

THE FINANCIAL SERVICES TRIBUNAL

Case No.: FSP11/2024

In the matter between:

BONGANI PROGRESS MASELA

Applicant

and

MOMENTUM INSURE COMPANY LTD

Respondent

DECISION

Tribunal: LTC Harms
PR Long

Date of decision: 30 July 2024

INTRODUCTION

1. The respondent, as financial services provider, debarred the applicant as a financial services representative in terms of section 14(1) of the Financial Advisory and Intermediary Services Act 37 of 2002 ('the FAIS Act'). In its notice of intention to debar the respondent stated that the applicant '*no longer meets the requirements of honesty and integrity as envisaged by the FAIS Act*'.
2. The applicant challenges the debarment and applies for the reconsideration of his debarment in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 ('FSR Act').

3. The parties have agreed that this matter can be decided on the papers filed of record.

FACTUAL BACKGROUND

4. The applicant was, prior to his dismissal, employed by the respondent as a financial services representative. The allegations levelled against the applicant are that:

- 4.1 A client of the respondent instituted a claim against it for a motor vehicle accident wherein the motor vehicle was written off.
- 4.2 The applicant failed to add 'car hire' to the client's policy which resulted in the client being provided with a courtesy motor vehicle for a period of 30 days.
- 4.3 The client contacted the applicant via WhatsApp and enquired from him to assist her with extending the use of the courtesy vehicle as her claim had not been finalised.
- 4.4 The applicant informed the client that he knew someone that could assist her with the extension but that that person required payment of R1200.00.
- 4.5 According to the client the applicant insisted that they meet privately and in person for her to pay him the money in cash.

- 4.6 The applicant met with the client, and she paid him the money.
- 4.7 The applicant provided the client with the name and cell phone number of a '*Lerato*' who was to do the extension for the client – however, the cell phone number does not exist and Lerato could not be traced.
- 4.8 The client's use of the courtesy vehicle was never extended.
- 4.9 The applicant ought to have referred the client to its claims department as he has no authority to grant any extension for the use of a courtesy vehicle.
- 4.10 '*[T]his serves to confirm that [the applicant] purely intended on eliciting a payment and bribe from the client as it was intended to bypass standard procedure*'.
5. The applicant denies that he took money from the client as a bribe and for purposes of extending the use of the courtesy vehicle by the client. He states that the WhatsApp messages do not relate to the extension of the use of the courtesy vehicle and instead that he assisted the client by taking her to hospital visits and doctor appointments and running errands for groceries. The money which he received from the client was an amount of R600.00 for repairs to the tire of the rental vehicle.

6. The applicant claims that he gave the client the details of the person who could assist her with the repairs – that is what the money was for. He never took money from her for personal gain.
7. The applicant alleges in his augmented grounds for reconsideration that he dealt with the client during the time when there was a delay in settling her claim and by the time he met the client, the car hire was overdue by 5 days.
8. In debarring the applicant, the decision maker relied on the findings made by the chairperson of the applicant's disciplinary hearing. The decision of the chairperson in the disciplinary proceedings record the versions of the parties. According to the respondent, the client contacted the respondent and reported that the applicant informed the client that he will arrange for an extension of the car hire and she would give him R1200.00 for this. However, the person whom the applicant claims would assist the client, could not be traced and their contact number does not exist. The applicant was negligent in not providing car hire to the client and in providing the client with 'the NCB10'. The negligence resulted in the respondent having to pay for the car hire and delayed the processing of the client's claim. The said chairperson also relied on the WhatsApp messages between the client and the applicant in finding the applicant guilty of the 'charges' against him.
9. In sanctioning the applicant, the chairperson (of the disciplinary hearing) found:

'...regardless of whether the employee received R1200 for a car extension (as per the complaint by the client) or the R600 for the rim replacement of the hired car (as per the employee's account of events) the employee had demonstrated behaviour that went against the company Code of Ethics furthermore not following due procedure. Whether the client is called upon to testify is irrelevant as the employee by his own account (and in his WhatsApp communication) admitted to taking the client to an unauthorised service provider and alleging to paying R600 to an individual there to obtain a rim...'

