

IN THE FINANCIAL SERVICES TRIBUNAL

CASE NO: FSP2/2019

In the matter between: -

MARCIA REFILOE NTOBENG

APPLICANT

and

LIBERTY GROUP LIMITED

RESPONDENT

Tribunal: L DLAMINI (Chairperson), NP DONGWANA and G MADLANGA

Hearing: 07 June 2019

Decision: 12 June 2019

Summary: Application in terms of section 230 the Financial Sector Regulation Act 9 of 2017 – Failure to comply with the provisions of section 14(3) of the Financial Advisory and Intermediary Services Act

DECISION

A. INTRODUCTION

1. This is an application in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 (“FSRA”). The applicant is Marcia Refiloe Ntobeng (“Applicant”). The Applicant is a former employee of Liberty Group Limited (“FSP”). The Applicant seeks reconsideration of the decision of the FSP to debar her dated 7 November 2018.
2. In her grounds for the application for reconsideration, the Applicant stated that the debarment was unlawful, unreasonable and procedurally unfair in that the FSP did not give notice of its intention to debar her and also that the FSP failed to give grounds for the debarment.
3. In the circumstances, the application is concerned with the process and procedure that was followed when the Applicant was debarred. Therefore, the nub of the issue in this matter is whether or not the FSP complied with the provisions of section 14(3) of the Financial Advisory and Intermediary Services Act 37 of 2002 (“FAIS Act”).

A. THE APPLICATION

4. The facts, very briefly, are that the Applicant resigned as the employee of the FSP on 19 September 2018. The Applicant resigned in order to pursue other employment opportunities. It was not disputed that at the time of resignation the FSP had not made any formal complaints against the applicant. Complaints arose subsequent to resignation.
5. On 28 September 2018 the Applicant was suspended pending investigations into her conduct. The Applicant stated that she fully cooperated with such investigations.
6. On 11 October Applicant was notified of a disciplinary hearing that was scheduled for 17 October 2018. The record shows that the Applicant was given a Notice of Disciplinary Hearing dated 12 October 2018 ("Notice") which the Applicant acknowledged on the same day.¹
7. The Notice confirmed that the investigation had been concluded and that the FSP had established grounds on which to bring disciplinary proceedings against the Applicant. An annexure setting out the charges was attached to the Notice.²

¹ See page 40 and 41 of the record of proceedings.

² Refer to page 43 to 45 of the record of proceedings.

8. The Notice made no mention of the debarment. No other notification was given to the Applicant. In particular, no form of communication was given regarding the fact that the FSP had intentions to debar the Applicant.
9. On 16 October 2018 the Applicant was involved in a motor vehicle accident from which she sustained injuries that led to doctors booking her off work until 20 October 2018. As a result, the disciplinary hearing was not held and could not be rescheduled to another date because the Applicant's employment contract terminated before the Applicant could return to work.
10. The FSP thereafter debarred the Applicant on 7 November 2018 as stated.

The FSP's conduct

11. At all material times the FSP insisted that it was justified in its decision to debar the Applicant and that in doing so it took section 14 of the FAIS Act into consideration.³ On the same basis, the FSP opposed the suspension of the debarment.
12. Further, the FSP persisted with its argument that it had complied with the letter of the FAIS Act⁴ notwithstanding the Tribunal's basis for granting the interim order suspending the debarment.⁵

³ See paragraph 17 at page 34 of the record of proceedings.

⁴ See page 59, in particular paragraph 10 of the record of proceedings.

⁵ Refer to page 59 of the record of proceedings.

13. Despite persisting that it had complied with procedure from inception to the date of the hearing, the representative of the FSP, one Cloete who also drafted the FSP's opposing papers, capitulated during proceedings. Cloete admitted that the FSP had failed to comply with section 14 of the FAIS Act.

B. FINDING

14. The FSP does not seem to have properly applied its mind to the statutory requirements relating to procedural fairness until the very last moment. In particular the FSP does not at all seem to have considered the fact that the basis of the debarment suspension order was that the FSP appeared to not have followed procedure. That order also made specific reference to the **Verne Thomas** decision in which the Respondent FSP in that matter flouted procedure in much the same way the FSP in this matter has done.
15. The FSP has clearly failed to comply with the mandatory requirements of section 14(3) of the FAIS Act.
16. In view of the above, the application for reconsideration succeeds.
17. Lastly, we note that the versions of both the Applicant and the FSP have virtually remained materially unchanged throughout the course of the matter. Therefore, the FSP's conduct with respect to the timing of its admission seems to suggest circumstances that may have warranted a costs order against the FSP. However, the Applicant did not ask for costs therefore the issue rests there.

C. CONCLUSION

18. The following Order is made: -

18.1. The decision to debar the applicant is set aside and the matter is remitted to the FSP for further consideration.

18.2. No order as to costs.

Signed on behalf of the Tribunal on this 12 June 2019 at Pretoria.



Langa Dlamini (Chairperson)