

THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

CASE NUMBER:

In the matter between:-

GOOLAM NABI AMOD

Appellant

and

REGISTRAR OF FINANCIAL SERVICE PROVIDERS

Respondent

DECISION

A. INTRODUCTION:-

1. The Appellant had lodged his notice of appeal in terms of Section 26(2) of the Financial Services Board Act 97 of 1990 (FSB Act) on 6 March 2013 against the Registrar's decision to debar the Appellant from rendering any financial services to clients by virtue of Section 14A of the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS Act). Such appeal has since not been finalised. It was eventually set down for hearing on 24 February 2016.

B. ISSUES FOR DETERMINATION:-

2. The Appellant sought a postponement at the eleventh hour, a day before the appeal hearing. On 23 February 2016 the Appellant as well as the Appellant's attorney advised the Secretariat of their unavailability to attend the appeal hearing on 24 February 2016.

3. The Registrar strongly opposed this postponement on grounds set out below and insisted that the matter proceed. It was on this basis that the Appeal Board was thus seized with considering whether a postponement of the hearing was justified or not.

C. THE POSTPONEMENT:-

4. Various correspondence was received from both Mr Miranda, the Appellant's attorney as well as the Appellant regarding their unavailability to attend the appeal hearing on 24 February 2016.
5. The reason submitted by the Appellant was that he had an "*emergency surgery*" on 22 February 2016, which did not allow him to travel. Mr Miranda, in further correspondence also advised the Secretariat that he also underwent "*an operation*" on 19 February 2016 and thus was also unable to attend.
6. Both the Appellant and Mr Miranda specifically stated that they both had the intention to attend the appeal hearing, but their medical conditions did not allow them to travel.
7. The grounds for seeking a postponement essentially were:
 - 7.1 it was the first time that the parties sought a postponement in respect of the appeal;

- 7.2 a postponement was justified as it was sought on the basis of the Appellant and his attorney's medical condition;
- 7.3 the Appellant had and has continued to practice as a financial services provider in the interim without any complaints;
- 7.4 there would be no prejudice on the part of the Registrar if the postponement is granted;
- 7.5 To substantiate the aforesaid a medical certificate from Dr Howard in respect of the Appellant as well as his airline ticket reflecting the date of travel being scheduled on the date of the appeal, was amended to the Secretariat of the FSB.
8. The Registrar indicated its opposition to the postponement upon receipt of the Appellant's correspondence. In summary the Registrar contended as follows:
- 8.1 Mr Amod had knowledge of the appeal hearing since 3 November 2015 (at least 4 months prior notice);
- 8.2 he was offered an opportunity of more than three months to submit argument in support of his grounds of appeal. He certainly made use of this opportunity and his written submissions were before this Appeal Board;

- 8.3 Hence, the Appellant would not be prejudiced in any way if the appeal proceeded as the grounds of appeal are before the panel;
- 8.4 This appeal has a history of extensive and undue delay of almost three years. The Registrar undertook to furnish the Appeal Board with a time line chronology which demonstrated how the unnecessary and protracted list of events that followed prevented the finalisation of this appeal.
9. At every stage of the appeal process the Appellant had delayed such process in *inter alia* the following respects, namely:
- 9.1 by his legal representative/counsel being unavailable;
- 9.2 by lodging (interim application) in terms of Section 26 B(12)(a)(i) of the FAIS Act and which turned out to be a futile attempt;
- 9.3 in failing to expedite the Section 26B(12)(a)(i) process by particularly frustrating the Registrar and the Secretariat in setting such application down for hearing;
- 9.4 in failing to furnish "*new evidence*" in respect of the aforesaid application;
- 9.5 in failing to file the "*new evidence*" timeously;

9.6 at the eleventh hour requesting assistance from the Appeal Board to subpoena witnesses to the interim hearing.

D. FINDINGS AND ANALYSIS:-

10. Having heard the Registrar's counsel and having taken cognisance of the Appellant's reasons for a postponement, this Appeal Board is obliged to exercise its discretion in considering a postponement.

11. It is trite law and the following principles are applicable in respect of considering a postponement. I make particular reference to ***Myburgh Transport v Botha t/a SA Truck Bodies 1991 (3) SA 310 Namibia Supreme Court*** at pages 314-315 where His Lordship (the late Chief Justice) Mohamed set out *inter alia* the following principles:

- a Court is slow to refuse a postponement if the parties' unreadiness was not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case;
- a postponement sought should always be *bona fide* and not used as a ploy for taking advantage to which such party is not legitimately entitled to;

- a primary factor which is always considered is the issue of prejudice – the general inquiry is: whether the prejudice caused by a postponement to the adversary can be compensated by an appropriate order of costs?

12. The Appeal Board must therefore be convinced that the Appellant has demonstrated good cause to justify such postponement.

