

THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: FSP26/2021

In the matter between:

NOKULUNGA MKHATSHWA

APPLICANT

and

OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LTD

RESPONDENT

Application for reconsideration of the debarment under the FAIS Act – debarment set aside.

DECISION

1. The applicant applies for the reconsideration under sec 230 of the Financial Sector Regulation Act 9 of 2017 of her debarment as financial service representative by her erstwhile employer, the respondent (Old Mutual).
2. The applicant was debarred in terms of sec 14 of the FAIS Act, 2002.
3. The parties waived their right to a formal hearing and the matter will be decided on the record as filed.
4. The applicant's debarment arose from the sale of a funeral policy. The insured was Ms CB but the premium payer and (probably) the beneficiary of the policy was one Mr AA who was somehow related to the insured. The policy was applied for and issued weeks before the death of the insured. Mr AA, many months later, claimed the policy benefit.
5. The Old Mutual settled the claim even though the death benefits were subject to a waiting period, which had not expired. Although the insured at the time had an existing funeral policy, which paid out, not only MR AA but also another family member obtained weeks before her death funeral policies for the insured, which were not paid.

6. The sudden interest of Mr AA in obtaining funeral insurance for the deceased was, without doubt, the result of her serious illness at the time of the insured. He was a consultant at another large insurance company and his desire to obtain cover for the deceased from the defendant is highly questionable. So, too, the fact that he acted as intermediary for the insured, arranging the policy with the applicant, limiting the contact between the applicant and the insured to a telephone conversation and producing sending the signed policy application electronically to the applicant, not correcting the patent error or disclosing her frail health position.
7. Also suspicious is the fact that although he alleged that he obtained the insurance because of his moral duty towards the insured to assure her of a proper funeral, he did not, as said, claim under the policy until she had been buried and the waiting period had lapsed. And then he lied to the rest of the family as to the reason why he obtained the policy for the deceased. He said it formed part of a family plan and was therefore convenient to add her, something that is untrue because he did not insure the family with Old Mutual because it was too expensive.
8. It also appears that the Old Mutual had some reservation about the signature of the deceased, but nothing came of that.
9. The Old Mutual failed to consider that the onus rested on it to show that the applicant should be debarred and did not consider the lack of veracity of Mr AA.
10. That brings me to the case of the applicant. She was found guilty of negligence because she had not followed the processes of Old Mutual by, for instance, consulting with the deceased personally but via telephone and through Mr AA. The complaint, according to the investigator, was that she had completed the application form negligently.
11. It contains a long list of health questions, some objectively ridiculous for someone of 62 years of age. One section begins with the question “do you have, have you ever had or are you

intending to see a doctor or a health professional about any of the following conditions”, one being high or low blood pressure. The answer entered by the applicant was in the negative. As a matter of fact, the answers indicate that this 62-year-old person never had any medical condition in her life. How the underwriter could believe that in issuing a policy, is beyond comprehension – unless the purpose of the form is not to assess the risk but to justify the rejection of a claim

12. According to the applicant, she was informed by both MR AA and the deceased that she had suffered from high blood pressure five years ago. She said that she was not aware at the deceased was using any chronic medication since the deceased told her that she was in good health and that she used to have high blood pressure and that while she had been on medication, she stopped using it four to five years ago, and that she was fine. She also told her that she recently went to the doctor because she had short breath and headaches and the doctor said it was probably fatigue and she should take some time off from work.
13. What was not disclosed by the deceased was that she had diabetes and hypertension and cholesterol problems since 2013 and was on chronic medication “but that the medical conditions were under control” until April 2020 when she started feeling ill, but she did not go to the hospital during the lockdown and her health started deteriorating. She went to see her house doctor during June who told her that she had had a stroke, and he gave her new high blood medication, pain medication and increased her diabetes medication and told her to have it twice a day instead of once a day.
14. The big issue raised by Old Mutual was the underlined words. The applicant was told that the deceased had recently visited a doctor, and by answering the question in the negative, the applicant misled the underwriter.
15. The problem with this is that the question was not whether the deceased had visited a doctor but whether she had done so in relation to her blood pressure. Since the diagnosis, according

to the deceased, was fatigue, the emphasis laid on the incorrect answer by the Old Mutual is misplaced. The Old Mutual also did not consider that the applicant was inexperienced and, as she said, did not realise the impact that the answer could have had.

16. The Old Mutual in this instance conflated negligence and the failure to follow procedures with the fit and proper requirements of the FAIS Act. The Old Mutual had to assess the character of the applicant as a whole and had to consider that “character cannot always be estimated by one act or one class of act. As much about a person as is known will form the evidence from which the inference of good or bad character is drawn.”
17. I am on balance satisfied that the applicant was incorrectly debarred, and the debarment is set aside.

Signed on behalf of the Tribunal on 23 July 2021.

A handwritten signature in blue ink, appearing to read 'LTC Harms', is written over a horizontal line.

LTC Harms (deputy chair)