

THE FINANCIAL SERVICES TRIBUNAL

Case Number: **FSP18/2022**

In the matter between:

JABU CEDRICK SHABANGU

Applicant

and

OLD MUTUAL FINANCE (RF) (PTY) LTD

Respondent

Tribunal: Adv Michelle Le Roux, SC (Chairperson), Adv William Ndinisa and Adv
Mustaque Holland.

For the Applicant:

Mr Luyanda Sandiso Luthuli of Ntozake
Attorneys;

For the Respondent Applicant:

Mr Bongani Masuku of Cliff Dekker
Hofmeyr Attorneys.

Date of Decision:

7 October 2022.

*Summary: Application for reconsideration – Financial Advisory and Intermediary
Services Act, 37 of 2002 – section 14(2)(a) – the process must be lawful,
reasonable, and procedural fair.*

DECISION

INTRODUCTION

1. The Applicant, Mr Jabu Cedrick Shabangu, approached this Tribunal in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 (“the FSR Act”), challenging the decision of the Respondent, dated 5 April 2022, to debar him (“the Application”).
2. The Respondent, Old Mutual Finance (Rf) (Pty) Ltd, is an authorised Financial Services Provider (“FSP”) and the decision maker in this matter.

BACKGROUND

3. The Applicant was employed by the Respondent from 1 November 2019 as a Financial Consultant, by virtue of his role in the Respondent's offices located at the Heidelberg Mall, Western Cape, and he is also a representative in terms of the Financial Advisory and Intermediary Services Act, 37 of 2002 (“the FAIS Act”).

Respondent's Version

4. On receipt of a complaint from a Mr P.P Lethea, the Respondent's Forensic department attended to investigate allegations that the Applicant committed acts of dishonesty by making unauthorised payments and/or transfers from Mr P.P Lethea's Old Mutual “*Money Account*”, while using his own personal cell phone, which resulted in the following charges being preferred against the Applicant:-

- “1. Dishonesty: it was discovered on or around 22 July 2021, in that you inserted a customer's (Mr P.P Lethea's) sim card into your personal cell phone to download the Money Account App, and registered the customer for Money Account (AccNo 5561493305) on your personal cell phone.***
- 2. Dishonesty: In that you retained the above customer's Money Account card after disbursing R 14 954.06 (loan ref: 1965675004) on 22 July 2021 into the customer's Money Account (AccNo. 5561493305) and transacted by paying R 4200.00 to Bidvest account number 22787314301, R 2800,00 to Standard Bank account number 70375134 through the customer's MA App on your phone without the consent and knowledge of the customer.”***

Applicant's version

5. In an affidavit deposed to by the Applicant on 10 September 2021, the Applicant admitted to perpetrating both acts of dishonesty, as cited by the Respondent, and that his conduct was wrongful, by stating that, ***“The wrong thing I have done was borrowing him my other cellphone to receive the verification code for the loan and also to do the transfers.”***

THE DEBARMENT ENQUIRY

6. In terms of the Respondent's *“Old Mutual Finance (OMF) Internal FAIS Debarment Guide”*, ***“The debarment must be effected in a lawful, reasonable and procedurally fair manner and this means that the Representative must still be given an opportunity to make representations against the debarment.”***

7. The records before us reflect that the Applicant resigned on 28 September 2021, before disciplinary action could be implemented.
8. The records reflect further that the Respondent notified the Applicant of the intention to debar him based on these facts and thereafter the Applicant requested a formal debarment enquiry, which was held on 28 March 2022. The Respondent embarked on a documentary debarment enquiry process, whereby the charge sheet and statements were made available to the Applicant to enable the Applicant to make representations.
9. The records reflect further that the Adjudicator, appointed by the Respondent to chair the debarment enquiry, considered the charges, the representations made by Mr Luyanda Sandiso Luthuli of Ntozake Attorneys ("Mr Luthuli") on behalf of the Applicant, and the representations made by the Respondent in his deliberations.
10. The records reflect further that, after having considered the evidence presented at debarment enquiry, the Adjudicator made a recommendation to the Respondent's Executive Management that the Applicant should be debarred. Thereafter, the Respondent's Executive Management decided that the appropriate sanction was the debarment of the Applicant, which was communicated to the Applicant by way of email on 5 April 2022 , with the Notice of Debarment dated 5 April 2022 attached thereto ("the Notice of Debarment").

