IN THE FINANCIAL SERVICES TRIBUNAL

CASE NUMBER: FSP55/2019

In the matter between:

J.L SIEMENS Applicant

And

OUTSURANCE INSURANCE COMPANY LIMITED Respondent

Tribunal: Mr. JM Damons (chair), Mr. A Jaffer and Mr. N Mxumalo
For the Applicant: Mr. J L Siemens
For the Respondent: Mr. Herbst

Hearing: 07th July 2020
Decision: 14th July 2020

Summary: Application for reconsideration of a decision in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 ("FSRA") – application to reconsider the debarment decision – meaning of conduct that justifies debarment – respondent failed to show that the applicant does not meet the requirement of fit and proper person as defined in section

DECISION

INTRODUCTION

1. In this matter the applicant applied for reconsideration of the debarment decision dated 20th August 2020[1] which decision was noted by the authority on the 08th October 2019[2]. Subsequent to the debarment decision the applicant filed an application for the reconsideration of a decision in terms of section 230(1) of the FSRA[3].

2. The applicant in this matter is Mr. Johnathan Louis Siemens (Mr. Siemens / the applicant) a former Financial Services Representative (FSR) of Outsurance Insurance Company Limited an authorized Financial Services Provider (FSP) and the Respondent in this matter.

3. The reconsideration application was filed with this Tribunal on the 09th October 2019. The application was opposed by the respondent. Mr. Siemens did not file heads of argument, but the respondent's representative did. This matter is thus considered on the written and oral submissions presented by the parties.

FACTUAL BACKGROUND AND COMPLAINT

4. The gist of the matter concerns an incident wherein it was alleged that Mr. Siemens failed to cancel a car insurance policy as instructed by a customer. The respondent instituted disciplinary proceedings against the applicant. The actual charge preferred against the applicant was formulated as follows:

> "***1. Not cancelling a risk as per the client's request and standard procedure within the department.***

[1] See record of proceedings part A page 4
[2] See record of proceedings part A page 43
[3] See record of proceedings part A page 1 - 3

In that you allegedly failed to cancel a vehicle as per client's request on OT8738451. Client called back at a later stage and the vehicle was subsequently cancelled by your colleague. Feedback code 4144999"[4].

5. Prior to the conclusion of the disciplinary proceedings, the applicant resigned from employment with the respondent. Parties concluded a termination of employment agreement ("*the termination agreement*") setting out the terms of termination[5]. The agreement indicated that despite the applicant's resignation, the respondent will still proceed with the debarment proceedings.

6. The termination agreement contained the following clauses:

> *"The employee is hereby informed that as a result of the charges against the employee, despite that the employee's resignation the company will seek debarment of the employee.*
>
> *The employee is hereby provided with notification of his right to make written representations providing reasons why the employee should not be debarred to the designated panel of Key Individuals who will make a decision on whether the employee will be debarred or not.*
>
> *The designated panel of Key Individuals will inform you of the decision of whether you will be debarred or not within 5 days of receipt of the representations set out in clause 12 or within 5 days after the 48 hour time period mentioned in clause 12 has lapsed should you fail to make any representation."*

7. On 29 August 2019, the Applicant submitted his written representations on why he should not be debarred, stating the following:

> *"I was under the impression that it was a trade-in and not a sold risk, therefore assisted the client with his query in stating that the client needs to call us back as soon as the client has the new risk, as I was under the impression that the client still had the old risk and still needed insurance on the risk.*
>
> *Not cancelling the risk was completely unintentional as per the discussion between the client and myself, the client never disputed the conversation*

[4] See record of proceedings part A at page 4
[5] See record of proceedings part B at page 5

regarding the cancellation of the risk. At the time of the conversation between myself and the client, the client informed me that one risk needs to be removed and one risk needs to be added, but the client was not certain what new risk the client will add and therefore I gave the client advice to call us back, under the impression that it was a trade-in as stated above. After giving the advice to the client, the client did not indicate that the risk was supposed to be cancelled the day of the discussion between the client and myself.

