

IN THE FINANCIAL SERVICES TRIBUNAL

CASE NUMBER: FSP5/2019

In the matter between:

NOEL BAKER

Applicant

And

MMI GROUP t/a METROPOLITAN

Respondent

(Registration no: 1904/002186/06)

Tribunal: Mr. JM Damons (chairperson of the Tribunal hearing), Mr. E Phiyega and Mr N Nxumalo (Tribunal panel members)

For the Applicant: Ms. S Govender

For the Respondent: No appearance

Hearing: 19 June 2019

Decision: 03 July 2019

Summary: Application for reconsideration of a decision in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 ("FSRA") – application to reconsider the debarment decision – Condonation for the late filing of reconsideration application – affording a party an opportunity to be heard prior decision to debar.

DECISION

1. INTRODUCTION

1.1 In this matter the applicant applied for reconsideration of the debarment decision dated 08th November 2018,¹ in terms of section 230(1) of the Financial Sector Regulation Act 9 of 2017 (“FSRA”).

1.2 The applicant is Mr. Noel Baker (Mr. Baker), a former Financial Services Representative (FSR) of MMI Group t/a Metropolitan, an authorized Financial Services Provider (FSP) and the Respondent in this matter.

1.3 The reconsideration application was filed with this Tribunal on the 16th January 2019. The Respondent expressed its intention to oppose this application on the 18th February 2019 and filed its opposing papers on the same date. Both parties filed heads of argument. However, prior to the hearing, the respondent filed a notice of withdrawal, withdrawing its opposition to the re-consideration application. The Tribunal thus proceeded on the basis that the reconsideration application is unopposed.

2. FACTUAL BACKGROUND AND COMPLAINT

2.1 The gist of the matter concerns an incident wherein it was alleged that Mr. Baker consulted with a client and sold a product for which he was not mandated. The Respondent instituted a disciplinary hearing which resulted in the dismissal of Mr. Baker.

2.2 In the hearing the chairperson found that Mr. Baker acted in a dishonest manner. It must be noted that Mr. Baker opted to resign before the finalization of the disciplinary hearing. In view of the resignation, the Chairperson of the disciplinary hearing stated that Mr. Baker’s conduct disqualifies him from the

¹ See record of proceedings at page 6

requirements of a fit and proper person to hold the position of an Financial Services Representative (FSR).

2.3 On the basis of the Chairperson's findings the Respondent issued a notice of debarment and same was submitted to the FSCA in October 2018. Mr. Baker was notified of the debarment on the 08th November 2018. It should be noted that the record of these proceedings did not contain a formal notice from the FSCA advising the parties of the debarment notice. The record contains an email from the Respondent advising Mr. Baker of the debarment². For purposes of this matter, the 08th November 2018 will be regarded as the date on which the debarment was noted and communicated to parties.

2.4 Mr. Baker filed his reconsideration application on the 16th January 2019³. The reconsideration application is thus out of time.

3 CONDONATION APPLICATION

3.1 In his application for re-consideration, Mr. Baker also applied for condonation of the late filing of the reconsideration application. I have already stated that the Respondent filed it opposing papers. Therefore, this matter was dealt with on an is unopposed basis.

3.2 Firstly, Mr Baker submitted that there is no need for the condonation application as according to his view, the reconsideration application was filed within the required time frames. Mr. Baker submitted that, if it is found that his application was indeed late, the degree of lateness is less than six days and thus very minimal. He submitted that he has good prospects of success as he was never afforded an opportunity to make representation prior to the Respondent taking a decision to debar him. With regard to the reasons for lateness he stated that he had submitted his application as at the 07th December 2018 but was

² See record of proceedings at page 6

³ See record of proceedings at pages 1 to 5

informed that he did not properly serve the application for reconsideration on the affected parties hence the reasons for being late.

3.3 Rule 9 of the Financial Services Tribunal Rules⁴

- “9 An application for reconsideration must be made:**
- (a) if the applicant requested reasons in terms of section 229 of the Act, within 30 days after the statement of reasons was given to the applicant; or**
 - (b) in all other cases, within 60 days after the applicant was notified of the decision, or such longer period as may on good cause be allowed.”**

3.4 A clear reading of this rule dictates that an affected person must file a reconsideration application within 60 days from the date on which that person became aware of the decision. If the affected person fails to adhere to this time frame, he/she must show good cause why this Tribunal should hear his/her application despite same having been filed outside the prescribed time frames.

