

**THE FINANCIAL SERVICES TRIBUNAL**

Case No: **FSP35/2020**

In the matter between:

**SAMANTHA WILLIAMS MOTHEI**

Applicant

and

**ADVICECUBE**

Respondent

Tribunal: H Kooverjie (chair), NP Dongwana and G Madlanga

Summary: What constitutes a lawful, reasonable and procedurally fair debarment process as envisaged in section 14(2) of the Financial Advisory and Intermediary Services Act.

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**DECISION**

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**A INTRODUCTION**

1. This application for reconsideration has been instituted against the decision of the respondent to debar the applicant, Ms Mothei.
  
2. The applicant's case was premised on the fact that the respondent had an agenda in light of her previous debarment with Nedbank (previous employer).  
The applicant stated that:

*“According to AdviceCube they are using the above debarment as grounds for a*

*second debarment in relation to personal characteristics of dishonesty and integrity of which does not form the basis as part of the act under financial services. I am further taking legal action against AdviceCube as for the below annexures and the Key Individual (Veenal Singh) in now using the debarment as a play of revenge against my legal recourse...”*

3. The further grounds which the debarment was contested was that the debarment process was irregular and unfair.
4. The respondent persisted with submissions that the debarment process was not only fair but justified in that:
  - 4.1 The applicant resigned from her previous employer while under investigation. However in her application for employment with the respondent, she misrepresented that she was leaving her previous employer for growth reasons.
  - 4.2 She was aware of the pending Nedbank debarment and was obliged to disclose same. By stating that her legal representatives advised her that she should not disclose Nedbank’s attempt to debar her, was unethical and dishonest on her part.
  - 4.3 She misrepresented information on “**fit and proper**” disclosures made to AdviceCube during her employment with them.
  - 4.4 She breached the Protection of Personal Information Act by disclosing client’s personal contact details to unauthorised persons.
  - 4.5 She arranged agreements with product providers without company consent and subsequently arranged for commission to be released by a

provider to AdviceCube.

- 4.6 Her actions have brought the employer into disrepute by displaying dishonesty and lack of integrity.
5. The applicant disputed the said findings. We note her response to the allegations levelled against her, particularly from the transcript of the hearing conducted.
6. Insofar as due process is concerned the applicant further pointed out that she only became aware of the debarment by Nedbank on the day of the said hearing. Prior to that she had only been aware of Nedbank's intention to debar her. She had made representations in that regard as well.
7. During the proceedings, it was brought to our attention that the debarment by Nedbank was also contested before this Tribunal, and on 13 August 2020, a ruling was issued to the effect that a settlement had been reached between the parties and that the debarment was set aside due to the "***fatal procedure lapse.***"

## **B THE FAIS ACT**

8. In our consideration, we deem it appropriate to firstly consider whether the debarment process was lawful and fair.
9. The debarment process is encapsulated in section 14(3) Financial Advisory and Intermediary Services Act ("***FAIS Act***"). Section 14 of the FAIS Act sets out the process for a fair debarment. In terms of section 14(1) of the FAIS Act, financial

service provider (FSP's) are obliged to debar representatives from rendering financial services if the FSP is satisfied on the basis of available facts and information that the representative no longer complies with *inter alia* the fit and proper requirements.

10. Section 14(2) of the FAIS Act requires that the debarment process be lawful, reasonable and procedurally fair.

11. In this instance the Guidance Note 1 of 2019, ("**Guidance Note**")<sup>1</sup> has relevance. At this juncture it must be pointed out that neither of the parties made reference thereto. It is rather concerning that financial service providers and representatives operating in this industry are not *au fait* with the legislative prescripts and processes which govern them.

12. First and foremost, a debarment must relate to:

- the non-compliance by a representative with the fit and proper requirements as postulated by section 13(2)(a) of the FAIS Act; or
- a contravention or failure to comply by a representative with the provisions of the FAIS Act in a material manner.