10. The applicant was summarily dismissed on 17 August 2023.

11. In the notice of intention to debar the applicant was invited to attend a debarment hearing on 4 December 2023. In its notice of intention to debar the respondent states its reasons for debarment process that the disciplinary proceedings revealed that the applicant had failed:

'...to comply with the proper process to extend client courtesy car and receiving money from a client to bypass the standard procedure. Exposing the client to financial harm and the Company to serious reputational damage.'

THE APPLICATION FOR RECONSIDERATION

12. The notice of intention to debar the applicant was issued after the applicant's dismissal

13. In its reasons for debarring the applicant, the decision maker cites a second ground of debarment not cited in the notice of intention to debar but which formed part of the disciplinary inquiry. This relates to an allegation that the applicant breached the terms of his suspension.
14. However, this aspect can be ignored because on its own it could not justify a debarment, and we proceed to consider the first charge.
15. The applicant seeks a reconsideration of the decision to debar him on the basis that, in essence, he did not take a bribe from the client for purposes of extending the use of the courtesy vehicle by her and therefore did not breach the respondent's policy. He ran errands for the client and the money he received from the client was paid to the person who was supposed to repair the damage to the tire of the rental vehicle. The applicant also complains that he was instructed not to contact the client. The client was not called as a witness (by the respondent) nor is there an affidavit by the client confirming her version of the events. Moreover, the terms of the applicant's suspension were that he was prohibited from making contact with any of the respondent's employees and from entering the respondent's premises. In the result, he was not afforded an opportunity to challenge the version proffered by the client.
16. Lastly, the applicant referred his alleged unfair dismissal to the CCMA and the respondent paid him R40 000.0 in relation to that referral. According to the applicant he 'won' and despite his request, the respondent has failed to disclose what the monies were for.

ANALYSIS OF THE EVIDENCE

17. In an email dated 7 July 2023 from Mr Ngewu to Mr Fivaz (both of the respondent), the former states that *'we received a voice note from a client'*. Accordingly, the client claimed that the applicant *'stole her car hire money'*. The client also claims that *'she kept her car hire longer than what she was supposed to'* and as a result she owed Avis an amount of R7500. The applicant advised the client that she needed to give him *'sugar money (R1300) and a claims consultant would arrange for the extension of the car hire'*. The applicant provided her with the number of the claims consultant, Lerato, who would assist her, however, the vehicle was never extended. The client also sent all the WhatsApp messages exchanged between her and the applicant to Mr Ngewu.

18. In an email dated 10 July 2023 from Mr Fivas to Messrs Kerford and De Beer (presumably investigators of the respondent), Mr Fivas states that the client reported a claim to the respondent for a vehicle accident where the vehicle was written off. A staff error was loaded against the applicant as he never added car hire to the client's policy. The client was however provided with a courtesy vehicle for 30 days after which she was required to return the vehicle. The client made contact with the applicant via WhatsApp and asked him to assist her with extending the use of the courtesy vehicle. The applicant informed the client that he knows someone that could assist her with the extension and that that person had to be paid R1200. *'He [the applicant] refrained from discussing this R1,200.00 over WhatsApp messages and told the client on a phone call to meet him somewhere and bring him cash as he did not want to leave any trace of the*

money exchange, the client met with him and paid him the cash. Although he does not discuss the client handing over the R1,200.00 in the attached messages, he does make several references to repaying the client the “25th” and thereby admitting that the R1,200.00 does indeed exist and needed to be paid back to the client’.

19. In the final paragraph of the email, Mr Fivas request the recipients to *‘advise if you are in a position to continue with the investigation and disciplinary process’*.
20. The WhatsApp messages formed part of the record which served before the Tribunal. Some of the messages were in isiZulu and others in English. Many of the messages are illegible.
21. The first message starts on 22 May – presumably 2023. The dates and times of the subsequent messages are however illegible. There were also voice notes exchanged between the parties – these however did not serve before the Tribunal.
22. Be that as it may, from the first messages it appears that the applicant requests the client’s banking details stating that he will forward it to *‘her’*. The client provides a screenshot of her bank card reflecting her banking details. She then asks him to *‘do it today’* because she is *‘taking it now’* and that she will put in a full tank of petrol. The applicant then makes reference to someone else (likely *‘Lerato’*) and that that person has said that they will go to work on Thursday the

25th *'because she did not know that she was dealing with someone that is not reliable'*.

