THE FINANCIAL SERVICES TRIBUNAL

Case No: **FSP38/2020**

In the matter between:

KEVIN JAGESUR Applicant

and

DISCOVERY LIFE LIMITED Respondent

Tribunal: Mr L Dlamini (chair), Adv Ndumiso Nxumalo and Mr Ahmed Jaffer[1]

Date of Deliberation: 26 January 2021

Date of Decision: 24 February 2021

Summary: Application for reconsideration of the debarment, admission to lodging fraudulent insurance claim, admissibility of admission.

DECISION

INTRODUCTION

1. This is an application for reconsideration in terms of section 230 read with section 218(b) of the Financial Sector Regulation Act 9 of 2017 (the Act) in which the

[1] On 26 January 2021 the three – member panel deliberated and reached consensus regarding the outcome of this application. Sadly, one of the panel members, Mr Ahmed Jaffer, passed on a week later before the decision could be published. May his soul rest in peace.

applicant, Mr Kevin Jaguser, seeks reconsideration of the decision of the Respondent, Discovery Life Limited, a financial services provider (FSP). The FSP debarred the applicant on 13 July 2020 in terms of section 14(1) of the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS Act).

2. The applicant was employed by the FSP as a financial services representative. In addition, the applicant also held a short-term insurance policy, the Discovery Insure Policy Plan, issued by the FSP which covered the Applicant's vehicle. The Discovery Insure Policy Plan was issued under policy number 4001506244 (Discovery Insure Policy Plan).

3. The applicant also had a long-term insurance policy with the FSP in respect of which the FSP raised issues of non disclosure as additional grounds for debarring the applicant.

4. The FSP debarred the applicant on the basis of allegations of misconduct relating to the above insurance policies particularly on the basis that the applicant submitted a fraudulent claim in respect of the Discovery Insure Policy Plan.

5. On 1 October 2019 the FSP suspended the Applicant [2] and conducted further investigations into the matter.

6. On 28 November 2019, once investigations were completed, the FSP issued a Notice of Intention to Debar the applicant [3] which set out three grounds on which it sought to debar the applicant.

[2] See page 39 of Part A of the Record.
[3] See page 9 of Part B of the Record.

7. Further conduct of the matter was thereafter interrupted by various factors predominantly emanating from Covid 19 restrictions. Despite restrictions, the parties continued to exchange correspondence and managed to convene to view video footage relating to the first ground of debarment (which will be discussed below).

8. On 13 July 2020, the parties having agreed to finalise the debarment process on the papers, the FSP debarred the applicant. The applicant now seeks reconsideration of the FSP's decision to debar him.

9. On this application, the parties also waived their right to a formal hearing and agreed that the matter may be disposed of on the papers.

10. The FSP stated three grounds for debarment:

    10.1. The Applicant's insurance claim submitted in respect of the Discovery Insure Policy Plan was fraudulent.

    10.2. The second and third charges were "fresh charges" brought after the applicant was suspended. They were in respect of certain non–disclosures that the FSP alleged the applicant failed to make in contravention of section 59 of the Long-Term Insurance Act.[4] In the second charge the applicant was charged with failure to make certain disclosures in his medical application questionnaire that he had a chronic disease in his life policy (also held with the FSP). In the third charge the

[4] Section 59 (1)(a) and (b) of the of Act 52 of 1998. See Ibid page 28.

applicant was charged with failure to disclose information pertaining to his wife's occupation.

GROUNDS FOR RECONSIDERATION

11. In his grounds for the application the applicant seeks reconsideration of the decision essentially on the basis that the FSP failed to:

    11.1. consider all the facts and evidence in support of his defence,

    11.2. prove the allegations in particular that the applicant did not act honestly and with integrity and that he no longer met the "fit and proper" requirements, and

    11.3. follow the correct process in accordance with the debarment policy and procedure in relation to the Applicant's suspension following the Notice to Debar issued to the applicant dated 28 November 2019.

ISSUE

12. Three grounds for debarment have been set out above. However, it is clear from the papers submitted that the FSP does not insist with all three charges. For instance, the FSP regarded the investigations relating to the second and third charges generally disagreeable and not fair.[5] Further, the FSP excluded argument pertaining to the fresh charges arising after the suspension of the

[5] See page 527 of Part 2 of the Record.

Applicant. In its Heads of Argument, the FSP opted to "not deal with charges 2 and 3 ".[6]

13. Accordingly, this application only focuses on whether the FSP was correct to debar the applicant on the basis of the first ground for debarment with respect to both the procedure and the merits.

14. Given the nature of these proceedings, we start with the grounds for reconsideration relating to procedure but first we set out the facts to provide context.