13. Section 13(2) of the FAIS Act stipulates:

***"An authorised financial services provider must-***

***(a) At all times be satisfied that the provider's representative and the***

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<sup>1</sup> Guidance Note 1 of 2019 (FAIS) Guidance Note on the debarment process in terms of section 14 of the Financial Advisory and Intermediary Services Act, 2002. (Guidance Note)

**key individuals of such representatives are when rendering a financial service on behalf of the provider, competent to act and comply with:**

- (i) Fit and proper requirements; and**
- (ii) Any other requirements contemplated in section 13(1)(b).”**

14. Section 14(3)(a) and (b) reads:

- “(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 any measures to protect the interests of clients in relation to unconcluded business;**
    - (ii) provide the person with a copy of the financial services provider’s written policies and procedure governing the debarment process;**
    - (iii) give the person 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.”**

15. It is reiterated that adequate notice should be given in writing of the FSP’s intention to debar the representative and the grounds and reasons for the debarment should be communicated to the individual.

## C GUIDELINES

16. It cannot therefore be gainsaid that the FSP's policies and procedures governing the debarment process must be aligned with the provisions of the FAIS Act.<sup>2</sup>
17. We have had sight to the respondent's "**Guidance on the disciplinary and debarment process**" ("**Guidelines**"). We note that it is, in fact, aligned with fair process as envisaged in the aforesaid section.
18. Cognisance is taken of the Guidelines which states that there are two different relationships between a FSP and a representative each with its own rights and obligations. The first relationship is the contractual employment relationship that exists between the FSP as the employer and the representative as the employee. This relationship is governed by the Labour Relations Act. The second relationship is characterised by a representative rendering financial services on behalf of the FSP. This relationship is governed by the FAIS Act. The labour process is governed by the Labour Relations Act and the withdrawal of authority of a representative to render financial services governed by the FAIS Act must both be observed, however, the two should not be combined.
19. In terms of section 14(1) of the FAIS Act, it is compulsory for FSP's to take action against representatives who are considered to be unfit or incompetent to render financial services. However such action commands due process.
20. The said Guidelines further note that an independent assessment is necessary

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<sup>2</sup> Section 14(3)(a)(ii) of the FAIS Act

to determine whether the misconduct is sufficiently serious to impugn the honesty and integrity of the representative (to effect the debarment). Independent assessment refers to an assessment of the conduct of the representative itself.

#### **D GUIDANCE NOTE**

21. The Guidance Note assists the FSP's in understanding what constitutes due and fair process. The FSP should with the notice of intention to debar, provide the person with a copy of its written policies and procedures governing the debarment process (section 14(3)(a)(ii)). The FSP should further through the notice give a person a reasonable opportunity to make a submission in response.
22. It is necessary for the FSP then to consider, together with all the available facts, information and any response received from the person, that the FSP intends to debar the person, and where applicable to also have regard to the information regarding the conduct of the person.
23. Clause 3.4.2 of the said Guidance Note specifically states:

***“A debarment process may form part of the employment related disciplinary proceedings which may be embarked upon by the employer against the representative. Should the FSP conduct a disciplinary hearing with the representative, it is advisable for the FSP to combine its policies and procedures governing the debarment process with the FSP's policies and procedures in respect of the disciplinary hearing. In the event that this is not done, the FSP cannot summarily debar a person based on the***

***outcome of the disciplinary hearing without following the steps set out in section 14(3).”***

24. It cautions financial service providers not to effect debarments in instances when appropriate enquiries to the conduct of the employees are not made in accordance with the FAIS Act. FSP's should not effect debarments in contractual or other grievance matters.

25. Hence, the enquiry as to whether a debarment is justified is a separate and specific enquiry. This entails an enquiry as to whether the applicant failed to meet:

- personal character qualities of “***honesty and integrity***”;
- whether he had contravened the provisions of the FAIS Act in a material manner;
- in determining whether the fit and proper requirements were met, the following are considered:
  - (a) Personal character qualities of honesty and integrity;
  - (b) Competence which includes experience, qualifications, operational ability, continuous professional development and financial soundness.

