THE FINANCIAL SERVICES TRIBUNAL

Case №: FSP 4/2020

In the matter between:

TEBOGO MALETSEMA M MOLOMO **Applicant**

and

OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LTD **Respondent**

Tribunal: William Ndinisa (chair), Zweli Mabhoza and Lucky Makhubela

Date of Decision: 15 July 2020

Summary: Financial Advisory and Intermediary Services Act 37 of 2002 ("the FAIS Act") – section 14(1) – Representative, no longer meets or complies with, the fit and proper requirements; or has contravene or failed to comply with the provisions of the FAIS Act – FSP has a duty to ensure that a debarment process is, inter alia, reasonable and procedurally fair. - Section 14(2) of the FAIS Act - Duty of FSP to give notice in writing stating, inter alia, the grounds and reasons for debarment – section 14(3)(a)(i) of the FAIS Act.

DECISION

INTRODUCTION

1. The Applicant applies under section 230 of the Financial Sector Regulation Act 9 of 2017 ("FSR Act"), for reconsideration of a debarment decision by Old Mutual Life Assurance (SA) Ltd, the Respondent in this matter. The debarment decision sought to be reconsidered was taken on 5 December 2019.[1]

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[1] Bundle A, page 7

2. The record reflects that the basis for the debarment are that the Applicant no longer complies with the fit and proper requirements in that she falls short of honesty, integrity and good standing. Further, the record indicates that there is material contravention or non-compliance with the provisions of the Financial Advisory and Intermediary Services Act 37 of 2002 ("the FAIS Act").

GROUNDS OF RECONSIDERATION

3. On or about 20 January 2020, the Applicant instituted this application and advanced the following reasons as the basis or grounds for the reconsideration: -

3.1 The Applicant conducted business in accordance with the processes and procedures of the Respondent. When the Applicant acted, she applied the custom methods as applied by the representatives of the Respondent. The management of the Respondent was fully aware of the methods of practice;

3.2 The Respondent has never raised any objection to the way the Applicant concluded her insurance deals and was never subjected to a disciplinary hearing for doing same;

3.3 The Respondent is aware of the challenges of the Applicant in executing her duties Applicant of the Respondent. Travelling by public transport, meeting clients after hours and securing meeting with clients was difficult. The pressure of Applicant to perform and achieve target led her to make mistakes;

3.4 The Applicant was honest all the time and co-operated with the

Respondent;

3.5 The Respondent disclosed personal and confidential information of Applicant' clients to other representatives during the debarment hearing. The evidence against the three independent representatives were contained in the same documents and submitted as proof against each of the accused representatives. According to the Financial Planning institutes of South Africa, of which the Respondent is a partner, no personal information of any client can be disclosed to other person, not even a co-employee;

3.6 The sanction imposed by the Respondent is harsh in comparison to the Applicant's conduct. The debarment of the Applicant will have serious present and future consequences in the formal financial industry. In short, the debarment will affect Applicant's rights to conduct business of her choice or follow a career of her choice;

3.7 The Applicant cannot be held liable for the non-payment of premium by clients; and

3.8 The Applicant is of young age and had learnt a very hard lesson. Applicant now understand the severity of the consequences of her conduct and would not repeat her mistakes.

4. This panel is called upon to reconsider, based on record before us, whether the Respondent acted rationally or reasonable when it came to the conclusion of debarment. In other words, was the decision of the Respondent justified, in light of the information and evidence contained in the record, to debar the Applicant?

5. It is worth noting from the onset that the parties in this matter consented that this

application be decided on records and documents before us, without oral submissions, because of the current coronavirus pandemic in the country and the observance of health protocols.