3.5 In this matter, Mr. Baker was aware of the debarment notice from the 08th November 2018. In terms of the rules, he had 60 days to file his reconsideration application. His application was only filed on the 16th January 2019. The 60 days period for which Mr. Baker should have filed his application expired on the 07th January 2019. The reconsideration application is therefore 6 days late. In view of this finding, Mr. Baker’s submission that condonation was not required is incorrect.

3.6 It is trite that in dealing with condonation application, one must consider the reasons for lateness, degree of lateness, prospects of success and prejudice to the other party⁵. Having considered Mr. Baker’s submissions, this Tribunal is of the view that the degree of lateness is very minimal. A delay of 6 days is easily excusable. Moreover, Mr. Baker reason’s for being late are reasonable. This weighs in favor of granting the condonation.

⁴ Rule 9(b) of the FSCA rules

⁵ See in this regard *Melane v Sanlam Insurance Company Limited* 1962 (4) SA 531 (A)

3.7 Mr. Baker also submitted that he has good prospects of success as he was not afforded an opportunity to be heard prior the decision to debar being taken. In view of our findings on the merits below, this Tribunal accepts that he has reasonable prospects of success in the reconsideration application. Lastly, he submitted that the Respondent will not suffer any prejudice if the condonation is granted but he will suffer severe prejudice if he is denied condonation. This application is unopposed and thus Tribunal finds no reason why the condonation should not be granted.

3.8 In view of the findings above, this Tribunal is of the views that Mr. Baker has shown good cause for the late filing of the reconsideration application.

4 ANALYSIS OF THE ARGUMENTS ON THE DEBARMENT DECISION

4.1 For this Tribunal to reconsider this matter, its powers are set out in section 234 of the FSRA. As this matter concern the debarment of an FSR, it will be important to consider section 14(2)(a) of the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS Act) which provides that debarment process must be lawful, reasonable and procedurally fair. The FSP thus has a duty to show that the debarment process was lawful, reasonable and procedurally fair.

4.2 In this matter, lawfulness and reasonableness of the decision to debar were not challenged and are not decisive. Mr. Baker's main argument was that he was not afforded an opportunity to be heard prior to the decision to debar him being taken. These submissions are not opposed. In view of this, this Tribunal finds that the debarment was not effected in accordance with a fair procedure. Consequently, the debarment should be set aside and remitted back to the Respondent to follow due process. This Tribunal has on previous occasion pronounced on a fair procedure in debarring Financial Service Representatives.

4.3 In debarment processes the FSP must give an FSR a right to be heard prior to taking a decision to debar. This is in line with the rules of natural justice.⁶ It is only after the FSR has given reasons as to why he/she thinks he/she should not be debarred and the FSP having considered those reasons and still finds that there is reasons to proceed, that the FSP can proceed with the debarment.

4.4 In this matter Mr. Baker was not afforded such an opportunity prior the decision to debar being taken. He was summoned to attend an internal disciplinary inquiry for misconduct and in his capacity as an employee. Once the disciplinary hearing was concluded and upon realising that the Applicant had already resigned from the Respondent's employ, it was decided that the only effective sanction for that misconduct would be his disbarment. The Respondent ought to have issued the Applicant with a notice of intention to debar him, setting out the reasons for the proposed debarment and inviting him to make representations as to why he should not be debarred. Having failed to do so, it follows therefore that the debarment process did not comply with section 14 of FAIS Act in that it was procedurally unfair.

5. In terms of section 234 of the FSRA, this Tribunal is authorised to set aside and substitute the decisions contemplated in paragraph (b) of that provision with its own decision. Debarment of representatives in terms of section 14 of the Financial Advisory and Intermediary Services Act 37 of 2002 ("FAIS") falls within the decisions contemplated in paragraph (b) of the FSRA, and therefore this Tribunal is empowered to substitute it.

6. However, on the basis that the merits of the finding that the Applicant are not fully ventilated in the record before us and the Respondent was not available to us – having withdrawn its opposition, we are unable to consider substituting the decision.

⁶ Audi alteram partem (or audiatur et altera pars) is a Latin phrase meaning "listen to the other side", or "let the other side be heard as well". It is the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.

7. On the basis of the findings and reasoning above, this Tribunal is of the view that this matter should be remitted back to the Respondent for further consideration.

8. As stated in the preceding paragraphs the debarment of Mr. Baker was procedurally unfair and this makes the following orders:

8.1 The application for condonation is granted;

8.2 The decision to debar Mr Baker is accordingly set aside;

8.3 The matter is remitted back to MMI Group Limited t/a Metropolitan for further consideration; and

8.4 No order as to costs.

Signed at PRETORIA on the 03rd day of July 2019 on behalf of the Tribunal



CHAIRPERSON
JM DAMONS