

**THE FINANCIAL SERVICES TRIBUNAL**

**Case No: FSP 5/2020**

In the matter between:

**NKUTU TAKALO**

**Applicant**

and

**OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LTD**

**Respondent**

Tribunal: William Ndinisa (chair), Zweli Mabhoza and Lucky Makhubela

Date of Decision: 15 July 2020

*Summary: Financial Advisory and Intermediary Services Act 37 of 2002 ("the FAIS Act") – section 14(1) – Representative, no longer meets or complies with, the fit and proper requirements; or has contravene or failed to comply with the provisions of the FAIS Act - General Code of Conduct for Authorised FSPs and Representatives, 2003 - a provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry.*

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**DECISION**

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**INTRODUCTION**

1. The Applicant applies under section 230 of the Financial Sector Regulation Act 9 of 2017 ("FSR Act"), for reconsideration of a debarment decision by Old Mutual Life Assurance (SA) Ltd, the Respondent in this matter. The debarment decision sought to be reconsidered was taken on 6 December 2019.<sup>1</sup>

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<sup>1</sup> Bundle A, page 7

2. The record reflects that the basis for the debarment are that Applicant no longer complies with the fit and proper requirements in that she falls short of honesty, integrity and good standing. Further, the record indicates that there is material contravention or non-compliance with the provisions of the Financial Advisory and Intermediary Services Act 37 of 2002 ("the FAIS Act").

#### **GROUND OF RECONSIDERATION**

3. On or about 21 January 2020, the Applicant instituted this application and advanced the following reasons as the basis or grounds for the reconsideration:

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- 3.1 The Applicant conducted business in accordance with the processes and procedures of the Respondent. When the Applicant acted, she applied the custom methods as applied by the representatives of the Respondent. The management of the Respondent was fully aware of the methods of practice;
- 3.2 The Respondent has never raised any objection to the way the Applicant concluded her insurance deals and was never subjected to a disciplinary hearing for doing same;
- 3.3 The Respondent is aware of the challenges of the Applicant in executing her duties Applicant of the Respondent. Travelling by public transport, meeting clients after hours and securing meeting with clients was difficult. The pressure of Applicant to perform and achieve target led her to make mistakes;
- 3.4 The Applicant was honest all the time and co-operated with the

Respondent;

- 3.5 The Respondent disclosed personal and confidential information of Applicant' clients to other representatives during the debarment hearing. The evidence against the three independent representatives were contained in the same documents and submitted as proof against each of the accused representatives. According to the Financial Planning institutes of South Africa, of which the Respondent is a partner, no personal information of any client can be disclosed to other person, not even other co-employee;
  - 3.6 The sanction imposed by the Respondent is harsh in comparison to the Applicant's conduct. The debarment of the Applicant will have serious present and future consequences in the formal financial industry. In short, the debarment will affect Applicant's rights to conduct business of her choice or follow a career of her choice;
  - 3.7 The Applicant cannot be held liable for the non-payment of premium by clients; and
  - 3.8 The Applicant is of young age and had learnt a very hard lesson. Applicant now understand the severity of the consequences of her conduct and would not repeat her mistakes.
4. This panel is called upon to reconsider, based on record before us, whether the Respondent acted rationally or reasonable when it came to the conclusion of debarment. In other words, was the decision of the Respondent justified, in light of the information and evidence contained in the record, to debar the Applicant.
  5. It is worth noting from the onset that the parties in this matter consented that this

application be decided on records and documents before us, without oral submissions, because of the coronavirus pandemic in the country and the observance of health protocols.

## FACTUAL MATRIX

6. The Applicant was appointed by the Respondent on or about 23 March 2017 as a Financial Advisor. The Applicant and the Respondent concluded a written agreement which, amongst other things, regulates their relationship (“the Contract of Employment”)<sup>2</sup>
7. On or about 21 October 2019 the Respondent instituted an investigation in respect of the advisory services rendered by the Applicant. Mr Petrus Lukas Abrie was appointed by the Respondent to conduct the investigation. The record also shows that Benny Venter was, amongst others, an investigator in this matter (“the Investigator”).<sup>3</sup> Mr Abrie attempted to contact certain clients that were serviced by the Applicant with a view to interview them. It appears from the record that nothing much resulted from Mr Abrie’s attempts in investigating this matter. Further, Mr Abrie attempted to schedule an interview with the Applicant on or about 29 October 2019 and the Applicant never availed herself for the reason that she wanted to enlist an assistance of a union representative.<sup>4</sup>
8. Furthermore, the record shows that a statement was obtained from the one of the clients of the Applicant. The relevant client in this instance is Ms Matlale Maria M Phasha. The statement of Ms Phasha reflects that she received

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<sup>2</sup> Bundle B, page 11

<sup>3</sup> Bundle B, page 54

<sup>4</sup> Bundle B, page 11

financial services from the Applicant during September 2018. Further, according to her statement, Ms Phasha, acknowledged that she took three policies. There are two policies, namely Max Pure Investment Plan with policy number 18521434 and another Max Pure Investment Plan with policy number 18522152, which are of interest in this matter.

