

THE FINANCIAL SERVICES TRIBUNAL

CASE NO: FSP8/2023

In the matter of:

Lufuno Precious Shiburi

Applicant

and

Liquid Capital (Pty) Ltd

Respondent

DECISION

Tribunal: Adv A.T. Ncongwane, SC (Chairperson),
E. Phiyega, and
W. Ndinisa (members)

Hearing: 23 August 2023

Date of decision: 29 August 2023

Appearances:

On behalf of the applicant: In person

On behalf of the respondent: Mr R Hornsveld

Summary: Debarment of financial service representative. No independent inquiry undertaken for section 14 (1) FAIS Act hearing. The misconduct must be sufficiently serious to impugn the honesty and integrity of the representative. Respondent failed to follow its own policy.

Introduction

- [1] The applicant applies under section 230 of the Financial Sector Regulation Act 9 of 2017 ("FSR Act") for reconsideration of her debarment by the respondent. She was dismissed by the respondent from being a financial service representative.
- [2] From the outcome of the disciplinary hearing, the debarment process was commenced with, resulting to a decision to debar her. At the debarment hearing, she appeared unassisted. The debarment is imposed under section 14 of the Financial Advisory and Intermediary Services Act 37 of 2002 ("FAIS Act").
- [3] On the 13th February 2023, the Deputy Chairperson of the Tribunal granted condonation for the application and the suspension of the debarment in terms of section 231 of the FSR Act.¹
- [4] Applicant appeared in person and Mr Hornsveld confirmed that the respondent does not oppose the application and was on a watching-brief. A letter was also addressed to the Tribunal by the respondent on the 18th February 2023 in which they stated that they will not be opposing the application.

¹ Ruling by the Deputy Chairperson, dated 13th February 2023, paginated page 14 of the Record.

Background

- [5] The background to the debarment is that the applicant was employed by the respondent since around August 2016 in a position of a Sales Agent. She submitted that her duties and responsibilities included giving financial advice to clients of the respondent (“the Financial Services Provider” or “FSP”). At the disciplinary hearing, the applicant was found guilty of the charge of “dishonesty”, in that on or about the 3rd of February 2022 she committed fraud by presenting falsified uber receipts to Sinethemba Vabaza (“the Head of Sales”) a co-employee, for supposed uber trips that were booked but subsequently cancelled. The charge stated that her action or conduct was “*intentional and deceitful*”.
- [6] She was also charged with breaching of company policy in that she failed to abide by the *Motus* Fraud Policy by presenting falsified receipts.
- [7] It is common cause that the windscreen glass window of the applicant’s car was damaged whilst parked at the applicant’s workplace in the demarcated area for parking. The cause of damage was from the stones thrown out from the cutting of the grass nearer to where her car was parked.
- [8] Applicant took the matter up with the respondent’s Human Resource (“HR”) and she was advised by HR that the respondent will have the damage to her car fixed and she will have to make other arrangements for transport to and from work for the period of the days she could not use the car. It

appears that the arrangement also had to cover the transport of her children to and from school.

[9] It is noted that the applicant was required to obtain quotes for the uber services so that she could be reimbursed for the expenses she incurred for transport. The Head of Sales reimbursed the applicant on the strength of the screenshots of the applicant's short message service ("SMS") proving that applicant paid through her banking account, for uber rides she took on the 27th of January 2022 and 28 January 2022. Applicant supplied her banking details to the head of sales and was duly paid a total amount of R861.00 (Eight Hundred and Sixty-One Rands), reimbursing her costs. This payment was made on the basis of the quotes received by the head of sales.

[10] After payment had occurred, the head of sales asked that applicant submits uber receipts. It appears that the applicant, assisted by a certain Penelope, a co-employee, obtained the uber receipts for her coming to work. This was done by resending the uber receipts to the head of sales. The uber receipts sent were found to be different from the other receipts received by the head of sales on previous occasions. This resulted to the respondent pursuing charges of misconduct against the applicant for falsification of receipts and breach of company policy.

[11] The applicant pleaded not guilty to the charges and gave evidence that she made cash payments to a certain Khumo for commuting to and from work

for two days. When respondent requested uber receipts, she asked Ms P. Sithole to obtain the quotes on her uber app.

[12] In her application for condonation, applicant stated that her senior manager agreed that, as they were still waiting for the glass window, which had been ordered, she could get a lift from a co-employee and will be reimbursed at the rate of the uber charges for the trips from work to home and back. She initially sent the quotes for the uber services and later obtained the receipts that were generated to be in line with the quotes, for her to receive the reimbursement. It is common cause that the applicant refunded the amount of R861.00 to the respondent when she was confronted with the charges.

[13] We note from the record that on the 12th of April 2022 at the dispute resolution centre, the Bargaining Dispute Council for the dispute mentioned above, the parties settled on the basis that the respondent will issue the applicant with *a neutral letter of reference* and will *not oppose the applicant's appeal for the debarment* from the Financial Services Board.

[14] The procedural fairness of the debarment is not in issue. A notice of debarment was delivered to the applicant on the 17th of February 2022 and the reasons for the debarment mentioned in the notice are that the applicant has failed to comply with the prescribed fit and proper requirements under FAIS, as she has been found guilty on the charges of dishonesty and not following company policy and procedure as per the disciplinary hearing.²

² Page 6 of the record, the notice of Intention to attend the debarment hearing.

The notice delivered to the applicant had annexures such as the respondent's debarment's policy, documentary evidence to be relied upon by the respondent at the debarment hearing, company statement, the disciplinary hearing outcome and evidence in a form of emails.