## **E THE POST DISMISSAL NOTICE**

26. It has not been disputed that the “***post dismissal notice***” advised the applicant of the respondent's intention to debar her. Same was issued in writing on 13 July 2020. Prior to that the disciplinary/debarment hearing was conducted on 3 July



2020.<sup>3</sup>

27. The hearing was initiated with correspondence dated 23 June 2020 where the applicant was informed to attend the “**hearing**” and further read:

**“Please avail yourself from 1pm to 3pm Friday, 3 July 2020 at our offices to attend the formal hearing on the following are concerned-**

- (1) Gross insubordination;**
- (2) Bringing AdviceCube into disrepute;**
- (3) Breach of protection of personal information;**
- (4) Failure to meet contractual obligations;**
- (5) Arranging agreements with product providers with company concepts;**
- (6) Failure to get marketing campaign signed off by management.**

**This is an internal process and only requires your attendance.”**

28. On 3 July 2020, the hearing proceeded. However it turned out that it was in fact a “**disciplinary and a debarment hearing**”. We note from the transcript that the attendees included a Chairman and a mediator. The procedure for the hearing was set out as follows:

- “1. AdviceCube to present their case and provides supporting evidence as per allegations;**
- 2. The applicant will then be afforded the opportunity to respond to each allegation;**
- 3. AdviceCube’s aggravating factors;**
- 4. The applicant’s mitigating factors;**
- 5. Determination by the Chairman.”**

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<sup>3</sup> Guidance Note 2019

29. Having further regard to the transcript the following was stated under the heading the “**Chairman’s address**”:

***“The purpose of today’s meeting is for the allegations to be presented by AdviceCube and for Samantha to then address these allegations and then to decide the best way forward and if a solution can be reached and how we can ensure that we resolve these matters in the best possible way. The mediator’s role is to ensure that the final outcome or the options are best as possible. Samantha is also entitled to a pack of the information which can be emailed after today.”***

30. Having regard to the Chairman’s address and the presence of a mediator, it was expressly stated that the purpose of the hearing was to mediate and attempt to achieve a resolution in this matter. The issue then is at what point was it decided to conduct the hearing in the form of a disciplinary/debarment hearing instead of the intended mediation.

31. We take cognisance of the factual basis upon which the charges were levelled against the applicant, and which charges were listed as follows:

- (1) Gross insubordination;
- (2) Bringing AdviceCube into disrepute and not acting in the best interest of AdviceCube;
- (3) Failure to meet contractual obligations;
- (4) Arranging agreements with product providers with company concepts;
- (5) Failure to get marketing campaign signed off by management.

32. Mr Singh, representing the respondent, had difficulty convincing the Tribunal that

the debarment procedure was in accordance with section 14(2) of the FAIS Act, particularly if one takes the following into consideration namely that:

32.1 The charges levelled against Ms Mothei were not presented to her together with the findings prior to the hearing.

32.2 At no stage was she aware that a disciplinary and a debarment hearing was to be held. She was merely advised that it was going to be an internal hearing.

32.3 The applicant's representations to the post dismissal notice were not taken into account when a decision was made for her debarment.

32.4 The notice to debar her was submitted to FSCA without her representation and a day before she submitted her response.

33. Mr Singh persisted that at all relevant times the applicant was very well aware of the Guidelines pertaining to the disciplinary and the debarment process. And so it was submitted that the Guidelines together with all the other informative aspects are communicated to the representatives regularly and on a quarterly basis.

34. As alluded to above, the Guidelines recognised that there are two different relationships between the FSP and the representative. In particular that there has to be an independent assessment in respect of the "**honesty and integrity**" requirements. Such independent assessment would assist in determining whether the misconduct is sufficiently serious to impugn the honesty and integrity of the representative (to effect the debarment). Independent

assessment refers to an assessment of the misconduct itself in other words, examining an act or omission which was committed. If it is found that the misconduct is of a sufficiently serious nature, then the following test was laid down in considering the debarment process namely that:

34.1 The test for dishonesty must be both subjective and objective;

34.2 An FSP considering a debarment must ask the following questions:

- Was the act of the representative one which an ordinary decent person considers to be dishonest (objective test)?;
- Should the representative had realised what he was doing, by those standards, dishonest (subjective test)?

35. The initial disciplinary hearing is convened under the Labour Relationships Act whereas the enquiry in terms of section 14(1) is convened under the FAIS Act and the Promotion of Justice Act.

36. Even with the debarment enquiry the FSP must have regard to the information regarding the conduct of the representative and afford the representative an opportunity to be heard before an adverse decision is taken.

