THE FINANCIAL SERVICES TRIBUNAL

Case №: **FSP48/2019**

In the matter between:

OFENTSE SEFIKE Applicant

and

METROPOLITAN Respondent

Hearing Date: 25 February 2020

Tribunal: H Kooverjie (Chairperson), G Madlanga and A Jaffer (Members)

Summary: Application for reconsideration in terms of section 230 of the Financial Sector Regulation Act 9 of 2017.

REASONS

ORDER

1. Upon the hearing of this application, the Panel made the following order namely:

   (1) the application for condonation is granted;

   (2) the application for reconsideration is granted and the decision of the

respondent to debar the applicant is set aside;

(3) reasons for the decision will be provided by the Panel in due course; and

(4) there is no order as to costs.

2. As alluded above, the decision stated that the reasons will be provided by the Panel in due course.

REASONS

3. In determining this matter, the Tribunal was required to consider the manner in which the respondent dealt with the debarment process and the basis for the debarment.

Non-appearance of the respondent and reasons for withdrawal

4. On 24 February 2020, a day before this hearing, the Secretariat was informed of the respondent's withdrawal of opposition from the matter essentially on the basis that:

> "***In the main the decision relates to the three charges that was listed against the applicant of which two of these charges related to a different advisor."***

5. These proceedings proceeded without the respondent. Upon the Secretariat's request for the reasons of withdrawal of the opposition in terms of rule 72 of the Financial Services Tribunal Rules, the respondent informed that:

5.1 The respondent had investigated the matter and after receipt of the application for reconsideration, it found that charges 1 and 2 related to another financial advisor. The advisor who was responsible for the alleged fraud was another individual, Mr Ofentse Matimbe. The forensic department confused the two advisors. Therefore the only charge relating to the applicant was charge 3, which constituted a transgression that she allowed one client to receive the USSD fact of authentication for another client;

5.2 The respondent upon consulting with the attorneys, was advised to file its intention to withdraw from the matter;

5.3 The respondent further advised that the transgressing of an internal rule was not sufficient grounds to justify suspending the client.

6. Essentially what had transpired was that the two clients had used the same cell phone number which was in contravention of the respondent's internal rules. The applicant had subsequent to her debarment, obtained affidavits from the said two clients Mr Shila and Mr Raphiri, who confirmed that they are friends and they used one cell phone number for both policies. This was not on the fault on her part as she could not have known. She stated that she dealt with these clients separately and at that time was not aware that it was the same cell phone number and neither was it disclosed to her.

Debarment procedure

7. The further issue the applicant raised was the procedure and the process in

which the applicant was debarred. The applicant demonstrates that the debarment process was unfair. In particular that:

7.1 On 15 April 2019, an email was sent from the respondent requesting that she should attend the formal meeting on 18 April 2019 regarding certain fraud cases. At that stage she was not advised as to what the nature of the allegations against her.

7.2 She attended the said meeting only to find the regional manager present. Mr Marcus, the regional manager at that point only made her aware that there were two matters where she has been implicated of fraud.

7.3 The meeting did not proceed and she was informed that she would be contacted for a follow up meeting. No such meeting was ever set.

7.4 On 14 May 2019 a notice setting out the details of the debarment hearing was sent to the applicant.

7.5 The applicant only became aware of the debarment hearing on the evening of 14 May 2019. The said notice was served on her mother. Due to her not being well, she did not attend the debarment hearing which was held on 15 May 2019. In this regard she provided a sick note.

7.6 On her return to work she came across a notice on the board reflecting her name with the words "***fraud***" next to her name. She then made

enquiries in this respect. It was only then that she learned she had been debarred.

8. The applicant expressed that she had been placed in a financial predicament as a result of the baseless and unfair debarment which caused her the loss of her prospective job she managed to secure when she resigned from the respondent's employment.

9. From the facts the following illustrates that the debarment process was unlawful and unfair in that:

(1) she had never been informed of the charges or the complaints against her;
(2) the debarment proceeded in her absence;
(3) she was not given an opportunity to provide an explanation of the charges against her, nor furnished with written representations in this regard;
(4) she was given a few hours' notice before the debarment hearing was set down, thus denying her the opportunity to properly present her case.

10. The applicant further informed this Tribunal that the debarment proceedings were instituted when the applicant resigned. The reason for her resignation was to follow better career growth and financial prospects.