THE FACTS

15. The facts of this matter are largely common cause.

16. On 20 May 2019 the applicant submitted a claim under the Discovery Insure Policy Plan to the FSP in his capacity as the insured. The applicant claimed for the loss of his vehicle's sound system, a Sony PlayStation 3 and sunglasses (insured items) that were stolen when his vehicle was broken into while parked at the Phoenix Plaza. The full details of what was stolen appears on the applicant's affidavit to the police signed on the day of the incident.[7]

17. On 12 June 2019 the FSP, in its capacity as the insurer, conducted some investigations through its forensic department which the FSP stated established

[6] See page 5 paragraph 12 of the Respondent Heads of Argument.
[7] See page 84 of Part B of the Record.

that the applicant's claim lodged under the Discovery Insure Policy Plan was fraudulent.[8]

18. On 18 September 2019 the applicant was interviewed by two of the FSP's forensic investigators. Also present at the interview was the applicant's business executive manager, one Janine Petterson (JP). JP's statement becomes relevant as the applicant seeks to rely on it to oppose his debarment (as will be seen below).

19. During the interview, the investigators played video footage obtained from the Phoenix Plaza depicting the movements and events captured on the camera that covered the parking lot where the applicant's vehicle was parked at the time of the alleged break-in and theft of the insured items. The video footage showed no activity around the applicant's vehicle and in particular, no tampering with his vehicle. Therefore the video footage shows a normal course of events from when the applicant parked the vehicle until he drove out of the parking lot. The video footage shows the applicant's vehicle reversing out of the parking lot with him giving the car guard a tip.

20. Following the viewing of the video footage, the investigators continued questioning the applicant. After some time the applicant admitted that the claim was fraudulent. The statement of his admission was thereafter reduced to writing in his own handwriting and he signed the statement.

[8] Ibid page 3.

21. In the statement the applicant stated, among other things, that "I wish to state that this claim was fraudulent. The loss never occurred as submitted. I have personally removed the items from the vehichle." He wrote further, "The reason I submitted this fraudulent claim is because I was under financial strain."[9]

22. These were the facts on the basis of which the FSP ultimamtely debarred the Applicant.

Retraction

23. In his formal response to the notice of intention to debar, the applicant sought to retract the admission. At paragraph 4.7 to 4. 9 the applicant's attorney stated the following:

> *"4.7 The statement made by our client was dictated to him by Johan Mouton. He did not write the statement on his own accord.*
>
> *4.8 He was further informed at the meeting that if he resigned from work the possibility of a FAIS hearing will be low and his honesty and integrity will be intact with them. If he did not resign then they will continue with a hearing and report the matter to the SAPS and he <u>will</u> be imprisoned.*
>
> *This threat caused our client to be intimidated and induced fear of being imprisoned and as a result he had no alternative than to sign a statement.*
>
> *4.9 The statement written by our client was made under acts of duress, threats and intimidation. Our client reserves his right lo launch an*

[9] See page 92-93 of Part B of the Record.

> *appropriate claim against Discovery and/or its investigators at the appropriate time in this regard in due course."*[10]

24. As part of the applicant's grounds for reconsideration, the applicant's attorney also stated that his client was intimidated, harassed, and threatened. The attorney also emphasised that the applicant was coerced and induced into signing a statement which was dictated to him by one of the investigators.[11]

25. No further details were provided regarding the alleged duress, threats and other improper actions and how these induced the signing of the admission statement.

26. Oddly, the applicant relied on the statement of JP, his business executive, to substantiate the basis on which the admission statement should be disregarded. The statement of JP records, inter alia, that: "They [the investigators] put pressure on him [applicant] to tell the truth as it would make him feel better." JP further stated, "… he [applicant] went quiet and said they were right that he had made the claim as he was under financial pressure" (sic).[12] Notably, JP's statement records the events before the applicant reduced the admission to writing.

27. The applicant first spoke to JP about his intention to withdraw the written statement immediately after he was interviewed. JP advised him to "go and make

[10] See pages 510 – 511 of Part B of the Record.
[11] See page 6 of Part A of the Record.
[12] See page 527 of Part B of the Record.

an affidavit and try get any information he could."[13] However, the applicant did not retract the statement. The Applicant's attorney acknowledges this.[14]

28. Having set out the facts we now turn to deal with the matter on the basis that the FSP failed to follow a proper debarment procedure.

Procedural Fairness

29. Section 14(2)(a) provides that:

"Before effecting a debarment in terms subsection 1, the provider must ensure that the debarment process is lawful, reasonable and procedurally fair."

30. The applicant alleges that the FSP failed to follow the correct process in accordance with the debarment policy and procedure when he was suspended. Therefore the applicant alleges that the procedure followed by the FSP was unlawful, unreasonable and procedurally unfair in some respects.