[15] Applicant had five (5) days within which to prepare for the debarment set down for the 25th of February 2022. This was in accordance with Clause 8.2 of the Debarment Policy.

[16] We note that the applicant was afforded a reasonable opportunity to make representations and received all the relevant documentation for the hearing. We are satisfied that the notice was adequate and the process complied with the respondent's policy on the procedural aspects.

[17] The respondent's debarment policy states that it applies in all situations relating to debarment and must be read in conjunction with FAIS, FSRA, as well as the fit and proper requirements.

[18] S.14 (1) of the FAIS provides that *"An authorise financial service provider must ensure that any representative of the provider who no longer complies with the requirements referred to in section 13(2)(i), is prohibited by such provider from rendering any new financial service by withdrawing any authority to act on behalf of the provider³..."*

³ 'representative' means any person who renders a financial service to a client on behalf of a financial services provider.... (own underlining)

[19] The respondent's policy emphasises that the debarment process (the procedure) must be documented strictly in accordance with the policy.

[20] It is significant to note that the policy also provides that "*a decision by an FSP to debar a representative can be taken only for reasons relating to the rendering of the financial services*". Therefore, any decision taken by an FSP to debar a representative for reasons other than reasons related to the rendering of financial services is invalid.

Substantive fairness

[21] According to the respondent, the applicant was dishonest based on the outcome of the DC hearing and the decision was taken to debar her for the reasons set out in the outcome of the disciplinary hearing document attached to the notice of debarment hearing.

[22] It was also startling to us to note that the finding made by the chairperson of the debarment hearing is that the "*applicant pleaded guilty to the charges set forward during her disciplinary hearing*". This finding misconstrues what appears in the record for the disciplinary hearing where it is explicit that the applicant pleaded not guilty and challenged the charges proffered against her.

[23] She stated that she does not believe that her actions were wrong because she did not plan to have her car window broken. She further mentioned that

she would not have suffered all the inconvenience had her window not being damaged at work.

[24] In the application before us, the applicant contended that she is of the view that the grounds for her to apply for the upliftment of the debarment is because she is of the view that she was unfairly debarred. She did not, in any way do anything, that would result to the respondent losing its licence, because it was not a work-related issue.

[25] The Tribunal has highlighted in many other cases but it is incorrect to base the grounds or reasons for debarment on the outcome of the DC hearing. The most relevant question is whether there was evidence in the debarment hearing or even in the DC hearing that objectively established that the applicant's character can still retain the essential qualities of honesty and integrity such that her good name as the representative remains unblemished.

[26] From the record, it appears that the chairperson of the debarment hearing has totally failed to embark on an independent enquiry to establish if the applicant no longer meets the fit and proper requirements as a representative.

[27] The act of misconduct is clouded in the factual dispute as to what exactly formed the agreement between the applicant and the key individual of the respondent. The only evidence from the record is that the applicant was

allowed to use an uber service quotation, to make a claim for reimbursement for her transport costs. There is evidence that the quotations were accepted by the respondent. This is common cause.

[28] There is no evidence that the uber receipts differed materially from the quotes. There is no finding made by the chairperson of the debarment hearing, save that she relied on the outcome of the DC hearing, without dealing with the basis of the finding by the DC hearing. In order for the applicant's conduct to constitute dishonesty that is susceptible to debarment, it has to be serious to impugn the character of "honesty" and "integrity" of the applicant.⁴

[29] In this matter, no facts that satisfy us that the debarment hearing evaluated the issues with the view to satisfy herself about the seriousness of the misconduct. The applicant's version on the permission to obtain the uber quotes and her reasons for transmitting the information from the quotes to the receipts were not taken into account in deciding whether the applicant's character would no longer meet the fit and proper requirements of section. 8 of FAIS.

[30] To return to the nature of the act or alleged misconduct, it is our view, that it does not involve the rendering of the financial services. Respondent's policy makes it clear that the debarment policy will only apply on the misconduct that relates to rendering of financial services and if used in other cases, the

⁴ F. Osman v FNB, FSP 44/2020

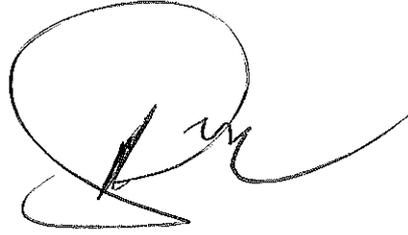
process will be invalid. The chairperson, once again failed to consider this important policy provision. The respondent's policy clearly renders the process leading to the applicant's debarment invalid on the grounds that the misconduct in issue was not in respect of the financial services. We have no basis to formulate a different interpretation to the clear wording of the policy in this regard. We remark that this provision is in line with section 13 (2) of FAIS.

[31] This matter is similar to most other matters where FSPs misattributed the grounds for the dismissal from employment to an automatic debarment of the representative. This approach is completely flawed and legally untenable. In many other cases, this Tribunal has cautioned FSPs not to issue a debarment purely on the outcome of the disciplinary hearing. A separate independent inquiry must be conducted in the debarment hearing and it must be factually established that the conduct is so serious and material that it has impugned the representative's fit and proper characteristics. In this matter, no such scrutiny was undertaken.

[32] In the premise, the following order is made:

[32.1] the application for reconsideration is granted.

[32.2] the debarment of the applicant is set aside forthwith.



AT Ncongwane SC, Chairperson

With the panel consisting of:

E. Phiyega, and

W. Ndinisa

Date: 29th August 2023