

THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: A17/2023

MBALANE FINANCIAL SERVICES (PTY) LTD

APPLICANT

and

THE FINANCIAL SECTOR CONDUCT AUTHORITY

RESPONDENT

Re: reconsideration of withdrawal of FSP licence because of failure to comply with sec 14(1) and 13(2) of the FAIS Act

DECISION

- 1 The applicant, Mbalane Financial Services (Pty) Ltd, is a financial service provider (FSP) specializing in selling funeral products to the public. It acted (as far as this matter is concerned) in terms of a brokerage agreement with the Old Mutual Life Assurance Co (SA) Ltd and employed agents/representatives to market funeral products.
- 2 The sole shareholder, director and key individual of the applicant is Mr SN Mbalane.
- 3 Old Mutual terminated the agreement on 7 December 2020. It gave its reasons in an email of that date<sup>1</sup> which is summarized in par 5.1 of the FSCA's reasons:

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<sup>1</sup> The applicant's replies to the allegations appear in the email but will not be repeated because they do not advance its case.

- Since 2019, the Licensee has been under investigation regarding fraudulent activities related to their representatives.
- As part of their internal Group Forensics' quarterly escalation, the Licensee featured as a "Top 5 High Risk Broker". As part of the deep dive into fraudulent business regarding the Department of Education - Eastern Cape Province (DoE EC), it was determined that of the 631 complaints received, 190 of the complaints were received from teachers employed in the DoE EC. The Licensee has the second highest number of complaints relating to fraud perpetrated against the teachers employed at the DoE EC.
- The Licensee failed to provide copies of the employment contracts of the representatives responsible for writing some of the abovementioned business.
- It appears that the Licensee's business practice is to enter into verbal employment contracts with representatives.
- Given the high number of complaints relating to fraudulent business submitted by the Licensee and the unfavourable reputational and media risk presently faced by them (Old Mutual), in respect of the fraud perpetrated against the teachers in the DoE EC. They have engaged with their Legal and Compliance Business Units, in order to mitigate the risks associated with the complaints, they decided to terminate their contract with the Licensee.

4 Old Mutual informed the FSCA of the reasons which have impacted on the question whether the applicant has failed to comply with the provisions of the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS Act) and still complied with the fit and proper requirements referred to in the Act applicable to authorized FSPs.

- 5 The FSCA first suspended the FSP licence of the applicant and then, after following the prescribed process, withdrew the licence with immediate effect on 27 March 2023.
- 6 The applicant applies for reconsideration of this decision of the FSCA in terms of sec 230(1) of the Financial Sector Regulation Act 9 of 2017.
- 7 The parties have waived their rights to a formal hearing and agreed that the matter may be disposed of on the record and argument filed.
- 8 Section 9(1) of the FAIS Act provides that the registrar [the FSCA] may at any time suspend or withdraw any licence if satisfied, on the basis of available facts and information, that the licensee–
- (a) does not meet or no longer meets the fit and proper requirements [see sec 6A] applicable to the licensee, or if the licensee is . . . corporate or unincorporated body, that the licensee or any key individual of the licensee does not meet or no longer meets the fit and proper requirements applicable to the licensee or the key individual;
- [or]
- (c) has failed to comply with any other provision of this Act or any requirement under the Financial Sector Regulation Act, including a conduct standard, a prudential standard or a joint standard.
- 9 The FSCA found that the Applicant had contravened the following provisions:
- section 14(1)(a) and section 13(2) of the FAIS [failure to debar FSRs];
  - section 36(1)(c)(v); section 42(1) and section 42(3) of the Determination of Fit and Proper Requirements for Financial Services Providers, 2017 [lack of operational ability];

- section 13(1) and 13(2) of the FAIS Act [fit and proper requirements of the KI and FSRs]; and
- section 2 and 11 of the General Code of Conduct [failure to act in best interest of clients].

10 The undisputed core facts are that the applicant was aware that since November 2018 many of its representatives had been writing fraudulent policies. They eventually amounted to 864 out of 1281 policies written by some 56 representatives (some unregistered at the time and some without employment contracts).

11 In response to the November 2018 notice from Old Mutual, the applicant issued four employee warning forms during December 2018 and informed the four agents that if the Old Mutual's final findings would indicate fraud, it would lead to debarment proceedings. Some of these had submitted 50 fraudulent policies. One individual, according to the applicant, submitted 172 fraudulent policies and provided it with a written apology.

12 Later complaints from Old Mutual did not motivate the applicant to do anything about the allegations. According to an email from Old Mutual of 13 June 2019, it was sitting with over 200 incidents involving only seven of the agents and it asked for urgent feedback with regards to all those incidents.

13 In each suspected instance the applicant was notified by Old Mutual of the complaint and the applicant was supplied with a feedback broker form and had to report on the actions taken. None was forthcoming.

14 Old Mutual repeatedly informed the applicant that

"In terms of FAIS legislation [the reference is to sec 13 and 14 of the FAIS Act] it remains the responsibility of the Financial Service Provider, being Mbalane Financial

Services (Pty) Ltd, to assess and investigate all complaints received against its own intermediaries. We [Old Mutual] require feedback on the action taken/to be taken against the involved intermediary as a result of the allegations made by the client and findings obtained from your investigation."

