THE FINANCIAL SERVICES TRIBUNAL

Case No. FSP30/2019

In the matter between:

CONSTANCE AMANDA MLOMBO Applicant

and

STANDARD BANK FINANCIAL CONSULTANCY First Respondent

KENNEDY MATEYO NO Second Respondent

Tribunal: LTC Harms (chair), Mr Ahmed Jaffer and Mr Gugulethu Madlanga

For the applicant: Adv Greg Fourie SC instructed by Howes Incorporated Inc

For the respondent: Mr Doctor Cithi of Mervyn Taback Inc

Hearing: 9 December 2019

Summary: Financial Advisory and Intermediary Services Act, 37 of 2002 sec 14 (1) - Debarment of FSR by FSP – ulterior purpose – destruction of files as contravention of FAIS Act in a material way – fit and proper requirement – nature of debarment: not punishment.

DECISION

1. This is an application for reconsideration of the decision to debar the applicant, Ms CA Mlombo, who had been employed as a financial service representative

(FSR) by the first respondent, the Standard Bank Financial Consultancy, a financial service provider (FSP), in terms of sec 39 of the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act) as FSR.

2. The debarment was effected in terms of sec 14(1) of the FAIS Act by the second respondent, a key individual employed by the first respondent subsequent to the applicant's dismissal as employee on 25 April 2019. The debarment took effect on 16 May 2019.

3. There was no reason to cite the second respondent as a party to the reconsideration proceedings. He acted on the behalf of the FSP in barring the applicant. Accordingly, references to "the respondent" in what follows will be a reference to the first respondent.

4. Section 14(1) of the FAIS Act provides that an authorised FSP must debar an FSR from rendering financial services if the FSP is satisfied on the basis of available facts and information that the FSR, inter alia,

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

   (ii) has contravened or failed to comply with any provision of the FAIS Act in a material manner.

5. As to the first ground, section 13(2)(a) states, to the extent relevant, that an authorised FSP must at all times be satisfied that its representatives, are, when rendering a financial service on behalf of the FSP, competent to act and comply with "the fit and proper requirements".

6. The fit and proper requirements are contained in sec 4 and we are for present purposes concerned with "the personal character qualities of honesty and integrity" and "competence".[1]

7. The debarment of the applicant was based on both grounds mentioned, namely the lack of the personal character qualities of honesty and integrity and the contravention of a provision of the FAIS Act in a material manner.

8. There are pending arbitration proceedings concerning the termination of the applicant's employment, but the labour law issues are not relevant to the present application for reconsideration of her debarment.

9. Nevertheless, the respondent relied on the facts established during the disciplinary proceedings in concluding that the applicant had to be debarred. These were that the applicant (a) was guilty of gross misconduct and abused her position of trust and authority as a financial planner when she instructed an insurer (Liberty) to make changes to the payment method initially agreed to on by the client without the client's consent or knowledge ; (b) was dishonest when she effected a change to the payment method without the client's consent or knowledge *and* in conjunction with the intention to earn higher commission; (c) was guilty of misconduct in that she brought the respondent's name into disrepute and caused it possible financial loss when she acted against or in disregard of a client's investment wishes and/or gave her wrong financial advice ; and (d) that she was guilty of gross misconduct in that she shredded or destroyed

[1] See also *DETERMINATION OF FIT AND PROPER REQUIREMENTS FOR FINANCIAL SERVICES PROVIDERS*, 2017, published under Board Notice 194 in Government Gazette 41321 of 15 December 2017.

client files, something against the respondent's policies and procedures and regulatory legislation.

10. Against that background the respondent concluded that the applicant contravened its financial advisory processes, the FAIS Act and the General Code of Conduct because she (a) failed to render financial services honestly, fairly and in the integrity of the financial services industry; (b) failed to exercise her judgment objectively in the best interest of the client; (c) requested third parties to amend instructions or documentation and thereby amending initial instructions without the knowledge or required consent of the client; and (d) failed to follow processes with regard to record-keeping, thereby contravening the respondent's processes and the FAIS Act.
11. The application for reconsideration raises (according to Mr Fourie's argument heads) four issues. First, the applicant alleges that she acted on the client's (apparently verbal) instructions and with its knowledge when subscribing to policies or making changes to premium arrangements; second, that she acted honestly and diligently in providing financial advice; third, that she did not intend to destroy any client document; and last, that the disciplinary and debarment proceedings were brought for an ulterior purpose, namely to stifle competition. We shall deal with these issues in a reverse sequence.

ULTERIOR PURPOSE

12. As said, the applicants alleges that the disciplinary and debarment proceedings were brought for an ulterior purpose, namely to stifle competition.
13. Her prime attack was on the chair of the disciplinary tribunal, accusing her of bias and incompetence. Counsel wisely refrained from arguing this for obvious

reasons except to refer to the fact that the chair had excluded an unsworn letter written by the client from the evidence. We shall revert to the content of the letter.

14. Her secondary attack was on the second respondent, also alleging that the decision to debar her was biased and with the further motive to remove her as a competitor of Standard Bank.