FACTUAL MATRIX

6. The Applicant was appointed by the Respondent on or about 1 April 2016 as a Financial Advisor. The Applicant and the Respondent concluded a written agreement which, amongst other things, regulates their relationship ("the Contract of Employment").[2]

7. On or about 21 October 2019 the Respondent instituted an investigation in respect of the advisory services rendered by the Applicant. Mr Petrus Lukas Abrie was appointed by the Respondent to conduct the investigation. The record also shows that Benny Venter was, amongst others, an investigator in this matter ("the Investigator").[3]

8. It appears from the record that on or about 14 October 2019 the Respondent enlisted the services of Mr Sarel Snyman, a handwriting examiner ("the Handwriting Examiner") and was mandated to examine documents in respect of certain clients advised by the Applicant. The Respondent needed to know whether the signatures on the identified documents are / are not copies of the same signatures. Subsequently, the Handwriting Examiner produced a report with his conclusions, dated 19 October 2019 ("the Report"). The following clients and the indicated policies were the subject matter of the case against the

[2] Bundle B, page 4
[3] Bundle B, page 44

Applicant:[4]

8.1 MCK Molomo, Max Pure Investment with policy number 18514678 allegedly signed on 14 September 2018, premium per month was R1500.00 for a 15 years term;

8.2 Same client as above, Max Pure Investment with policy number 18514767, allegedly signed on 14 September 2018, premium per month was R1200.00 for a term of 15 years;

8.3 KE Maya, Max Investment Plan with policy number 18429223, the debit order payer is TA Moabelo, both (client and payer) allegedly signed on 30 May 2018, premium per month was R2 000,00 for a term of 15 years;

8.4 KE Maya, Max Pure Investment annuity with policy number 18429196, allegedly signed on 30 May 2018, premium of R1 500.00 per month for a term of 25 years;

8.5 KE Maya, payer is TM Maya, Max Investment product with policy number 18514767, allegedly signed on 20 January 2019; and

8.6 KE Maya, policy number 18514678, also associated with the Applicant.

9. The Handwriting Examiner, after having examined the documents in respect of the policies referred to herein above, observed that the signatures are identical, save for signatures in respect of TA Moabelo.[5] Further, the Handwriting Examiner came to the conclusion that the documents contained photostatic

[4] Bundle A, page 13 and Bundle B, page 45
[5] Bundle A, page 16

copies of the same original signatures.[6]

10. On or about 20 November 2019 the Respondent issued a Notice of Intention to Debar the Applicant and invited the Applicant to a debarment enquiry scheduled for hearing on 5 December 2019.

11. It appears from the record that a hearing did indeed take place and the Applicant arrived at the enquiry after it had commenced.[7] The chairperson of the enquiry, after welcoming the Applicant, proceeded with the hearing and eventually came to the conclusion that in the case presented, he find sufficient evidence that the Applicant has breached aspects of both her Contract of Employment and fit and proper requirements.[8]

12. The Respondent's industrial relations offices (the scribe in the matter) summarised the case of the Respondent as follows:

"SUMMARY OF MANAGEMENT'S CASE

MS MOLOMO FAILED TO COMPLY WITH THE FAIS ACT, 2002 (ACT NO. 37 OF 2002)

SHE SUBMITTED 6 POLICY APPLICATIONS TO OM, SIGNED BY TWO DIFFERENT CONTRACTING PARTIES/CLIENTS. THE FORMS/DOCS WERE NOT ACTUALLY SIGNED BY THESE CLIENTS & THE SIGNATURES WERE NOT GENUINE, BECAUSE MS MOMOLO MADE COPIES OF INCOMPLETE FD'S, THAT WERE ALLEGEDLY SIGNED BY THESE CLIENTS."[9]

13. Further, the scribe noted the summarised version of the Applicant's case by

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[6] Bundle A, page 17
[7] Bundle B, page 45
[8] Bundle B, page 47
[9] Bundle B, page 52

indicating that the clients serviced by the Applicant did not fill in the information in the forms (common practice) as long as they (the Applicant and the clients) all agree.[10]

14. On 5 December 2019 the Respondent recorded a decision to the effect that the Applicant is debarred for the reasons of non-compliance with the fit and proper requirements in respect of lack of honesty, integrity and good standing. Further, for reasons of material contravention or non-compliance with the provisions of the FAIS Act.

