THE FINANCIAL SERVICES TRIBUNAL

Case №: **FSP58/2019**

In the matter between:

KH LEKALAKALA Applicant

and

ABSA INSURANCE & FINANCIAL ADVISORS Respondent

Tribunal: H Kooverjie (chair), NP Dongwana and G Madlanga

Summary: Debarment in terms of section 14(1) of the Financial Advisory and Intermediary Services Act, 37 of 2002 ("***the FAIS Act***") is unreasonable and procedurally flawed.

DECISION

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1. The applicant, aggrieved with the respondent's decision to debar him, instituted this application for reconsideration in terms of section 230 of the Financial Sector Regulation Act ("***FSR Act***").

2. The applicant was further unsuccessful in his application for suspension, which he brought prior to this application.

3. At the time of his debarment, the applicant was employed with the respondent, ABSA Bank (more specifically Energy At Work - ABSA WMI) on or about May 2017.

4. It appears that this was a temporary employment contract. The essence of the applicant's complaint was that he was not informed of his debarment and the respondent failed to issue the notice of intention to debar him. Consequently the applicant argued that the debarment was unreasonable, unlawful and procedurally unfair.

5. The applicant submitted that he only became aware of the debarment on 9 October 2019 through his current employer. He maintained that the respondent had never informed him of his debarment.

6. The issues for determination are therefore crisp, namely whether the applicant's debarment was reasonable, lawful and procedurally fair?

7. From the factual sequence, we take note of the following:

   7.1 On 12 March 2018, the applicant was indeed furnished with a notice of the disciplinary hearing which also set out the charge against him namely "***gross, negligence and/or gross dishonesty in that the month of November 2017, you contacted a client however the client informed you to contact her husband. You failed to do so and instead submitted the same as if the client agreed on the sale which was not true. You thereby misrepresented information to indicate that a sale occurred which in fact did not."***

7.2 The disciplinary hearing was indeed conducted on 14 March 2018, and the applicant was found guilty of dishonesty in terms of the charge.

7.3 On 16 March 2018, the applicant was notified thereof and afforded an opportunity to make submissions in mitigation.

7.4 The Chairperson then made a ruling recommending the dismissal of the applicant for dishonesty in terms of the charge. Based on the recommendation, the applicant was then dismissed on 23 March 2018. The applicant did not challenge this dismissal. We note that the notice of dismissal was indeed served on the applicant on 23 March 2018.

7.5 On 13 April 2018, ABSA informed the applicant that it would inform the Financial Services Board of its debarment decision.

7.6 However it was only on 16 May 2018 that the applicant responded to ABSA's intention to have him debarred.

7.7 On 15 June 2018, ABSA submitted a notice of debarment to the Financial Services Board in terms of section 14(1) of the Financial Advisory and Intermediary Services Act, 37 of 2002 ("***the FAIS Act***"). According to the respondent the notice included the applicant's email of 16 May 2018.

7.8 On 28 June 2018, the Financial Sector Conduct Authority recorded the applicant's debarment.

8. The applicant's gripe lies with the fact that he was not informed of his debarment. In this regard, we find guidance in terms of section 14 (3) of the FAIS Act, which sets out the process which must be complied with when debarring a person. The FSP is further required to give a person reasonable opportunity to make a submission in response to its intention to debar him/her of the FAIS Act.

9. Section 14(3)(a) specifically stipulates that:

> "***Adequate notice in writing must be given to the party, stating the reason of the intention to debar him, the grounds and reasons for the debarment and any terms attached to the debarment.***

10. Of significance is section 14(2)(a) which stipulates:

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

11. There are three jurisdictional requirements for a debarment namely that:

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

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

11.3 A debarment that is undertaken in respect of a person who no longer is

a representative of the FSP must be commenced no longer than 6 (six) months from the date that the person ceases to be a representative.

12. In this regard we take cognisance of Guidance Notice 1 of 2019.[1] The Guidance Note specifically cautions financial service providers not to abuse the section 14(3) debarment process.

13. Moreover it was expected of the respondent when conducting the disciplinary hearing to have combined the policies and procedures governing the debarment process. Clause 3.4.2 of the Guidance Note specifically states that in the event that this is not done, an FSP cannot summarily debar a person based on the outcome of a disciplinary hearing.

14. Clause 3.5.1 specifically stipulates that:

> "***FSP's should not use the debarment process to satisfy contractual and other grievances."***

15. FSP's may, subject to the contractual terms, terminate an agreement with a representative and key individual without debarring him/her where the reason for the determination of the agreement does not constitute grounds for debarment. Debarment procedure should therefore not be abused for ulterior purposes.[2]

16. Further issue for determination remains - whether the misconduct on the part of

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1 Guidance Notice on the debarment process in terms of section 14 of the Financial Advisory Intermediary Services Act, 2002.

