

THE FINANCIAL SERVICES TRIBUNAL

Case No: FSP5/2022

In the matter between:

SIYETHEMBA SINOTHILE NGOBESE

APPLICANT

and

LIBERTY GROUP LIMITED

RESPONDENT

Tribunal: Adv S Jikela SC (chair), Adv. Mustaque Holland and Mrs K E Moloto-Stofile

Appearance for Applicant

Applicant on Documents filed on record

Appearing for Respondent

Respondent in person Ms Chetty

Date of Hearing:

30 September 2022

Date of Decision:

10 October 2022

Summary: Applicant challenged the Procedural fairness of debarment proceedings, claiming failure to afford her a hearing/opportunity to be heard before disbarring her; and on substantive grounds Applicant challenged the grounds on which the debarment was made. Disbarment is justified under circumstances where the misconduct was in breach of the fit and proper requirement, as provided for in the FAIS Act.

DECISION

A: INTRODUCTION

1.

This is an Application for reconsideration brought in terms of Section 230 of the Financial Sector Regulation Act 9 of 2017 ("FSRA"). At the hearing the Applicant consented to matter proceeding in her

absence and determined on the papers submitted, in terms of Rule 50.¹

2.

This matter deals with an FSR who was debarred because she was said not to meet the requirements of fit and proper person, after being found guilty of materially contravening the provisions of Section 13(2)(a) of the Financial Advisory and Intermediary Act 37 of 2002 ("FAIS Act") in that she conducted herself with lacked honesty, integrity, and good standing as contemplated in the financial services industry.

B: GROUNDS FOR RECONSIDERATION

3.

The Applicant was an agent of the Respondent mandated by to act as its representative in terms of the Financial Advisory and Intermediary Act, 37 of 2002 in the Pietermaritzburg Branch. She was appointed in terms of a mandate agreement concluded on 1 September 2020 and terminated by the Respondent on 10 January 2022. The agreement was terminated subsequent to a Corrective Action Inquiry wherein the Applicant was found guilty of following charges:

- 3.1 Charge 1: Non-Compliance with the duty of a representative to render financial services honestly fairly, with due skill, care, and diligence, instead committing acts fraud and dishonesty. This charge related to Applicant having dishonestly and fraudulently initiated a Policy Number 1187741113 in the Rose Dlamini's ("clients") name without her authority and consent, and by submitting a Disclosure Pack to the Liberty's ("the Respondent's"), thereby creating an impression that she had provided client with advice, thereby misleading the Respondent.
- 3.2 Charge 2: Contravention of financial advisor agreement: The applicant failed to act in the client's and the Respondent's best interest and thereby brought the Respondent's name

¹ See *Financial services Tribunal Rules issued by the Chairperson of the Tribunal dated 1 August 2019*

into disrepute.

4.

The Applicant challenged the Respondent's decision to debar her on procedural and substantive grounds. On procedural grounds the Applicant implied that the debarment was procedurally unfair in terms of section 14 of the FAIS Act in that:

- 4.1 She was not notified of the debarment action brought against her;
- 4.2 The debarment process commenced in the period after her resignation, yet the company wanted to hold her accountable for things that happened in her absence.
- 4.3 As a result she was not given an opportunity to state her case and answer the allegations made against her, as a result was denied a fair hearing.²

5.

On substantive grounds the Applicant asserts that the debarment was not justified, and claimed that:

- 5.1 She was innocent of the charges brought against her. To her knowledge the particular client applied for the policy and provided the information required, signed the application forms, and the policy was approved before her resignation without any challenges from the client.
- 5.2 A few months after her resignation, she learned that the client had disputed the validity of the policy using a different name. She asserted that simply because the address, signature and didn't match the one on the application forms, doesn't qualify as fraudulent conduct. She also questioned how signing using the surname of Ntuli and Dlamini could be expected to look the same. She insisted that the client's signatures on the forms and on affidavit were bound to be different.

² See Annexure B page 3: Part A of the Record

C: THE RESPONDENTS'S CASE

6.

