

FINANCIAL SERVICES TRIBUNAL

CASE NO: FSP2/2022

In the matter between:

AIDAH NOMASONTO MAZIBUKO

APPLICANT

and

SANLAM DEVELOPING MARKETS LIMITED

RESPONDENT

Tribunal: S Jikela SC (Chair); Adv M. Holland and Mrs Puli K. E. Moloto-Stofile

Appearance for the Applicant: No appearance

Appearance for the Respondent: Ms K Molefe

Date of hearing: 30 September 2022

Date of decision: 31 October 2022

Summary: Procedural fairness of the debarment proceedings

DECISION

INTRODUCTION

1. This is an application in terms of section 230 of the Financial Sector Regulation Act, 2017 (“FSR Act, 2017”) for reconsideration of the debarment decision. The applicant was, in terms of section 14 (1) of the Financial Advice and Intermediary Services Act, 202 (“FAIS Act, 2002”) debarred for she was found to fall short, or no longer complied with the requirements referred to in section 13 (2) (a) of the FAIS Act, 2002 or contravened or failed to comply with the provisions of the FAIS Act, 2002 in material respect.
2. The application was heard via an electronic medium. Unfortunately, the applicant experienced connectivity challenges and was not able to successfully connect from her electronic device, in spite the effort by the Tribunal to connect

her. To that end, the applicant consented to the hearing proceeding in her absence and on the papers before the Tribunal.

FACTUAL BACKGROUND

3. The factual basis for the debarment as it appears from the papers is as follows: the applicant, a Management Outsource representative of the Respondent lodged policy applications with her supervisor for auditing, verification and thereafter capturing in the respondent's system. In the process of verifying the policy applications, irregularities were noted in two of the policies submitted by the applicant. The transactions recorded on the one bank statement were identical to several transactions in the other bank statement for the second policy application. Both bank statements had the exact bank stamp. One of the policyholders was the applicant's spouse and had confirmed authorization of the policy and the accuracy of the bank statement. As a result of the noted irregularities, the respondent conducted an investigation into the alleged irregularities in two of the applicant's issued policies.
4. The investigation established that the applicant's explanation that one of the policy applicants may have fabricated his own bank statement to reflect the same transection as those that appear in her spouse's bank statement, was highly improbable. Thus, it was rejected by the respondent.
5. The outcome of the investigation was that there was *prima facie* evidence to support the contention that the applicant intentionally misrepresented the respondent into accepting a policy in the name of a client, which contained a false bank statement and false monthly salary. Further, *prima facie* evidence was established to suggest that the applicant fabricated the bank statement in one of the client's names by inflating the client's salary information and concocting several bank transactions in order to earn undue commission. It was determined that the applicant's actions resulted in her misusing information, in contravention of FAIS General Code of Conduct and that she failed to render financial services honestly, fairly, with due skill, care and diligence, and in the interests of the client and the integrity of the financial services industry. In the end, the respondent initiated a debarment enquiry, found the applicant guilty of fraudulent misrepresentation and terminated the applicant's contract with it.

6. The applicant's grounds for this reconsideration application as stated succinctly on her papers are mainly on the assertion that, the debarment process was procedurally unfair, in that she was never notified of the respondent's intention to debar her, nor was she advised of the reasons for the debarment, thus, was never afforded a reasonable opportunity to make submissions against the debarment. Further, the applicant asserts that she was not notified of the debarment outcome as required by the FAIS Act, 2002, therefore, she only became aware of the debarment on 13 January 2022.
7. Consequently, the applicant's application for reconsideration is dated 13 January 2022. In line with the applicant's assertion that she was never notified of the debarment outcome, there is no explanation for the delay and neglect to approach the Financial Sector Conduct Authority ("FSCA").
8. The respondent opposed the application on the basis that:
 - 8.1 on 22 July and 23 July 2019, the applicant was sent smses to her cellphone number, notifying her of the debarment hearing to be held on 14 August 2019. Similarly, a notice of debarment enquiry together with documentation relevant to the said enquiry, including the investigation report and the policy and procedure on debarment, was transmitted to the applicant through her email address.
 - 8.2 on 15 August 2019, an sms of the debarment outcome was sent to the applicant to her cellphone number as well as to her email address. On both occasions, the applicant failed to respond to this correspondence.
 - 8.3 The respondent asserts that the debarment of the applicant originates from the forensic investigation and the subsequent report and findings that the applicant had contravened or failed to comply with any provision of the Financial Advisory and Intermediary Services Act, namely lack of honesty, integrity and good standing, in a material manner.
 - 8.4 Further, the respondent submitted that, the applicant has not shown good cause why the decision to debar her should be reconsidered.

