1Life received notification that the appellant had written a fraudulent and fictitious policy in the name of Ms Mbadu. An investigation was requested and conducted by one Mr Carl Olivier (the investigator).
22. Further the Registrar submitted that the investigator reported, *inter alia*, that an application form (FP5072299) for a funeral plan was written up and signed on 22 April 2014. Ms Mbadu is recorded as the policyholder and premium payer and the appellant's agent code 0229 and broker code 0237 appear on the application form.
23. In her statement to the investigator Ms Mbadu stated that she did not consent to the policy being taken out, that she did not know and never met the appellant, that the signature on the application form was not hers and that certain details recorded on the application form were incorrect.
24. The appellant was given the opportunity to respond to the allegations in the investigator's report. He provided the investigator with an affidavit, dated 26 June 2015, which he said was deposed to by Ms Mbadu. Very briefly, this

affidavit stated that Ms Mbadu cancelled the policy due to financial constraints and that she wished to withdraw her complaint regarding the unauthorised deductions from her salary. The affidavit cemented the appellant's assertion that he had met and that he knew Ms Mbedu. Therefore the affidavit was the appellant's response to the fraud allegation.

25. However, at the hearing the appellant sought to pursue another version which was different from the above version. For all intents and purposes this second version could not be reconciled with the first.
26. All along the appellant's first version was that he met with Ms Mbadu and the latter took the policy with him, that cancellation of the policy emanated from Ms Mbadu's inability to finance policy premiums. The second version, which the appellant advanced during proceedings, was that he never met Ms Mbadu. Someone else from his office signed up the fraudulent policy, apparently using his code.
27. The appellant persisted with this contradictory version despite the record showing sworn statements that supported his one version and not the other. For instance, on 10 November 2015 the appellant stated, under oath, that he had met with Ms Mbadu in Queenstown, that she took the policy with him but that a few months later Ms Mbadu cancelled the policy due to financial difficulties.
28. We spent an appreciable amount of time seeking clarity on this matter. The appellant could not offer any meaningful explanation why his versions were mutually exclusive neither was it clear why the appellant changed his version.

29. On record we had three separate statements from Ms Mbadu. The statements are dated 29 January 2015, 22 June 2015 and 21 August 2015. Without going into too much detail, all her statements consistently point to the same fact; she has never met the appellant.
30. Further, we were presented with a forensic expert report, which dealt with the authenticity of the signatures that appeared on the 1Life application form (FP5072299) in relation to the specimen signatures obtained from Ms Mbadu from various sources. It concluded, *“The disputed signatures on the Application for 1Life Funeral Policy Plan with number FP5072299 were not signed by the person who signed the specimen signatures”*.
31. The appellant did not respond directly to the report. He did not dispute the findings nor did he question the validity of the report. The conclusion of the report, however, clearly supports the version that the appellant did not meet with Ms Mbadu.
32. The apparent contradictions in the appellant’s own version as shown above did not augur well for his case. We were left with a distinct impression that the appellant was not telling the truth about what had happened regarding the 1Life policy in question.
33. In any event, the onus rests squarely on the appellant to show that he meets the fit and proper requirements. Having considered the evidence before us, we are of the view that the appellant failed to discharge this onus.

34. In light of the above and bearing in mind that the appellant failed to pay the prescribed levy as stated, we are of the view that the Registrar was justified to withdraw the licence and to debar the appellant.

SANCTION

35. Section 14A of the FAIS Act entitles the Registrar to debar a person who contravenes any of its provisions. The period of such debarment is clearly a matter for the Registrar's discretion. The discretion amounts to an exercise of administrative power that the Act confers upon the Registrar to enable him to carry his mandate meaningfully. The Board will not interfere with such discretion lightly.
36. The Registrar submitted that her decision of 16 February 2016 was justified in that the appellant no longer met the requirements set out in section 8 of the FAIS Act, particularly those relating to honesty and integrity.
37. The FAIS Act does not provide for a maximum period of debarment and this aspect falls within the Registrar's discretion. In this regard, the Registrar has decided that such period should be five years. The Registrar must exercise this discretion by taking into account, *inter alia*, public interest and the severity of the transgression complained of.

38. In the Appeal Board matter of Nomvuzo Nkalitshana v Registrar of FSPs¹ it was held that: *“...the debarment provisions of the FAIS Act are aimed 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”*.
39. The Registrar submitted that its decision was guided by the provisions of Board Notice 106 of 2008² which sets out the fit and proper requirements for FSPs. This formed the basis for arguing for a five-year debarment.
40. The appellant sought to have this period reduced. He stated that he was the sole breadwinner and that he has worked in this industry for over two decades. Further he submitted that this industry was the only environment in which he could be gainfully employed.
41. We take cognisance of the principle that persons who have had a lapse in their life are capable of mending their ways. Therefore we had to consider whether the appellant appreciated the error of his ways.
42. The importance of the transgressor’s appreciation of his wrongdoing was dealt with in the Appeal Board matter of P Labuschagne v Registrar of FSPs³ 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*

¹ <https://www.fsb.co.za/appealBoard/Documents/Decision-%20Nomvuzo%20Nkalitshana.pdf>

² https://www.fsb.co.za/Departments/fais/legislation/BoardNotice_ByYear/BN106of2008.pdf

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

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”.

43. We found that the appellant largely contradicted himself. He did not come across as a credible witness. Therefore nothing indicated to us that he appreciated his wrongdoing.

44. Having considered all material facts before us, we find no basis on which to alter the decision of the Registrar. We find, in particular, that the debarment period of five years, reckoned from 16 February 2016 was appropriate in the circumstances.

45. Accordingly the appeal is dismissed, each party to pay its own costs.

Dated at Pretoria on this 20 day of September 2016.

L Dlamini

CHAIRMAN: L DLAMINI

G.O Madlanga

G. O. MADLANGA

N.P Dongwana

N.P. DONGWANA