THE FINANCIAL SERVICES TRIBUNAL

Case №: **FSP72/2019**

In the matter between:

RUDO LOUBSER	Applicant
and	
DISCOVERY LIFE (PTY) LTD	First Respondent
CRAIG DEATS	Second Respondent
STEPHAN HERBST	Third Respondent

Tribunal: H Kooverjie (chair), J Pema and E Phiyega

Summary: Was the decision to debar and the process reasonable and fair in terms of section 14(3) of the Financial Advisory and Intermediary Services Act, 37 of 2002 ("***the FAIS Act***")?

DECISION

A INTRODUCTION

1. The applicant, in his application for reconsideration seeks to set aside the decision of Discovery to debar him on the basis that not only the process was procedurally unfair, but the debarment was unreasonable.

2. The applicant was appointed as a Discovery Independent Contractor ("***IC***") in June 2013, and as per the agreement mandated to only market and sell Discovery products. His Discovery FSP number was 18147. The applicant, during the course of September 2017, founded an independent broker house-Journey Advisory Services (Journey, with FSP number 49353) and appointed as a key-individual of Journey.

3. In October 2019, the applicant approached Riaan Steyn, the franchise director of Discovery Health in Cape Town-Durbanville, requesting to be released as independent contractor and instead register as an independent financial advisor with Discovery, where Discovery would remain as one of his product providers under Journey.

4. In Discovery's notice of intention to debar in terms of section 14(1) of the Financial Advisory and Intermediary Services Act, 37 of 2002 ("***the FAIS Act***"), the applicant was advised that the basis of the intended debarment was more specifically that:

    4.1 He no longer met fit and proper requirements in terms of The Determination of Fit and Proper Requirements for Financial Service Providers (BN194/2017)], in that he acted dishonestly by providing advice but used his colleague Evonne Joubert as the advisor on the BrightRock products;

    4.2 He failed to disclose to his clients that he was not authorized to provide advice on the BrightRock products;

4.3 He failed to render financial services honestly, fairly with due skill, care and diligence and in the interest of clients and the integrity of the financial services industry in terms of section 2 of the FAIS General Code of Conduct;

4.4 He misrepresented himself as an authorized representative of Journey;

4.5 He rendered advice on a BrightRock product for which he was not authorized to sell;

4.6 He provided advice to Discovery clients on the platform of Journey without a mandate to share personal information of his clients.

B WAS THE DEBARMENT PROCESS FAIR?

5. Insofar as process was concerned, Discovery in response maintained that the process was procedurally fair and in terms of Discovery's debarment policy.

6. The applicant however persisted that 48 hours to respond to the notice of intention to debar was insufficient. One of our concerns is whether this constituted reasonable time to make submissions if we have regard to Discovery's debarment policy?

7. We note that the notice served was an immediate suspension of the independent contractor (IC) agreement. Such notice of intention to debar was issued to the applicant on Friday, 8 November 2019. The applicant claimed that at that point

the email address used for Discovery was already suspended. The notice was once again forwarded on Monday morning, 11 November 2019 to the applicant's email address which he used at Journey Advisory. The applicant was therein advised in the said notice that if he intended to oppose his debarment, he should advise Discovery within 48 hours.

8. Instead the applicant not only opposed his debarment, but he further made representations and did so hastily. The applicant however intended to expand on his response to Discovery and in so doing, he started collating information together for the hearing and intended to send it on the Friday of the same week. However to his surprise he was by this time already served with the debarment notice.

9. We note from Discovery's debarment policy that clause 3.2.3 thereof upholds fair process and makes provision for the applicant to have reasonable time to respond to his debarment irrespective of whether the applicant chose the verbal or documentary debarment process. The 48 hour period was only to advise Discovery of whether he was going to oppose his debarment or not?

10. The table illustrated in paragraph 4 of the Discovery policy reinforces this and goes on to state that the applicant will have at least 10 days to attend a FAIS hearing or make a written submission.