LEGAL FRAMEWORK

15. The FAIS Act provides guidance to Financial Services Providers ("FSP") in respect of procedural aspect of debarment. Section 14(2)(a) of the FAIS Act provides that:

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

16. Further, section 14(3) of the FAIS Act stipulates the following to ensure that a debarment process is achieved where there is a debarment enquiry:

*"A financial services provider **must** –*

(a) before debarring a person-

*(i) give adequate notice in writing to the person **stating** its intention*

[10] Bundle B, page 54

*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 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

(c) immediately notify the person in writing of-

(i) the financial services provider's decision;

(ii) the persons' rights in terms of Chapter 15 of the Financial Sector Regulation Act; and

(iii) any formal requirements in respect of proceedings for the reconsideration of the decision by the Tribunal." (own emphasis)

17. In *Financial Services Board v Barthram and Another*,[11] Ponnan JA referred to the case of *Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another*[12] ("*Heatherdale case)* where Colman J held:

"It is clear on the authorities that a person who is entitled to the benefit of the audi alteram partem rule need not be afforded all the facilities which

[11] Financial Services Board v Bartram and Another 2018 (1) SA 139 (SCA), at par 21

[12] 1980 (3) SA 476 (T) at 486 E-G

are allowed to a litigant in a judicial trial. He need not be given an oral hearing, or allowed representation by an attorney or counsel; he need not be given an opportunity to cross-examine; and he is not entitled to discovery of documents. But on the other hand (and for this no authority is needed) a mere pretence of giving the person concerned a hearing would clearly not be a compliance with the Rule. For in my view will it suffice if he is given such a right to make representations as in the circumstances does not constitute a fair and adequate opportunity of meeting the case against him. What would follow from the last-mentioned proposition is, firstly, that the person concerned must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations; secondly ***he must be put in possession of such information as will render his right to make representations a real, and not an illusory one****."*

18. In the case of *the Minister of Environmental Affairs and Others v Phambili Fisheries*[13] *("the Phambili Fisheries")* Howie J stated, amongst other things, the following whilst dealing with what constitutes adequate reason:

> *"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*

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[13] [2003] 2 All SA 616 (SCA)

*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."*[14]

19. In the case of *Gavrić v Refugee Status Determination Officer & Others* 2019 (1) (SA) 21 (CC) ("the *Gavrić* case") at paragraph 79, the Constitutional Court stated the following, in respect of a person knowing the substance of her case:

*"....**a person can only be said to have a fair and meaningful opportunity to make representations if the person knows the substance of the case against her**. This is so because a person affected usually cannot make worthwhile representations without knowing what factors may weigh against her interests. This is in accordance with the maxim audi alteram partem (hear the other side), which is a fundamental principle of administrative justice and a component of the right to just administrative action contained in section 33 of the Constitution."* (own emphasis)

20. It is against this backdrop that this panel will consider whether the Respondent has observed the principles captured in our law during the debarment process

[14] The Phambili Fisheries case, par 40

leading to the debarment decision.

PROCEDURAL FAIRNESS

21. We have noted herein above that the FAIS Act provides guidance or directions on what an FSP must observe when instituting a debarment enquiry. It is patently clear from the wording to of section 14(3)(a)(i) of the FAIS Act that, amongst other things, grounds and reasons for debarment must be stated when a notice to debar is given to a person to be debarred. It is our view that a person to be debarred must be given clear statement of allegations, constituting grounds and reasons, to enable him or her to make representations on why he or she should not be debarred. In the absence of such grounds and reasons, a person to be debarred will be at large, not knowing what case to meet.

22. We have considered the contents of the record before us, more specifically the Notice of Intention to Debar the Applicant and could not find a statement containing grounds and reasons for the Applicant to respond and defend herself.

23. The panel requested clarity on whether the Respondent did furnish the Applicant with a statement containing grounds and reasons for debarment. On or about 8 July 2020 the Respondent responded and stated the following:

*"Kindly note that the **Takalo**-matter was a section 14(1) debarment. This means that there was an internal disciplinary hearing and a subsequent debarment enquiry after the conclusion of the disciplinary hearing. Accordingly, the "list of allegations" formed part of the detailed charge sheet for purposes of the disciplinary hearing in terms of our IR practice.*

*On the other hand, the **Molomo**-matter was a section 14(5) debarment hearing, since she had already left the employ of Old Mutual at the time. Our practice for Section 14(5) hearings is to not provide a detailed charge sheet as the debarment enquiry is only related to the breach of*

the FAIS honesty and integrity requirements. The specifics of the breach (in other words which clients and documents are relevant to the debarment enquiry) is however included in the debarment pack which is sent to the ex-employee as part of the evidence and for her to prepare and give reasons why she should not be debarred."