2 Clause 3.5.1 of the Guidance Notice

the applicant constituted grounds for the debarment. A debarment has to be rational and reasonable. Clause 3.6.3 of the notice specifically states that:

> "***FSP's must use the power to debar within the framework of the law. When the FSP provider considers a debarment, it must only take relevant factors into account. Failure to take relevant factors into account or giving consideration to irrelevant factors may render the debarment unlawful."***

17. This means that the action taken by the provider must make sense and be justifiable given the information that is available to the person who makes a decision or takes the action.

18. Section 14.1 of the FAIS Act specifically makes provision for a person to be debarred if he/she no longer complies with the requirements of a fit and proper person as contemplated in section 13(2)(a) of the Act.

19. We note from the recommendation that the applicant was charged and found guilty of gross negligence and/or gross dishonesty. However the debarment was not dealt with in the disciplinary proceedings. This may be a typical termination of an employer/employee contract for misconduct. The recommendation did not assess the "***fit and proper***" requirements of the applicant as a financial services provider in terms of the FAIS Act.

20. The recommendation was limited to *inter alia* the following findings:

    20.1 the applicant contravened his statutory and contractual duties at the workplace;

20.2 he committed the misconduct against the company;

20.3 the behaviour is serious and will create operational risks for the company should it happen again;

20.4 the company's disciplinary code warrants a dismissal for the committed offence. Even though a company's disciplinary code is a mere guideline and each case should be considered on its own merits, the Chairperson found that in the situation there is no reason to deviate from the company's disciplinary code as there were no mitigating factors of such a nature that would warrant a lessor sanction for the offence committed.

21. We hold the view that it was necessary for the adjudicator (Chairperson) to have ventilated the extent, if any, of the negligence and/or dishonesty on the part of the applicant.

22. Moreover the applicant's version which we gather from his written statement, is essentially the following that the applicant admitted that he contacted a client, who gave the applicant her husband's number to speak to regarding the plan however he submitted that he was unable to remember much as more than five months had passed since this incident; and he stated that due to the extensive number of calls he made on a daily basis, he was unable to specifically recall the said conversation.

23. It is trite that an act of dishonesty, negligence, incompetence or mismanagement do not constitute *prima facie* evidence or absence of honesty and integrity. The dishonesty, negligence, incompetence or mismanagement must be sufficiently

serious to impugn the "***honesty and integrity***" of a person concerned.

24. Our courts have separately dealt with what constitutes "***negligence***" and what constitutes "***dishonesty***". In short, negligence includes the failure or omission to take proper care and exercise a degree of diligence which is required under the circumstances of the matter.

25. In this regard, reference is made to **Hammerstrand v Pretoria Municipality 1913 TPD 374 at page 377** where De Villiers JP held:

> "***Negligence is the failure or omission to take proper care which is according to our law a diligence pater familliaS…A 'prudent reasonable man' would take under the circumstances of such a case. The law presumes that a person who exercises only calling or who does any particular act, will exercise a calling or do such act with skill, with knowledge and any dangers connected with that calling or act and that he will take all reasonable precautions to guard others against danger."***[3]

26. Insofar as "***dishonesty***" is concerned, this will include one's character and integrity. Essentially the determination of whether a person is of sound character involves a moral judgment. In arriving at that judgment, it is necessary to consider the person's manner of conduct, not only in respect of his/her private life but also in his/her business dealings.

27. The quality of a person must be judged by the person's act and motives, meaning behaviour and the mental and emotional situations accompanying the

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[3] See also Durr v ABSA Bank Limited and Another 1997 (3) SA 448 SCA at 469 D - E

behaviour.[4]

28. As alluded to above these aspects were not addressed by the Chairperson and we find that the respondent had failed to demonstrate that the applicant was grossly negligent and/or dishonest. This may have been a case where the respondent may have been justified to terminate the agreement with the applicant contractually without debarring him, and the reason for the termination of the agreement did not constitute grounds for debarment.

29. In conclusion we therefore find that the debarment was unreasonable, unlawful and procedurally flawed. The Tribunal is entitled in terms of section 234(1)(b)(ii) of the FSR Act to substitute the decision of the respondent. In light thereof the following order is made:

(1) this application for reconsideration succeeds;

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

SIGNED at **PRETORIA** on this ____ day of **MAY 2020** on behalf of the Panel.

[4] Hamilton Smith & Company v Registrar of Financial Markets Appeal Board matter dated 16 September 2003, where the court held: "***To determine where a person is of good character and integrity involves a moral judgment. In arriving at that judgment, it is necessary to have regard to the manner in which a person concerned has conducted himself not only in his private life but also in his dealings with those with whom he has come into contact professionally or in the course of his business. A distinction is sometimes draw in this context between character and reputation***."

ADV H KOOVERJIE SC

With the Panel consisting also of:

NP Dongwana

G Madlanga