11. Section 14(3) of the FAIS Act requires that there must be a fair process. Such fair processes must be contained in the FSP's policies and procedures

governing its debarment processes.[1]

12. By virtue of the **Guidance Note 1 of 2019 – FAIS Act**[2], the salient requirements are:

- the applicant should be given adequate notice in writing of Discovery's intention to debar him;
- The grounds and reasons for the debarment must be clear set out;
- Any terms attached to the debarment including, matters of unconcluded business;
- Any measures stipulated for the protection of the interest of clients (section 14(3)(a)(i) of the FAIS Act;
- The FSP should through the notice provide the person with a copy of its written policies and procedures governing the debarment process;
- The FSP should further through the notice give the person a reasonable opportunity to make a submission in response (section 14(3)(a)(iii) of the FAIS Act.

13. What constitutes "adequate notice" and "reasonable opportunity" will depend on the circumstances of each case, for example when there are reasonable grounds to believe that substantial prejudice to clients or the general public may occur.

14. The purpose of the process envisaged in terms of section 14(3) of the FAIS Act, was to afford a representative a reasonable and sufficient opportunity to make

1 Section 14(3)(a)(ii) of the FAIS Act
2 Guidance Notice on the Debarment Process in terms of section 14 of the Financial Advisory and Intermediary Services Act, 37 of 2002

submissions in response to the grounds, and reasons that inform an FSP's intention to debar him or her.

15. FSP's have always been cautioned that the debarment should not be effected by FSP's in order to satisfy the contractual and other grievances. A debarment of a person should only be effected by a person duly authorized by the provider to do so. In particular clause 4.2(a) of Discovery's policy requires that the offence or misconduct be considered material enough that it could warrant a debarment, and if so then charges must be formulated.

16. At this juncture we find it apt to refer further to Discovery's debarment policy at paragraph 4.2 which stipulates:

> ***(a)*** "***At the conclusion of the investigation, should the offence or misconduct be considered material enough that it could warrant a debarment, charges against the accused will be formulated.***
>
> ***(b)*** ***Charges must be formulated based on the evidence available, mainly from the forensic or compliance investigation.***
>
> ***(c)*** ***Group Compliance will take a leading role in formulating the charges and produce a charge sheet (the 'Notice of Intention to Debar').***
>
> ***(d)*** ***Group Compliance will issue a 'FAIS Pack' which comprises of the prepared Notice of Intention to Debar and the investigation report, together with supporting evidence.***
>
> ***(e)*** ***The FAIS Pack will be sent to the representative (via email or in person) and the Business Executive / Franchise Director / Regional Manager and Senior Compliance Manager.***
>
> ***(f)*** ***The representative must acknowledge receipt of the Notice; alternatively, if it was sent via email an electronic acknowledgement of delivery will suffice.***

(g) The representative will be given <u>48 hours</u> in which he/she must indicate <u>whether they will oppose the intention to debar</u>. Should he/she wish to oppose the notification, it must be indicated whether the documentary or verbal process will be followed. The intention must be provided in writing (email is acceptable)."

17. It appears that the applicant was merely served with the notice of intention to debar without the charges, evidence and/or findings of an investigation.

18. Furthermore clause 4.4.1 of Discovery's policy requires Discovery to have held a FAIS hearing. No such hearing took place. By Discovery responding that: *"**…he chose to follow the documented process**. **We further requested that he confirm whether his response was his formal response"*** demonstrates that even Discovery ignored its own process and policy. There can be no substance to them holding the applicant ransom to his response when due and fair process was not followed and that he advised them that he intended furnishing an additional response.

19. It must be emphasized that the debarment decision by an FSP constitutes the exercise of administrative action, and in light thereof these decisions should be rational, reasonable and lawful. The right to a fair hearing lies at the heart of the rule of law. The crucial aspect of the rule of law is that a decision should not be made without affording the other side a reasonable opportunity to state his/her case.[3] In light of the aforesaid, we find the debarment process was not fair as envisaged in section 14 of the FAIS Act.