LEGAL FRAMEWORK AND ANALYSIS

9. Section 14 (1) of the FAIS Act, 2002 provides that:

“An authorized financial services provider must debar a person from rendering financial services who is or was, as the case may be a representative of the financial services provider if the financial services provider is satisfied on the basis of available facts and information that the person does not meet, or no longer complies with, the requirements referred to in section 13 (2) (a) of the FAIS Act, 2002 or have contravened or failed to comply with any provisions of this Act in a material manner.”

10. Section 14 (2) (a) and (b) of the FAIS Act, 2002 states:

“Before a provider effects a debarment in terms of sub-section (1), the provider must ensure that the debarment process is lawful, reasonable and procedurally fair. If a provider is unable to locate a person in order to deliver a document or information under sub-section (3), after taking all reasonable steps to do so, including disseminating through electronic means where possible, delivering the document or information to the person’s last known email or physical business or residential address will be sufficient.”

11. In terms of section 14 (3)(a) (i) to (iii) of the FAIS Act, 2002 a financial services provider must:

“Before debarring a person:

- (i) give adequate notice in writing to the person stating its intention to debar the person, the grounds and reasons for the debarment, and any terms attached to the debarment, including, in relation to unconcluded business, any measures stipulated for the protection of the interests of clients;*
- (ii) provide the person with a copy of the financial services provider’s return policy and procedure governing the debarment process; and*
- (iii) give the person a reasonable opportunity to make a submission in response.”*

12. Section 14 (3) (b) provides:

“A financial services provider must also immediately notify the person in writing of its decision, the person’s rights in terms of chapter 15 of the Financial Sector

Regulation Act, and any formal requirement in respect of proceedings for the reconsideration of the decision by the tribunal.”

13. Indeed, the papers before the tribunal adequately establish that the respondent had reasonable grounds to find that the applicant no longer satisfy the requirements of section 13 (2) (a) of the FAIS Act, 2002 and the applicant acted contrary to the provisions of part 2 (2) of FAIS Act, general code of conduct, 2014 in that she failed to render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry.
14. There is no evidence before the tribunal to suggest that the respondent was unable to locate the applicant in order to deliver documents and/or information relating to the debarment process. Accordingly, section 14 (2) (a) of the FAIS Act, 2002 provides for dissemination of documents and/or information through electronic means. In this instance, the respondent has established that at all material times relevant to the debarment process the applicant was furnished with the debarment notices accompanied by the applicable annexures and the debarment policy. By sending such documents by means of applicant’s known email address, the respondent complied with the provisions of section 14 (3)(a) (i) to (iii) of the FAIS Act. We are of the view that the applicant was afforded reasonable opportunity to make submissions in response to the intention to debar her. Of significance is that the applicant’s email address in the records of the respondent is still in use and has been used by the Tribunal officials to dispatch documents, directives and notices pertaining to this hearing.
15. Further, there is sufficient evidence to suggest that the applicant’s cell phone number that was used by the respondent to notify the applicant of the intention to proceed with a debarment process, is still in use. In this regard, we took note of the fact that the applicant was accessible and reached on the day of the hearing, on the same cellphone number that was utilized by the respondent to disseminate the debarment information.
16. Having considered all the documents relevant to this application, oral submissions made on behalf of the respondent, and the relevant legislative provisions we find that:

16.1 the evidence before the Tribunal establishes that the debarment process was lawful, reasonable and procedurally fair.

16.2 the applicant has not followed the correct process to have her name removed from the debarment list of representatives with the FCSA.

17. In the circumstances:

The application for reconsideration is dismissed.

Signed on behalf of the Tribunal

S. Jikela SC

With panel members:

Adv M. Holland and

Mrs Puli K. E. Moloto-Stofile