THE FINANCIAL SERVICES TRIBUNAL

Case №: **FSP16/2018**

In the matter between:

MAISHA ARNETH MORATA Applicant

and

SELLO SIMON RASEMANA Respondent

Tribunal: H Kooverjie (chair), Mr W Ndinisa and G Madlanga

Decision:

Summary: Section 14(1) of the Financial and Intermediary Services Act (2002) FAIS Act confers administrative decision making powers on financial service provider when effecting a debarment and Section 14(3) prescribes a fair process.

DECISION

A INTRODUCTION

1. This application for reconsideration was instituted by the applicant in terms of section 230 of the Financial Sector Regulation Act No 99 of 2017 ("***FSRA***"). The respondent debarred the applicant after conducting a disciplinary hearing. The finding in effect was that she found guilty *inter alia* for contravening her employment contract and submitting a fraudulent policy.

B **POINTS *IN LIMINE***

2. Both the applicant and the respondent raised various points *in limine* which is dealt with below.

(a) No locus standi

3. The applicant in particular raised the issue that since she was not employed with the respondent at the time he decided to hold a disciplinary hearing, the respondent was not authorised to conduct such hearing. This point is rejected as it is trite law that an employer can hold a disciplinary hearing within 6 months of the employer's termination of employment as a representative. Moreover the applicant left her employment without formally resigning from the respondent's employment. Therefore for all intents and purposes she was considered to be in his employment at the time.

(b) Internal appeal process

4. The respondent specifically raised the point that the applicant should have followed the internal appeal process as afforded to her in respect of her disciplinary findings. This point further has no merit as it was the respondent who in fact informed her that she could approach this Tribunal for reconsideration of his decision.[1]

5. The respondent debarred the applicant in terms of Section 14(1) of the FAIS Act

[1] Page 151 of the record

(as amended). Section 14(1) confers an administrative decision-making power on the FSP. The power to debar is conferred on the respondent by virtue of the fact that he is an employer as well as the fact that he is an authorised FSP. The respondent is therefore required to exercise this power in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) when he exercises the power to debar a representative in terms of Section 14(1) of the FAIS Act. Therefore, his action must be lawful, reasonable and procedurally fair.

6. When a representative is debarred, the Registrar is informed thereof. The Office of the Registrar merely updates the debarment and publishes the debarment in a form of a list of debarred representatives. The Registrar therefore cannot intervene or overrule a debarment effected by an FSP. This however does not leave the debarred representative without recourse. Such representative has recourse before this Tribunal by way of a reconsideration in terms of Section 230 of the FSA. Section 230(1)(b) of the FSCA stipulates that reconsideration of a decision constitutes an internal remedy as contemplated in Section 7(2) of the Promotion of Administrative Justice Act.[2]

7. Section 230(1)(a) makes provision for an aggrieved person to apply to the Tribunal for the reconsideration of the decision, which includes a decision in terms of Section 14 of the FAIS Act. Consequently this point also fails.

(c) <u>New documents</u>

8. The record constitutes of further documents which were not part of the initial

[2] Guidance Note: Financial Advisory and Intermediary Services Act, 2002 (Act 37 of 2002) published 18 December 2017

record. The Tribunal is required to make a ruling on this aspect. It was provisionally allowed into the record by the Chair of the Tribunal in his ruling on this aspect. We note that the provisional record appears from p102 – 220 of the paginated record. Nothing new turns on these new documents. The provisional record constitutes extensive duplication and repetition of the allegations levelled by the parties against each other. In addition there are documents relating to the debarment of the other two employees as well. We have however not considered such documents as they do not pertain to this matter. Insofar as the rest of the documents are concerned, we have considered them and therefore they will remain part of the record.

C SALIENT FACTS AND ARGUMENT

9. The applicant, Maisha Arneth Morata was employed with the respondent, Mr S Rasemana, as a financial advisor. The applicant, at all relevant times, only possessed a Category A licence.

