THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

A61/2013

In the matter between

RICKAN S NAIDOO **APPELLANT**

and

REGISTRAR OF FINANCIAL SERVICES PROVIDERS **RESPONDENT**

DECISION

INTRODUCTION

1. This is an appeal in terms of Section 26(1) of the Financial Services Board Act, 97 of 1990 as amended ("the FSB Act") read with Section 8(1)(a) of the Financial Advisory and Intermediary Services Act, No. 37 of 2002 (FAIS Act).

2. On 10 June 2013, the Registrar of Financial Services Providers ("the Registrar") took a decision to debar Rickan Naidoo ("the appellant"), an authorised financial advisor, from rendering financial services for a period of five years.

3. At all material times hereto, the appellant provided intermediary services for Discovery Life Investment Services (Pty) Ltd (Discovery) in terms of the agreement dated 05 November 2007.

4. As the basis for its decision to debar the appellant, the Registrar alleged firstly, that the appellant no longer satisfied the fit and proper requirements with reference to personal character qualities of honesty and integrity referred to in the FAIS Act. Secondly, the Registrar alleged that the appellant contravened Sections 2 and 3(1)(d) of the General Code of Conduct for Authorised Financial Services Providers.

5. The facts informing the Registrar's decision related, inter alia, to the allegation that:

   5.1. The appellant misrepresented to Discovery that 4% commission was due to him as a result of an investment of R 345 000 made by one Ms Ntombela, (the client).

   5.2. The appellant knew that the client had already paid him R 12 000 as commission.

   5.3. The appellant acted dishonestly in submitting an application reflecting the 4% commission to Discovery as commission due to him, when the client had in fact directly paid him. The appellant therefore unlawfully obtained

an additional 4% commission on the client's investment, thus earning double commission.

5.4. The appellant further advised the client that by paying commission directly to him the client would effectively pay less commission than would otherwise have been the case. The appellant assured the client that Discovery would not deduct for commission against her investment.

5.5. Furthermore, armed with information regarding how much money the client held in her investment portfolio, the appellant on two occasions attempted to solicit loans of R 5 000 and R 60 000 from the client.

6. Those were matters, in a nutshell; that the Registrar contended had not been properly addressed at the time of its decision to debar the appellant.

7. On 23 July 2013, the appellant served the notice to appeal the debarment. In his grounds for appeal, the appellant did not deny receiving commission directly from the client. However, he emphatically denied receiving commission from Discovery. As such, the appellant's version was that there was no double commission.

8. On 26 August 2013, the Registrar furnished reasons for the decision as required by the FSB Act.

9. On 27 August 2013, the appellant brought an Application for Interim Relief, which was unopposed. The Chairperson of the Appeal Board suspended the Registrar's decision to debar the appellant pending the outcome of the appeal.

THE APPEAL

10. The appeal was initially set down for hearing on 24 April 2014. On that date the appellant brought a Notice in terms Section 26B (12)(a)(ii) of the FSB Act seeking to introduce information intended to show that he did not receive double commission (new evidence).

11. The appellant contended that the crucial part of the new evidence was contained in commission statements from Discovery. The appellant requested to have the statements on record in order to prove that he did not receive any commission from Discovery.

12. The commission statements were the basis on which the appellant sought reprieve. Counsel for the appellant made this fact abundantly clear during the 26B(12) application. Referring to the commission statements, counsel emphasised the fact that the evidence of the statements was so material and fundamental to the Registrar's decision that it would be a denial of justice not to have it as part of the record.

13. After deliberations the application was granted and the matter was accordingly referred back to the Registrar for reconsideration. The appeal was deferred pending the Registrar's final decision on the new evidence.

14. The Registrar made enquiries with Discovery to verify the contents of the statements. On 9 July 2014, Discovery responded to the Registrar advising that the statements had been generated from an incorrect month. The correct month's statement showed that the appellant had indeed earned commission.

15. On 23 July 2014, the Registrar advised the appellant of the outcome of its enquiries with Discovery and accordingly offered the appellant an opportunity to respond to Discovery's submission. The appellant was given until 31 July 2014 to respond.

16. Despite the Registrar's numerous reminders to the appellant for him to offer an explanation, the appellant failed to respond. On 11 November 2014, the Registrar notified the appellant that he no longer satisfied the fit and proper requirements with reference to personal character qualities of honesty and integrity.

