THE FINANCIAL SERVICES TRIBUNAL

Case №: FSP 29/2020

In the matter between:

KABELO BASIEA SESIOANA	**APPLICANT**
and	
FIRST FOR WOMEN INSURANCE COMPANY LIMITED	**RESPONDENT**

Tribunal: William Ndinisa (chair), Neo Dongwana and Gugulethu Madlanga

Date of Decision: 9 December 2020

Summary: Compliance with section 14(3) and 14(5) of the Financial Advisory and Intermediary Services Act, 37 of 2002 – Failure to participate in debarment processes - Test for bias and lack of sufficient details to establish bias

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DECISION

INTRODUCTION

1. The Applicant was debarred by the Respondent in terms of section 14(1) of the Financial Advisory and Intermediary Services Act 37 of 2002 (as amended) ("the FAIS Act") on or about 15 April 2020. The Applicant is now challenging the decision of the Respondent in terms of section 230

of the Financial Sector Regulation Act 9 of 2017 (as amended) ("FSR Act").

2. The Respondent is a Financial Services Provider and the Applicant was in the employ of the Respondent as its representative in terms of the FAIS Act. On or about 16 June 2020 the Applicant approached the Tribunal and advanced grounds on the basis of which he sought the debarment decision of the Respondent to be set aside.

GROUNDS OF RECONSIDERATION

3. There are three grounds submitted by the Applicant in his bid to challenge his debarment. The grounds are in the main the following: -

3.1 The Respondent failed to comply with section 14(3) of the FAIS Act;

3.2 The Respondent failed to commence debarment within six (6) months from the date on which the Applicant ceased to be a representative of the Respondent in terms of section 14(5) of the FAIS Act and the debarment is time barred; and

3.3 The Respondent displayed bias in respect of the fit and proper requirements.

BACKGROUND

4. The Applicant was in the employ of the Respondent, holding a position of sales consultant. During February 2019 the Applicant was a subject of internal forensic investigation and fraud was being investigated. On 8 February 2019 the internal forensic team interviewed the Applicant in relation to the fraud. This investigation prompted the resignation of the Applicant from the employ of the Respondent on 11 February 2019.

5. What is apparent in this investigation is the Applicant was afforded an opportunity to provide his explanation on the issues that were raised by the forensic investigator. According to the report, the Applicant provided versions which were thereafter changed when confronted with certain facts.[1]

6. A forensic report was eventually produced following the investigation. The internal forensic team concluded in its report that the Applicant, amongst other things, deliberately used the multiple bank accounts and friends to write up fraudulent policies by calling the accomplices and they played the part of clients during the sale.

7. Further, the forensic report stated that the only inference that can be made based on the concerned policies is that all the policies had been written after the Applicant together with other individuals had intentionally

[1] Bundle B, page 9 - 11

colluded to fraudulently write up factitious policies.

8. The Respondent decided to invoke the provisions of section 14(1) of the FAIS Act and debar the Applicant on or about 5 August 2019 ("the Initial Debarment"). The Applicant approached the offices of the Tribunal to challenge Initial Debarment. The Initial Debarment was set aside by the Deputy Chairperson of the Tribunal on 28 November 2019 and the matter was referred back to the Respondent for reconsideration in terms of section 234(1)(a) of the FSR Act.[2]

9. On 11 December 2019 the Respondent initiated what we shall refer to as a second debarment by letter sent to the Applicant ("the Notice"). The second debarment process clearly states the following: -

9.1 the Applicant is given notice of intention to debar in terms of section 14(1) of the FAIS Act;

9.2 a forensic investigation report found the Applicant to be in contravention of the disciplinary policy, code and procedure in that Applicant wrote up to eleven (11) fictitious policies using four different bank accounts;

9.3 the Applicant is required to possess the personal character personality of honesty and integrity, which is one of the elements of the fit and proper requirements;

[2] Bundle B, page 15

9.4 the Applicant is provided with the Respondent's Debarment Policy; and

9.5 the Applicant was provided with all documentation for the debarment.

10. The Applicant was afforded an opportunity to provide reasons in writing within sixty (60) days from the date of the Notice as to why he should not be debarred and why his action should not be deemed as having impugned on his honesty and integrity.

11. Further, the Applicant was afforded with another opportunity to provide his written reasons, within fifteen (15) days from the date of the letter dated 10 March 2020, why he should not be debarred with the Financial Sector Conduct Authority ("the Authority").