37. We note from the record that after the disciplinary hearing, an “*investigation*” was conducted. It was alleged that the purpose was to investigate the conduct of the applicant in relation to her “*fit and proper requirements*”. The findings then caused the post dismissal notification of 13 July 2020 to be issued wherein the applicant was informed that:

***“Further through your summary dismissal from AdviceCube on the 3<sup>rd</sup> of July 2020, I write to inform you of our intention to proceed with the debarment enquiry in terms of section 14(1) convene under the FAIS Act and the Promotion of Justice Act (PAJA).***

***We believe that your conduct is sufficiently serious to impugn your honesty and integrity as a representative due to the act or omission which was committed. The dishonesty displayed are both subjective and objective. Additional allegations to dismissal:***

- ***dishonesty and breach of integrity;***
- ***inception and during employment.”***

38. It is common cause that the respondent submitted the applicant’s debarment notice to the Regulator on 15 August 2020. This was even before the applicant’s representations to the 13 July 2020 notice was filed. The applicant’s response was submitted a day later, on 16 August 2020.
39. This conduct is indicative of the fact that the applicant was neither given an opportunity to respond to the notice of intention to debar her, nor was a debarment enquiry, as set out in the notice, conducted. The said notice further did not make provision for the applicant to furnish a response within a reasonable time.
40. As alluded to above, Mr Singh at the hearing conceded that the applicant was not informed that the hearing was in fact a ***“disciplinary and/or debarment hearing”*** nor was she furnished with the charges levelled against her.

41. Mr Singh particularly submitted that it was never the intention to mislead the applicant and that it was never intended to have the debarment process. However since her honesty and integrity qualities were questioned in all of the charges levelled against her, the debarment issue was raised.

42. Mr Singh, on his understanding, submitted that the process was fair in that:

42.1 the applicant was informed of the hearing and the aspects that would be canvassed;

42.2 the outcome of the "**hearing**" demonstrated that the misconduct was of a serious nature;

42.3 an independent assessment became necessary in order to determine the applicant's fit and proper requirements and as such an investigation into her character requirements was conducted;

42.4 the post dismissal notification was served on her prior to the debarment;

42.5 she had responded to such notice in writing.

43. By virtue of section 33 of the Constitution "***every person has a right to lawful, reasonable and procedurally fair administrative action.***" Moreover Section 34 provides that "***every person has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate another independent and impartial tribunal or forum.***"

44. Yacoob J illustrated the need for a fair and reasonable hearing in paragraph 34<sup>4</sup>:

***"11 This s 34 fair hearing right affirms the rule of law which is a***

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<sup>4</sup> JM De Beer v North Central Local Council and the South Central Local Council, CCT 59/00, dated 26 September 2007

***founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and Rules of Court where it is reasonably possible to do so, in a way that would render the proceedings fair. it is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected. Rules of Courts make provision for this. They are not however, an exclusive standard of reasonableness. There is no reason why legislation should not provide for other reasonable ways of giving notice to an affected party. If it does this, it meets the notice requirements of s34...***

## **F CONCLUSION**

45. Having considered this matter, we conclude that the debarment process was flawed and not in accordance with section 14 of the FAIS Act read with the Guidance Note 1 of 2019.
  
46. It must however be emphasized that in as much as the FSP should not abuse the debarment processes, the same caution should be extended to representatives. More often than not representatives challenge the debarment processes merely to obviate the substantive aspects when the merits are not in their favour.

47. The fact that this Tribunal has not dealt with the substantive findings does in no way mean that the applicant's submissions are accepted. During the hearing, the members of the Tribunal briefly ventilated certain allegations made against Ms Mothei with her. Her responses were somewhat concerning insofar as her conduct as a representative is concerned. As alluded to above, a separate enquiry was necessary in order to evaluate her fit and proper requirements.

48. In this instance, the debarment has to be set aside for lack of due and fair process.

49. The following order is therefore made:

- (1) the decision to debar the applicant is set aside and remitted to the respondent for reconsideration.

SIGNED at **PRETORIA** on this **25<sup>th</sup>** day of **NOVEMBER 2020** on behalf of the Panel.



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**ADV H KOOVERJIE SC**

With the Panel consisting also of:

NP Dongwana

G Madlanga