11. The Notice of Debarment informed the Applicant that he may approach the offices of the Financial Services Tribunal should he feel aggrieved by the debarment.
12. The records reflect further that, after having received the Notice of Debarment, on 5 April 2022 Mr Luthuli requested that the Adjudicator appointed by the Respondent provide the Applicant with reasons upon which the decision to debar the Applicant was based, which further reasons were provided to the Applicant on 25 April 2022.
13. The Adjudicator's further reasons were as follows:-

- “1. The Employer managed to prove that Mr Shabangu was aware that his actions were in contravention with the company policies.***
- 2. The employer proved awareness through the Old Mutual Code of Conduct and Contract of Employment.***
- 3. Mr Shabangu did not deny the fact that he had transferred funds from the clients' Money Account using his personal cell phone.***
- 4. In his declaration, Mr Shabangu admits to being aware of his wrongdoing.***
- 5. The employee representative argued that while Mr Shabangu did admit to being wrong, it should not be taken into consideration as English is not his first language.***
- 6. The latter does not hold water as the full declaration was written in English and no other statement on the declaration was disputed.”***

GROUND OF RECONSIDERATION

14. The Applicant approached this Tribunal based on 4 (four) grounds which are in the main falling within procedural and substantive aspects. The grounds for reconsideration may be summarised briefly as follows:-

13.1 The Adjudicator, appointed by the Respondent to chair the debarment enquiry did not call any witnesses to testify in support of the allegations levelled against the Applicant, which meant the Applicant was not given the opportunity to cross-examine any witnesses;

13.2 The Respondent did not lead any evidence to prove the allegations levelled against the Applicant;

13.3 The Respondent did not disclose which witnesses statements it intended to rely upon to prove the allegations levelled against the Applicant; and

13.4 The Applicant was debarred outside of the prescribed period of 6 (six) months that followed the termination of the employment relationship.

LEGAL FRAMEWORK AND ANALYSIS

15. The FAIS Act, read with, amongst other things, the General Code of Conduct and the Determination of Fit and Proper Requirements, 2017 (“the Fit and Proper Requirements”), regulate the conduct of FSPs, key individuals and representatives.
16. Section 2 of the General Code of Conduct states that an FSP must at all times render financial services honestly, fairly, and with due skill, care, and diligence in the interests of clients and the integrity of the financial services industry.
17. Section 8(1), read with section 7(1) of the Fit and Proper Requirements, states, amongst other things, that the representative must be a person who is (i) honest and has integrity and (ii) of good standing.
18. FSPs must ensure that their representatives and key individuals are fit and proper persons to be entrusted with providing financial advice to the investing public and thus FSPs are charged with a duty to take reasonable steps to ensure that representatives comply with any applicable code of conduct and applicable laws in the conduct of business.¹

¹ *Associated Portfolio Solutions (Pty) Ltd and Another v Basson & Others* (554/2019) [2020] ZASCA 64 (12 June 2020), para 22.

19. Accordingly, if it is found that a representative has committed an act of dishonesty sufficiently serious to impugn the honesty and integrity of the representative, the FSP must ensure that the representative is debarred in terms of section 14(1) of the FAIS Act.

Procedural aspect

20. In respect of debarment processes, section 14(2)(a) of the FAIS Act requires that before effecting a debarment, the provider must ensure that the debarment process is lawful, reasonable, and procedurally fair.
21. The records before us indicate that the allegations levelled against the Applicant and statements from witnesses were made available to the Applicant at the initial stages of the debarment process.
22. According to the records, the Applicant was invited to make representations, to challenge the allegations levelled against him, which the Applicant did by retaining the services of a legal representative to make representations on his behalf at the debarment enquiry.
23. At a procedural level, the Applicant alleges that he not given the opportunity to cross-examine any witnesses at the debarment enquiry. However in light of the fact that, in an affidavit dated 10 September 2021, the Applicant admitted to perpetrating both acts of dishonesty and that his conduct was wrongful, there was no legitimate need, procedurally or otherwise, for the Adjudicator

and/or the Respondent to call any witnesses, as the statements from witnesses were made available to the Applicant at the initial stages of the debarment process and not refuted by the Applicant and/or Mr Luthuli.

24. Accordingly, we do not find a basis for the aforementioned grounds of reconsideration, which grounds cannot be sustained.

25. With regard to the Applicant's challenge that he was debarred outside of the prescribed period of 6 (six) months that followed the termination of the employment relationship, the records reflect that the Applicant resigned on 28 September 2021 and the debarment enquiry was set down for hearing on 3 March 2022, but was postponed in order to afford the Applicant the opportunity to retain legal representation, which the Applicant did by appointing Mr Luthuli to represent him at the debarment enquiry on 28 March 2022.

CONCLUSION

26. In perusing the records and on the evidence presented by the Applicant and the Respondent at the hearing, we find no basis that the process of debarment was procedurally unfair. The Applicant was afforded a fair opportunity to make representations during the debarment enquiry.

27. In the circumstances, the Tribunal can find no grounds to interfere with the Respondent's decision to debar the Applicant.

ORDER:

- (a) The application for reconsideration is dismissed in terms of section 234(1)(c) of the FSR Act.

Signed on behalf of the Tribunal

A handwritten signature in black ink, consisting of a circle with a vertical line through it and a horizontal line across the middle, with a long diagonal stroke extending from the top right.

Adv Mustaque Holland.