

THE FINANCIAL SERVICES TRIBUNAL

Case №: FSP 13/2022

In the matter between:

NTHABISENG MATHAFENI

Applicant

and

LIBERTY GROUP LIMITED

Respondent

Tribunal: Adv Michelle Le Roux, SC (Chairperson), Adv William Ndinisa and
Adv Mustaque Holland.

Appearance for Applicant

In person

Appearing for Respondent

Ms Chetty for the Respondent

Date of Decision:

17 January 2023

Summary: Sections 14(2) and 14(3) of the Financial Advisory and Intermediary Services Act 37 of 2002 – Procedural fairness – section 13(2)(a)(i) – compliance with the fit and proper requirements – section 2 of the General Code of Conduct for Authorised Financial Services Providers and Representatives, 2003 – render financial services honestly, fairly, with due skill, care and diligence, and in the interest of clients and the integrity of the financial services industry.

DECISION

INTRODUCTION

1. The Applicant, Ms Nthabiseng Mathafeni, applied for reconsideration of the decision of the Respondent, Liberty Group Limited (“Liberty”), contained in a letter dated 4 March 2022.
2. This application is in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 (“the FSR Act”).

3. The impugned decision relates to the debarment of the Applicant on the basis that she no longer complies with the fit and proper requirements of honesty and integrity.

BACKGROUND

4. The Applicant was in the employ of Liberty in the capacity of representative as defined in the Financial Advisory and Intermediary Services Act 37 of 2002 (“the FAIS Act”). Her employment commenced on 1 March 2016 and was terminated on 4 March 2022.
5. Group Forensic Services (“GFS”), a division of Liberty received a request on 1 July 2021 to investigate allegations of fraud. The allegations of fraud were made by two clients, namely Ms Sibongile Gloria Mpungose (“Ms Mpungose”) and Ms Dumisile Nozipho Gumede (“Ms Gumede”).
6. Allegations of Ms Mpungose are in respect of policy number 0070722680 which she stated she did not have with Liberty. Further, Ms Mpungose stated that she did not give anyone authority to deduct or open other policy for her child Sibahle Neliswa Thabethe because she is already covered on policy number 11673016060 as an extended member. Policy no. 11673016060 (a burial plan) is an old policy that Ms Mpungose has with Liberty. This information is contained in an affidavit of Ms Mpungose dated 9 June 2021.
7. In respect of Ms Gumede, the allegations are that she noticed a deduction in her payslip which is unknown to her. The disputed policy number in question is policy no. 1189759541. Ms Gumede stated, amongst other

things, that she wants Liberty to cancel this disputed policy and take further steps on this issue. This is according to the affidavit of Ms Gumede dated 11 June 2021.

8. GFS conducted its investigation and, in the process, it interviewed a number of persons, including the Applicant, and the two aforementioned clients who reported the allegations of fraud.
9. The two disputed policies (policy no. 0070722680 in respect of Ms Mpungose and policy no. 1189759541 in respect of Ms Gumede) were initiated by the Applicant.
10. There are no application forms for the disputed policies because of Covid 19 pandemic and lockdown. Application summaries were considered by GFS and tested with information received from the clients and clients' credit history records.

Ms Mpungose: Policy no. 0070722680

11. GFS noted that the information contained in the application summary in respect of Ms Mpungose and stated, amongst other things, that identity numbers and cell number are similar with the information in the client's credit history. Further, GFS noted that the application summary has no signatures of Ms Mpungose. The absence of signature is of no consequence as this situation obtained during Covid-19 pandemic.
12. However, GFS noted the fact that the address recorded in the application summary, being P.O. Box 3175, *Dundee, 3000* is different from the

address appearing on the Signature Specimen form, Application for Refund of Premium form and affidavit, being P.O Box 3157, *Blood River*, 3102.