23. It appears that there was an undertaking from an unidentified person ('she'/'her'/'Lerato') to pay the client by the '25th'. For what exactly, the messages do not state. However, when the money was not paid by the 25th, the client sent a message to the applicant enquiring whether to contact his managers that he, the applicant, robbed her of R1200.00 *'or momentum because I need my money'*. The applicant then asks the client if she wants the manager's number. To which the client responds, *'yes please'* and that she will inform her lawyers as well. The applicant responds by stating that he helped her with the hope that she was a *'human being'* but instead she is an *'animal'*, that she knows he did not rob her, that he will inform Avis that she took the car to an *'unauthorised workshop'*, and that she needs to pay him for the transportation on the day and all the places he took her.
24. The client then states that she does not care, and that the money can rather go to Avis than being *'chowed'* by him. She also states, *'what transportation when I was busy putting petrol for you and buying you food'*. Later she states that the applicant told her that the *'lady'* will pay her by the 25th and now it's *'a different story'*. The applicant states in response that he tried to get hold of *'her with no luck, remember you the first client to screw him...she won't do any business with me at all because I bring the wrong clients'*.

25. In response the client states that she did not 'screw' anyone, that the applicant said that he would help her but made a fool of her. The applicant then states that '*with the transportation*' it was '*helping but now we are on a different page*'. The applicant states that he sent '*her a message*' – presumably Lerato. The client then forwards a message from Avis to the applicant wherein Avis seeks payment of R7500.00. She then says that she needs '*that cash*' and that Avis will blacklist her if she does not pay. In response the applicant states that '*she*' was supposed to have deposited the money, whereafter the client asks for '*her*' details and threatens to report the applicant to the respondent as she has '*all the proof*'. The applicant claims that she has no proof. It seems the number which the applicant gave of '*her*', does not exist and the client then claims that there is '*no other woman*' and that the applicant took her money.
26. The applicant then states that he will pay her minus his expenses for transporting her 'to look for parts', 'hospital' and 'wine'. The messages end there.
27. First, it does not appear from the record that an actual investigation was done by Messrs Kerford and De Beer as requested by Mr Fivas. At the disciplinary inquiry Mr Fivas' testimony was very limited. He testified that the applicant was negligent in not providing the client with car hire, that '*Lerato*' could not be traced and that the '*contact number provided by the client for this person does not exist*'.
28. Second, a reading (insofar possible) of the WhatsApp messages do not make mention that the client requested assistance with the extension of the use of the courtesy vehicle or that the R1200.00 was intended for that purpose. This the

respondent concedes. Whilst payment of 'R1200.00' is mentioned by the client in the WhatsApp messages, the messages do not disclose the intended purpose or use of the R1200.00.

29. Third, in the email from Mr Fivas he states that the WhatsApp messages make reference to the *applicant* repaying the client on the 25th and that this serves as proof that the R1200.00 exists and needed to be paid to the client. This is of course incorrect. The applicant never admits that he must pay the client, instead payment was required by 'she'/'her' – presumably 'Lerato', on the 25th. The applicant does at some point undertake to pay the client, in lieu of payment by Lerato, less his 'expenses' for transporting the client.
30. Lastly, the applicant claims that the client owes him money for transporting her to look for 'parts', 'wine' and to hospital. The client never denies that the applicant provided her with transportation for these things and in fact the client states that she put petrol in the applicant's car and bought him food. This appears to confirm the applicant's version that he ran errands for the client.
31. What is apparent is that: the applicant and the client met; the applicant assisted the client by running errands for her and she in turn put petrol in his car and bought food for him (perhaps even paid him to do so); their relationship soured due to monies not being paid on the '25th'; the purpose and use of the monies are not disclosed in the WhatsApp messages; and as a result of the non-payment the client reported the applicant to the respondent.

32. The WhatsApp messages, which appears to be the best evidence obtained by the respondent for debarring the applicant, do not support the allegations that the applicant took money from the client in exchange for assisting her with the extension and thereby breaching the respondent's policies. This is the basis for his debarment.

ORDER

33. Accordingly, we make the following order:

The decision to debar the applicant is set aside.

SIGNED at SANDTON on this the 30th day of JULY 2024 on behalf of the Panel

A handwritten signature in black ink, consisting of a large, sweeping initial followed by a series of smaller, connected strokes.

PR LONG