The client was not negatively impacted by the incident as the client was refunded for the risk, shortly after the incident.

I had no other active not cancelling risk feedbacks at the time of the incident.

After receiving feedback 4144999 I take full responsibility for the incident and I feel that I was sufficiently punished as I was suspended and waiting for hearing which led to me losing my job. One of Outsurance's values is human and being human I made an honest mistake and therefore I took full responsibility as stated above but do not believe I should get debarred."

8. On 20 September 2019, Outsurance sent an e-mail to Mr. Siemens stating that:

"Please note that we have considered all the merits and representations made to us with regards to your possible debarment in order to make a decision on your debarment as a F AIS representative.

The employer has a duty in terms of Section 14(1) of the F AIS Act to debar a representative that no longer complies with the fit and proper requirements as set out in the F AIS Act, or has breached any material provisions of the aforesaid Act.

We hereby confirm that a decision has been made that we will be proceeding with your debarment and our compliance department will send further correspondence in this regard in due course."

9. On 25 September 2019, Outsurance addressed a letter to Mr. Siemens stating the following:

"We have a duty in terms of Section 14(1) of the FAIS Act to debar a representative that no longer complies with the fit and proper requirements as

set out in the FAIS Act, or has breached any material provisions of the aforesaid Act.

You were afforded the opportunity to make representations to us providing reasons why you should not be debarred.

We have deliberated the reasons that you furnished us with and a decision was made that you no longer complied with the fit and proper requirements as prescribed by the FAIS Act and that you should be debarred.

As per the notification sent to you on 20 September 2019, we hereby confirm that a decision has been made to proceed with your debarment.

Notification of your debarment will be sent to the Financial Services Conduct Authority accordingly."

On 25 September 2019, Outsurance completed the FSCA Debarment Notification form stating that the effective date of debarment was 20 September 2019 and that the grounds of debarment were indicated to be lack of honesty and integrity.

10. On 8 October 2019, Outsurance addressed a letter to the FSCA informing it of its decision to debar Mr. Siemens. The letter stated the following:

"We herewith wish to inform you that Mr Siemens (Identity number: 9711215220081) was employed with us in our Client Care Department as a Client Care Inbound Advisor.

We have proceeded to remove Mr Siemens from our representative register as we are of the opInio11th at he no longer meets the Fit and Proper requirements.

- *The following was identified during Mr Siemens' employment with OUTsurance:*
- *He did not cancel a risk as per the client's request and per the standard procedure within the department*
- *This was done on policy number OT8738451.*
- *His aforementioned dishonest conduct resulted in him deriving an unfair advantage in respect of the performance based system of remuneration.*

As a result of the above facts, we are of the opinion that Mr Siemens' actions

amount to a lack of Integrity and that his actions reflect dishonesty. We strongly believe that he should be debarred as we are of the opinion that he can no longer be classified as a representative who meets the fit and proper requirements of honesty and integrity."

GROUNDS FOR THE RECONSIDERATION

11. The applicant's main ground for the reconsideration is that the "client did not indicate that the risk was supposed to be cancelled"[6]. The applicant also seems to argue that the incident was a mistake and that there was just miscommunication.

12. On close scrutiny of the record, it appears to us that the issues that call for determination in this application for reconsideration resolve themselves to the following:

    12.2 Whether the substantive grounds for debarment were established; and

    12.3 Whether the process followed by Outsurance in debarring Mr. Siemens complies with the procedural requirements.

LEGAL FRAMEWORK

13. 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 that representative no longer complies with inter alia the fit and proper requirements.

14. Our law provides guidance to parties on the procedure that must be followed in the event of an FSP invoking 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 procedural fair.

