

THE FINANCIAL SERVICES TRIBUNAL

CASE NO: FSP46/2023

In the matter between:

PHOLOSO MAILA

Applicant

and

INNOVATIVE GROUP DISTRIBUTION (PTY) LTD

Respondent

Decision on Papers

Date of Decision: 1 December 2023

Summary: Application for Reconsideration in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 ("FSR Act") of the decision of the Respondent to debar Applicant – Non-compliance with the fit and proper requirements of honesty including fraud and falsification of documents in terms of section 13(2) of the Financial Advisory and Intermediary Act, 37 of 2002 ("FAIS Act"). Application for Condonation for the late filing of the Application for Reconsideration.

DECISION

A. INTRODUCTION

1. The Applicant applied for reconsideration in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 ("the FSR Act") of a decision taken by the Respondent, dated 25 October 2021, to debar her in terms of section 14(1) of the Financial Advisory and Intermediary Services Act, 37 of 2002 ("FAIS Act"), which debarment was recorded by the Financial Sector Conduct Authority ("FSCA ") on 1 December 2021.

2. In addition to the reconsideration application, the Applicant seeks condonation for the late filing of her application for reconsideration.
3. The Respondent opposes both the condonation and the reconsideration applications.
4. The parties have waived their rights to a formal hearing.
5. The issues before us are twofold:

5.1 Firstly, whether this tribunal should condone the late filing of the reconsideration application. If we dismiss the application for condonation, that will be the end of this matter, and the reconsideration application stands to be dismissed. If we grant the condonation, we will consider the merits of the reconsideration application.

5.2 If successful with the condonation application, the second issue is whether the Respondent was correct to debar the Applicant because she no longer meets the requirements of fit and proper as required by section 13(2)(a)(i) of the FAIS Act. It is common cause that the Applicant was found guilty of dishonesty and fraudulent misconduct during the disciplinary hearing conducted on 7 October 2021.

B. CONDONATION APPLICATION

6. Relevant background facts to the condonation application

7. The facts of this case and the parties' respective versions relevant to the condonation are recorded in the papers filed on behalf of the respective parties. There is no need to burden this ruling with a repetition of the factual background. However, I will briefly state the Applicant's reasons for condonation as well as the chronology of event.

8. Applicant's reasons for condonation

9. It is asserted by the Applicant that upon termination of her employment with the Respondent on 11 October 2021 she was 7 (seven) months pregnant and preparing to commence maternity leave.

10. This period was marked with emotional distress, and she grappled with uncertainty about the appropriate course of action.
11. Subsequently, when her son was 5 (five) months old, he was hospitalized, tragically resulting in her losing her son on 17 June 2022. Following the loss of her son, she experienced significant stress and took some time to return home to Limpopo to gather herself.
12. Unaware that she could file a reconsideration application and under the misconception that legal assistance was necessary for that process, she did not initiate the reconciliation proceedings earlier.
13. It was only through the advice of a friend that she learned about the option to seek assistance from the FSCA. Subsequently, thereto she filed her reconciliation application on 16 August 2023 at the Financial Services Tribunal ("FST").

Chronology of events

14. The Applicant was employed as a sales representative of the Respondent from 17 September 2018 until her dismissal on 11 October 2021, rendering financial services for underwritten products. This case relates to the Applicant's employment to sell MFA Credit Shortfall products. At all relevant times she was a representative of the Respondent, a Financial Services Provider ("FSP").
15. On 23 September 2021 a notice of suspension was sent to the Applicant pending the outcome of an investigation regarding alleged irregularities. Based on the outcome of the investigation, a notice to attend a disciplinary hearing was sent to the Applicant on 30 September 2021.
16. It is common cause that on 7 October 2021 a disciplinary hearing was conducted against the Applicant based on 5 charges relating to dishonesty including fraud and falsification of documents. These charges against the Applicant were all based on similar facts namely that the Applicant fraudulently altered the market value of a vehicle, resulting in her securing a sale to the client of a shortfall coverage policy by reducing the premium at the expense of the Respondent and the policyholders. It was submitted by the Respondent that the Applicant was paid commission on these sales, which she would not otherwise have earned if not for her

fraudulent conduct. The Applicant attended the disciplinary hearing, her rights were explained to her, and she was provided with supporting documentation. A copy of the Respondent's disciplinary code was furnished to the Applicant as far back as 17 September 2018, receipt of which was acknowledged by the Applicant. The Applicant was found guilty on all charges, resulting in her dismissal with immediate effect. She was further advised of her right to appeal or to refer her dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). The Applicant elected not to appeal nor refer the matter to the CCMA. The Applicant's dismissal was confirmed in a notice of dismissal, dated 11 October 2021, receipt of which was acknowledged by the Applicant.