31. The argument has not been concisely set out. The applicant does not state any specific provisions that it alleges have been breached. However, the thrust of the argument appears at paragraphs 11 and 12 of the Applicant's grounds.[15]

32. The applicant brought the spotlight to the fact that the FSP cancelled the Insure Policy Plan before the matter was referred to the FSP's forensic department that

[13] Ibid.
[14] See page 54 of Part A of the Record.
[15] See page 7 of Part 1 of the Record.

investigated the allegations. Further, when the FSP "approached the applicant for an interview, the matter was already finalised".[16] In essence the applicant complains that he was called for an interview in which the matter was supposed to be investigated at a time when his debarment was a *fait accompli.*

33. However, the applicant's argument ignores the fact that the cancellation of the Discovery Insure Policy Plan is a separate matter to the debarment to the extent that the FSP was entitled to deal with it in terms of the provisions under that insurance contract which may well have entitled the FSP to cancel it in the circumstances.

34. The debarment process stands on its own. It requires the FSP, inter alia, to afford the applicant a proper platform to respond to the grounds for debarment placed before him. In this regard we looked specifically at the process that followed the applicant's suspension to determine if there was any merit that the debarment process was procedurally unfair.

    34.1. On 28 November 2019 the applicant was issued with the Notice of Intention to debar. It required the applicant to respond within 48 hours. It also stipulated that it was his choice to oppose the debarment either through a documented or oral process.[17]

    34.2. On 29 November 2019 the applicant engaged the services of an attorney to represent him. The matter was then delayed from that time for various reasons including delays occasioned by the applicant's change of

[16] Ibid.
[17] See page 10 of Part B of the Record.

attorneys of record and Covid 19 restrictions. After the FSP granted numerous extensions, the matter eventually resumed on 21 February 2020 when the applicant's attorney of record opposed the Notice of Intention to debar.

34.3. On 21 June 2020 the applicant attorney's response regarding the manner in which the matter would be conducted (whether through correspondence or through oral evidence), was that there should be a formal enquiry and the applicant should be afforded an opportunity to defend himself.

34.4. The FSP agreed to a hearing process save that the applicant was not allowed attorney representation given the internal nature of the debarment inquiry at that stage.

34.5. On 2 July 2020 the applicant's attorney then advised the FSP that there was no need for their client, the applicant, to deal with the matter through oral submissions at the hearing. The attorneys then requested the FSP to decide the matter on the basis of the documented responses.

34.6. At all material times the applicant was given the opportunity to challenge the basis of the debarment. The applicant in fact responded and raised various issues through his attorneys. It was also the applicant's choice not to hold a formal hearing.

34.7. At no stage was his debarment a forgone conclusion before 13 July 2020. On this basis there is no merit that the procedure adopted was not fair.

Merits

35. Section 14(1)(a) of FAIS Act provides that:

> *"An authorised financial services provider must debar a person from rendering financial services who is or was, as the case may be—*
>
> *(i) a representative of the financial services provider; or*
> *(ii) ...*
>
> *if the financial services provider is satisfied on the basis of available facts and information that the person—*
>
> *(iii) does not meet, or no longer complies with, the requirements referred to in section 13 (2) (a)..."*

36. Section 13(2) (a) of the FIAS Act provides that:

> *"(2) An authorised financial services provider must—*
>
> *(a) at all times be satisfied that the provider's representatives, and the key individuals of such representatives, are, when rendering a financial service on behalf of the provider, competent to act, and comply with—*
>
> *(i) the fit and proper requirements; and*
> *(ii) any other requirements contemplated in subsection (1) (b) (ii);"*

37. The Registrar determines the fit and proper requirements for FSPs, in terms of section 6A of the FAIS Act, as set out in Board Notice 16 of 2008 which provides

that the Registrar may, by notice in the Gazette determine fit and proper requirements for representatives of providers.[18]

38. Section 7(1) of the Fit and Proper Requirements provisions states:

> *"The fit and proper requirements relating to honesty, integrity and good standing contained in this Chapter apply to all FSPs, key individuals and representatives."*

39. Section 8(1) of the Fit and Proper Requirements provides: *"A person referred to in section 7 (1) must be a person who is—*

> *(a) honest and has integrity; and*
>
> *(b) of good standing."*

40. Bearing in mind the aforegoing statutory position, we then proceed to consider whether the facts relied upon to debar the applicant established that the applicant was no longer a fit and proper person and thus the FSP was perforce obliged to debar the applicant from rendering financial services as required by section 14(1)(a) of FAIS Act.[19]

APPLICATION

41. In its heads of argument, the FSP relied on the principles governing the withdrawal of confessions in criminal cases to contend that the applicant had not made a proper case for the exclusion of his admission from evidence. This approach inadvertently equates the debarment proceedings with criminal proceedings. The policy and constitutional considerations that underlie admissibility of evidence in criminal cases are different to those governing

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[18] The Registrar published the Determination of Fit and Proper Requirements on 15 December 2017 in Government Gazette No 41321.