Ms Chetty for the Respondent stated that:

- 6.1 On 21 July 2021 the Respondent received complaints from a client (Ms R Dlamini) in respect of an unauthorised policy initiated by the Applicant in her name without her knowledge and consent. The client indicated that she didn't know the Applicant and had never met her.³
- 6.2 According to the forensic report issued (refer to Annexure 2), in a telephonic interview conducted by the Respondent's forensic investigator and the client on 04 August 2021, the client confirmed the following:
 - 6.2.1 some of the information such as the name and identity number contained in the disputed policy application form belongs to her;
 - 6.2.2 the cell phone number recorded on the disputed application form does not belong to her;
 - 6.2.3 the address contained in the disputed application form does not belong to her; she does not know the Applicant and did not receive a call from any representative of the Respondent to confirm the disputed policy details or affordability thereof; and
 - 6.2.4 that she would like the disputed policy to be cancelled and for the premiums deducted from her account to be refunded.
- 6.3 The Respondent's forensic services department ("FSD") investigated the complaints to establish veracity. On 29 August 2021, in a telephone conversation between FSD and Applicant, she admitted that she used a friend to confirm to confirm the sale of a policy and forged the client's signature on the policy.⁴

³ See Annexure 1, page 1 of Part B: A sworn Affidavit of Rose Dlamini

⁴ See Annexure 2, page 2 of Part B: Group Forensic Services Investigation Report

6.4 When she was approached to provide a statement in writing she resigned by email and she further failed to pick up telephone calls made to her number and or to respond to email sent to her email address.

6.5 On 09 December 2021, the Respondent sent the Applicant a Notice of Intention to Debar, as well as:

- A copy of Respondent's written Debarment Policy;
- The Forensic Investigation Report; and
- The Applicable Annexures.

6.6 The documents in clause 6.5 above were sent to the Applicant at the same email address she used to communicate with the Tribunal in this matter. The Respondent provided proof that they contacted the Applicant on several occasions by telephone in December 2021 at the last contact it had for her, and to the email last known email address.⁵

6.7 The Notice of Intention to Debar stipulated that the Applicant should provide additional information in response to the charges, to supplement her statement already provided, if necessary, within five (5) days of receipt or to make alternative arrangements with the initiator. Failure to submit the written response or to make alternative arrangements with the initiator would result in the documentary enquiry proceeding in her absence.

6.8 The Applicant failed to make written submissions in addition to her oral statement, nor did she make alternative arrangements with the initiator. When the prescribed period of 5 days expired the Debarment Hearing was held in her absence and concluded on the 10 January 2022.

6.9 The Adjudicator of the documentary inquiry (refer to Annexure 8) based on the evidence presented found that:

6.9.1 The Financial Adviser (the Applicant is) GUILTY of:

⁵ See Clause 12-13 on page 1E of Part B of record

Allegation 1: Non-Compliance with duty of representative to render financial services honestly, fairly, with due skill, care, and diligence in committing acts of fraud and dishonesty.

Allegation 2: Contravention of financial advisor agreement: act in Liberty and the client's best interest and not bring Liberty's name into disrepute.

- 6.10 The adjudicator recommended the following sanction to Liberty and the relevant Executive Management that the following sanction be imposed since the Financial Advisor has resigned from Liberty:
- 6.10.1 That the Financial Advisor's code be terminated effective 10 January 2022.
 - 6.10.2 That she be removed from the Liberty representative register in terms of FAIS.
 - 6.10.3 That she be debarred because of not complying with the Fit and Proper requirements in terms of the FAIS Act

7.

On 17 December 2021, the Adjudicator was provided with all applicable documentation regarding the findings made in the Respondent's Forensic department's investigation and informed the Adjudicator of the various attempts made to contact the Applicant.

- 7.1 The Adjudicator recommended that the Respondent's Executive Management impose the following sanctions: that the Applicant's code be terminated; that the Applicant be removed from the Respondent's representatives register; and that the Applicant be debarred due to non-compliance with the fit and proper requirements in terms of the FAIS Act
- 7.2 The Respondent's Executive Management agreed with the recommendations made by the Adjudicator and the Applicant was subsequently notified on 12 January 2022 of the outcome of the inquiry and the decision to debar her effective 10 January. The notice was sent to

ciyethemban@gmail.com and a successful delivery report was received in lieu of this email (refer to Annexure 9).⁶

8.

In response a month after being notified of the outcome, On 10 February 2022 the Applicant commenced the debarment reconsideration process.

9.