17. On 24 November 2014, instead of providing a response in respect of the Registrar's concerns expressed on the letter of 23 July 2014, the appellant raised a point *in limine*. He contended that the information received from Discovery was inadmissible. He stated that the Registrar ought to have made application in terms of the FSB Act if it intended to introduce such information. However, the appellant expressed his desire to proceed with the appeal.

18. The matter was then referred to the Chairman of this Board who directed the appellant to sustain the point *in limine,* but also to respond in the alternative to afford the Board the opportunity to hear all matters simultaneously.

19. On 26 February 2015, the appellant deposed to an affidavit which restated the point *in limine,* but without any attempt to respond in the alternative to the issues raised in the Registrar's letter dated 23 July the previous year. However, notably the appellant stated that he received commission from Discovery due to an error.

20. The matter was thereafter set down for hearing.

21. At the beginning of the hearing, the appellant's counsel drew our attention to paragraph 5 of the Heads of Argument (Heads) which read: "Without seeking an amendment to the Grounds of Appeal, having considered the advice of his legal representative and having some 20 months to re-consider same of his own accord, the appellant seeks only part of the relief set out in the appellants (sic) Grounds of Appeal."

22. From that point on, the Heads reveal certain admissions, albeit on a limited basis. In particular, the appellant admits that he received double commission. However, it is stated that the appellant received commission in error.

23. Further, the appellant, on the amended version of his grounds of appeal stated that he "appeals only against sentence (sic) …".

24. However, there were factual allegations that were pertinent for sanction that were still in dispute and that required for us to first deal with and dispose of. For instance, the appellant persisted with the argument that:

24.1. He made an error in initially not sending the correct documentation to Discovery, which in any event he rectified as soon as his attention was drawn to the fact that he had made an error;

24.2. At no time did he render financial services dishonestly, unfairly, and without the required due skill and care and diligence;

24.3. He never tried to solicit loans from the client, rather "the client enquired about possible business opportunities with a return. The appellant simply spoke to the client about a business venture which the appellant was then interested in and advised the client that he would contact her … should anything materialise"[1].

25. In light of the above, sanction could not be readily separated from the merits notwithstanding the fact that the appellant had made some concessions that related to the merits.

26. Further, during proceedings and after much ado, the appellant eventually conceded without reservations that he, in fact, did attempt to solicit monies from the client. He also admitted that he received double commission in that the client had paid him when the investment was made, and that Discovery had credited his account with commission on the basis of the application he had made requesting to be paid. It is this application that the appellant alleged contained the error submission in respect of commission.

[1] Grounds of Appeal - paragraphs 5 to 7.

[2] Nichol v Registrar of Pension Funds 2006 (1) All SA 598 (SCA)

ANALYSIS

27. It must be borne in mind in dealing with this matter, that this is an appeal in the fullest sense [2].

28. The appellant placed emphasis on the fact that the conduct complained of was occasioned by error as opposed to misconduct. He was afforded adequate time to explain how the error occurred but failed to do so.

29. In any event, we do not agree with the appellant that the error was occasioned by human error as he described it. It is improbable that the appellant would have confused himself on the application for commission regarding a commission declaration of 0% versus 4%. It is difficult to see how the error would have coincidentally been in respect of the exact same percentage commission that would have otherwise been claimable in respect of the same portfolio.

30. The appellant persistently and for a long time vehemently disputed that he received double commission. He even sought to rely on commission statements that did not relate to the month in dispute.

31. When the Registrar confronted him with the correct statements that revealed he had in fact received commission from Discovery, the appellant resorted to avoiding the issue instead of stating at that stage that he had made an error.

[2] Nichol v Registrar of Pension Funds 2006 (1) All SA 598 (SCA)

32. The appellant had ample opportunity to correct himself if he had in fact made a mistake. He was, on numerous occasions invited to respond (particularly from 23 July 2014 to March 2015). He elected to not respond but instead to persist that the information that spoke against his integrity should not be considered. The appellant sought to rely on what he perceived as a safe technicality.