13. Further, GFS also noted that the email address on the application summary, sibaneliswa@gmail.com is different from the email mpungosesibongile63@gmail.com recorded on the affidavit, application for refund and specimen signature form all received from the client.
14. GFS noted irregularities regarding information on the gross and nett incomes of the client. The gross monthly income on the application summary is R32 567, 56 and it is different from the gross income of R16 606, 44 appearing on the client's payslip. The nett monthly income on the application summary is R25 671 and is different from the nett monthly income appearing from the client payslip. According to the GFS report, the nett and gross salaries were overstated.
15. Call records to the cell number 0835257941 was extracted by GFS and established that the Applicant called the client on 18 November 2020 and they had a 28 minute: 21 seconds duration of conversation. That conversation was regarding the fact that the client's daughter is over age and must be removed as a child from client's old policy. The conversation referred to the client's cash back bonus.
16. GFS noted that on 19 November 2020 Ms Mpungose submitted documents for a cash back bonus on the old policy and attached a copy of her daughter's identity document and a letter to add her as an extended

family member on the old policy. Liberty stated that the letter states the following:

“the above child is my daughter, I covered her in my old policy 1167346060 now she is 24 years, please can you put her under extended family”¹. (own emphasis)

17. According to the interview conducted by GFS on 6 August 2021, Ms Mpungose was aware that her daughter had already been added as an extended family as she was advised by Mr John Muchangi, her financial advisor.
18. Further, GFS noted that a focus call was not conducted in respect of the disputed policy no. 0070722680 of Ms Mpungose. A focus call is a practice done by a sales area manager to verify the terms and conditions of the new policy taken by client.
19. A commission in the sum of R545, 35 was paid into the account of the Applicant on 21 November 2020 and was clawed back on 9 December 2021.

Ms Gumede: Policy Number 1189759541

20. GFS followed a similar approach of comparing the information recorded on the application summary for the disputed policy to the personal details recorded in Ms Gumede’s ICT report, affidavit dated 11 June 2021, Specimen Signature form and Application for Refund of Premium form.

¹ Records, Part B, p1K

21. It was established that the address, P.O. Box 154 *Ndwedwe*, KwaZulu Natal, South Africa 3680 recorded in the application summary, is different to the address *Ward 18, Kwazini Area*, Ndwedwe, P.O. Box 154 Ndwedwe 4342 recorded on the Signature for Specimen form, Application for Refund of Premiums form, and affidavit of Ms Gumede. According to GFS the different address does not belong to Ms Gumede as per the credit history enquiry.
22. GFS also noted irregularities with payslip information. According to GFS the gross and nett salaries are overstated. The gross monthly salary in the application form is R36 878, 07 and the gross income in the payslip is R17 284, 94. The nett income in the application summary is 26 787, 07 and the nett income in the payslip is 10 158, 12. There are very obvious differences.
23. It is noted that a commission in the sum of R1 906, 79 was paid the Applicant and was clawed back on 6 December 2021.
24. GFS extracted call records to the cell phone number 0725467293 and establish that the Applicant called the number on 19 October 2020. The call was six seconds.
25. According to GFS, the area sales manager, Abbey Ndlovu noted that he made a focus call and stated that the client was pleased with advice. Further, according to PFS no focus call was conducted.

Applicant: Ms Nthabiseng Mathafeni

26. On 12 August 2021 GFS conducted a telephone interview with the Applicant where she was informed of the allegations made against her and was afforded an opportunity to respond.
27. The Applicant responded and stated, amongst other things, that she could not understand how Ms Gumede could not have knowledge of the policy as she also helped Ms Gumede with her cash back bonus.
28. The Applicant stated that the clients (Ms Gumede and Ms Mpungose) were not truthful as she did talk to them over the phone and they initiated the policies.
29. The Applicant submitted that in respect of the discrepancies regarding salaries, Ms Gumede provided an estimation as they could not have access to her payslip as it was lockdown. The estimate came from the client. Further, the Applicant submitted in respect of Ms Mpungose's salary that the payslip used was a bonus payslip. These accounts for the salary discrepancies.
30. In respect of discrepancies regarding addresses of the clients, the Applicant submitted that they could not pick up some of the addresses due to the system used as the areas are remote. They had to rely on postal code or postal addresses.
31. The GFS finalised its investigation and issued its report dated 7 January 2022. It concluded that the disputed policies were initiated without the

knowledge and consent of the clients. Further, it concluded that the information provided to Liberty was false and inconsistent with the information received from clients and their respective credit history.

32. A notice of formal enquiry was initiated by Liberty on or about 25 January 2022 (“Notice of Inquiry”). The nature of the process is titled “*Documentary Process*” and same is provided for in the terms of the Guidelines for the Corrective Action (“the Guidelines”). It contains the following information regarding the charges preferred against the Applicant: -

- 32.1 The allegations and legal basis for the charges;
- 32.2 Liberty stating that it attached evidence supporting the allegations;
- 32.3 Invitation to the Applicant to provide additional information to the charges, to supplement statement made by the Applicant;
- 32.4 Advice to the Applicant that the procedure for documentary enquiry is contained in the attached Guidelines; and
- 32.5 most importantly, a statement warning the Applicant that should she be found guilty of any or all of the charges, it may result in debarment.