12. The letter dated 10 March 2020 carries within itself a warning to the Applicant to the effect that should no response be received within the provided time period, the matter will be assessed for debarment without such responses and, if deemed necessary, a notification of debarment will be provided to the Authority in terms of section 14 of the FAIS Act.

13. Furthermore, both the Notice and the letter dated 10 March 2020 informed the Applicant on how the written reasons are to be sent and that should there be any queries, how to contact the offices of the Respondent.

14. It is common cause between the parties that the Applicant did not respond

to the invitation to submit written reasons showing why he should not be debarred.

15. The Applicant's grounds for reconsideration appear to be attacking the procedural aspect of debarment process. In other words, the Applicant is aggrieved of the manner in which the Respondent handled the matter.

LEGAL FRAMEWORK

16. This Tribunal had on countless occasions considered matters that fall with the framework of section 14(3) of the FAIS Act. Section 14(3) of the FAIS Act states the following: -

A financial services provider must

(a) 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 written policy and procedure governing the debarment process; and

(iii) give the person a reasonable opportunity to make a submission in response;

(b) consider any response provided in terms of paragraph (a)(iii), and then take a decision in terms of subsection (1); and

(c) immediately notify the person in writing of-

(i) the financial services provider's decision;

(ii) the persons' rights in terms of Chapter 15 of the Financial Sector Regulation Act; and

(iii) any formal requirements in respect of proceedings for the reconsideration of the decision by the Tribunal." (own emphasis)

17. Further, section 14(5) of the FAIS Act states the following in respect of a person who has ceased to be a representative of the FSP: -

"A debarment in terms of subsection (1) that is undertaken in respect of a person who no longer is a representative of the financial services provider must be commenced not longer than six months from the date that the person ceased to be a representative of the financial services provider." (own emphasis)

18. In respect of bias, the case of *The President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[3] *("the SARFU case")* states, amongst other things, that a cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals.[4] This legal position applies, amongst others, to civil cases as well as to quasi-judicial and administrative proceedings.[5]

19. Further, *SARFU case* provides the following as to a test in respect of assessing bias: -

"The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case,

[3] 1999(4) SA 147 (CC)
[4] SARFU case, par 35
[5] *Ibid*

that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial." (own emphasis)

20. We shall now consider the specific grounds for reconsideration provided by the Applicant in this matter in light of the aforementioned legal framework.

ANALYSIS

Respondent's failure to comply with section 14(3) of the FAIS Act.

21. The Applicant appeared in person during the hearing of the matter. He persisted on the point that the Respondent failed to comply with the provisions of section 14(3) of the FAIS Act. In the main, the Applicant submitted that when he received the Notice on or about 11 December 2019 and the further notice on 10 March 2020 from the Respondent, the latter did not include a detailed description of the grounds as well as all accompanying evidence and terms attached to the debarment.

22. The version of the Respondent, who was represented by Ms Zelda Swanepoel, is that the Notice that was provided to the Applicant in terms

of section 14(3) of the FAIS Act contained grounds and reasons for the debarment. The Respondent's heads of argument noted that the Applicant wrote up to eleven (11) fictitious policies. Further, it was argued that the misconduct of the Applicant was found to have effect on his honesty and integrity.

23. Further, the Respondent argued that the Applicant was furnished with a copy of the debarment policy. It was submitted by Ms Swanepoel that the Applicant did receive documents in relation to the debarment. According to the Respondent, such documents were received during the period when the Initial Debarment was considered. Further, according to the Respondent, the Notice did refer the Applicants to the documents which were already in Applicant's possession.

24. The Applicant did not deny the fact that he did in fact receive the documents during the Initial Debarment phase. It is the contention of the Applicant that he was dissatisfied that he received the documentation about the debarment before the Notice.

25. It is our view that the contention of the Applicant in this regard is not sustainable for the reason that he did in fact received the documents containing details about the debarment allegations. It does not appear, in our view, that there was any confusion that the documents already received by the Applicants were related and relevant to the Notice.

26. Further, it is our view that the Notice sent to the Applicant on 11 December 2019 did provide grounds and reasons in itself. It cannot be denied, in our

view, that the internal forensic report, which was made available to the Applicant as part of the documents, contains details of the allegations relating to the debarment.

