

**THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD
HELD AT PRETORIA**

CASE NO: A24/2017

In the complaint between:

CHIPA KINGSLEY BALOYI

Appellant

and

THE REGISTRAR OF FINANCIAL SERVICES PROVIDERS

Respondent

DECISION

1. The Appellant appealed against the Registrar's decision to withdraw the Appellant's licence and debar him for a period of five (5) years on the basis that he failed to comply with the "*fit and proper*" requirements of the General Code of Conduct for Authorised Financial Services Providers and Representatives (Code of Conduct).
2. The decision to debar was premised on an inspection conducted by the Financial Services Board ("FSB") in terms of Section 21 of the Inspection of Financial Institutions, No. 80 of 1988. The Registrar came to the conclusion that the Appellant failed to meet the honesty and integrity requirements, thus contravening the Financial Advisory and Intermediary Services Act 37 of 2002 ("FAIS") Act and the Regulations thereto.

3. The findings of the inspection revealed that certain employees from the Financial Planning Institute (“*the FPI*”) assisted a large number of candidates to unlawfully obtain their regulatory qualifications by intercepting and manipulating their exam answer sheets in return for payment. Simply put, the *modus operandi* of these officials was to assist such candidates to unlawfully pass their regulatory examinations in an improper, fraudulent and dishonest manner.
4. At this juncture it is necessary to emphasize that the Appeal Board, in making a determination, is confined to the record and may only give consideration to further evidence if same is included in the record by way of Section 26(B)(12) of the Financial Services Board Act (“FSB Act”).
5. The Registrar made, *inter alia*, the following findings, namely that:
 - 5.1 the Appellant passed RE1 and RE5 exams respectively under the FPI;
 - 5.2 on the 26th of May 2012 the Appellant paid Ms Zanele Xaba (“*Ms Xaba*”) an administration assistant employed with the FPI, an amount of R3 000.00;
 - 5.3 the payment was made three days after the Appellant wrote the RE5 exam;
 - 5.4 between 7 May 2012 to 26 May 2012 the Appellant had communicated with Mr Mhlungu and Ms Xaba several times;

- 5.5 the Appellant's exam results were manipulated, which led him to pass.
6. Initially when questioned by the inspectors, the Appellant denied making payment to Ms Xaba and moreover submitted that he was unable to recollect the events immediately upon being questioned. However, in his later version to the Registrar, the Appellant admitted having contacted Ms Xaba and Mr Mhlungu and also making payment to Ms Xaba.
7. On appeal, the Appellant relied on, *inter alia*, on the following grounds, namely that:
- 7.1 he was only able to recall the events after being shown the deposit slip as well as the cell phone communication, between him and the employees of the FPI. This was due to the extensive time lapse between the alleged transgression and the investigation conducted.
- 7.2 he had interacted with these officials three years ago and it was therefore reasonable that he could not recall the events immediately.
- 7.3 he had and has no established relationships with any of the officials as it was only a once-off event.
- 7.4 his failure to reflect the events was in no way intended to deceive the investigators or to conceal the truth or act in a dishonest manner.

8. With regard to his explanation concerning the payment of the R3 000.00, his versions were as follows:

“... I was informed that I could receive assistance by having my examination papers looked at thoroughly. I do not know at the time what that action actually involved. I therefore placed my trust fully on the people I was engaging with as I was made to believe they were working in the examination environment on a daily basis and was therefore part of their responsibility to assist the candidates.

... I had no idea that the service that I was being promised was actually to temper (sic) with the examination papers and by doing so to manipulate the results to be in my favour.

Upon realising what the actual intentions of the FPI's ex-employees was, I accept that I have been implicated in activities which I could have easily avoided by being more vigilant. The experience I have gone through regarding the fraudulent manipulation of examination results is unfortunate, unintended and something I deeply regret.”¹

9. In his response to the notification of the Registrar's intention to withdraw his authorisation, (letter dated 10 May 2017) he explains his interaction with the FPI officials as follows:

“One of the inspectors then asked me how I can deposit the money to someone I do not know. I explained to them that I made the said deposit because before writing the examination we attended revision classes and we were told by the instructor that our exams scripts to receive attention it deserves we advised to call the FPI call centre and ask for Mr Mhlangu, which I did and he told me to call him on his cell phone, he then gave me his cell phone number which I

¹ P10 and 11 of the record, (affidavit on appeal).

contacted him on and he referred me to Ms Xaba. I contacted Ms Xaba for further information and she then told me about the amount of R3 000.00 which was to be paid and afterwards the reason for the payment was. She then explained that the money is for them to look into my script because the markers are lazy to give our exam scripts proper attention they deserve. She told me to pay the R3 000.00 in her bank account. Then I deposit the money into her account and called her to check if she received the money and she confirmed receiving the amount of R3 000.00 into her bank account. After a few days she called me and informed me that the results were positive."² (My underlining)