33. The Applicant made her submissions and attached documents in support of her version. This was done on or about 1 February 2022.

34. On or about 16 February 2022 the adjudicator after having considered the two charges, the submissions made, concluded, amongst other things that:

“That the Financial Advisor went to great lengths to carefully plan to carry out his [sic] fraudulent conduct, and displayed intentions to mislead and /or be dishonest. To tolerate this type of conduct will be a deviation and breach from the FAIS Act, which requires that every financial advisor to exercise highest degree of honesty and integrity in their duties...”²

35. On or about 4 March 2022 Liberty issued the Notice of Outcome of the Corrective Inquiry following the recommendations of the adjudicator and debarred the Applicant for not complying with fit and proper requirement of honesty and integrity. This is the decision sought to be reconsidered by this Tribunal.

GROUND OF RECONSIDERATION

36. The Applicant attacks the decision of Liberty on procedural and substantive fronts.
37. On the aspect of procedural fairness, the Applicant stated that the official of Liberty did not properly explain the consequences of debarment to her. According to Applicant, Liberty has a duty to explain what is debarment.
38. Further, the Applicant submits that she was dismissed without a disciplinary hearing. She submitted that she was never given an

² Records, Part A, p16

opportunity to state her side of the story which is against Labour Relations Act 66 of 1995 (the LRA”).

39. Regarding substantive fairness, the Applicant submitted that there are several inconsistencies that render her debarment unfair.
40. The Applicant refers to what the adjudicator stated in his report and contrasted same with what the GFS reported. For instance the Applicant stated that that the adjudicator stated the Applicant used incorrect Identity Document numbers of both Ms Mpungose and Ms Gumede while GFS stated that the ID numbers are matched. It is this consistency that the Applicant challenged.
41. Further, the Applicant questioned the GFS for not investigating the content of her telephone conversation with Ms Mpungose’s daughter on 18 November 2020.
42. On the question of discrepancies on salaries, the Applicant stated that in respect of Ms Mpungose she (the Applicant) conceded that a bonus payslip was used. In respect of the salary of Ms Gumede, it was an estimate as she was not sure and it was during the Covid-19 lockdown.
43. Furthermore, the Applicant explained that her manager advised that he made a call to Ms Gumede and confirmed the policy. Further, the Applicant explained that she alerted Liberty about a duplication on policy number of Ms Gumede and such a conduct is not of a person who wants to defraud.

44. In respect of focus call, the Applicant stated that her manager conducted focus calls on the clients and policy numbers were issued. Further, the Applicant stated that GFS reported that no focus call was done. According to the submission of the Applicant, the truth will not be known as there are contradictions.

LEGAL FRAMEWORK AND ANALYSIS

Procedural Fairness

45. Section 14 of the FAIS Act provides a legislative framework on debarment of representatives. Section 14(2)(a) of FAIS Act states that before effecting a debarment in terms of subsection (1), the provider (the FSP) must ensure that the debarment process is lawful, reasonable and procedurally fair.

46. The FAIS Act provides guide in respect of the process to be followed and section 14(3) of the FAIS Act states the following:

“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 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); and*
- (c) immediately notify the person in writing of-*
 - (i) the financial services provider's decision;*
 - (ii) the persons' rights in terms of Chapter 15 of the Financial Sector Regulation Act; and*
 - (iii) any formal requirements in respect of proceedings for the reconsideration of the decision by the Tribunal."*

47. We have considered the concerns of the Applicant that procedural fairness was not followed for the reason that Liberty did not explain what are the consequences of debarment. Our assessment of the Notice of Inquiry dated 25 January 2022 clearly states the possible consequences of being found guilty of any or all of the charges may result in being debarred.

48. There is nothing in the process that could have prevented the Applicant from seeking clarity on the consequences debarment. The Guidelines at paragraph 2.5.8 referred to debarment as one of the sanctions that Liberty may consider. The Applicant participated in the enquiry fully aware that she might be debarred. We see no reason why Liberty should be burden with a duty to explain what is stated in the Guideline, without receiving any query. We therefore hold the view that this ground of reconsideration lacks substance.