Failure of commence debarment within six (6) months in terms of section 14(5) of the FAIS Act

27. The Applicant contended that the debarment process commenced more than six months later from the date of his resignation. It was argued by the Applicant that he resigned on 11 February 2019 and the commencement of the debarment was on 11 December 2019. The Respondent disputed the contention of the Applicant and stated that: -

27.1 The debarment process did commence within six months from the date of Applicant's resignation;

27.2 Since the Applicant resigned prior to a disciplinary hearing, the matter for debarment was referred to the relevant committee of the Respondent to be considered for debarment; and

27.3 After the debarment committee had considered the matter, it was decided to debar the Applicant and this process was concluded by 5 August 2019.[6]

28. It is our observation that since the Initial Debarment was considered by

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the debarment committee of the Respondent and reported to the Authority, it is apparent that the Initial Debarment commenced within six (6) months from 11 February 2019.

29. In addition to the above, it is our view that when the matter was remitted back to the Respondent for reconsideration in terms of section 234(1)(a) of the FSR Act, the Respondent was enabled to commence the second debarment process on 11 December 2019. A view to the contrary, in our view, will defeat the purpose of section 234(1)(a) of the FSR Act.

30. For the reasons referred to herein above, we hold the view that the contention of the Applicant in this regard is unsustainable and therefore rejected.

The Respondent displayed bias

31. It is the contention of the Applicant that the Respondent displayed bias. The Applicant submitted that the forensic investigator used duress and fear to force some sort of acceptance of the charges. Further, the Applicant submitted that the entire process left him feeling uncomfortable and threatened.

32. Furthermore, the Applicant contended that he could not remain in the employ of the Respondent after having been bullied and verbally abused by the forensic investigator. The forensic investigator, according to the Applicant, took the line of his line manager in advising him to resign to

avoid interrogation.

33. Further, the Applicant contended that the decision to debar him was taken in his absence and decided without his participation.

34. It is the contention of the Respondent that the Applicant elected not to take part in the in the debarment process by failing to make written submissions. Further, the legal representative of the Respondent submitted that the Applicant was given more time to make written submissions, but failed to do so.

35. Furthermore, it is submitted by the Respondent that the conduct of the Applicant is serious and the latter has not bothered to reject, refute and/or defend it. It is submitted by Ms Swanepoel that the conduct of the Applicant is sufficiently serious to impugne his honesty and integrity.

36. It is the contention of the Respondent that there was no evidence of any kind in support of the allegations of bias. The Respondent argues that the statements made by the Applicant are untrue.

37. It is our view that the failure of the Applicant to participate in the debarment process at the appropriate time (phase) in this matter did not assist him in tackling the procedural concerns he had raised. There is nothing of substance, in our view, from the Applicant explaining why he could not participate in placing his version by written submissions. We therefore see not substance in Applicant's contention that he was debarred in his absence and could not participate.

38. In respect of bias, the Applicant submitted that the investigator used duress and force to force him to accept charges. This version, in our view, cannot hold water as there is no evidence that the Applicant did indeed accept charges. In any event, the Applicant did not provide details in respect of the allegations of duress and force.

39. Further, the Applicant contended that the entire process left him feeling uncomfortable and threatened as the tone of voice of the investigator was loud and intimidating. This version of events was never presented during the debarment process and it does not assist the Applicant to raise it at this eleventh hour. Not much details were provided to advance this point.

40. We are therefore of the view that the Applicant failed to advance factual basis to demonstrate that the Respondent did not bring an impartial mind to bear on the adjudication of this matter. It appears in our view, that when the Respondent invited the Applicant to submit written reasons why he should not be debarred, it was an indication that the Respondent's mind was open to persuasion by evidence and/or submissions.

CONCLUSION

41. After having considered the information contain in the records before us and having heard both parties, we are not persuaded that the Respondent did not comply with sections 14(3) and (5) of the FAIS Act.

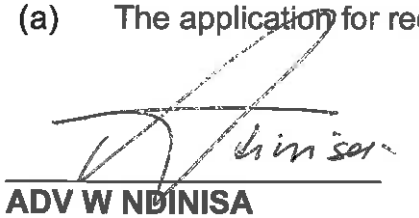
42. Further, on the information before us, we do not find basis for bias on the

part of the Respondent.

43. In the premises we make the following order: -

ORDER

(a) The application for reconsideration is dismissed



ADV W NDINISA

With the Panel consisting also of:

NP DONGWANA

G MADLANGA