9. According to her statement, Ms Phasha acknowledges that she took the Policies, it is her signature on the Finalisor forms and she did sign the forms when she took the policies. The policies were taken for education plan for Ms Phasha's children. Further, Ms Phasha stated that she, amongst other things, consented to the taking of the policies, authorised the debit orders, aware of the premium of R350.00 in respect of each policy taken and provided her details about her Capitec Bank account numbers.<sup>5</sup> Apparently the policies in question lapsed because the Respondent failed to deduct premium on her account.
10. It appears that in the course of the investigation, the Respondent procured services of Mr Sarel Snyman, a forensic document examiner ("the Handwriting Examiner") and mandated him to assess a set of documents and to determine whether the signatures are / are not copies of the same signatures. The Handwriting Examiner eventually produced a report, which incorporate assessment of other client's documents too, and same report is dated 19 October 2019 ("the Report"). The Report refers to MP1 and MP2 documents in respect of the case of Ms Phasha and it concluded that same documents are photostatic copies of the same original signature.<sup>6</sup>
11. As stated herein above, and in addition to the information in respect of Ms

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<sup>5</sup> Bundle A, pages 19 - 20

<sup>6</sup> Bundle A, page 16, paragraph 7 and page 18, paragraph 7

Phasha, the Report, contains information and conclusions reached in respect of the following clients which appeared to have been advised by the Applicant: -

- 11.1 Ms M Sako received financial advice on 27 February 2019 in respect of Max Investment Policy with policy number 18623767;
  - 11.2 Ms Sako received financial advice on 25 February 2019 in respect of Max Investment Retirement Plan with policy number 18621229;
  - 11.3 Ms T Kgaphola received financial advice on 26 September 2018 in respect of Max Investment Retirement Plan with policy number 18518650; and
  - 11.4 Ms T Kgaphola received financial advice on 26 September 2018 in respect of Max Pure Investment Plan with policy number 18518694.
12. According to the Report, the Handwriting Examiner concluded as in Ms Phasha matter that the submitted copies in respect of each policy, are photostatic copies of same original signatures.
13. The record indicates that on 20 November 2019 the Applicant received a notice of intention to debar her and at least seven (7) charges were preferred against her. All the charges, save for the seventh charge, are formulated in a similar manner. In short, the charges relate to all the policies stated hereinabove in that the Applicant submitted documents in respect of each policy to the Respondent, which purport that each client had duly signed and it later emerged that the forms are not signed by the relevant clients, but the Applicant made copies of incomplete, signed finalisor declaration and the signature of each client was not genuine.

14. On 6 December 2019 a debarment enquiry was held which was attended by, amongst others, the Investigator as witness of the Respondent and the Applicant. The debarment enquiry proceeded accordingly. Minutes of the debarment enquiry were produced and same were provided to this panel as part of the record ("the Minutes").<sup>7</sup> In essence, the case of the Respondent appears to be captured on the following paragraphs: -

14.1 *"As per handwriting examiner, for the first client MM Phasha, document BV2 & BV4 are photo static copies of the same signature. This means that the advisor requested a client to sign a blank finalisor and advisor completed the rest of the information afterwards. Second client M Sako signatures on BV6 and BV8 finalisors are photo static copies of the same original signature. Third client T Kgaphola, finalisors on document BV10 & BV 12 are photo static copies of the original signature."*<sup>8</sup>

14.2 *"He also made repetition on page 16:8.6.3, which states that an employee shall not entitle to or request a client to sign a blank proposal form or other documentation or to complete such proposal form or other documentation after client had signed it."*<sup>9</sup>

15. The Respondent's case appears to turn on the information that the Applicant enabled the clients to sign blank forms and the Applicant thereafter completed the details or the information. In support of its case, the Respondent refers to, amongst other things, clause 8.6.2.3 of the Contract of Employment.

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<sup>7</sup> Bundle B, page 54

<sup>8</sup> Bundle B, page 55

<sup>9</sup> Bundle B, page 56

16. What is apparent from the Minutes is the absence of Applicant's version and lack of explanation of the allegations made against her. It is noted that the Applicant is not alluding to any information or facts presented before the chairperson of the debarment enquiry, which could be used to justify her conduct.

