THE FINANCIAL SERVICES TRIBUNAL

Case No: FSP42/2023

In the matter between:

SELLO MOEPYE Applicant

and

DISCOVERY CONNECT DISTRIBUTION SERVICES Respondent

Tribunal Members: MG Mashaba SC (Chair), E Phiyega and PR Long.

Appearance for the Applicant: In Person

Appearance for Respondent: K Sithole together with R Kirsten

DECISION

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1. The applicant brought an application for consideration in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 against the decision of the respondent dated 16 May 2023.

2. In his application, the applicant raises both procedural and substantive grounds for reconsideration. The applicant has also submitted augmented/supplemented

grounds for reconsideration. The augmented grounds were received by the tribunal on 14 August 2023.[1]

3. Based on the facts before us the applicant was invited to make representations in the debarment proceedings, and the respondent submitted that he failed to do so. However, before one deals with the submissions presented by the respondent and the arguments submitted by the applicant it is important, for the purpose of putting context to this matter, to deal firstly with the factual background leading to the debarment of the applicant so as to get proper understanding and context the issues.

4 The Applicant was employed by the Respondent as its representative from 01 April 2021. He was one of many other representatives whose duties were to contact clients telephonically in order to sell short term insurance policies to them. When a policy had to be sold, the insured's drivers' license was needed inter alia to enable a proper premium to be arrived at. The premium was to be calculated based on the license type, the year in which it was issued etc.

5 On 22 November 2022, the respondent sent a notice to the applicant of its intention to debar him. In that notice he was informed, amongst other things, that the respondent's insurance management team identified exceptions on a number of quotations to clients made by sales agents, including the applicant, resulting in significantly cheaper premiums to be paid by clients. The issue was escalated to the respondent's insure product house for further investigation and the pricing

[1] Page 22 of Part A of the Tribunal Record.

and analytics team identified that numerous sales agents activated policies where the premiums were 46% lower than they should have been with some policies being discounted with as much as 97%.[2]

6 The applicant was, in terms of the notice of intention to debar, further informed that upon investigation it was found that:

a. The applicant intentionally manipulated the system to adjust the client's excess which was not linked to the client risk profile. This allowed the applicant to provide a client with a 66% discount to the initial quote provided to the client.

b. The applicant intentionally manipulated the system to decrease the client's premium by changing the client's license type more than once.

c. The applicant intentionally updated the excess field multiple times on the system until the premium dropped from R3 002 to R1 191.

d. The applicant had manipulated a total of 25 quotes and activated policies for the period of June 2022 to November 2022.

e. The financial impact of the reduced premiums resulted in respondent suffering a financial loss of R31 071 on a monthly basis.

f. The applicant failed to notify the management team/business of any discrepancies picked up between the previous quotations created by previous representatives to the one being generated by him.

[2] Page 11 of Part B of the Tribunal Record.

g. He failed to follow the script where the following terms and conditions were of importance during the sales stage:

i. Where an excess was more than 20% of the sum insured that was supposed to be referred to underwriting for further review for businesses to determine if they were willing to accept the risk or not, these cases were not referred to underwriting.

ii. Where a different license type had been pulled from Trans-Union, the representative (sales agent) was required to confirm a different license type with the client and in these instances, the clients did not mention a different license type multiple times, but the system was updated multiple times with different license types which resulted in system updating the client's premium to a lower premium.

h. The applicant failed to report the irregularities.

7 In the same notice the applicant was informed that he had the option of a verbal hearing or making written submissions. In the event of the applicant electing a verbal hearing, he would be afforded an opportunity to make representations and the date and time of the hearing would be communicated to him.

8 The applicant communicated his election for a verbal hearing. The hearing was arranged for 19 December 2022. The hearing was however cancelled.

9 The hearing was rescheduled for 10 January 2023. However, the applicant resigned prior to this date and was therefore under the impression that he did

not have to attend the hearing. On 27 February 2023, the respondent disabused the applicant of his impression that because he was no longer in the employ of the respondent's he was no longer required to attend the hearing. The respondent informed the applicant by way of email that despite his resignation it intended proceeding with the debarment. The respondent again informed the applicant that he had a choice between an oral hearing or written submissions and in the event of the former he would be advised of a hearing date. The applicant in his response of 4 March 2023 again expressed his election to have an oral hearing.

10 The next debarment hearing was scheduled for 29 March 2023. It is at this hearing that the decision to debar the applicant was arrived at. It must be borne in mind that the applicant had indicated that he elected to have an in-person hearing. It was also incumbent on the respondent to inform the applicant of the date and place at which the hearing was to be held.

11 The applicant contended that he was not informed of the date, time and place at which the hearing was to be held. The respondent could not provide proof that the applicant had in fact been informed of the hearing that was to be held on 29 March 2023. The respondent alleged that it was of the view that the notice had been sent to the applicant.