33. In his affidavit dated 25 February 2015, the appellant went as far as offering "to pay / reimburse the client the amount in question … plus interest to date by 31 March 2015 as well as write her a letter of apology **provided** the Registrar accedes my plea (sic) not to debar…"[3] *[emphasis underlined]*

34. In all of this the appellant never stated that he had made an error. He did not admit any misconduct. He simply bargained with the process in the hope that something would give.

35. Further, the appellant stated in paragraph 5 of his grounds of appeal that, "having considered the advice of his legal representatives and having some 20 months to re-consider same of his own accord; the appellant seeks part of the relief set out in the appellant's Grounds of Appeal". Despite this apparent reconsideration, the appellant proceeded straight into denying the very basis of the claim against him.

36. The appellant seems to have typically played the process until all his options ran out. With reference to the appellant's Heads, all that seems to have happened was that after 20 months the appellant finally accorded the Registrar's decision a

[3] Record page 293 paragraph 3.

proper weighting and eventually reached the conclusion that perhaps his focus should be shifted to reducing sanction.

37. The appellant's timing regarding the intention to deal only with the issue of sanction is relevant. We note that it was only after the appellant had been referred to the record, and had been granted several indulgences to confer with his attorney and counsel during proceedings, that he conceded allegations levelled against him relating to soliciting monies.

38. The alleged error regarding double commission was not explained. The appellant spent a considerable amount of energy and time shifting the blame either to Discovery, the Investigators, or the Registrar, for his own lack of explanation. It was in fact these institutions that afforded the appellant adequate opportunity to evaluate his conduct regarding this aspect of the allegations against him.

39. With regard to admissions, we took cognisance of the fact that the appellant did make certain admissions regardless of when they were made.

40. We observed that generally our courts would view an admission of guilt in favour of the accused but would not regard such admission as a mitigatory factor in itself[4]. Therefore an admission, although a sign of penitence may therefore not be considered as mitigatory in isolation.

[4] R v Mvelase and Others 1958 (3) SA 126(N)

41. In the matter of **Pieter Labuschagne v Registrar of Financial Services**[5] it was stated that when considering the appropriateness of sanction, the Board has to consider whether the appellant admitted to some kind of remorse and admitted his fault [6]. In this matter it was also stated that, it is important for the appellant himself to first properly identify the defect of character or attitude involved, and thereafter to act in accordance with that appreciation. Until and unless there is such cognitive appreciation on the part of the appellant, it is difficult to see how the defect can be cured or corrected. *[emphasis underlined]*

42. Bearing in mind the above, the appellant showed no signs of remorse despite making admissions. He remained resolute that he was a man of integrity.

However, the evidence viewed in totality indicates that at the time of the alleged misconduct, the appellant was in financial distress. He owed Discovery commission of about R 154 000. The appellant's arrangement with Discovery was such that Discovery would have been entitled to retain 50% of commission the appellant earned to reduce commission he owed Discovery. The appellant understood that Discovery would deduct against commission received if the client paid commission to Discovery directly. Unwilling to incur deductions the appellant arranged for the client to pay him directly instead.

43. There was no suggestion that the appellant tried to pay over to Discovery any portion of the monies he directly received from the client. Instead the appellant seems to have consciously snatched the opportunity to have it all to himself and to leave Discovery to hang dry.

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[5] A decision of this Board by Howie J.

[6] The Board relied on Swartberg v Law Society of Northern Provinces 2008 3 All SA 438 (SCA)

44. In the circumstances, the appellant prevented Discovery from recovering on its debt against commission firstly, by requesting payment directly into his own account and secondly, by failing to advise Discovery that commission had been received. The appellant's conduct smacked of a deliberate intention to defraud the process of its natural ability of balancing what he earned against what he owed. This deliberate act perverted the appellant's honesty and integrity.

45. Further, the appellant failed to honestly deal with the client, whom the appellant in his own words described as a person who "needed extra care due to her age and illness"[7]. At the time the client was about 70 years old.

46. As stated above, the appellant conceded during proceedings that he tried to solicit monies from the client on two occasions. The appellant further lied to the client when he advised her that Discovery would not deduct commission against her investment. The record shows that it was by pure chance that the client mentioned that she had paid commission already. The appellant never mentioned this to Discovery at any point.

47. The appellant's lack of honesty and integrity went deep. For the purposes of this matter it suffices to state that we were satisfied that the Registrar's decision was correct.