15. Intemperate language appears to have been part of the applicant's litigation tactics. For instance, the applicant's attorney's affidavit in support of the submission of further evidence alleged malice on the part of the second respondent and that he undertook a "cut and paste" approach "on behalf of the First Respondent". Counsel did not seek to justify the allegations.

16. This Tribunal is not enamoured by gratuitous attacks on persons who have to make difficult decisions, and is not impressed by emotive language.

17. As to the motive to remove the applicant as competitor, it is based on a bald allegation and not justified by any fact. At the time when the investigation against the applicant began, she resigned and informed the respondent that she was leaving the financial services industry. It only later became known that she intended to join another FSP.

18. It is in any event trite law that motive is irrelevant and that a good motive does not make something lawful which is not and conversely a bad motive does not make something unlawful which lawful.[2]

[2] *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA) ; 2009 (1) SACR 361 (SCA) ; 2009 (4) BCLR 393 (SCA) ; [2009] 2 All SA 243 (SCA) para 39.

19. The issue before us is purely factual and that is whether the jurisdictional facts for debarment were present. This is an application for reconsideration and not an appeal, and an attack on the reasoning of the key individual is in itself of limited value because this tribunal has to reconsider the facts.
20. We accordingly dismiss this ground for reconsideration.

DESTRUCTION OF CLIENT FILES

21. In terms of sec 36(1)(a) of the FAIS Act, any person who contravenes or fails to comply with the provisions of inter alia sec 18, is guilty of an offence and is on conviction liable to a fine not exceeding R10 million or imprisonment for a period not exceeding 10 years, or both such fine and such imprisonment. Section 18, in turn, requires an authorised FSP to maintain records for a minimum period of five years, more in particular of known premature cancellations of transactions or financial products by clients of the provider; complaints received; the continued compliance with the requirements referred to in section 8; cases of non-compliance with the Act, and the reasons for such non-compliance; and the continued compliance by FSRs with the requirements referred to in section 13(1) and (2).
22. It is not in dispute that all the physical files of all the applicant's clients were destroyed by her or on her instructions sometime after 31 January and mid-March 2019.
23. The reason given by her is that she misunderstood the respondent's instruction about the storage of files. She thought that if they were uploaded on her One Drive cloud file, the physical documents could be destroyed.

24. The applicant sought to introduce her attorney's recollection of what one of the respondent's witnesses had said during the unfair dismissal arbitration about how the document could have been read or understood. Such evidence is inherently of no value. The document has to be read in the light of the statute.
25. That then brings one to her One Drive file. She said that she had instructed her assistant, one Darren Kruger, to upload all the files and that once the documentation had been securely uploaded, stored and checked, Kruger attended to the shredding to ensure the protection of client information.
26. A screen shot of her One Drive file disproves this version. It contains the file of one client only, which was uploaded on 2 August 2017. All the other files are empty and were last modified during 2017 – long before the destruction date. The applicant did not deal with this in reply in the application for submission of further evidence and left it to her attorney to provide an inconsequential answer.
27. The attorney attached a supposed affidavit by Kruger to her replying affidavit. The document, which was neither signed nor sworn, did not deal with the uploading and destruction or explain the screen shot.
28. The applicant also relies on the respondent's Business Process Management (BPM) system, because advice documents are stored there, and that the destruction of the physical files was therefore of no consequence. Since sec 18 is not limited to advice documents and since the BPM system is not a storage system and does not cover the documents of the last five years because of its later introduction, this point is also bad.
29. It follows from this that destruction of by the applicant of her client files amounted to a contravention of or failure to comply with a provision of the FAIS

Act in a material manner. This ground of debarment is a separate statutory ground. It is not the same as the "personal character qualities of honesty and integrity" ground.

30. We hold that the applicant's excuses do not cut ice and that she was correctly found to have contravened or failed to comply with any provision of the FAIS Act in a material manner.

FIT AND PROPER

31. The applicant was, as mentioned, employed by the respondent as an FSR. She sold, at least, products of Liberty Life. She earned commission on products sold and earned employment points. The commission she had to share with her employer. Commission rates differ depending on the product sold. For instance, the commission on a single premium or lump sum investment is much lower that the commission on a recurring investment such as a monthly premium. In other words, it was more profitable for the applicant to sell endowment policies with monthly premiums than policies with a lump sum investment.
32. The applicant had an important client, Lengwati Electrical CC, represented by Mrs Lengwati, its only member. The applicant had been their FSP since 2017. The grounds on which it was found that the applicant was no longer a fit and proper person relate to four investment policies sold to this client during April 2018 and February 2019.
33. It is in this context that the first two grounds for reconsideration listed by Mr Fourie arise, namely that the applicant at all times acted on the client's instructions and with its (the CC's) knowledge when subscribing to policies or making changes to premium arrangements and that she acted honestly and

diligently in providing financial advice. It is also in this context that the letter of Mrs Lengwati, which the chair of the disciplinary hearing held constituted hearsay evidence, is relevant as well as her affidavit confirming the information contained in the letter – both of which were before the second respondent.

