THE FINANCIAL SERVICES TRIBUNAL

CASE No: FSP77/2023

In the matter between:

NTWANANO EUGENE MABUNDA Applicant

and

LEBOHANG MODIMO BROKERS (PTY)LTD Respondent

Tribunal Members: MG Mashaba SC (Chair), M.E Phiyega and A Saldulker.
Appearance for Applicant: In person.
Appearance for Respondent: L Modimo.

Summary: Application for reconsideration in terms of section 230 of the FSR Act of a natural person- non-compliance with fit and proper requirements.

DECISION

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[1] The applicant has brought an application for reconsideration in terms of section 230 of the Financial Sector Regulation Act 9 of 2017(the FSR Act) against the decision of the respondent to debar him with effect from 15 October 2023.

[2] The applicant was employed by the respondent as its financial advisor from January 2023. The applicant was under a 12 month supervision which started from January 2023 and was to end after the 12 months' period (December 2023). Eight months into his new job, the applicant had a fallout with the

respondent involving his commission and the fact that the respondent allegedly failed to show him the commission statement in terms of the employment agreement. On 21 August 2023 the applicant sent a letter of resignation to the respondent informing it that he was resigning and mentioning the aforementioned grievances as reasons which influenced his decision to resign.[1]

[3] On 15 October 2023 the respondent debarred the applicant and the Financial Sector Conduct Authority (FSCA) was notified of such decision and the grounds for the debarment were recorded as: non-compliance with fit and proper requirements (honesty and integrity).[2] On 8 November 2023 the applicant sent a letter to the respondent requesting reasons for his debarment and the evidence which was submitted to the Regulator.[3] In the said letter the applicant also requested clarity as to (a) the reason why the respondent did not notify him of its intention to debar him, (b) why he was not summoned to a hearing, and (c) proof of communication.

[4] In response to applicant's enquiries the respondent sent a letter to him dated 11 November 2023 saying the following:

"In response to the letter dated 08 November 2023, management of Lebohang Modimo Brokers (Pty) Ltd would like to highlight that:

1. It was observed during due diligence that the replacement record of advice for your submitted business was not completed for Hollard MLM policy holder, Ms OS M, policy number. The product provider enforced the

[1] Page 9, Part A.
[2] Page 12, Part B.
[3] Page 6, Part A.

application as new and not as a replacement policy. The risks on clients and FSP were discussed with you on few occasions.

2. Evidence is that the 'replacement record of advice' page on the application form was crossed-out with wording indicating that the policy was a new policy. and in which the product provider Hollard My_Life_and_More enforced as a new policy. This is also heard in a recorded conversation with the client on 22 August 2023 who was under the impression that she was taking a replacement policy not a new policy. This is a demonstration of dishonesty and lack of integrity.
3. The FSP also found out that after a dispute on commission payment, you Eugene Mabunda had illegally obtained the business commission statement of Lebohang Modimo Brokers (Pty) Ltd and shared with others without authorisation of the FSP. This is in breach of the signed Non–Disclosure Agreement.
4. You were informed during a conversation on WhatsApp on the 1st of October 2023 about the FSP's intention to follow the process of debarment against you, in which you responded with a WhatsApp voice audio that the FSP can continue with the process as you had nothing to hide."

[5] On 6 February 2024 the debarment of the applicant was suspended pending the finalisation of the reconsideration application. In his ruling the Deputy Chairperson (as he then was) noted that: "It is not apparent that the prescribed process in terms of section 14 of the FAIS Act was followed." I proceed to deal with the procedural aspect of this matter.

PROCEDURAL FAIRNESS

[6] Section 14(3)(a)-(b) of the FAIS Act dealing with the debarment of representatives stipulates the following:

> (3) 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).

[7] During the hearing the respondent's representative was invited by the panel to indicate from the tribunal record where a written notice of intention to debar was given to the applicant stating (a) the respondent's intention to debar the applicant, (b) the grounds and (c) reasons for the debarment. The respondent's representative maintained that the applicant was served with the notice of intention of debarment via email even though he was at pains a locate a copy of the notice of debarment. He ultimately conceded that he did not have a copy

of the notice of debarment and that neither was a copy of such notice contained in the tribunal record.

[8] It is clear on the facts of this matter that the respondent failed to give the applicant notice for its intention to debar him. This is precisely the reason the applicant in paragraph 2 of his letter addressed to the respondent dated 8 November 2023 requested: èÑ to get clarity on why did the FSP Lebogang Modimo Brokers did not notify me on your intentions to debar me as per the GUIDANCE NOTICE 1 OF 2019.ê[4]

[9] The respondentés representative was invited to indicate the date on which the applicant was debarred. He indicated that the applicant was debarred with effect from 11 November 2023 as reflected in page 9 of Part B of the bundle.[5] This is not correct because according to the debarment noti¸ cation form[6], the applicant was debarred with effect from 15 October 2023. The respondentés representative could also not provide us with or refer us to any correspondence that was sent to the applicant before his debarment notifying him of the date of his looming debarment process and requesting him to make his submission. The evidence before us indicates that the respondent failed to afford the applicant an opportunity to present the side of his story before his debarment.

[10] It follows that the respondent also failed give the applicant a reasonable opportunity to make a submission in response and also failed to consider any

[4] Page 6, Part A (Annexure B).
[5] See also Page 5, Part A (Annexure A).
[6] Page 12, Part B.

response from the applicant before taking its decision. It is clear based on the facts of this matter that the debarment process was not procedurally fair for reasons indicated above.