12 In the bundle of documents provided by the respondent there is a letter dated 10 March 2023 purporting to invite the applicant to attend a hearing on 29 March 2023. However, the letter was not under cover of an email, nor were we provided

with any other documentation showing that the notice of the hearing was actually sent to the applicant. There was a copy of a Microsoft Teams meeting invite. However, from this document it is not apparent whether the applicant was in fact sent the meeting invite and when. During the hearing we afforded the respondent's representatives an opportunity to provide us with proof that the applicant was notified of the hearing. One of the respondent's representatives searched her laptop for the email with the notice attached. She was unable to locate it. The applicant in any event denied receiving the notice to attend the hearing on 29 March 2023.

13 It was necessary that the notice advising the applicant of the date and place where the hearing was to be held be produced because the applicant denied ever receiving it. Eventually, respondent's representatives conceded that the notice was not sent to the applicant.

14 On 17 May 2023 the respondent sent an email to the applicant informing him that the debarment hearing was held on 14 April 2023 in his absence after failing to attend the scheduled hearing. He was further informed that (i) the chairperson reviewed the submissions from business and recommended debarment, and (ii) the debarment forum met on 16 May 2023 to review the recommendations and a decision was made to uphold the recommendations.[3] Notably, in the recommendations by the chairperson, under the heading 'General' the following is stated:

[3] Page 17 of Part B of the Tribunal Record, Annexure CN6.

"6. The employee had resigned from his role in January 2023 . Attempts have been made to contact Mr Moepye as this debarment hearing was postponed on 2 occasions. On the day of the hearing, despite all of management's efforts, the employee had failed to adhere to these requirements and further failed to attend the FAIS hearing.

7. The hearing continued in the absence of Moepye."

15 The chairperson found that the applicant had, in the process of obtaining information from clients for purposes of providing premium quotations, altered the client's license type, year of issue *etcetera,* to the extent that premiums were quoted significantly lower than it should be for a certain license type issued on a particular day. This trend started in January 2022 but escalated in April 2022 to November 2022. A total of 25 cases were identified for the investigation period. The chairperson found that the applicant failed to present himself to the hearing and therefore did not provide any evidence that was contradictory to that of management and to prove that he had conducted himself appropriately. The chairperson was of the view that it was clear that the applicant knew that his misconduct was sufficiently serious to impugn his honesty and integrity as a representative and that he lacked the requisite characteristics of honesty and integrity.[4]

16 The requirements for a fair process are part of the respondent's Debarment Policy and Procedure, version 1 May 2019. Paragraph 4.2 of the respondent's debarment policy and procedure details the process to be followed before a

[4] Page 6 of Part A of the Tribunal Record, from paragraph10-17.

representative may be debarred. For the sake of completeness, the paragraph is quoted in full here below:-

"(a) At the conclusion of the investigation should the offence or misconduct be considered material enough that it could warrant a debarment, charges against the accused will be formulated.

(b) Charges must be formulated based on the evidence available, mainly from the forensic or compliance investigation.

(c) Group Compliance will take a leading role in formulating the charges and produce a charge sheet (the "Notice of Intention to Debar").

(d) Group Compliance will issue a "FAIS Pack" which comprises of the prepared Notice of Intention to Debar and the investigation report, together with supporting evidence.

(e) The FAIS Pack will be sent to the representative (via email or in person) and the Business Executive/Franchise Director/Regional General Manager and Senior Compliance Manager.

(f) The representative must acknowledge receipt of the Notice; alternatively, if it was sent via email and electronic acknowledgement of delivery must suffice.

(g) The representative will be given 48 hours in which he/she must indicate whether they will oppose the intention to debar. Should he/she wish to oppose the notification, it must be indicated whether the documentary or verbal process will be followed. The intention must be provided in writing (email is acceptable)."

17 Furthermore, in paragraph 3.2.3 of the respondent's policy document, under the subheading 'debarment processes' the following is mentioned:

"The debarment process can be in the form of a documentary process or a verbal process. The representative is allowed to select the debarment process to be followed. The different processes are explained in the next section of the document. In both the documentary and verbal process Discovery will: –

(a) afford the representative reasonable time to make a submission in response to the notice of intention to debar;

(b) provide the representative with a copy of this policy and process governing the debarment process;

(c) consider any response provided and then take a decision."

18 According to the respondent's debarment policy and procedure the applicant is afforded the right to challenge the evidence against him through cross-examination and examining any documentation or electronic media pertaining to the case, right to present his case and the right to call witnesses that pertain to the case at hand to produce his evidence that will substantiate his case. None of these rights were accorded to the applicant even after he indicated that he would like to exercise these rights.