34. The applicant explained that the business of her client was such that that it did not receive regular payments from its clients and could not guarantee that regular monthly payments would be obtained but that she could make lump sum payments as and when she obtained additional payments. That is a clear indication that the client could not bind itself to substantial monthly premiums but that it had from time to time large amounts to invest.
35. Nevertheless, the first policy, which was entered into during April 2018, provided for a monthly premium and debit order of R200 000.00 for five years. Unsurprisingly, the debit order was almost immediately cancelled and the premiums funded by two lump sum investments of R1.2 million on 15 May 2018 and R1 million on 25 October 2018 in non-interest bearing accounts at Liberty.
36. We find the same pattern with the second policy, which provided for a monthly premium of R300 000.00 for five years. The debit order, too, was cancelled, and funded on 1 November 2018 with another lump sum investment of R1 million.
37. There were no debit orders in place for these two policies at the time of Mrs Lengwati's letter in April 2019 and they must have been in arrears.
38. The third policy was for monthly premiums of R100 000.00 for five years. It was erroneously in the name of Mrs Lengwati personally and not in the name of the CC.

39. The intention was to have it cancelled and replaced by the fourth policy with a monthly premium of R500 000.00 in the name of the CC.
40. It was not cancelled but made paid up with the result that the inevitable full commission claw back did not take place.
41. In the event, the fourth policy was concluded during February 2019, but to avoid being debited monthly Mrs Lengwati paid a lump sum of R4 million into the same non-interest bearing account with Liberty. This raised the red flag on 1 March and gave rise to the investigation into the conduct of the applicant.
42. If one has regard to the facts before and conclusions of the disciplinary tribunal on which the decision to debar was based, the two grounds relied on by Mr Fourie miss the target.
43. The applicant should have advised the client to conclude lump sum investments with the funds at hand instead of investments based on monthly premiums which were not sustainable. On her own version, it means that she did not advise the client of the option to make lump-sum investments instead of periodic investments. The denial of the applicant that she knew of the difference in commission structure was found to be improbable, which is correct if regard is had to her description of her experience and competence. This led to the conclusion that the way the policies were structured was to earn higher commission. If her denial were true, it means that she is not competent to act as adviser.
44. The fact that she disclosed the commission payable on the investments to the client does not change the conclusion. If she had presented the client with the two calculations the client would have been able to make an informed decision.

45. The same applies to her failure to have alerted the client of the fact that the lump sums deposited did not attract any interest. She said that she did not know but the point is that she should have known. Mrs Lengwati was not happy when she learnt of the fact because in her letter she requested the return of the surplus and reintroduction of the debit orders. Her statement in her affidavit that she had no issue with the fact that interest was not earned on the pre-payment "as this is what I asked for" cannot be true because the issue of interest was not raised at the time.
46. In the context of the finding that there was no tangible proof of permission by the client to cancel the debit orders, the presiding officer said that Mrs Lengwati was not called and that her statement constituted hearsay. She went however further and had regard to the content of the letter and pointed out that it contained no detail as to where, when and under what circumstances permission was given. Such permission or instruction has to be in writing. In that regard she was correct. Mrs Lengwati, in her affidavit for the debarment, sought to plug the hole but still did not provide the detail mentioned by the presiding officer.
47. That brings us to the grounds of debarment as set out in the debarment letter. We conclude that the findings that the applicant had failed to render financial services honestly, fairly and in the integrity of the financial services industry and that she failed to exercise her judgment objectively in the best interest of the client have been established and that the jurisdictional ground for her debarment was satisfied.
48. However, the finding that she requested Liberty to amend instructions or documentation and thereby amending initial instructions "without the

knowledge or required consent of the client" is not sustainable in the light of the affidavit of Mrs Lengwati.

DEBARMENT

49. The applicant, presumptuously, asked that this Tribunal should direct an investigation by the FSCA into the conduct of the respondents to assess whether their conduct violated the guidelines and ethical standards. This is in line with her general defence that others should have advised her better and should have picked up problems earlier.
50. The jurisdiction of this Tribunal is to reconsider the debarment and to make an order as permitted by sec 234 the Financial Sector Regulation Act 9 of 2017 nd nothing more.
51. The FAIS Act obliges the FSP to debar an FSR if the jurisdictional facts for debarring have been established. Debarring, accordingly, cannot be for a period depending on the "seriousness" of the acts of the FSR, and the complaint of the applicant that she had been barred for an unlimited period of time and the alternative submission that she should rather have been "suspended for a fixed period" and that her debarment since 16 May to date was "adequate punishment" are misplaced.
52. Barring is not akin to a sentence. As long ago as 1778, Lord Mansfield stated in *Ex parte Brounsall* Cowp 829 that debarment (in that case of a solicitor) is not a punishment and that the question is rather whether the person concerned in the

light of the conduct would be free from suspicion. In other words, debarring is for protecting the public and is not punitive.[3]

53. The application is dismissed.

Signed on behalf of the Tribunal Panel on 23 December 2019 at Pretoria.

LTC HARMS (Chair)

3 Norman S. Poser *Lord Mansfield: Justice in the Age of Reason* (2013) p 501 – a judgment still cited.