IN THE FINANCIAL SERVICES TRIBUNAL

CASE NO: FSP20 /2019

In the matter between: -

TEVIN JOHN DUBE APPLICANT

and

CLIENTÉLE LIFE ASSURANCE COMPANY LIMITED RESPONDENT

Tribunal: L DLAMINI (Chairperson), A JAFFER and G MADLANGA

Summary: Debarment of persons no longer in the employ of the Financial Services Provider – requirements where such person cannot be located – section 14 (2) of the Financial Advisory and Intermediary Services Act

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DECISION

INTRODUCTION

1. This is an application in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 ("FSRA") brought by JOHN TEVIN DUBE ("Applicant"), a financial services representative ("FSR") in terms of section 14 (1) (a) (i) of the Financial Advisory and Intermediary Services Act 37 of 2002 ("FAIS Act"). The Applicant is a former FSR of CLIENTÉLE ASSURANCE COMPANY LIMITED ("Respondent"), a financial services provider ("FSP") trading as such under FSP Number 15268.

2. The Applicant seeks reconsideration of the decision of the Respondent to debar him dated 11 April 2019. The Applicant challenges the debarment on the basis that the Respondent, in debarring him, failed to ensure that the process for debarment was procedurally fair. In particular, the Applicant argues that he was not notified about the debarment.

FACTUAL BACKGROUND

3. The Applicant was employed by the Respondent as a telesales consultant on 1 August 2018. He was registered and licensed to sell financial products as an FSR of the Respondent.

4. On 21 December 2018, the Respondent's "Group Quality Department" lodged a complaint against the Applicant. The complaint was that on 16

December 2018, the Applicant captured a policy in a manner that constituted a breach of the Respondent's procedures and also, in the process the Applicant committed a fraud.

5. On 17 January 2019 the Respondent brought the complaint to the Applicant's attention. The Applicant says the matter was discussed with his sales coach, he apologised and he received training from the floor manager. The Applicant left the employ of the Respondent on the same day, 17 January 2019.

6. However, it was not until the 1 April 2019 that the Respondent issued a notification of debarment hearing (Notice).[1] The Notice confirms, among other things, that the employment relations between the Applicant and the Respondent terminated on 17 January 2019, that the Respondent intends to debar the Applicant in terms of section 14 of the FAIS Act. The Notice states the reasons for the debarment, the debarment hearing date (10 April 2019) and provides the address and the time for such hearing. It also attached the Respondent's debarment policy.

7. The last paragraph of the Notice states that "Your failure to attend the debarment hearing in person without a valid and acceptable reason shall entitle the Chairperson to proceed with the hearing in your absence and arrive at a decision based on the evidence provided."

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[1] See record of proceedings Part A p, 4 – 5.

8. The Respondent sent the Notice to email address tevinjohnsmith@gmail.com which appears on a delivery notification ("delivery note") dated 1 April 2019 sent on 1 April 2019 at 3:37 PM.[2] The Respondent submitted the delivery note as proof that the Applicant was notified about the debarment. The delivery note records that "Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server."

9. The Applicant denies that the email address shown was his. He denies ever receiving the Notice. In his grounds for reconsideration the Applicant contends that the "FSP used incorrect information to contact me, while they were in position (sic) of my correct contact information as they kept sending campaign messages on my phone long after I had left."[3]

ISSUE

10. The issue is whether the Respondent's Notice of debarment meets the requirements set under section 14 of the FAIS Act.

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2 See record of proceedings Part A p, 7.
3 Refer to record of proceedings Part A p,11.

THE LAW

11. Section 14 (1) of the FAIS Act places an obligation on the FSP to debar an FSR who has failed to comply with the provisions of the FAIS Act in a material manner.[4] Section 14 (3) goes further to state the procedure that must be followed to effect the debarment.[5]

12. Section 14 (2) (a) of the FAIS Act stipulates that the FSP is obliged to ensure prior to effecting the debarment, that the process of debarment is lawful, reasonable and procedurally fair.[6] Therefore the FSP is under a duty to satisfy itself that all procedural requirements for debarment are fulfilled every step of the way before the FSR can be debarred. If the FSP makes a material misstep, the debarment cannot be sustained. The matter

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4 Section 14 (1) (*a*) An authorised financial services provider must debar a person from rendering financial services who is or was, as the case may be—

(i) a representative of the financial services provider; or

(ii) a key individual of such representative,

if the financial services provider is satisfied on the basis of available facts and information that the person—

(iii) does not meet, or no longer complies with, the requirements referred to in section 13 (2) (*a*); or

(iv) has contravened or failed to comply with any provision of this Act in a material manner;

5 See section 14 (3) of the Act and also refer to the decision of this Tribunal: Verne Thomas FSP 5/2018.

6 Section 14 (2) (*a*) Before effecting a debarment in terms of subsection 1, the provider must ensure that the debarment process is lawful, reasonable and procedurally fair.

may be remitted back to the FSP in terms of section 234 of the FSR Act for the FSP to observe a procedural step the FSP may have missed.

13. Bearing in mind the requirement for the FSP to observe pre – debarment procedures, section 14 (2) (b) of the FAIS Act further states:

> "If a provider is unable to locate a person in order to deliver a document or information under subsection (3),[7] 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."

14. In light of the above, the FSP is required to locate the FSR for the purposes of delivering documents that relate to the impending debarment. However, if after exhausting all reasonable efforts to locate the FSR, the latter's whereabouts remain unknown, sending an email, for instance, to the FSR's last known address will be regarded as a sufficient method for the delivery of such documents. Put differently, sending an email will not be sufficient if the FSP cannot show that it took all reasonable steps to locate the FSR to deliver the Notice.

15. Section 14 (2) (b) places emphasis on the FSP's obligation to ensure that the FSR is properly notified about the debarment specifically when the FSR has long left the employ of the FSP as is the case in this matter.

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[7] Subsection 3(a) (i) in particular requires the FSP to give the FSR adequate notice of debarment.

FINDING

16. On the Respondent's own version, no attempt was made to locate the Applicant to deliver the Notice. Instead the Respondent opted to send the Notice electronically by email. The method of delivery the Respondent used would have been a sufficient method of delivering the Notice if the Respondent attempted but failed to successfully establish the Applicant's whereabouts.

17. Evidence shows that the Respondent had the opportunity to locate the Applicant to ensure delivery of the Notice and in turn notify the Applicant about the impending debarment. The Respondent neglected to do so.

18. Even if the Respondent argued that it had taken steps to locate the Applicant but could not locate him, the email that the Respondent sent generated the delivery note which shows that the Notice was delivered. However, the delivery note serves merely to indicate delivery of the Notice as opposed to serving as confirmation that the Notice was delivered to the Applicant.

19. The Respondent seems to have misguided itself in adopting the approach that it merely had to deliver the Notice. The proverbial bell should have rung when the Respondent did not receive any acknowledgement of its email attaching the Notice. That bell should have rung louder with each day passing and the date for the intended hearing getting closer.

20. It follows that since the Respondent has debarred the Applicant without showing that it took reasonable steps to locate him to give notification of the impending debarment, the debarment cannot stand.

21. In the premises, the Respondent failed to ensure that the debarment process was lawful, reasonable and procedurally fair.

ORDER

22. The following Order is made: -

22.1. The decision is set – aside and the matter is remitted back to the decision – maker for further consideration.

22.2. No order as to costs.

Signed on behalf of the Tribunal on this 13 February 2020 at Pretoria.

Langa Dlamini (Chairperson)