When asked by the investigators if he thought that this was normal procedure, his response was *"No, it's not, I found that it's not, but I thought that is the way these people are doing it as much as the information was given to me like that."*³

10. As alluded to above, there is no doubt that the employees were involved in the aforesaid explained *modus operandi*. These candidates were requested to first contact Mhlungu, who would lure them into the trap. He would forward their details to Ms Xaba who would then intercept their exam scripts, correct the answers and reseal the envelopes. There is evidence that at least 119 exam scripts were tampered with.
11. The office of the Registrar found that it highly improbable that the payment of R3 000.00 and his interaction with Ms Xaba and Mr Mhlungu was an insignificant once-off occurrence and was not something he would remember.

² P101 of the record.

³ P89 of the record.

12. By virtue of Section 10 of the Determination of Fit and Proper Requirements read with Board Notice 219 of 2012; representatives were required to successfully complete the RE1 exams by the extended deadline of 31 March 2013. This meant that unless he passed the examination or was exempted therefrom, he would no longer be allowed to render financial services.
13. A further observation noted is that he did not merely have a once off conversation with Ms Xaba, the investigation revealed that at least 19 calls were made. Whether there were any conversations is hard to tell. However, one cannot rule out the fact that he had conversed with Ms Xaba more than once.
14. Section 2 of the “Code of Conduct” states that:
- “A provider must at all times render financial services honestly, fairly, with due skill, care and diligence and in the interest of clients and in the integrity of the financial services industry.”***
15. The issue for determination is whether the Appellant was being misled, or whether he was aware of the scam and colluded with the FPI employees so that they would pass the exam.
16. In the affidavit on appeal, specific reference is made to his version at paragraph 16, when he states the following:

“When I was informed that I could receive assistance by having my examination paper looked at thoroughly, I did not know at the time what that action actually involved. I therefore placed my trust fully on the people I was engaging with as

I was made to believe that they were working in the examination environment on a daily basis and it was therefore part of their responsibility to have this canvassed.

17. He then further submitted that this belief was further entrenched by the fact that he was requested to only make the payment after writing the exam and receiving the results.
18. He goes on further to state that ***“I should have interrogated them at that stage in order to gain an understanding of how they were going to attend to looking at my examination paper thoroughly. By doing so I would have then opportunity to fully understand what the intentions were and which would have put me in a position to make an informed decision.”***
19. The question that begs an answer is whether his explanation constitutes a reasonably probable explanation?
20. Cognisance is taken of the explanation proffered by the Appellant that the only reason for payment of R3 000.00 was so that his paper would be given attention. This Panel cannot from the evidence before it, find that the Appellant was aware of the *modus operandi* initially. However, there is no doubt he had become aware of it at some stage during the latter conversations he had with her and with Mhlungu. This placed his integrity at risk.
21. As a financial services provider in the finance services he should have found it odd when requested to pay the R3 000.00 into Ms Xaba’s personal account and not FPI’s bank account.

22. On his own version, after the fact, he confirmed that that was not the normal procedure. By stating that he considered the process followed by them to be their way of doing business, demonstrates carelessness and negligence on his part.
23. Integral to the existence of any financial services provider is that they meet the competency requirements. Subject to the provisions of the FAIS Act, the Registrar is obliged to lay down qualifying criteria against which regulatory examinations will be set and whereby it will evaluate and recognise qualifications as part of the list of recognised qualifications by virtue of Section 8(1) of the FAIS Act. As part of the "*fit and proper requirements*", not only is the FSP required to comply with personal character qualities and honesty and integrity but also required to satisfy prescribed level of:
- Competency;
 - the necessary experience;
 - the qualifications;
 - Correcting the regulatory examinations; and
 - be financially sound.
24. In this instance, the Appellant certainly falls short of the fit and proper requirements, particularly in respect of his competency, and qualifications and his honesty and integrity.
25. He has been operating in an industry, an in all probability knowing that his qualifications were not genuine. Even if this Panel gives him the benefit of

the doubt that he was misled initially (namely that he was advised that the payment was to ensure that his paper received the attention), the glaring improbabilities shall persist. For instance, by paying the amount into a personal bank account is irregular and should have raised concern. Moreover, his submission that he trusted that this arrangement was part and parcel of the FPI's duties is ludicrous. This conduct was sheer negligence and unbecoming of a financial services provider in this industry.

