

THE FINANCIAL SERVICES TRIBUNAL

Case No: **FSP73/2019**

In the matter between:

CL BASSON

Applicant

and

CHRIS LUCK

First Respondent

LIBERTY GROUP LIMITED

Second Respondent

Tribunal: H Kooverjie (chair), A Jaffer and E Phiyega

Summary: Requirements for a fair debarment process in terms of section 14(3) of the Financial Advisory and Intermediary Services Act ("**FAIS Act**")

DECISION

A THE APPLICATION

1. The application for reconsideration is based on a debarment decision of the second respondent, Liberty, which the applicant contends was unlawful, unreasonable and unfair.

2. It is common cause that on or about March 2017, the applicant entered into a Financial Adviser Agreement ("**the FA Agreement**") with Liberty Group Limited ("**Liberty**").

3. The applicant raised contentions *in extenso* and did so, both substantially and procedurally. It is common cause that the applicant resigned on 16 July 2019, and was required to work until 19 August 2019.
4. The two principal issues which requires consideration are whether the debarment was procedurally fair, thereby in compliance with section 14(3) of the Financial Advisory Intermediary Services Act, 2007 of 2019 (“*the FAIS Act*”), and secondly in the event that it is found that the debarment was procedurally fair, then the next inquiry following is whether the debarment was justified in terms of the FAIS Act?
5. In giving due consideration to this matter, the Tribunal found it appropriate, and where relevant to deal with the contentions in somewhat detail.

B THE DECISION

6. The decision to debar the applicant was contained in the “**“Notice” of Outcome of Corrective Action Inquiry**” (“**Notice**”), which was served on the applicant on 8 October 2019. The relevant extracts thereto:

“I refer to the inquiry conducted in terms of the Guidelines for corrective action, including the original “Notice”.

I attach the findings and recommendations of the Adjudicator, confirming his findings of guilty and his recommendations.

The Adjudicator has recommended to the executive management of

Liberty Group (Liberty) that your Financial Adviser Agreement be terminated, that you be removed from the Liberty's register representatives and that you are debarred. Your financial adviser agreement has already terminated and your name has been removed from Liberty's register. Executive management has determined that you be debarred.

Notice is accordingly furnished in terms of section 14 of the Financial Advisory and Intermediary Services Act that you are debarred from the Central Register and the Financial Sector Conduct Authority is being notified accordingly...

If you are aggrieved by the debarment decision in terms of section 14(1) of FAIS, you may apply to the Conduct Authority Tribunal in terms of section 230 of the Financial Sector Regulation Act for a reconsideration of the decision regardless of whether you exercise your right of appeal."

C DEBARMENT PROCESS

7. The debarment process commenced with a "**Notice of Formal Inquiry – Documentary Process**" dated 20 August 2019. A copy of the "**Guidelines for the Corrective Action**" ("**Guidelines**") was attached thereto.
8. The first charge related to the non-compliance with the fit and proper requirements-honesty and integrity, and the second charge related to the applicant breaching the terms of the Agreement entered into between the parties.

9. The **“Notice”** also advised the applicant that he will not be afforded the right to appeal any findings or decisions made pursuant to the inquiry unless:

- the decision is made that he failed to comply with fit and proper requirements in terms of the FAIS Act and that he must be debarred;
- if the executive allows the appeal in their discretion.

10. We note that the applicant was given 5 days in respect of the **“Notice”** to respond. (as per **“Guidelines”**). In paragraph 7 of the said **“Notice”** reads:

“In the event that you do not comply with the fit and proper requirements in terms of the FAIS Act, that you are debarred.”

11. The allegations levelled against the applicant were that he:

- ***“negotiated with and entered into an agreement with a competitor of Liberty namely Discovery to obtain leads from Discovery with a view of marketing Discovery products to those non-Liberty clients and then negotiated with and entered into an agreement with Discovery to act as a representative with Discovery.***
- ***entered into an agreement with a competitor of Liberty namely Discovery to persuade clients of Liberty to discontinue their products with Liberty and to move to Discovery.***
- ***entered into an agreement with an authorised financial services provider namely B-Sure Life to persuade clients of Liberty to discontinue their products with Liberty.***
- ***obtained quotations in respect of the termination of Liberty products with Liberty clients, with the view to persuading the clients to discontinue their***

Liberty products and referring the clients to Discovery products.