24. We could not find basis in law for treating debarment processes involving current employees of an FSP differently from those employees who had just left the employ of an FSP but fall within the purview of section 14(5) of the FAIS Act. The Respondent's approach in dealing with former employees is, in our view, not in line with the legal stance of the of the Constitutional Court stated in the *Gavrić* case. For that reason, the approach of the Respondent in respect of providing or not providing reasons and grounds on a statement, is in our view not reasonable and fair. At best, the pack of documents provided to the Applicant before hearing, without clear statement of allegations (grounds and reasons), could constitute evidence in support of allegations.

25. We note that the Respondent did provided the Applicant with documents such as the Report from the Handwriting Examiner, the finalisor forms in respect of each policy containing photostatic copies of signatures and Contract of Employment. The record reflects that during the enquiry, the Applicant was confronted with, amongst other things, the following allegations:

25.1 The Applicant asked clients to sign an uncompleted form and filled in the information on the form after the client have signed, which is in breach of her Contract of Employment;[15] and

25.2 The Report states that the signatures in all the documents were identical,

[15] Bundle B, page 46

meaning that they are copies of the same signature.[16]

26. We hold the view that in the absence of a clear statement of allegations, containing patent grounds and reasons, the Applicant could not have prepared for the matter and submit sound representations for the Respondent to consider and come to a conclusion. Furnishing documents to the Applicant on or about 20 November 2019 and develop the grounds and reasons during the hearing, in our view, defeats the purpose of section 14(3)(a)(i) which is aimed at enabling the Applicant to know what case to meet and preparing representations, before the enquiry.

27. After having considered the contents of this matter, this panel wishes to make the following observations: -

27.1 The Respondent states that the Applicant had resigned at the time of the debarment enquiry and yet it is not indicated when did she resigned; and

27.2 In the absence of particularities as to when did the Applicant resigned, it would be difficult for the Applicant and for the chairperson of the debarment enquiry, to assess if this matter falls within section 14(5) of the FAIS Act.

28. For the reasons stated herein above, we find that no adequate notice of intention to debar was given to the Applicant. If she was given such a notice, certainly it did not contain clears grounds and adequate reasons for the Applicant to know what case to meet. It was not clear, in our view and for purposes of Applicant's

[16] Bundle B, page 45

preparations, whether it was a case of allowing clients to signed blank documents and Applicant filling information later, or was it a case of identical signatures copied from one common signature. If the Applicant was required to answer to all the allegations in the record, in our view, the Applicant was placed in a weak position for lack of statement of allegations, being grounds and reasons. Section 14(3)(a)(i) places a duty on the Respondent and that is the reason this panel could not overlook this point.

29. In the circumstances, we find the debarment process to be unlawful, unreasonable and procedural unfair. It is recommended that the Respondent should formulate a statement of allegations, containing grounds and reasons, to enable the Applicant to make representations, if she wishes to do so.

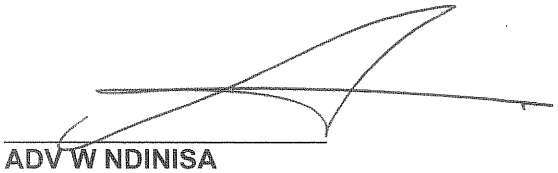
30. In the premises therefore, we hold the view that this application for reconsideration should be successful.

ORDER

(a) The application for reconsideration is successful;

(b) The debarment decision dated 5 December 2019 is set aside; and

(c) The matter is referred back to the Respondent for reconsideration.



ADV W NDINISA

With the Panel consisting also of:

Z Mabhoza

L Makhubela