SUBSTATIVE FAIRNESS

[11] The ¸rst ground that the applicant has raised against his debarment is that it was discovered in the applicantés replacement record of advice a policy document belonging to one client, Ms OS M, that the applicant had crossed out a page on such application form with wording indicating that the policy was new (instead of 'as a replacement policy') and the product provider Hollard enforced such policy as a new policy instead of a replacement policy. This, according to the respondent, was a demonstration of dishonesty and lack of integrity on the part of the applicant.

[12] In response to the above allegations the applicant averred that (a) it was standard practice that the respondent would complete a manual RPAR on his behalf since he was under his supervision, (b) as a representative under the supervision of the respondent he never completed any RPAR document of the clients he concluded business with, and (c) he did not understand how standard business practice of the respondent was a demonstration of dishonesty and lack of integrity .

[13] The respondent's representative confirmed that the applicant was under his supervision from January 2023 until August 2023 when the applicant submitted his letter of resignation following their contractual dispute. The respondent's

representative submitted that the applicant was, during the period of his supervision, trained for 7 days which consisted of three days training by the product supplier and a four (4) day face to face training by the respondent to see if the applicant understood him on how to complete a replacement contract on tablet and paperwork.

[14] The applicant confirmed that he was trained for three days in Cape Town and thereafter the respondent assigned two of its employees to teach him on how to complete a replacement contract at his home in Limpopo. According to him these two employees from the respondent's office did not adequately train him on the work of completing replacement contracts and, according to him, during this training period he was constantly arguing with them.

[15] There is a dispute between the parties as to whether the applicant was properly and adequately trained on how to complete a replacement contract. The evidence before us, which is not in dispute, indicates that the applicant, at the time of his debarment, was under supervision for eight months and during that supervision period underwent a three-day training on how to complete a replacement contract and had a 4 days face to face training with two of the respondent's employees. These two employees have not provided statements disputing the applicant's version that he was not properly and adequately trained by them.

[16] The respondent does not dispute the applicant's version that it was standard practice that the respondent would complete a manual RPAR on his behalf since he was under his supervision and that as a representative under the supervision

of the respondent, he never completed any RPAR document of the clients he concluded business with. It is clear on the facts of this matter that the applicant's conduct of completing clients' contracts as new contracts instead of replacement contract was probably as a result of naivety or lack of adequate experience due to limited training which was still ongoing other than some dishonest motives.

[17]. There is no indication, neither was it the respondent's case, that the applicant deliberately completed the clients' policies as new contracts instead of replacement contracts in order to derive a commission through improper means. On the contrary the evidence indicates that both the applicant and the respondent suffered commission loses as a result of Hollard exercising claw back proviso to return the money that had already been paid as commission to the respondent as a result of the applicant's errors.

[18] Dishonesty is defined as a fraudulent act or deceitfulness which is shown in someone's character. The facts of this matter do not indicate that the applicant in wrongly completing clients' contracts as new contracts instead of replacement contracts was driven or motivated by deceitful or fraudulent motives.

[19] The second point which the respondent relied on in debarring the applicant was that the applicant illegally obtained its business commission statement and shared it with others without authorisation from the respondent. According to the respondent that was in breach of the signed Non-Disclosure Agreement. The respondent failed to present evidence or highlight reasons which informed

its conclusion that the applicant had obtained its business commission statement through illegal means and also failed to indicate the identity of the third party it alleged that the applicant shared this information with.

[20] In reply to the allegations that he received the business commission statement illegally, the applicant submitted that such statement was sent to him by an ex-colleague via WhatsApp and that this colleague was at the time allocated a tablet which had his (the applicant's) email address. The respondent did not challenge or dispute the applicant's version that he received the business commission statement from an ex-colleague. It was also not the respondent's case that the ex-employee received this business commission statement illegally before handing it over to the applicant. In the circumstances we find no substance in the respondent's argument that the applicant received the business commission statement illegally.

[21] The evidence presented before us indicates that the applicant was debarred for reasons emanating from contractual disputes with his erstwhile employer and had nothing to do with misconduct which impugned his honesty and integrity character. In order for a representative to be debarred for misconduct, the misconduct must exist and must be so serious and material that it impugns his ˛t and proper characteristics.[7]

[22] According to paragraph 3.5.1 of the Guidance Notice 1 of 2019 debarment should only be effected in circumstances (a) relating to the non-compliance by

[7] K Mathalise v Clientele Assurance FSP 33/2001, paragraph 26; Mamphoka Johanna Ntshari v First National Bank

a representative or a key individual of such representative with the ¿t and proper requirements as provided for in section 13(2)(a) of the FAIS Act or (b) a contravention or failure to comply by a representative of a key individual of such representative with a provision of the FAIS Act in a material manner, and should not be used by FSPés to satisfy contractual or other grievances. FSPés may, subject to contract, terminate an agreement with a representative or key individual without debarring him where the reasons for the termination of the agreement do not constitute grounds for debarment. Debarment proceedings should not be used for ulterior purposes.

[23] The evidence that has been presented does not prove that the applicantés conduct was so serious and material that it impugned his ¿t and proper characteristics, and the decision of the respondent cannot stand.

In the premise the following order is made:

(a) The debarment is set aside.

SIGNED at PRETORIA on 4th day of SEPTEMBER 2024 on behalf of the Panel.

MG Mashaba SC

With the Panel consisting also of:

M.E Phiyega and A Saldulker.