[7] Appellant's Grounds of Appeal dated 29 October 2013

SANCTION

48. The facts of this matter remain pertinent for sanction.

49. Section 14A of the FAIS Act entitles the Registrar to debar a person contravening any of its provision. The period of such debarment is clearly a matter for the Registrar's discretion[8]. It is trite that the Registrar must exercise such discretion judicially. In the exercise of its discretion regarding the debarment period, the Registrar must have regard to whether or not such period was appropriate bearing in mind the circumstances from which the conduct complained of arises[9]. The appropriateness of the period of sanction will therefore vary according to the facts of each matter.

50. In this matter, the Registrar debarred the appellant for a period of 5 years, which the appellant contends was inappropriate in the circumstances.

51. Counsel for the appellant argued for the suspension of the entire period of debarment. He submitted that a suspension would be in the interest of justice given that, if applied, it would take into account the appellant's personal circumstances.

52. In particular, the appellant's counsel stressed the fact that the appellant was under severe financial pressure which had and continued to have, a negative impact on the appellant's family. A suspension therefore, counsel continued,

[8] Mondisa Cindi vs the Registrar of Financial Services Providers A31/2013

[9] NJ Yekani v the Registrar of Financial Services Providers A5/2014

would enable the appellant to be employed, which would in turn alleviate his family's financial woes.

53. Counsel emphasised that the Board must not lose sight of the fact that the appellant was a first offender and that he has not had a complaint levelled against him during the time when he was allowed to practice in terms of the Interim Relief. He argued further that in any event the amount in respect of which the conduct complained of was relatively nominal.

54. In his submissions, counsel also referred us to various decisions of the Law Society, the Health Professions Counsel of South Africa and the Medical Schemes Council, as well as to decisions of other Boards.

55. In response, the Registrar argued that a suspension was unworkable under these circumstances. In particular the Registrar argued that a debarment was effectively a suspension. Thus there was no room for suspending a suspension.

56. In our view the pivotal issue is whether or not the Board has grounds in he circumstances on which to interfere with the Registrar's discretion to decide on the period of debarment, a prerogative which Section 14A of the FIAS Act conferred on the Registrar.[10] It follows therefore, that any argument about the suspension of the debarment period becomes relevant only if it could be shown that the Board can interfere with the Registrar's decision on the facts of this matter.

[10] Section 14A provides: The Registrar may at any time debar a person, including a representative, for a specific period from rendering financial services…"

57. We recognise the fact that when the Registrar expresses displeasure regarding the manner in which a person in the position of the appellant has conducted himself, the Registrar's assertion against such particular conduct must be taken seriously unless there are compelling reasons evincing a necessity to rule otherwise[11]. A clear basis must exist to justify interference with the Registrar's discretion[12].

58. We were not satisfied that there was any reason for us to interfere with the Registrar's decision. The appellant was unable to convince us of that at all. His responses to the issues raised amounted mostly to bare denials and where he did manage to explain matters, he did so very poorly.

59. In fact, it is clear from the record, and from what transpired during proceedings that the appellant had his mind set on dragging this matter out until all options were exhausted. No earnest attempt was made to provide compelling reasons that could justify interference with the Registrar's decision.

60. Further, at no stage was the appellant ever prepared to accept that he had done anything untoward, let alone admitting that he fell short of the standard required of him by the FIAS Act, until the very last end when he had no where else to turn. There was therefore no basis on which to find any differently to the Registrar on the basis of penitence as the appellant showed no remorse.

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[11] Julius Preddy and Another v The Health Professions Council of South Africa 54/2007 [2008] SASCA 25

[12] Mondisa Cindi v Registrar of Financial Services Providers A31/2013

CONCLUSION

61. The appellant conceded the merits of the matter. Therefore the decision of the Registrar was correct.

62. In the context of the entire case, there appears to be no exceptional circumstances to warrant interference with the decision of the Registrar regarding sanction.

63. In the circumstances the appeal fails.

ORDER

64. The appeal is dismissed; costs will be costs in the course.

Dated at Pretoria on this 12th day of June 2015.

L Dlamini

CHAIRMAN: L DLAMINI

L Makhubela

L MAKHUBELA

NP Dongwana

NP DONGWANA