26. His failure to ascertain the true purpose and even dishonest behind the R3 000.00 was not only negligent, but to an extent dishonest.
27. In Jones v Gordon (1877) 2 App Cas 616 (HL) the court stated that if the jury came to the conclusion *“that he was not honestly blundered and careless, but that he must have had a suspicion that there was something wrong and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind – ‘I suspect there is something wrong and if I ask questions and make further inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover’ – I think that is dishonest.”*
28. Judge Mokgoro in the matter before the Appeal Board, in Basil Jukile Joka and the Registrar of Financial Services Providers, case number A4/2014 at par 38 – 39 stated:

“In the context of a country like South Africa where most consumers of financial services have no sound knowledge and understanding of the general financial investment environment and are mostly relevant on FSP's when they make important financial investment decisions and are as a result most vulnerable in that regard, the need to require appropriate set standards of

financial services is critical. It ensures that financial services are provided with the necessary competence and clients are provided with the required quality of services.

Thus, under Section 8(1), the Registrar of the FSB has a statutory obligation to ensure that FSP's and their representative are fully compliant with the provisions of the Act and all other relevant legislation and laws, before authorisation is granted to FSP's to operate in the field particular products."

29. Ad paragraph 42 she further stated:

"Whereas the personal qualities of honesty, integrity and financial soundness speak mostly to the trust, members of the public must have in the way financial services are rendered, the comprehensive and operational ability required of FSP's, inspire confidence that they can be relied upon for quality intermediary services and advice, based on their experience and other qualifications. The idea of Section 8(1) is therefore not to make application for licences unduly difficult. It is to protect the public."

SANCTION:

30. The Appellant contended that the sanction is harsh and that mitigating factors exist which should be considered. He submitted that he has been in the financial services industry for a period of over 17 years and has been practising as an independent insurance broker and has never been involved in any acts of dishonesty or never been found guilty of any misconduct previously.

31. He has a clean track record and this incident in respect of the examination was the only aspect tarnishing his reputation.
32. The Registrar holds a contrary view and the argument submitted is that:
- Since 2012 (over 5 years) he has been operating in the industry knowing all well that his qualifications were fraudulent. Each time the Appellant rendered financial services to clients knowing that he was not qualified to do so.
 - The Appellant has placed different versions before the investigators, the Registrar and the Appeal Board. That in itself demonstrates that he was in collusion with the FPI officials.
 - The Registrar is duty bound to protect the public against persons who act with dishonesty. This is clearly an instance which justifies a disbarment.
33. The Panel was referred to the **Financial Services Board and Barthram and Another 2015 3 All SA 655 SCA** where the court emphasized that lacking character requirements of honesty and integrity and competency is a danger to the public. The interest of the public must always be protected.
34. The Registrar in terms of Section 9 of the FAIS Act has a discretionary power when considering the debarment period. Certain Guidelines exist which empowers the Registrar to impose a sanction between 2 to 5 years. The severity of the transgression is a primary factor to consider. However, the mitigating and aggravating circumstances have to be weighed up as well.

35. This Panel is also mindful not to interfere with the Registrar's decision unless there is just reason to do so.

36. However, in exceptional cases, it may depart from the Registrar's decision. the question whether a departure is justified must be considered with reference to the entire context of the case.⁴

37. The primary consideration is "fairness" to all concerned.

38. In National Union of Metalworks of SA v Vetsak Co-operative Ltd and Others, the Appellate Division stated:

"Fairness comprehends that regard must be had not only to the position and interest of the worker, but also those of the employer in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral and value judgment to establish facts and circumstances..."

39. In the matter before this Appeal Board in Mondisa Cindi v Registrar of Financial Services Provides, case A31 of 2013 at par 61, when considering the sanctions, the following factors were considered:

39.1 Whether the period of suspension will be sufficiently correct to avoid recurrence;

39.2 Where the Appellant has shown remorse;

39.3 Where his private life has been affected.

⁴ Airodexpress (Pty) Limited v Chairman, Local Road Transportation Board, Durban and Other 1986 (2) SA 663 A at 680 E-F.

40. The Appellant has been disbarred since 23 June 2017. A mitigating factor which we cannot ignore is that he has been in the financial service industry for over 17 years and appears to have, but for the transgression in issue, maintained a clean track record.
41. The Appellant further conceded that he has not been diligent enough in respect of his dealings with Mr Xaba, he should have been more cautious and made the necessary enquiries before depositing monies into her personal bank account.
42. From the evidence, there is no doubt that he became aware that his paper was tampered with. However, there is insufficient evidence on the record that when he learnt of this.
43. It goes without saying, that the debarment has affected his private life as in all probability his financial means. However, having considered the facts before us, and the fairness principle, we find that the sanction of 5 years is harsh. In light of the aforesaid, a more appropriate sanction in light of the mitigating facts is 2½ years. Such period of suspension would be sufficient to avoid a recurrence.
44. In the premises, the following order is made:
 - (1) The Appellant remains disbarred for a period of 2½ years in terms of Section 14A of the FAIS Act, which period should commence from date of debarment, that is 23 June 2017.

SIGNED at PRETORIA on this 6th day of DECEMBER 2017.



ADV H KOOVERJIE SC

On behalf of the Panel including

- Mr J Pema
- Mr G Madlanga