- ***attended training at Discovery.”***

12. At this juncture it is appropriate to refer to the “***Guidelines for Corrective Action***”.

We note that the “***Guidelines***” sets out the procedures to be followed by Liberty when conducting an Inquiry relating to the conduct of the representatives. The word “***inquiry***” is defined as “***means to conduct an examination of a matter to determine whether or not alleged misconduct, failure to comply with the FAIS or breach of contract has taken place by the representative. This inquiry could entail a direct process or a documentary process.***”

13. By virtue of the direct process a representative is given 3 days to respond to the initiator with reasons why there has not been compliance. By virtue of the documentary process the representative is given 5 days from delivery of the written “***Notice***” to respond. Paragraph 5.11 reads:

“In the event of a finding that the Representative is guilty of the allegations, the Adjudicator shall not be entitled to make a decision with regard to the sanction and/or penalty, if any which ought to be imposed. However, the Adjudicator shall make recommendation or recommendations to the executive management to the appropriate sanctions and/or penalties.”

14. Paragraph 9 thereof stipulates:

“A Representative who has been debarred as a result of these proceedings may if they have not been furnished with the facts on which a debarment was based, request these facts within 30 days of being notified of the decision. Executive management then has 30 days to provide the facts to

which a decision was based. The representative may then approach the Financial Sector Tribunal for a reconsideration of the debarment.”

15. From the applicant’s grounds for reconsideration we note the following contentions namely that:

15.1 Adequate notice was not given to him in writing of Liberty’s intention to debar him, the grounds and reasons for the debarment and any terms attached to the debarment as section 14(3) of the FAIS Act.

15.2 The **“Notice”** served on the applicant does not state that Liberty intended to debar the applicant, but merely that the debarment of the applicant would follow if the applicant does not comply with **“fit and proper requirements.”**

15.3 The applicant was made aware of the disciplinary process after he left Liberty’s employment. He commenced his employment with B-Sure Life on 19 August 2019. On 20 August 2019 he was approached by Du Toit from Liberty to meet him so that he could serve the **“Notice”** as well as the documentation of the allegations against him.

15.4 The time period to respond to the **“Notice”** was unreasonable as he had insufficient time to go through a plethora of documents and allegations against him.

15.5 A breach of contractual terms between the parties does not necessarily mean that a debarment is justified. Liberty’s ulterior motive in instituting

the disciplinary proceedings was to debar him.

- 15.6 The allegations against him relate to a breach of his contract. A fair debarment process would entail a separate inquiry particularly on the “**fit and proper**” assessment of the applicant.
- 15.7 There was bias on the part of the Adjudicator. Mr Chris Luck, the Adjudicator was head of sales for Liberty and could not have been impartial to this inquiry when the outcome of the inquiry was structured in a way that would benefit Liberty.
- 15.8 The findings of Liberty are unjustified as the Adjudicator did not find any evidence of a formal agreement with Discovery in order to obtain leads as a representative.
- 15.9 No evidence could be found that he entered into a formal agreement with B-Sure Life to persuade his clients to discontinue their products for Liberty.
- 15.10 It was further argued that Liberty’s true intention was to debar the applicant and not merely challenge the applicant on the breach of the contract between the parties.
- 15.11 Liberty had from 17 July 2019 to 18 August 2019 to institute disciplinary proceedings against the applicant. Debarment proceedings were instituted only after the applicant left Liberty’s employment.

15.12 He was never charged in his capacity as an “*intermediary*” in the said “*Notice*”, but findings were made that “*his intentions with the respective clients constituted the rendering to services of an intermediary.*”

16. The Adjudicator’s findings in respect of non-compliance with the “*fit and proper requirements – Honesty and Integrity*” fell under two categories namely:

16.1 The findings made regarding the breach of his agreement were the following:

“I conclude that Mr Basson is in breach of his Financial Advisory Agreement with Liberty. I find specifically that the provision...have been breached.

- *I do not find any evidence that indicates that Mr Basson entered into a formal agreement with Discovery in order to obtain leads or as a representative.*
- *I do not find that Mr Basson entered into a formal agreement with B-Sure Life to persuade clients to discontinue their products with Liberty. This finding does not undo the actions of Mr Basson as detailed above regarding clients Moodley, Makhene and Mabunda.*
- *I find that Mr Basson did obtain quotations on Discovery products.”*

16.2 With regard to dishonesty it was found:-

“The allegation of dishonesty was proved. The discussion between Mr Basson and Mr Figuera is instructive. It is clear that for a number of weeks prior to the meeting with Mr Du Toit, Mr Basson was planning his exit from

both Insurance Zone and Liberty...Mr Basson was an affront to Mr Figuera's moral compass and he specifically states so in his affidavit. I accord weight to the statement made by Mr Figuera."