19 The respondent's debarment policy must be read in conjunction with section 14(2)(a) of the FAIS Act. Section 14(2)(a) of the Act requires that an FSP, before effecting a debarment in terms of subsection (1), **must** ensure that the debarment process is lawful, reasonable and procedurally fair. Guidance Notice 1 of 2019 records that a debarment decision by an FSP constitutes the exercise of

administrative action and it is required of FSP's in exercising their debarment powers to act reasonably, rationally, and fair.[5] What is fair in the particular circumstances, will depend on the context of each case.[6] This is why the requirements of *audi* are contextual and relative.[7]

20 Guidance Notice No 1 of 2019 records that a debarment decision by an FSP constitutes exercise of administrative action. A debarment, being an administrative act, must be exercised reasonably, rationally and fairly, as per section 3(2) (a) of the Promotion of Administrative Justice Act No 3 of 2000 (PAJA).

21 Whilst section 14 of the FAIS Act does not require that an oral hearing should follow a notice of intention to debar, the respondent's policy affords its employees the option of an oral hearing. The applicant made his election which was expressed to the respondent on more than one occasion.

22 In addition, in terms of section 14(2)(b) of the FAIS Act, if a provider is unable to locate a person in order to deliver a document or information under subsection (3), after taking all reasonable steps to do so, including dissemination through electronic means where possible, delivering the document or information to the person's last known e-mail or physical business or residential address will be sufficient.

23 As has already been stated in the preceding paragraphs, the applicant denied having been informed of the intention to debar him on 29 March 2023.

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[5] Guidance Notice 1 of 2019 at para 3.6.
[6] Section 3(2)(a) of PAJA.
[7] *Chairman, Board on Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 (SCA) at para 19.

Furthermore, the respondent could not provide proof that the applicant was informed of the intention to debar him. A further issue to be kept in mind is that the respondent, during the hearing, conceded that the notice had not been sent to the applicant. The inevitable conclusion that we reach is that the hearing date was not communicated to the applicant. This means that the hearing was held without proper notice. It also means that it was held in contravention of section 14(2)(a) of the respondent's own debarment policy and goes against the letter and spirit of section 3(2)(a) of PAJA.

24 In our view there was no wilful disregard of the hearing on the part of the applicant. Wilfulness can only be inferred if the applicant had been apprised of the hearing date and deliberately decided to stay away. The evidence before us negates that inference. All things being considered, the only conclusion is that the debarment hearing held on 29 March 2023 was not procedurally fair.

25 We are of the view that to remit this matter will serve no purpose.

26 During the hearing it was apparent that the respondent does not at all appreciate its default and the implications thereof given the serious nature of the allegations against the applicant and the admonition by the chairperson of the applicant's purported delinquency in failing to attend the hearing. The manner in which the respondent presented its case before this Tribunal was rather casual and nonchalant. The evidence presented by the respondent for purposes of demonstrating that the applicant lacked honesty and integrity, in itself lacks particularity and consisted of a total of 4 pages of cryptic screenshots.

27 Whilst the existence of procedural irregularities negates the need to entertain the merits. We deem it prudent to record that the explanation by the applicant concerning the change in license type and issue date is perfectly plausible. It would appear that the applicant's electronic system where the information is recorded reduces the premium every time the license particulars are changed even when the same particulars are re-entered. It would therefore appear that the same particulars could be entered multiple times, and the system would reduce the premium upon each entry. The element of dishonesty appears to be lacking.

28 We further observed an attitude, during the debarment hearing, that the respondent's failure to inform the applicant of the date should be placed at the door of the applicant for what may be termed his past actions which the chairperson regarded as indicative of applicant's lack of co-operation. Two examples should suffice to illustrate what may amount to bias on the part of the chairperson. In paragraph 6 of the FAIS Debarment Inquiry held on 14 April 2023 the following appears.

> " 6. *The employee had resigned from his role in January 2023. Attempts have been made to contact Mr Moepye as his debarment hearing was postponed on 2 occasions. On the day of the hearing despite all of management's efforts, the employee had failed to adhere to these requests and further failed to attend the FAIS hearing".*

29 Furthermore, in paragraph 8 the following appears:-

" 8. Mr Moepye has not previously been cooperative with Management or the Compliance department and had consistently denied all evidence provided by Discovery."

30 The statement in paragraph 6 of the chairperson's inquiry is not supported by any evidence provided to the enquiry. Nowhere during the hearing was it placed on record that the applicant was informed of the hearing. The chairperson simply relies on the fact that the hearing was postponed on 2 occasions to justify why on 29 March 2023 he had to continue in applicant's absence.

31 The statement in paragraph 8 of the chairperson's inquiry that Mr Moepye had previously not cooperated with Management or the Compliance department being used as justification for denying applicant's his rights to be treated fairly is fantastical and is demonstrative of bias.

32 We find that the debarment must fail on the lack of substantive fairness. We are further of the considered view that there is evidence of material bias in how the hearing to debar the applicant was conducted and that as such it should not be remitted for further consideration.

33 In the circumstances the following is made:

ORDER:

The debarment is set aside.

SIGNED at PRETORIA on 29 of January 2024 on behalf of the Panel.

MG Mashaba SC (Chair)

With the Panel also consisting of:

E Phiyega

PR Long