- 15 The applicant's approach was that it was a labour law issue, that no one but it suffered any loss due to fraudulent policies (commissions having been reversed), that complaints may have been the result of clients who suffered from purchaser's remorse and therefore could be ignored, that Old Mutual had ulterior motives, and that it would not act unless it had a forensic report from Old Mutual.
- 16 The applicant conveniently ignored Old Mutual, alleging that it was always awaiting a final report from Old Mutual. The FSCA rejected this excuse and rightly so because the applicant had no reason to believe that it was Old Mutual's duty to ensure that the agents complied with the FAIS Act since it had been told in explicit terms that it was not the position. The allegation of Mr Mbalane in one of his letters that "we understood that Old Mutual would continue with the investigation" and furnish it with a report and that its further actions would be based on the reliability of those report is not credible.
- 17 The core of the applicant's reconsideration application is that it was entitled to await the finalisation of the Old Mutual report before it could have acted against its implicated representatives. The augmented grounds (which were not argued) raised many disparate factual issues without reference to the FSCA's reasons and discussion of the issues in the decision letter but eventually appear to amount to a request for leniency.
- 18 In fact, the reconsideration application does not take direct issue with anything in the decision letter.

19 The written argument limits the issue to the same issue, but framed it in the context of the Promotion of Administrative Justice Act 3 of 2000, and *audi alteram partem*: the applicant should have been given the reasonable opportunity to make representations in response to findings in an Old Mutual Forensic Report, which act would have enabled the Applicant to adequately institute debarment process against the Representatives that would have been found to have committed fraud in the Old Mutual Report.

20 In conclusion the applicant submitted that

“Broadly speaking [fair administrative action] involves the enquiry that, having regard to the actions taken by the Applicant to issue suspension letters to its Representatives that were said to have committed the fraud, pending the finalization of the Forensic Report and the decision taken by the Respondent despite the Respondent not receiving or affording the Applicant reasonable opportunity to make representation on the Forensic Report, whether the decision by the Respondent to suspend the Applicant’s authorisation license was justifiable under the circumstances.”

21 The submission began with a misstatement: the applicant did not issue any suspension letters to any implicated representative – it only issued final warnings to some of them.

22 These points need to be stressed. Old Mutual’s failure to have provided the applicant with a forensic report does not amount to an infringement of PAJA and the audi rule because Old Mutual is not an “administrator” under the Act. The representatives were the FSRs of the applicant, and not Old Mutual. It was the duty of the applicant to ensure that its representatives are fit and proper within the meaning of the statute. The Old Mutual was only in a contractual relationship with the applicant and it had no authority over or duties towards the applicant or its agents. Old Mutual had not duty to search and supply the applicant with evidence of wrongdoing.

23 The detail of the forensic report was given by the FSCA to the applicant in the audi (warning) letter of the FSCA of 9 December 2022. The applicant did not take issue with anything therein and it was not entitled to more by way of disclosure or discovery. *Staufen Investments (Pty) Ltd v The Minister of Public Works, Eskom Holdings SOC Ltd & Registrar of Deeds*, Cape Town [2020] 2 All SA 738 (SCA); 2020 (4) SA 78 (SCA); *Chairman, Board on Tariffs and Trade, and Others v Brenco Inc and Others* 2001 (4) SA 511 (SCA); *Park-Ross v Director for Serious Economic Offences* 1998 (1) SA 108 (C); *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* 2011 (1) SA 327 (CC).

24 Accordingly,

“the main argument that the Applicant is developing in these heads of argument is that the issue at core of the present application- the procedural unfairness and unjust administrative action taken by the Respondent without the Applicant being afforded an opportunity to make representation on Old Mutual Forensic Report”

is devoid of merit.

25 The alternative or additional ground is whether the FSCA had breached PAJA by having failed to respond to the applicant’s demand that it obtain reasons from Old Mutual as to why Old Mutual had failed to supply the applicant with the report. It is difficult to follow the convoluted reasoning, but the answer would be the same: Old Mutual had no administrative law duty to account to the applicant. In addition, if regard is had to the applicant’s complaint to the FSCA on the cancellation of the Old Mutual contract (he did file a complaint alleging discrimination), one wonders how bona fide this ground is.

26 Section 13(2) provides that an FSP, as the applicant, must at all times be satisfied that its FSRs are, when rendering, financial services on behalf of the FSP, competent to act and

comply with the fit and proper requirements, and must take steps as may be reasonable in the circumstances to ensure that those FSRs comply with any applicable code of conduct as well as with other applicable laws on conduct of business. The statistics speak for themselves. The applicant did nothing of consequence to satisfy itself of compliance.

27 Section 14(1) obliges an FSP to debar representatives if the facts and information available show that the representative does no longer meet the requirements of sec 13(3) or has contravened any provision of the Act in a material way. This process must be preceded by a proper investigation by the FSP who must have regard to information furnished to it by any interested person. With the information at hand received from Old Mutual, the applicant did nothing.

28 The FSCA concluded on this aspect as follows:

- Based on available evidence, the licensee has been provided with sufficient evidence to conduct their investigation and take appropriate actions. Old Mutual provided the licensee with the copies of complaints; disputed policy application forms and the representative responsible for writing the policy. Furthermore, Old Mutual requested the licensee to investigate and provide them with feedback of those investigations.
- Further, the allegations of fraudulent policies were brought to the attention of the licensee on 30 November 2018. To date, he has failed to investigate and take appropriate action. It should also be noted that some of the representatives that the licensee gave written warnings submitted over 50 fraudulent policies per representative. The one individual that the licensee states that she submitted a written apology, submitted about 172 fraudulent policies.

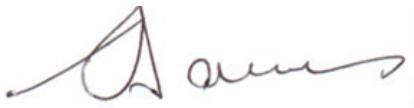


- Therefore, the Authority is satisfied that Licensee is in contravention of section 14(1) of the FAIS Act.

29 This finding cannot be faulted and it follows that the other findings which were based on this and which have not been dealt with in the grounds for reconsideration or the argument submitted must stand.

ORDER: The application for reconsideration is dismissed.

Signed on behalf of the Tribunal on 24 August 2023.

A handwritten signature in black ink, appearing to read 'LTC Harms', is enclosed in a thin black rectangular border.

LTC Harms (deputy chair)