[19] Financial Services Board v Barthram and another [2015] 3 All SA 665 (SCA).

admissibility of evidence in civil proceedings. The applicable principles in debarment proceedings are those governing admissibility of evidence in civil proceedings.

42. In *Hohne v Super Stone Mining (Pty) Limited*,[20] the SCA had to consider the admissibility of evidence that was videotaped and transcribed during an interview between Hohne and representatives of his employer and documentation signed by the appellant, after that interview. The facts were that an employee of diamond-mining company admitted to stealing rough diamonds during an interview that was video-taped and transcribed. At the end of the interview he signed an admission statement. The admissions were found to be inadmissible in the criminal court, resulting in his acquittal.

43. On appeal against judgement given against him in a civil action, the SCA held as follows:

> *[29] It is a well established principle of our law that if a party wishes to avoid liability on the basis that he assented to an agreement by reason of duress, the onus is upon him who makes that allegation. The same applies where a litigant claims that evidence was obtained in breach of his constitutional rights. The appellant alleged that he had signed the acknowledgement and the statement before the police under duress but did not testify. Although care must be taken not to confuse the relevant principles in claims founded in delict and those based on contract, it is not always impermissible to borrow principles from the one type of causa and apply them to another. We are dealing here with a written acknowledgment of both liability and the amount in question. The closeness of the facts in this case to those ordinarily featuring in contractual claims, in my opinion, justifies a general examination of when legally recognised duress may be found to exist in situations other than delict. I turn now to consider the question of enforceability in our law.*
>
> *[30] In Machanick Steel and Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd. Machanick Steel and Fencing (Pty) Ltd v Transvaal Cold Rolling (Pty) Ltd19 Nestadt J gave a comprehensive review of the law relating to threats of prosecution, including the well-known case of Arend and another v Astra Furnishers (Pty)*

[20] [2016] JOL 36993 (SCA)

Ltd, in which Corbett J delivered the judgment of the Full Court. Nestadt J dealt with whether the duress in question was induced by actual violence or reasonable fear of the threat of an imminent or imminent considerable evil and then concluded that two vital questions need to be asked: (i) was the threat contra bonos mores*. and (ii) did the creditor thereby exact or extort something to which he was not otherwise entitled? Machanick Steel dealt with an acknowledgment of debt that was used in evidence in support of an application for the winding-up of a company. The acknowledgement had been obtained by threatening a prosecution of the directors. Nestadt J held that the onus was on the respondents to make out a case of operative duress. He found that they had failed to do so and a provisional order of liquidation in each instance was justified.*

[32] […] I conclude that the experience of the appellant and, more particularly, what was said to him immediately before he began to confess to his theft, was not contra bonos mores. Furthermore, it did not result in Super Stone exacting or extorting something to which it was not otherwise entitled. The contrary is true. Moreover, the conduct of Super Stone was not otherwise unlawful, never mind illegal. […]

[35] The appellant failed to discharge the onus that rested upon him. The appellant did not give or show any evidence as to operative, or legally recognised, duress which could prevent the acknowledgement of debt from being enforced against him. The evidence is admissible because it is relevant and the uncontested evidence of Super Stone does not suggest a reason why it should be otherwise be excluded [sic]. Furthermore, there is no compelling policy consideration either why the evidence in question should be excluded or the admission of liability and quantum unenforced. On the contrary, in the absence of any legally recognised duress, policy considerations favour the admission of the evidence and the enforceability of the claim where a person has stolen millions of rands from another."

44. Similarly, in the present case, the applicant has not discharged the onus upon him to show that his admission was induced by any legally recognised duress. A threat of being reported to SAPS is not *contra bones mores*. The admission that the claim was fraudulent did not result in the FSP exacting or extorting

something to which it was not otherwise entitled. For these reasons, the admission is admissible.

45. On the basis of the evidence before it, including the admission statement and the video footage of the day of the alleged incident, the FSP's satisfaction that the applicant no longer complied with the requirement of honesty and integrity cannot be faulted.

46. Consequently the application for reconsideration cannot succeed.

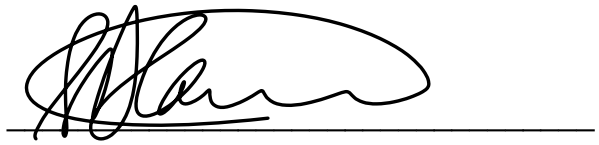
CONCLUSION

47. The following order is made.

    47.1. The Application is dismissed

    47.2. No order as to costs.

Signed on behalf of the Tribunal on 24 February 2021 at Pretoria.



Langa Dlamini (Chairperson)