In concluding her address to the panel Ms Chetty stated:

- 9.1 The Respondent was of the opinion that the Applicant's conduct was in breach of the fit and proper requirement, as provided for in the FAIS Act, and that this type of fraudulent conduct requires meticulous planning and behaviour of a deliberate *ma/a fide* nature shown on behalf of the Applicant which cannot be tolerated.
- 9.2 These contraventions justify a sanction prohibiting the Applicant from participating in the financial services industry.
 - 9.2.1 To tolerate this type of conduct will be a deviation and breach of the FAIS Act which requires that every representative exercises the highest degree of honesty and integrity in their role as representative.
 - 9.2.2 As such, an appropriate sanction should support prohibiting the representative from participating in the financial services industry.
 - 9.2.3 The Respondent has an obligation to protect its clients, and therefore a sanction that suits the transgression was imposed by the Respondent. Although the amount lost to the Respondent may be minimal, the reputational damage suffered is far worse.
 - 9.2.4 In light of the above, the Respondent seeks that the decision to debar the Applicant on 10 January 2022 be upheld and the suspension of the decision made by the Respondent to debar should not be granted.

⁶ See Annexure 12-13 pages 25-31 Part B of the Record

D: ANALYSIS OF FACTS AND LAW: FAIR PROCESS

7.

In her application for reconsideration the Applicant alleged that the debarment was procedurally unfair, as defined in section 14 of the FAIS Act, in that she was not afforded meaningful opportunity to be heard.

8.

Section 14 of the Financial Advisory and Intermediary Services Act ("FAIS Act") sets out the process for a fair debarment. Section 14(2) of the FAIS Act requires that the debarment process be lawful, reasonable, and procedurally fair.

8.1 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 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 policies and procedure governing the debarment process; and
(iii) give the person a reasonable opportunity to make a submission in response.
(b) Consider any response provided in term of paragraph (a)(iii), and then take a decision in terms of subsection (1); and ..."

8.2 Furthermore the Guidance Note on the debarment process is aligned to section 14(3) of the FAIS Act. Which states that:

8.2.1 Before debarring a representative, the FSP is required to ensure that adequate notice is given to a person in writing stating its intention to debar the person; the grounds and the reasons for the debarment; the FSP should also through the "Notice" provide the person with a copy of its written policies and procedures governing the debarment process. (Section 14(3)(a)(ii).

- 8.2.2 In addition that the FSP should also through the "Notice" give the person a reasonable opportunity to make a submission in response (section 14(3)(a)(iii)) of the FAIS Act. In it all the available facts and information must be considered including the response received from the FSP as well as information regarding the conduct of that person must be considered.
- 8.2.3 The debarment has to be rational and reasonable. This means that the action taken by the provider must make sense and be justifiable, given the information that is available to the person who decides or takes the action.
- 8.3 The right of a fair hearing lies at the heart of the rule of law, therefore such a decision should not be made without affording the other side a reasonable opportunity to state his/her case. As set out in *De Beer v Central Local Council and South-Central Local Council and Others* 2011(11) BCLR 1109 CC, Yacoob J at para 127:
- 8.4 In this regard we considered the Respondents submission⁸ stating that:
- "The Respondent notified the applicant that a formal documentary inquiry has commenced on 09 December 2021. This notice contained the allegations made against the Applicant. The notice, together with supporting evidence, was sent to the Applicant via email, with ciyethemban@gmail.com⁹ being the latest email address on record (refer to Annexure 9). A reminder was sent to the Applicant on 15 December 2021 on ciyethemban@gmail.com the same email noted above (refer to Annexure 9). This email was delivered. No response was received....."*
- 8.5 The Respondent tendered evidence that they sent the Applicant the documents referred to in terms of 16 above¹⁰ as required by the FIAS Act.
- 8.6 In her reply to the Respondent's above response, the Applicant persisted that the process was procedurally and substantively unfair. She denied receipt of the Notice of Intention to Debar

⁷ See: *De Beer v Central Local Council and South-Central Local Council and Others* 2011(11) BCLR 1109 CC, Yacoob J at para 12 stating "This Section 34 fair hearing rights affirms the rule of law which is a 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 court as a pre-requisite to an order being made against anyone is fundamental to a just and credible legal order....."

⁸ See page IE para 13

⁹ Annexure 9 and 10 Pages 38-41 Part A of the Record

¹⁰ See 6 supra

from the Respondent and all the attachments referred to in 6 above, and which she claims were sent to an email which was not in operation at the time. She also stated that:

*"All the contact details that were used are no longer in operation under my name, right after my resignation with the liberty company except for the physical address of which I did not receive any letter served by the sheriff in my door step."*¹¹

- 8.7 We noted that the telephone numbers called and the email address used were the last known address of the Applicant, as stated in her letter of resignation, which is sufficient for purposes of delivery in terms section 155 of the FSR Act.¹² There was no legal requirement for the Respondent to deliver the documents to the Applicant's residence through the sheriff of court.
- 8.8 In this instance we hold the view that the debarment notice, and process as envisaged in section 14 of the FAIS Act read with the Guidance Note was followed.