17. Consequently the findings against Mr Basson were that:
 - 17.1 his FA Agreement be terminated;
 - 17.2 he be removed from the Liberty representative register in terms of the FAIS Act;
 - 17.3 he be debarred due to not complying with the fit and proper requirements in terms of the FAIS Act, especially the requirements pertaining to appropriate standards relating to "***personal character qualities of honesty and integrity***" as envisaged in section 6(A)(2)(a) of the Act.

D THE LEGISLATIVE PROVISIONS

18. 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.
19. Our law provides guidance on initiating a debarment process. The FAIS Act states in section 14(2) that before effecting debarment in terms of subsection (1), the FSP must ensure that the debarment process is lawful, reasonable and procedurally fair.

20. 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 ...”**

(own emphasis)

21. The industry is well *au fait* with the Guidance Note on the debarment process, which is aligned with section 14 of the FAIS Act, thereby endorsing a fair debarment process. The prerequisite for initiating a debarment process is that the debarment must have occurred or have become known to the FSP while the person was still a representative of the FSP (the first requirement); and the debarment must commence no longer than 6 months from the date that the person ceases to be a representative of the FSP (the second requirement).¹

¹ Clause 3.1.3 of the Guidance Note

Clause 3.1.4 qualifies the said requirements namely:

- (a) In respect of the first requirement, if the reason for the debarment occurred or only became known after the representative had ceased to be representative of the FSP, the FSP may not debar the representative and must refer the matter to the authority.
 - (b) With respect to the second requirement, the FSP may proceed with the debarment notwithstanding the fact that the person at the time of the commencement of the debarment process was no longer a representative of the FSP.
22. The reason for the debarment occurred whilst Basson was still a representative of the FSP. From the record, we note that prior to Basson's resignation, Liberty was aware of the breaches. Already in his discussion with Du Toit, Du Toit warned Basson that he had evidence that Basson intended "***churning his books.***" Du Toit was alerted of Basson's exit from Liberty by Figuera prior to his meeting with Basson.
23. The FSP must take all reasonable steps to commence debarment proceedings within 6 months from the date on which a person is ceased to be a representative. On the facts herein, we note that the debarment process was initiated within the 6 months period and therefore in compliance with clause 3.1.4 and 3.1.5 of the Guidance Note.

24. Before debaring 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)).²
25. The FSP should also through the “**Notice**” give the person a reasonable opportunity to make a submission in response (section 14(3)(a)(iii)). We note that Mr Basson was given 5 days to respond as per the stipulated time period in terms of the “**Guidelines**”.
26. What constitutes adequate notice and reasonable opportunity will depend on the circumstances of each case, for example when there are reasonable grounds to believe that the substantial prejudice to client or the general public may occur. This may warrant a debarment process and should be carried out on an urgent basis.³
27. The final step is that 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.
28. Once a decision is taken to debar or not to debar a person, the decision must

² Clause 3.2 of the Guidance Note

³ Clause 3.2 of the Guidance Note

be communicated in writing and reasons must be furnished, as well as advice the debarred person of his/her right of recourse through having the decision reconsidered by the Tribunal (section 14(3)(c)).

29. The Guidance Note prescribes the following namely that an oral hearing is not required, and a debarment may be considered on a documentary process.⁴

Clause 3.4.2 specifically states that:

“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 hearings. In the event that this is not done, the FSP can not summarily debar a person based on the outcome of the disciplinary hearing without following the steps set out in section 14(3).”

30. This is an instance where the “**Guidelines**” canvassed FAIS non-compliance and breach of contract and incorporated the debarment process therein. Basson as a financial adviser was considered an independent contractor by virtue of the FA agreement.

31. The inquiry extended to an “**examination of a matter to determine whether or not the alleged misconduct, failure to comply with FAIS or breach of contract has taken place by the representative.**”

⁴ Clause 3.4 of the Guidance Note

32. The “**Guidelines**” applied to all Liberty Representatives, whether contracted, mandated or employed by Liberty.⁵ Clause 2.4 specifically states:

“In respect of representatives who are also employees of Liberty, the disciplinary policies and procedures applicable to employees of Liberty will also apply.”

33. In clause 2.5 of the said “**Notice**”, the sanctions were listed which *inter alia* includes termination of the contract and/or in the event that the representative does not comply with “**fit and proper**” requirements in terms of FAIS, that the representative be debarred.

34. Clause 5.5 stipulates that:

“The representative also has 5 business days to submit a full written response to the initiator, as read in 5.6, alternative arrangements are made, which we presume would include an extension of time.”