[3] See also Johanna Davis and AC & E Engineering Underwriting Managers (Pty) Ltd a decision of the Financial Services Board dated 24 October 2018

C WAS A CASE FOR DEBARMENT BEING MADE?

20. The applicant contended that he failed to render financial services honestly, fairly, with due skill care, diligence, in the interest of clients and integrity of the financial services industry.[4] The issue therefore is whether this breach with Discovery warranted a debarment.

21. On the applicant's own admission, he had admitted to giving advice to all of his clients. His clients base included not only new clients and current clients, but his Discovery clients as well. His intentions were to ensure that clients had the best product and the best options available to them irrespective of the product.

22. The applicant on his own version admitted to the breach by advising on other products since he still remained an independent contractor of Discovery.[5] He responded:

> ***"I've mentioned that I gave advice, but I have also explained it was in conversation with my IFA on Journey Discovery, where we looked at client's cover and their needs and worked out a solution that suits the client's current needs. Not all solutions were to replace their existing cover. It was discussed with the clients but finally the advice was still given and signed off by Evonne Joubert, the representative of Journey Discovery. As KI on Journey Discovery I oversaw the process."***[6]

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4 Page 14 of the Record
5 Page 7 of the Record
6 Page 5 of the Record

23. The applicant persists that he at all relevant times disclosed to his Discovery clients of his role at Journey but that he was currently an independent contractor with Discovery. He attached reference 9 to illustrate this point.[7] In that regard he was not dishonest.

24. There is no dispute that the applicant had given advice to his Discovery clients on other products, and in most instances the BrightRock products when he could not do so as an independent contractor of Discovery. We note that Journey was established in September 2017 and between September 2017 and up until his debarment, the applicant had given advice to his Discovery clients on the suitability of other products.

25. In an email dated 12 November 2019 to Craig Deats he confirmed this that he gave advice to Discovery client's on their portfolios, but he also advised that he was a key individual on Journey and was in a process of becoming an independent financial advisor. On this basis he advised his clients that he was not licensed to sell BrightRock, but the FSP was authorized.

26. From the record we have not had sight of the charges levelled against the applicant, nor the evidence but for the findings set out in the notice of debarment. An enquiry has to be made whether this is a case justifying a debarment?

27. It is necessary to have regard to the fact that when questioning the fit and proper requirements of a financial provider, one considers the qualities of honesty and integrity. An enquiry into this involves a moral judgment which one takes into

[7] Page 30 of the Record

account with a person's overall manner in which he conducts himself, not only with Discovery but in his professional life as well as his private life.

28. Moreover an act of dishonesty or negligence, incompetence or mismanagement does not per say constitute *prima facie* evidence of absence of honesty and integrity. Such dishonesty, negligence, incompetence or mismanagement must be sufficiently serious to impugn the honesty and integrity of the person concerned.[8]

29. Discovery was well aware that the said enquiries were necessary. In its own policy (clause 3.2.2), it is expressly stated:

> "***Discovery will initiate a debarment process when it becomes aware of any misconduct or any reason whereby a representative may have contravened any provisions of any applicable Acts that may influence the fit and proper status of the representative.***"

30. Time and again this Tribunal has emphasized in its various decisions that the debarment of a representative must be justified and fair.[9]

31. In the premises therefore the Tribunal finds that the debarment process was unlawful and unfair. The following order is made:

(1) the application succeed;

(2) the decision of the respondent to debar the applicant is set aside.

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[8] Pieter Labuschagne v Registrar of Financial Services Providers – a decision of a Financial Services Board dated 3 September 2012

[9] K Mahasha v OUTsurance FSP40/2019, dated 25/02/20; AJ Davis v AC & E Engineering Underwriting Managers FSP4/2018

SIGNED at **PRETORIA** on this **26th** day of **JUNE 2020** on behalf of the Panel.

ADV H KOOVERJIE SC

With the Panel consisting also of:

J Pema

E Phiyega