[6] See record of the proceedings part A at page 2

15. Further, the FAIS Act states the following in section 14(3) (a) and (b):

"(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 policy 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 terms of paragraph (a)(iii), and then take a decision in terms of subsection (1); and……." (own emphasis)

16. An FSP is required, before debarring its representative, to give adequate notice in writing to the person stating its intention to debar the person, the grounds and reasons for the debarment.

17. In the case of *The Minister of Environmental Affairs and Others v Phambili Fisheries*[7] *("the Phambili Fisheries")*, the Supreme Court of Appeal had an opportunity to express itself on what constitutes adequate reason. Howie J stated in ***the Phambili Fisheries*** case that:

"[40] What constitutes adequate reasons has been aptly described by

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[7] [2005] 2 All SA 519 (SCA)

Woodward J, sitting in the Federal Court of Australia, in the case of *Ansett Transport Industries (Operations) Pty Ltd and Another v Wraith and Others* (1983) 48 ALR 500 at 507 (23-41), *as follows:*

> *'The passages from judgments which are conveniently brought* together *in Re Palmer and Minister for the Capital Territory (1978) 23 ALR 196 at 206-7; 1 ALD 183 at 193-4, serve to confirm my view that s 13(1) of the Judicial Review Act requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect: "Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.'*
>
> *This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only."*

18. The first question is whether OUTsurance gave the Applicant a notice of intention to debar him before taking the final decision to debar setting out *the* grounds and reasons for the intended debarment. The second question is whether OUTsurance was satisfied on the basis of available facts and information that that representative no longer complies with inter alia the fit and proper requirements.

NOTICE OF INTENTION TO DEBAR

19. Extracts of documents that passed between OUTsurance before and after his debarment are set out above and need not be repeated.

20. Mr Herbst, who appeared on behalf of OUTsurance, submitted that OUTsurance had complied with the requirements of section 14(3) of the FAIS Act. He made reference to the notices of suspension and disciplinary hearing which states the following: -

> *"Please take not that should you be found guilty of an offence that affect your fit and proper status in terms of FAIS Act, the Company has a duty to debar you. Should you resign prior to the disciplinary hearing, the Company reserves its rights in this regard and an application for debarment may still be made in terms of the Debarment Policy."*

21. The debarment policy of OUTsurance states, in relation to a representative who has resigned in order to avoid a hearing, that it is essential that its human resource department ensures that he must sign a termination of employment agreement.[8] The Applicant falls within this category.

22. It is our view that the Termination Agreement cannot be said to constitute adequate notice as envisaged in the provisions of section 14(3)(a) of the FAIS Act for the reason that it does not provide information regarding grounds and reasons for the intended debarment. The Termination Agreement is a standard template that notifies the representative of Outsurance's obligations to proceed with debarment.

23. The Termination Agreement does not notify the Applicant of Outsurance's intention to debar him and it does not provide him with any grounds for debarment. It does not even notify him whether he had been found guilty of the offence he was charged with. As apparent from the email notice of debarment sent on 20 September 2019 and the letter of debarment dated 25 September 2019, even after the decision to debar him had been taken no reasons were provided to him for the decision to debar him.

24. The only attempt to provide the grounds for debarment was in Outsurance's letter to the FSCA, albeit *ex post* factor, very cursory and not issued to the Applicant.

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[8] Bundle B, page 16

25. What Outsurance should have done is: After the conclusion of the Termination Agreement, it should have given the Applicant a notice stating that it intended to debar him on the grounds stated in full therein, conceivably on the basis that his failure to cancel the policy was deliberate and dishonest, and invited him to make representations as to why he should not be disbarred on the proposed basis or why the proposed grounds of debarment are incorrect.

26. This was not done, resulting in Outsurance's failure to discharge its procedural obligations in terms of section 14(3) of the FAIS Act.

DECISION TO DEBAR

27. The debarment policy of OUTsurance provides for the FSP must ensure that the debarment is rational, justifiable and reasonable. It also states that the FSP must debar a representative only if the person does not meet the fit and proper requirement of honesty and integrity or has contravened or did not comply with a material provision of the FAIS Act which impacts on the representatives fit and proper status.