E: ANALYSIS OF LAW & FACTS: WAS DEBARMENT JUSTIFIED

9.

In terms of section 14(1) of the FAIS Act, an FSP is obliged to debar a representative 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 8 of the FAIS Act provides for the fit and proper requirements to be measure *against the following categories namely:*

- "(i) personal character qualities or honesty and integrity;*
- (iii) Competence including experience, qualification and knowledge;*
- (iv) The applicant's financial soundness."*

¹¹ See Annexure B page 3: Part A of the Record

¹² See Annexure 6-10, page 12 -16 of Part B: Record of cellphone calls and emails sent in December

11.

The General Code of Conduct for Authorized Financial Services Providers and Representatives Code (“the Code”) – specifically requires a financial services provider at all times to render financial services honestly, fairly, with due skill care and diligence and in the interests of clients and integrity in the financial services industry. Section 3 of the Code further places specific standards that must be met when a financial provider renders a financial service.

12.

In addition, Board Notice 194 of 2017 titled “Determination of Fit and Proper Requirements for Financial Services Providers, 2017” sets out the criteria for fit and proper requirements of financial service providers (Board Notice). Clause 9 of the Board Notice provides instances where a person is considered not to be fit and proper. One such instance (clause 9(1)(a)(ii) stipulates when there is “theft, fraud, uttering a forged document, perjury or an offence involving dishonesty, breach of fiduciary duty, dishonourable or unprofessional conduct...”

13.

In our analysis of the facts, we have taken into consideration both parties’ version and considered the application together with the investigation findings. It is necessary to point out that we had some level of difficulty with the applicant’s protests of her innocence, which could not be substantiated with evidence. We specifically noted that she:

- 13.1 claimed that she was never told that a client had complained against her and believes that the complaint was only received after her resignation, which is refuted by the Respondents Forensic Investigation report. But she admitted that she participated in a telephonic interview by the Respondent’s Forensic Team, stating that the content of the telephonic interview was limited to answering questions about where, when, and how she met client and initiated the client’s policy;
- 13.2 alleged that no one told her that she was being investigated as part of any charge, and she could not remember admitting to anyone during the telephonic interview that she forged signatures or misused client’s information fraudulently for personal gain. She challenged

the Respondent to produce a record of the conversation she had with GFS.¹³

- 13.3 admitted that she was asked to write a statement based on the telephonic interview but failed to do so, as her manager went on leave without giving her the requisite form to complete, she got a better job, resigned, and left the company before the manager came back from leave.
- 13.4 making a vague statement about not remembering that she had confessed to forging the client's signature, as the interview happened a long time ago. This begs the question why she didn't deny outrightly ever having made such a confession.
- 13.5 We further noted her failure to address damning allegations of a confessions she made to the following:
 - 13.5.1 she did to advance any cogent reasons explaining why this client make allegations under oath, stating that she didn't know the Applicant and had never met her.
 - 13.5.2 she failed to address the allegation made by GFS that she had also confessed to using her friend to confirm the sale when the ASM, Mr Cele, conducted the focus call and had also refused to disclose her friend's name.
- 13.6 However in contrast she strangely could remember that she had been asked questions about where, when, and how she initiated the policy, and that she was asked to produce a written statement.
- 13.7 Her failure to contradict damning evidence of a confession she made, and her selective memory with regards to parts of the GFS interview points to her lack of credibility and lends credence to the Respondent's version.
- 13.8 In this instance we hold the view that the process as envisaged in section 14 of the FAIS Act read with the Guidance Note was followed, and the evidence provided by the

¹³ See Pages 8-10 of Part A of the Record

Respondent credible.

F: CONCLUSION

16.

In perusing the Tribunal Record and on the evidence presented by the Respondent at the hearing, nothing was established to gainsay the Respondent's version that the debarment procedure was procedurally fair and, in fact, substantively fair.

16.1 Insofar as the applicant's conduct is concerned, we find that she had compromised her "honesty and integrity" and which conduct justified her debarment.

16.2 In the circumstances, the Tribunal can find no grounds to interfere with the Respondent's decision to debar the Applicant.

17.

In the premises we make the following order:

This application for reconsideration is dismissed.

Signed on behalf of the Tribunal



Mrs. K E Moloto-Stofile

With the Panel also consisting of:

**Adv Siphokazi Jikela S .C (chair) and
Adv. Mustaque Holland**