## LEGISLATIVE FRAMEWORK

17. Section 8A of the FAIS Act states that an authorised financial services provider, key individual, representative of the provider and key individual of the representative must – (i) continue to comply with the fit and proper requirements; and (ii) comply with the fit and proper requirements relating to continuous professional development.
18. Further, sections 8(1) and 8(2) of the Determination of Fit and Proper Requirements, 2017, BN 194 of 15 December 2021<sup>17</sup> ("the 194 Notice"), which deal with fit and proper requirements, and more specifically with aspects of honesty, integrity and good standing, state the following:
- "(1) A person referred to in section 7(1) must be a person who is –*
- (a) honest and has integrity; and*
- (b) of good standing.*
- (2) In determining whether a person complies with subsection (1), the Registrar may refer to any information in possession of the Registrar or brought to the Registrar's attention."*
19. The General Code of Conduct of Authorised Financial Services Providers and



Representatives ("the General Code")<sup>10</sup> provides in section 2 that a provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry.

20. In respect of debarment of representatives, section 14(1) of the FAIS Act states, amongst other things, that a Financial service Provider ("FSP") must debar a person from rendering financial services who is or was, as the case may be – (i) does not meet, or no longer complies with, the requirements referred to section 13(2)(a); or (ii) has contravened or failed to comply with any provisions of this Act in a material manner.
21. In respect of procedure when an FSP contemplates to debar a representative, sections 14(3) and 14(2) of the FAIS Act provide directions to be observed by an FSP. Section 14(2)(a) of the FAIS Act specifically provides that:  
  
*"Before effecting a debarment in terms of subsection (1), the provider must ensure that the debarment process is lawful, reasonable and procedurally fair."*
22. We have considered the grounds and the reasons submitted by the Applicant in this matter and could not find grounds that attack the procedural fairness of the debarment. However, we do note that in her heads of argument, she submits that in respect of procedural fairness, the decision to debar the Applicant was a foregone conclusion. The Applicant does not provide reasons to support this point. We therefore think that this point does not assist the Applicant.

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<sup>10</sup> BN 80 in GG 25299 of 8 August 2002

## MERITS OF THE ALLEGATIONS

23. The Respondent, according to the Minutes of the debarment enquiry, appears to base its finding on the conduct of the Applicant of requesting a client to sign a blank finaliser form and the Applicant completed the information afterwards. This conduct of the Applicant appears to be done on six policies. The Applicant earned commissions following her financial advice on the policies.
24. After having examined the documents in respect of the concerned policies, a Handwriting Examiner, namely Mr Snyman, concluded that the documents contain photostatic copies of the same original signatures. It appears that the Respondent has established basis in fact that the Applicant submitted documents to the Respondent, which purported that the clients had duly signed and which later emerged that the same documents were not duly signed by the relevant clients. In short, the signatures of each client were not genuine.
25. As stated earlier, the record before us, including the Minutes, do not provide a version for the Applicant. It appears on the Applicant's application for reconsideration that, according to the Applicant, the conduct was in accordance with the custom methods of representatives and the Respondent was aware of that conduct. It is understandable, in our view, why the Applicant has no version for the reason that she accepted that the conduct, which is the subject of the complaint, is normally done by representatives.
26. The Applicant appears to say that the conduct of making photostatic copies of signatures and present them as genuine signatures had been done in the past and insurance deals had been closed in that manner. Further, the Applicant advanced her difficulties in executing her duties and travelling difficulties in

respect of securing meetings with clients, as part of grounds for reconsideration of the Respondent's debarment decision.

27. It is our view that the Applicant's conduct of presenting photostatic copies of signatures of clients and present same as genuine cannot be said to be an honest conduct as envisaged in section 2 of the General Code. Further, such financial services cannot be said to have been delivered fairly, with due skill, care and diligence. Turning a blind eye to the pretence of presenting a photostatic copy of signature as if it is genuine is, in our view, neither in line with interests of clients nor in the interests of the financial services industry.
28. The Applicant did not, in our view, provided sound grounds to persuade this panel that the debarment decision by the Respondent against her is unreasonable and therefore unlawful. Further, it is our view that the sanction of debarment is appropriate for the reason that the conduct of presenting signatures of clients as genuine whilst they are not, is serious enough and cannot be accepted as a norm.
29. In the premises therefore, we hold the view that this application for reconsideration should be dismissed.

## ORDER

- (a) The application for reconsideration is dismissed.



ADV W NDINISA

With the Panel consisting also of:

**Z Mabhoza**

**L Makhubela**