10. The applicant alleged that on the instructions of the respondent, the standard business practice was as follows:

10.1 Apart from advising on Category A products, the applicant was requested by the respondent to assist him in advising clients on products of Old Mutual and AVBOB which was beyond her qualifications. She clearly was not authorised to do so.

10.2 She was instructed to advise such clients and complete the application forms.

10.3 Since she was never been privy to his submission codes, the

respondent would always submit the policy proposal forms in his name and cite himself as broker/advisor of the clients. The commission on these policies would be shared with her.

10.4 The respondent promoted this type of conduct so that he could earn more commission. The practice of advising clients in respect of risk cover, investments and retirement annuities under other categories was imposed on the applicant's other colleagues as well, Ms Ramosha and Ms Rivombo. Their confirmatory affidavits were attached to the applicant's papers.

11. The applicant was persistent that the respondent did not approach the FSCA with clean hands. The respondent sanctioned the said practice and dishonestly submitted the application with the pretext that he provided the said advice.

12. The respondent's business activities came under scrutiny when Mr Nkoana, an alleged client of the applicant laid a complaint with AVBOB. AVBOB then conducted an investigation particularly in respect of Mr Nkoana's policy and concluded that the applicant was not licenced with AVBOB nor was she authorised under the respondent's licence.

13. Mr Nkoana demanded that the said policy be cancelled with immediate effect and also confirmed in his statement that his signature was forged.

14. The respondent through Ms Ramalepe then reported this incident to the Regulator in an e-mail dated 10 October 2018. The said correspondence explains that the Applicant displayed a careless attitude. She disregarded his

request to attend the disciplinary hearing regarding the allegations pertaining to the fraudulent policy. Consequently, the respondent debarred her. The said hearing was scheduled for hearing on 7 May 2018.

15. On 3 July 2018, the applicant was advised by the Registrar of her debarment.

16. If one has regard to the application form, the following is noted, namely:

16.1 The sales person is identified as "*Arneth"*;

16.2 The signature appears of "*Arneth"*;

16.3 The signature of the principal broker also appears.

It has not been disputed that the respondent signed as the principal broker.

17. The explanation proffered by the applicant was the following:

17.1 They are allowed to work with sub-agents who would source clients;

17.2 The sub-agents would hand blank but signed policy proposal forms to the applicant and her colleagues, who would in turn submit them to the respondent after completing the forms;

17.3 The respondent would submit these forms to the respective insurance company when he would sign off as the advisor;

17.4 In this instance the applicant admitted that she had not contacted Mr Nkoana or verified with him whether the policy was in order;

17.5 The sub-agent handed a signed blank proposal form with Mr Nkoana's details on a separate sheet to her – she then

completed the form based on the information set out therein.

18. From the aforesaid, if one were to accept the applicant's version, then the probable conclusion one may arrive at is that the sub-agent forged Mr Nkoana's signature. We are however not able to establish this with certainty as there is no evidence to this effect before us. On the probabilities, the signature could have been forged by the applicant or the sub-agent.

19. Particular note is taken of the fact that the respondent wasted no time in informing the Regulator of the applicant's conduct. In his affidavit he alleges that the applicant committed fraud with AVBOB by forging the signature of Mr Nkoana.

20. The respondent's version is essentially as follows:

20.1 We note from the respondent's affidavit that he considered the applicant as his employee. It was the applicant's duty to inform the respondent of every one of his clients. He does not dispute the fact that it is the applicant who was expected to meet the client. The respondent would only contact the client thereafter, obtain a quotation and code from the service provider. As soon as the respondent obtains a code, he would advise the applicant to consult with the client. If client is satisfied with the quotation, then the respondent would sign the application form as the applicant does not have a code. This was the manner in which he ran his business.

20.2 Furthermore, the respondent indicated that in this instance he did not contact Mr Nkoana, nor did he hold a telephonic discussion with him.

The respondent specifically expressed his dissatisfaction in being dragged into this situation when it was the applicant who forged Mr Nkoana's signature.

20.3 The respondent contended that the applicant was given more than sufficient notice with regard to her disciplinary hearing. It was alleged that she was aware of the misconduct as early as 1 August 2017. The hearing was only conducted on 15 May 2018.