17. On 25 October 2021 a notice of intention to debar was sent to the Applicant. The grounds and reasons for debarment was encapsulated in this notice and she was afforded an opportunity to make written submissions in response thereto within 5 working days. She was further requested to forward her written submissions to compliance@innovation.group or post it to 155 West Street, Sandton, 2196. The Applicant was advised that her failure or refusal to respond in writing to the notice or to provide acceptable and legitimate reasons for her failure to respond will result in the conclusion of the debarment process. It was expressly stated that such failure or refusal will be interpreted to imply that she has waived her right to make a submission in response. The Applicant has opted not to make any written submissions.
18. Subsequently, the Applicant was debarred. Although there is no notice of debarment in the record the Applicant was at all relevant times aware of her debarment as appears from her augmented grounds for reconsideration that, *"The Applicant seeks reconsideration of the decision of the Respondent to debar her dated 10/November/2021."*

Legal principles

19. In terms of section 230(2) of the FSR Act, an aggrieved person may apply to the tribunal for a reconsideration of a decision taken against it, which application must be made-

"(a) if the applicant requested reasons in terms of section 229, within 30 days after the statement of reasons was given to the person; 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."*

20. The Applicant did not request reasons for the decision to debar her in terms of section 229 of the FSR Act and therefore she does not meet the requirements in terms of section 230(2)(a) of the FSR Act.
21. Subsequently, the Applicant had 60 days after notification of the decision to debarment her, which on her own version was 10 November 2021, and which expired on 10 January 2022.
22. The Applicant's application for reconsideration was filed on 16 August 2023 being 1 year 7 months out of time.
23. The legal principles and factors as stated in *Steenkamp and Others v Edcon Limited (CCT29/18) [2019] ZACC 17* and *Grootboom v National Prosecuting Authority and Another (CCT/08) [2013] ZACC 37* to consider in determining whether or not it is in the interest of justice to grant condonation are the nature of the relief sought, the extent and cause of delay, the effect of the delay on the administration of justice, the reasonableness of the explanation for the delay, the importance of the issue to be raised and the prospects of success. Some of these factors may justifiably be left out of consideration in certain circumstances for example where the delay is unacceptably excessive and there is no reasonable explanation for the delay, there will be no need to consider the prospects of success.
24. It is also trite that condonation "*cannot be had for the mere asking*" (See: *Grootboom* case). A party seeking condonation must make out a case entitling it to the court's or tribunal's indulgence. It must show sufficient cause. This requires giving a full explanation for the non-compliance with the rules of the court or the tribunal.

Application of legal principles to facts

25. In considering the explanation given by the Applicant for her non-compliance with the time frame for filing her application for reconsideration as stipulated in the section 230(2)(b) of the FSR Act, this tribunal finds that the Applicant's delay is unacceptably excessive, and her explanation is unsatisfactory. The crux of her explanation for her late filing of her application

for reconsideration is that she did not know that she can bring an application for reconsideration of her debarment and that she was under the misconception that the application should be done by a lawyer. Further, that the application for reconsideration was delayed due to the passing of her son.

26. It was submitted by the Respondent that the Applicant was appointed as a representative in terms of the FAIS Act having had the knowledge and training required to know the relevant legislations, policies and processes that came with her position. In addition, the Applicant submitted that the Respondent was provided with FAIS and debarment training, which the Applicant acknowledged (Annexure "H"). A copy of the Debarment Policy was provided to the Applicant (Annexure "I"). Thus, it can be accepted that the Applicant had knowledge of the debarment process to be followed against her debarment.
27. Although this tribunal sympathise with the Applicant for the loss of her child. The debarment process began in October 2021, concluded in November 2021, and confirmed by the FSCA in December 2021. The Applicant confirmed that her child passed in June 2022. The time difference of which is months apart from the date of the debarment and no reasonable explanation was given for the delay during this period.
28. In considering the prospects of success, this tribunal had regard to the seriousness of the allegations against the Applicant and the crux of the Applicant's submissions for reconsideration namely that the debarment process was procedurally unfair in that there was no formal debarment hearing neither was she notified of the debarment.
29. In the Applicant's augmented grounds for reconsideration it is stated that, *"The Applicant seeks reconsideration of the decision of the Respondent to debar her dated 10/November/2021."* This tribunal accepts that even if the Applicant was not formally notified of her debarment, on her own version, she was aware of her debarment. In addition, the Applicant does not dispute that she received the notice of intension to debar and that she opted not respond thereto. Neither were any reasons for her failure or refusal to respond to the aforementioned notice provided, resulting in the commencement and finalization of the debarment process.

30. Section 14 of the FAIS Act does not require that an oral hearing be held. The debarment process may form part of employment related disciplinary proceedings which may be embarked upon by the employer against a representative. It is common cause that a disciplinary hearing was held, that the Applicant was provided with the supporting documentation relating to the charges brought against her as well as with the relevant policy documentation, that the Applicant had the necessary training and knowledge of the debarment process, that a notice of intention to debar was sent to her and that she failed to file any written submissions in response thereto. Thus, this tribunal finds that the debarment process was not procedurally unfair and/or defective.
31. For reasons stated above, this tribunal finds that the Applicant has no prospects of success to succeed with her reconciliation application and thus her debarment was justified.
32. To let the Applicant continuing rendering financial services, given the gravity of her misconduct, is not in the interest of justice.
33. For reasons stated above, this tribunal finds that both applications fail.

C. ORDER

1. The Applicant's application for condonation is dismissed.
2. The Applicant's application for reconsideration is dismissed.

SIGNED on behalf of the Tribunal on this 1st day of DECEMBER 2023.



ADV SALMÉ MARITZ

For self and on behalf of LTC Harms (Chair)