28. In seeking the substantive grounds for debarment, Outsurance placed reliance on the transcripts of the two telephone discussions between the relevant client and Mr Siemens (the first telephone discussion) and the one between the relevant client and Mr More (the second telephone discussion).

29. The relevant part of the transcript of the telephone call reads as follows:

"MR SINGH:	*I actually wanted to, to find out, I am in the process of buying a new car and I sold my car that I have an existing OUTsurance with you all.*
MR SIEMENS:	*Okay.*
MR SINGH:	*And I wanted to put a stop to the payment and then when I buy my car now I want to put that onto the plan. [...]*
MR SIEMENS:	*Okay, so you do not know what vehicle you are 20 actually getting as of yet?*

MR SINGH:	*Ja, Ja, because I am still looking here, ja. But I am definitely going to buy a car today.*
MR SIEMENS:	*Okay. So the thing is regarding your payment, it has already been submitted for 1 August, so for today.*
MR SINGH:	*Okay*
MR SIEMENS:	*What is going to happen is when you get that new vehicle, Sir, you insure that new vehicle....[intervenes]*
MR SINGH:	*Ja?*
MR SIEMENS:	*....and we cancel the old one for you. Obviously there will be a refund for your vehicle*[9]

30. When it was put to Mr Herbst during oral argument that it was far from clear in the first telephone discussion that the client was instructing Mr Siemens to cancel the policy, Mr Herbst relied on the transcript of the second telephone discussion to argue that the client intended to cancel. Read objectively, transcript of the first telephone discussion shows that the client wanted to substitute the old car with a new car in the pre-existing policy, without cancelling the old policy and taking a new policy (i.e. the substitution of risk).

31. Whatever the real meaning of what the client said in the first telephone discussion is a matter for interpretation. There is nowhere in the transcript where the client expressly told Mr Siemens that he was cancelling his policy. As such, the meaning that Mr Siemens gave to what Mr Singh said to him is not unreasonable.

32. The fact that Mr Herbst had to rely on the transcript of the second telephone discussion with Mr More shows that he was also unable to find a clear instruction to cancel the policy in the transcript of the first telephone discussion, hence he had to resort to extrinsic material.

33. Be that as it may, the hurdle that Outsurance has to overcome is that it does not have evidence on the record that shows that Mr Siemens' interpretation of

[9] See record of proceedings part B at page 48

what Mr Singh said to him was not what he genuinely understood, but was a deliberate and dishonest ploy to avoid cancelling the contract so as to improve his scoring for purposes of remuneration incentive.

34. Despite basing his argument on the substantive grounds for debarment on this allegation of dishonesty and integrity, Mr Herbst conceded that there is no evidence in the record upon which Outsurance could rely for such a finding. There is also no evidence of Outsurance having rejected Mr Siemens evidence that he was "*under the impression that it was a trade-in and not a sold risk*".

35. In fact in all notices of debarment sent by Outsurance to Mr Siemens it is nowhere stated that Outsurance found that his failure to cancel the policy was due to dishonesty. Even in the letter to the FSCA, where it is stated that failure to cancel was dishonest, there are no reasons stated top support that conclusion.

36. This Tribunal is of the view that no dishonesty or lack of integrity was established and that Outsurance's failure to give Mr Siemens a notice of its intention to debar him in which adequate reasons for the intended debarment, including the factual findings and legal grounds, are set out.

37. Accordingly, in terms of section 234(1)(b)(ii) read with section 218(b) of FSR Act, this Tribunal makes the following orders:

37.2 The debarment of the applicant is hereby set-aside;

37.3 No order as to costs

Signed at PRETORIA on the 14th day of JULY 2020 on behalf of the Tribunal

CHAIRPERSON
JM DAMONS