20.4 The applicant left her employment on1 November 2017. At some point she joined Mashilo Financial Services. She however did not resign. Therefore, for all intents and purpose, the respondent was entitled to institute a disciplinary hearing.

D CONTRACT OF EMPLOYMENT

21. From the contract of employment, we note that the applicant was employed as sales representative and the relevant portions of the contract stipulated that:

21.1 The employee's main duties and responsibilities were to be determined by the employer and the employee was required to do everything reasonably necessary and ancillary to the performance of her functions.

21.2 As per paragraph 6 of the contract we also note that the renumeration was target based. If she did not source sufficient clients, it could lead to termination of her employment;

21.3 The conditions were stringent, for instance if she was unable to source

5 cases weekly in succession for three months, then her contract would be terminated;

21.4 Furthermore, the employee was requested to display characteristics of total honesty and integrity during her period of employment.

22. It was argued on behalf of the applicant that her debarment was unjustified. The respondent did so on unproven facts. In particular the allegations of fraud and dishonesty are not proven. Moreover it was the respondent who submitted this policy to AVBOB. He certainly had a part to play in this fraudulent policy in that:

22.1 The respondent was required to confirm the client's details which he had not done.

22.2 The applicant was a middle person. The sub-agent sourced the client, handed a blank signed proposal form to the applicant, who then filled in all Mr Nkoana's details from information contained on a separate sheet. She then handed it to the respondent who then submitted the policy to AVBOB.

23. At this juncture we find both the respondent and the applicant's conduct rather concerning. As financial service providers they conducted themselves in a manner which is unbecoming and unacceptable. The manner in which they rendered financial advice is contrary what is expected of them and as set out in the Code of Conduct and the Financial Advisory and Intermediary Services Act ("*FAIS Act*") for instance:

23.1 The applicant was at all times aware that as a Category A licensee, she

could not render advice in respect of other categories. She did not have the relevant qualifications or the knowledge of such products.

23.2 It appears from the contract between the parties that the respondent chased commissions. Ultimately, he did so through her colleagues and the sub-agent where he was able to obtain new clients.

23.3 In order to cover his tracks, he validated the client's details and name by contacting them just before he submitted their policies. This is conduct unbecoming of a financial service provider who is required to act with the highest level of integrity and honesty when rendering financial services.

24. By virtue of section 16 of the FAIS Act read with section 2 of the Code of Conduct. A provider must at all relevant times render financial services honestly fairly, with due skill, care and diligence and in the interests of the financial service industry.

25. By virtue of section 13(2) an authorised FSP must at all times be satisfied that its representatives are competent to act and comply with the requirements of the FAIS Act and take such steps as may be reasonable to ensure that the representatives comply with the Code of Conduct as well as other applicable laws on the conduct of business.

E **<u>THE DEBARMENT:</u>**

26. The applicant was debarred by the respondent in terms of Section 14(1) of the Financial Advisory and Intermediary Services Act ("*FAIS Act"*) which places a

statutory duty on a FSP to debar an representative from rendering financial services if the FSP is satisfied that the representative no longer complies with the requirements set out in Section 13(2)(a) of the FAIS Act or has contravened or failed to comply with any provision of the FAIS Act in a material manner.

27. As alluded to above, section 13(2)(a) provides that an authorised FSP must at all material times be satisfied that its FSP's are, when rendering a financial service on behalf of the FSP, competent to act and comply with the fit and proper requirements.

28. The fit and proper requirements are dealt with in Section 6A, and published under Board Notice 194/2017, GG 41321 dated 15 December 2017.

29. Section 14(3)(a) (as amended), specifically stipulates a prescribed procedure when an FSP debars a representative. The prescribed procedure set out in Section 14(3)(a) requires that adequate a notice in writing must be given to the party, stating the reason the intention to debar him, the grounds and reasons for the debarment and any terms attached to the debarment.