11. The Tribunal notes that the debarment findings are inconclusive and vague. It is necessary to reiterate the following:

"*I refer to the debarment hearing held on 15 May 2019, in the Metropolitan Office boardroom, Arcadia, Hatfield to investigate a complaint of dishonesty against you as detailed in the notice to attend a debarment enquiry. Having carefully considered the evidence submitted, my findings in respect of the verdict and sanction are as follows:*

Verdict

I am of the opinion that the above complaints have been sufficiently made out. I base this finding on the documentary proof, testimony of the initiator and statements from the clients that proved on a balance of probabilities that you did in fact engage in actions that were dishonest and in contravention of the Company rules and FAIS legislation. You knowingly submitted for enrolment three (3) funeral policy applications, policy number 313848832 for Petrus Mokoena, policy number 315533653 for Mr Jerry Molefe and policy number 315535400 for Mr Stephens Raphiri. You used the same cell phone number 0655118513 and 0761780927 to issue the policies through Metropolitan Straight Through Process (STP) enrolment system which both do not belong to the client.

These acts are blatantly dishonest and fraudulent with the sole purpose of enriching yourself.

Sanction

You are hereby notified that you are Debarred as a Financial Advisor effective 16 May 2019 and the Financial Sector Conduct Authority (FSCA) will be notified accordingly.

1. ***Metropolitan has a duty in terms of the FAIS Act to protect the public from representatives who have shown themselves to be dishonest and cannot put its customers and the public at risk.***

2. ***Your conduct was in breach of the fit and proper requirements as provided for in the FAIS Act, which require you to have the qualities of honesty and integrity. With your act of dishonesty, you no longer satisfy the criteria of being fit and proper to work in the Financial Services industry.***

Having found you guilty of dishonesty the company is obliged notwithstanding that you have sent an email dated 30 April 2019 to Mr Hendrie Marais that you are resigning from the company with immediate effect, to debar you in accordance with section 14(1) of the Financial Advisory and Intermediate Services Act 2002. (Act no. 37 of 2002). (the FAIS Act).”

12. The respondent has placed nothing before the Tribunal which contests the applicant's allegation of the unfair process. The legislative prescripts which the respondent was required to adhere to were simply ignored.

13. Section 14(2)(a) prescribes that:

> “***Before effecting a debarment in terms of subsection 1, the provider must ensure that the debarment process is lawful, reasonable and procedurally fair.”***

14. Section 14(3)(a) (as amended), specifically stipulates a prescribed procedure when an FSP debars a representative. The prescribed procedure set out in Section 14(3)(a) requires that adequate notice in writing must be given to the party, stating the reason the intention to debar him, the grounds and reasons for the debarment and any terms attached to the debarment.

15. There are three jurisdictional requirements for a debarment, namely:

15.1 The reason for a debarment must have occurred or must have known to the financial service provider while the person was a representative of the provider.

15.2 Before effecting a debarment the FSP must ensure that the debarment process is lawful, reasonable and procedurally fair.

15.3 A debarment that is undertaken in respect of a person who no longer is a representative of the FSR must be commenced no longer than 6 months from the date that the person ceased to be a representative of the FSP.

16. Section 14(3)(a) thereof specifically stipulates that:

> **"*A financial service provider must before debarring a person, give adequate notice in writing to the person stating its intention to debar a 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 interest of clients*."**

17. In terms of section 14.1 of the FAIS Act a debarment is a regulatory instrument intended to rid the industry of incompetent and dishonest representatives. Debarment should not be used to satisfy a provider's contractual or other grievances against a representative, unrelated to the fitness of competence requirements. Such use would be of unfair revenge or retaliation of the representatives.

18. Furthermore a debarment must be effected for the purpose it was intended for. FSP's must appreciate and understand that they can terminate an agreement with the representative without debarring her. The debarment must relate to the non-compliance by the representative with the competency and integrity requirements as envisaged in section 13(2)(a) read with section 8(1)(a) of the FAIS Act and with any applicable code of conduct or law on the conduct of business as set out in section 13(2)(b).

19. Clearly in this instance the debarment was unreasonable, unlawful and unfair. The Tribunal had time and again dealt with debarments of this nature. Industry players are aware of the legislative debarment procedures yet they ignore them.[1]

20. The respondent's conduct from the institution of the debarment proceedings to their non-appearance before this Tribunal is abhorrent and illustrates disrespect of the integrity of the financial services industry, the legislative requirements and ethical considerations.

21. Consequently this application succeeds with the order handed down.

SIGNED at **PRETORIA** on this **26th** day of **FEBRUARY 2020** on behalf of the Panel.

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1 AJ Davis v AC & E Engineering Underwriting Managers (Pty) Ltd, FSP4/2018 dated 24 October 2018; MA Morata v SS Rasemana, FSP16/2018

ADV H KOOVERJIE SC

With the Panel consisting also of:

G Madlanga

A Jaffer