35. The Adjudicator merely makes a recommendation and not a decision with regard to the sanction of the penalty.⁶

36. Having considered the process, we find that:

36.1 the “**Notice**” that was delivered was inclusive of section 14 of the FAIS Act. The “**Notice**” in our view was adequate in that the grounds for misconduct was set out; the “**Guidelines**”, being the written policy, was

⁵ Clause 2.2 of the Guidelines

⁶ Clause 5.11 of the Guidelines

furnished to the applicant and the applicant was informed that he can be debarred in the event of a finding of non-compliance with the “*fit and proper requirements*.”

36.2 Although the applicant was supposed to have responded within a shorter period of time, the applicant was given 15 days and not the normal 5 days in order to respond to the allegations made out in the “*Notice*”;

36.3 The applicant responded to the charges contained in the section 14 “*Notice*”;

36.4 Upon receipt of the applicant’s response the Adjudicator furnished his findings; “*Adjudicator’s Report*”;

36.5 Liberty notified the applicant of the decision by executive management based on the report of the Adjudicator;

36.6 The applicant acknowledged receipt of the “*Notice*” of the outcome of the corrective action hearing.

D WAS DEBARMENT JUSTIFIED?

37. The second inquiry is whether the debarment was justified? Section 14(3)(b) further requires that the applicant’s response must be considered before a decision can be made.

38. The applicant contended that there was no evidence to motivate the finding of the contravention of section 13(1)(b), (aa), (bb) and (1)A of the FAIS Act. Moreover Liberty did not take into account the mitigating factors. In particular that in the 10 years of furnishing financial services to his clients only one complaint was made against him.
39. In order for a representative to be debarred, there must be:
- 39.1 non-compliance by a representative or a key individual of such representative with a “*fit and proper*” requirements as postulated by section 13(2)(a) of the FAIS Act; or
- 39.2 a contravention or failure to comply by a representative or a key individual of such representative with the provision of the FAIS Act in a **material manner**.
40. This entails an enquiry as to whether the applicant failed to meet:
- 40.1 personal character qualities of “*honesty and integrity*”;
- 40.2 whether he had contravened the provisions of the FAIS Act in a material manner?

F ON FINDINGS OF BREACH OF THE FA AGREEMENT

41. We note that the Adjudicator concluded that he breached such agreement, but in the same breath the Adjudicator finds:

(1) “*I do not find any evidence that indicates Mr Basson entered into a formal agreement with Discovery in order to obtain leads or as a representative...*”

(2) *I do not find Mr Basson entered into a formal agreement with B-Sure Life to*

persuade clients to discontinue their products with Liberty...

(3) I find that Mr Basson did obtain quotations on Discovery products on his own admission.”⁷

42. The Adjudicator however found Basson had meetings with clients for instance; K Moodley, D Makhene (Liberty clients) where he canvassed Discovery products. With regard to client Mabunda, he requested Discovery quotes from Els (Discovery representative). In these instances he rendered services as an **“intermediary.”**

43. We know that in determining the **“fit and proper requirements”**, the following are included but not limited to an enquiry into:

- (a) Personal character qualifies of **“honesty and integrity”**;
- (b) Competence which includes experience, qualifications, operational ability, continuous professional development and financial soundness.

44. Section 13(2) stipulates that:

“An authorized financial services provider must:

(a) at all times be satisfied that the “provider’s representatives, and the key individuals of such representatives, are when rendering a financial service on behalf of the provider, competent to act and comply with:

(ii) fit and proper requirements and

(ii) any other requirements contemplated in section 13(1)(b)(ii).”

⁷ Record P41, Part A

45. From the Adjudicator’s findings, the applicant was however found to have obtained Discovery quotes for clients. Moreover it has not been disputed that the applicant was not charged for his conduct as an intermediary.
46. In considering the Adjudicator’s findings, it appears that the applicant’s response in relation to the clients were not addressed by the Adjudicator. The applicant’s main defence is that he obtained the quotes in order to gain a better understanding of Discovery products. In the process of obtaining such information, he did not sign any contract with Discovery, nor did he have a Discovery Code.
47. The issue to determine then is whether he failed to comply with the provisions of the FAIS Act in a material manner. We particularly note that:
- 47.1 in response to the “**charge sheet**”, the applicant admitted that he was exploring alternatives with Discovery. He engaged with them in order to determine how they operated and what their ethics and principles were;
- 47.2 he only signed the contract with B-Sure Life after leaving Insurance Zone;
- 47.3 the training he went for was not a prescribed Discovery product training;
- 47.4 the applicant admitted to obtaining quotes for some of his clients. The applicant specifically responds to his conduct with each of the clients referred to in the findings.⁸