30. There are three jurisdictional requirements for a debarment, namely:

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

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

30.3 A debarment that is undertaken in respect of a person who no longer is a representative of the FSR must be commenced no longer than 6 months from the date that the person ceased to be a representative of the FSP.

31. According to the respondent's version attempts were made to contact her in order to advise her of the cancellation and lapsing of the policies she submitted as well as to inform her of the fraudulent policy matter. She failed to respond. It was only when she was advised that a disciplinary hearing was to be conducted, she responded and informed the respondent that she would not be able to attend since she was assisting her sister with funeral arrangements of her niece.

32. In the notice of the disciplinary hearing, she was advised that the hearing would take place on 7 May 2018 and the details of the complaint were set out therein. We note that the debarment was not only based on the fraudulent policy but also in respect of policies which had been cancelled or lapsed.

33. The applicant contended that she was not given a fair opportunity to be heard. She had advised the respondent that she was not able to attend the hearing on the date that it was set down. She expressed this in a letter dated 1 August 2017 where she asked for reasons. The respondent submitted that the applicant was provided with more than adequate opportunities to attend the hearing and to address the issues that were to form part of her disciplinary hearing.

34. The applicant denies this and stated that the respondent was aware that she was to join Mashilo Financial Services and that she had terminated her employment. The respondent persists that she left her employment without advising him and that he was not able to locate her whereabouts. It was only when she was advised of the hearing that she responded. She commenced her new employment at Mashilo Financial Services without resigning from her previous employment. According to the respondent she was well aware of the hearing date by 26 April 2018. We note that in fact it was the date that the notice of the hearing was served upon her.

35. The applicant further alleged that the debarment was unfair on the basis that it has not been proven that it was she who had forged the signature of Mr Nkoana on the policy. Moreover the respondent referred to various cancelled policies where she was not given an opportunity to respond.

36. If one has regard to the details of the complaint, no reference has been made as to which policies were lapsed or cancelled. Under the heading "complaint" we note the complaints to be for "lapses and cancellation" and "fraud". The applicant was indeed notified of the hearing on 26 April 2018.

37. We find that the applicant has certainly not conducted herself in accordance with due care, skill, due diligence and integrity. It was required of her to provide financial advice and services only to the extent that she was qualified to do so. She therefore acted contrary to the aforesaid provisions of the Code of Conduct and the FAIS Act.

38. However in this instance her debarment was based on the fraudulent policy as

well as the cancelled/lapsed policies. The applicant denied that she forged Mr Nkoana's signature. We are aware that a sub-agent was involved as well. We are not in a position to ascertain with certainty on the facts before us, save to accept that the signature was not that of Mr Nkoana.

39. In particular no detail was furnished to her pertaining to her misconduct in respect of cancelled/lapsed policies. She was further not given an opportunity to address the allegations made against her in this regard.

40. We are therefore not satisfied that the debarment was fair, or that the decision was reasonable. Under these circumstances the respondent's decision to debar does not pass muster in terms of fair administrative action where a decision to debar should be fair, reasonable and lawful, thereby not meeting one of the jurisdictional requirements.

41. The respondent certainly had a hand in this policy. His signature appears on the fraudulent policy. Despite these glaring facts, he does not take any blame for his role in this matter. His conduct and the running of this business warrants an investigation. This also does not mean that the applicant is exonerated from any blame and wrongdoing. She conducted herself in a manner that is not appropriate of a financial service provider. As alluded to above, she failed to act with the necessary due care, skill and diligence. It is necessary that her conduct in the "business scheme" of the respondent be investigated as well.

42. In light thereof, we make the following order:

(1) The debarment is set aside;

(2) The FSCA is requested to investigate the business activities of the respondent taking into consideration the contents of the decision as well as the record of these proceedings;

(3) The FSCA is required to investigate the conduct of the applicant as a financial services provider whilst in the employment of the respondent.

SIGNED at PRETORIA on this 25th day of MARCH 2019 on behalf of the Panel.

ADV H KOOVERJIE SC

With the Panel consisting also of:

W Ndinisa

G Madlanga