13. In applying our minds we have taken various factors into consideration, which does not entitle the Appellant to a postponement, namely:

13.1 The Appellant was in a position to brief another legal representative to appear on his behalf. He should have been aware that Mr Miranda was unavailable at least a week before when Mr Miranda went for surgery;

13.2 Alternatively Mr Miranda was on brief and should have advised the Appellant of his unavailability (due to his surgery). The Secretariat only learns of Mr Miranda's unavailability on 22 February 2016;

13.3 Already on 3 November 2015, two and half months prior, the Appellant was aware that the date on which the appeal hearing was set down for. He had ample time to prepare and brief his legal representative, being Mr Miranda or another representative

;

13.4 This matter has dragged on since May 2013, when the Appellant's appeal was filed. The appeal process was delayed due to an unsuccessful interim application to introduce further and new evidence. This process took over 2 years before the appeal could proceed;

13.5 Between the period August 2015 to November 2015, an amicable date between the parties could not be arranged. Eventually the Chairperson issued a directive stipulating the date for the appeal hearing to be 24 February 2016 and to which both parties were amenable to.

14. At this juncture to give effect to our reasoning, it is necessary to highlight our concerns already raised at the interim hearing and which was relayed to Mr Miranda:

“... Now we come two years down the line and what you are saying, all you bring an application with two affidavits... The crux of this issue, is the Registrar's findings ... How do you dispute that? Should not old Mutual and those other witnesses have been subpoenaed here to show that there was a dispute of fact ... What I'm saying, Mr Miranda is that how does it take your matter further?”

“I've got to allow this evidence, if there is good cause. Part of good cause is that these documents were not before the Appeal Board ... They are material and your colleague is saying that this is just another ploy to delay the matter. There are no relevant documents ... You are holding onto straws just to try to delay the process.”²

15. To date the Appellant has failed to show good prospects of success and his *bona fides* in finalising the matter.

¹ p 54 of the transcript of the interim application proceedings

² p 55 of the transcript of the interim application proceedings

16. He has failed to file one shred of evidence demonstrating that the Registrar's findings could be wrong. He had a perfect opportunity to do so, with the interim application.
17. The previous "*obstructive*" delays and the last request for a postponement prevents the finalisation of this matter. It is reiterated that at least a representative for Mr Amod could have been present to represent him. It was noted that Mr Amod was not present at the Section 26(B)(12)(a)(1) hearing. Only Mr Miranda appeared on behalf of Mr Amod.
18. In our view the request for this postponement is not justified. The delays have already prejudiced and will further prejudice the Registrar. This Appeal Board finds that it is in the interest of justice to finalise the matter. The Registrar has an obligation to the industry and to the public to finalise its appeals.
19. It is obviously convenient for the Appellant not to finalise this appeal as he had been granted leave to continue his business as a financial service provider. By virtue of the Chairperson's ruling of the debarment was suspended on 2 May 2013.
20. We have considered the Appellant's heads of argument where he set out his grounds on appeal. He essentially challenged his debarment on *inter alia* the following grounds:

20.1 ***“He was not given any hearing the rules of natural justice, the audi alterem partem rule and the Promotion of Administrative Justice Act Section 3 of Act 3 of 2000 were ignored.”³***

20.2 that the FSB’s conduct and procedure followed was one sided and flawed. He was not furnished with all the information which Old Mutual’s based its findings;

20.3 If the FSB properly considered the matter it would have found that he did not contravene the fit and proper requirements in terms of Section 8(1)(a) of the FAIS Act.

21. Given the history of this matter, we are of the view that the Appellant had more than sufficient time, at least three years to challenge the Registrar’s findings. He failed to do so despite being given fair opportunities to bring new and further evidence as well as deal with his appeal.

22. Hence the aforesaid grounds cannot be sustained. Consequently the Registrar’s decision of 22 February 2013 to debar him stands. The Appellant was effectively debarred for 2 months and 1 week – 22 February 2013 to 2 May 2013 (when his application to continue his services as a financial services provider was granted). The remaining debarment period is shift for a period of at least 4 years and 10 months.

³ para 9 of Appellant’s heads

E. COSTS:-

23. On the issue of costs, the Registrar requested that the Appellant should be liable for the costs of the appeal. We take cognisance of the Registrar's argument that the Appellant delayed and frustrated the finalisation of this appeal. However the record reflected that he is a "*man of straw*" and to date has difficulty even in paying his legal representative's fees. We therefore deem it just and equitable that in this instance each party pays its own costs.

We therefore make the following order:-

- (1) The appeal is dismissed;
- (2) Each party is to pay its own costs;
- (3) The debarment period begins to run from the date of this decision for a period of 4 years and 10 months.

SIGNED AT PRETORIA ON THIS 7th DAY OF MARCH 2016.

H Koovertjie

H KOOVERJIE
Chairperson

J Damons

J DAMONS
Panel Member

N Dongwana

N DONGWANA
Panel Member