⁸ P216 - 224

48. It appears that the applicant had to use the clients' personal details in order to acquire comparative quotes from Discovery. However there is no finding by the Adjudicator that the clients were persuaded to move to Discovery as a result of the applicant's comparisons. Basson advises that "**every client that I left Insurance Zone and moved to Discovery, and that I will not enticing anyone to move to Discovery.**"⁹
49. If we have regard to the findings of the Adjudicator (by virtue of clause 1.1.2 of the FA Agreement) that although he canvassed for products marketed by other companies not associated with Liberty the Adjudicator did not find that he persuaded clients to discontinue their products with Liberty.¹⁰ (Clause 4.1.1.2 of the "**Notice**").
50. Basson's conduct in canvassing for products marketed by Discovery was certainly a breach of this FA Agreement. We note that Basson sought assistance from Els of Discovery. However such breach does not in our view, warrant a debarment.

G DISHONESTY

51. On the charge of dishonesty the finding was based on Basson's discussion decision with Mr Figuera – where Basson notified him of leaving Liberty and Insurance Zone weeks before he resigned and the fact that Mr Basson "**was an affront to Mr Figuera's moral compass.**" The finding of dishonesty was weighed on this decision.

⁹ Page 216

52. The further allegations in the **“Notice”** made reference to the fact that:
- 52.1 he conducted himself in an underhand manner with a view of causing financial prejudice by persuading Liberty clients to discontinue their Liberty products; and
- 52.2 he misrepresented to Du Toit and Ferreira that he had no intention of leaving Liberty.
53. Basson furnishes an explanation in respect of his discussions with Figuera and Du Toit. In his discussion with Du Toit, Basson confirmed that he affirmed his loyalty to Insurance Zone in order to ensure receipt of his outstanding commission. He did not feel it appropriate to discuss his exit from Liberty in this conversation. He however went back the next day and confessed to Du Toit that he lied and informed him that he was resigning and joining a Discovery franchise.
54. The applicant argued specifically that his character of **“honesty and integrity”** had never during his time with Liberty been questioned. The allegations and the findings thus does not reflect his personal attributes and characteristics of **“honesty and integrity.”**
55. Basson specifically deposed to an affidavit setting out his relationship with Figuera and the discussions that ensued in respect of his move to Discovery. The gist of the conversations, so he says – was that Figuera knew for over a month that Basson intended to resign and move to Discovery as well as the fact that he had an interview at a Discovery franchise.

56. However Figuera in his affidavit alleged that Basson's intention was to churn his books. In other words, move his Liberty clients to Discovery and benefit again from the commissions.¹¹ There was no evidence in this regard, as per the Adjudicator's finding.
57. In determining "**dishonesty**" the enquiry goes to the root of a person's character. The characteristics of "**honesty and integrity**" is a permanent quality that every financial service provider must possess. Time and again this Tribunal has referred to authorities which assist in determining characteristics of "**honesty and integrity**".
58. One must have regard to the manner in which the person concerned conducted himself not only in his private life but also in his dealings with those whom he has come into contact professionally or in the course of his business.¹²
59. A person's quality of good character is judged by his/her acts and motives. Moreover such character cannot be estimated by a single act or class of act. In **AGM v Registrar of Financial Service Providers**, Case no: A45/2014, paragraph 36, the Appeal Board held:

"to determine the necessary honesty and integrity indeed requires a moral judgment, taking into account a person's conduct in both her private life and interaction with other. An inference is drawn from her (actions) and

¹¹ Record P42, Part B

¹² Hamilton Smith & Company v The Registrar of Financial Markets, Appeal Board decision dated 1 September 2003; See also AJ Davis v AC & E Engineering Underwriting Managers (Pty) Ltd FSP4/2018 dated 24 October 2018.

motives, not once but over a period of time, or through a number of incidents...”

60. The findings of “**dishonesty**” had certainly not been considered in the aforesaid light. An inquiry into his character was not probed. Basson’s character could not have been properly considered by a “**lie**” to Du Toit. Cognisance should also be taken of Basson’s conduct by approaching Du Toit the very next day and confess to him that he lied.

61. In the premises we find the debarment was not reasonable and justified. The following order is made:

(1) the debarment of the applicant is set aside.

SIGNED at **PRETORIA** on this 3rd day of **AUGUST 2020** on behalf of the Panel.



ADV H KOOVERJIE SC

With the Panel consisting also of:

A Jaffer

E Phiyega