49. The Applicant submitted that she was dismissed without a disciplinary

enquiry. It is our view that the procedure of documentary enquiry as covered in the Guidelines is not inimical to the rights provided for in sections 14(2) and 14(3) of the FAIS Act. This is in accordance with the maxim *audi alteram partem* (hear the other side), which is a fundamental principle of administrative justice and a component of the right to just administrative action contained in section 33 of the Constitution.³

50. It is our view that the Applicant had more than one opportunity to put her version before the decision made by Liberty. Therefore, we are not in a position to fault the documentary inquiry procedure which led to the debarment.
51. To the extent that the Applicant referred to the LRA, this Tribunal has competence on labour law issues.

Substantive Inquiry

52. Section 13(2)(a)(i) of the FAIS Act states, amongst other things, that a registered financial services provider must at all times be satisfied that its representatives, and the key individuals of such representatives, are, when rendering financial services on behalf of the provider, competent to act, and comply with the fit and proper requirements.
53. Section 8 of the Determination of Fit and Proper Requirements, 2017 (“Fit and Proper Requirements”) provides, amongst other things, that a representative must be a person who is – (i) honest and has integrity; and

³ Financial Services Board v Bartram and Another 2018 (1) SA 139 (SCA), at par 21

(ii) has good standing.

54. The General Code of Conduct for Authorised Financial Services Provider and Representatives, 2003 ("the General Code of Conduct") provides in section 2 that a provider must at all times render financial services honestly, fairly and with due skill, care and diligence, and in the interest of clients and the integrity of the financial services industry.
55. The Applicant is charged and found guilty of failing to render financial services with the required due skill, care and diligence, and in the interest of clients, Ms Mpungose and Ms Gumede, by initiating the disputed policies in their respective names without their authorisation and consent.
56. We have considered the grounds of reconsiderations of the Applicant which, in the main, challenge the inconsistency of the adjudicator's report and the GFS report in the matching of identity numbers and cell phone numbers used. The Applicant explained the differences in the residential addresses of the clients and the discrepancies in salaries.
57. What we have observed is that the Applicant does not explain why she did not follow the instructions of Ms Mpungose contained in a letter dated 19 November 2020 when she instructed the advisors to include her daughter in her old policy as an extended member. The record reflects that this information was available to the Applicant or at least to Liberty on the day after the Applicant had a 28 minutes telephone call with Ms

Mpungose.⁴ The failure of the Applicant to explain her disregard of the 19 November 2020 letter does not assist the Applicant. We are of the view that on this point alone, we find no reason to interfere with the decision of Liberty.

58. We find it difficult to disregard the affidavits of the clients who deny having given authorisation or having knowledge of the disputed policies. We noted that the Applicant disputed the truthfulness of the clients. We are not in a position to overlook the content of the contents of the clients' affidavits, without more from the Applicant. Therefore, we are not persuaded by the submissions of the Applicant in this regard. The version of Liberty that the clients did not consent or authorise the initiation of the disputed policies is not discredited.
59. The record shows that GFS extracted call records to cell number 0725467293 and established that the Applicant called the number on 19 October 2020 but the call was six seconds. Although the Applicant submitted in her affidavit dated 6 June 2021 that she had a telephone conversation with Ms Gumede during or mid October 2020, nothing more is submitted by Applicant to discredit Ms Gumede's affidavit.⁵ The absence of telephone records in this regard is not assisting the Applicant.
60. Incorrect addresses and overstated salaries are not issues that, in our view, could be overlooked as they are relevant in considering the interest of the clients and the integrity of the financial services industry.

⁴ Record, Part B, page 91

⁵ Records, Part B, page 73

61. On the aspect of sanction, the Applicant submitted that same is too harsh because Liberty and the clients did not suffer any financial loss. Liberty submitted that the reputational damage it suffered is worse and for that reason debarment suites the transgression. We are of the view that conducts that fall short of fit and proper requirements and impact on honesty and integrity are serious as they affect, not only the clients, but also the financial services industry at large. We find no basis to interfere with sanction.

CONCLUSION

62. The documentary inquiry process which culminated to the debarment of the Applicant does not, in our view, appear to fall short of procedural fairness. The Applicant had more than one opportunity to place her version before Liberty and she used those opportunities. Therefore, there is no substance on this ground.
63. We have considered the information on records and the submissions made by the parties during the hearing of the matter. It is our view that there is no basis to interfere with the decision recorded in a letter dated 4 March 2022.

ORDER

1. The application for reconsideration is dismissed.



Adv W Ndinisa

With the Panel consisting also of:

Adv Michelle Le Roux, SC, and

Adv Mustaque Holland.