

In the matter between:

ZENITH MOLOTO

APPLICANT

and

UDM INTERNATIONAL (PTY) LTD

RESPONDENT

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DECISION

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Coram : Adv Lindi Nkosi-Thomas (Chairperson)  
Adv. M.E. Phiyega  
Mr A Jaffer

Summary : Reconsideration in terms of section 14(3) of FAIS Act non-compliance with section with section 14 (3) of FAIS – remittal of matter to Respondent for further consideration

Decision : 22 May 2020

## A. INTRODUCTION

1. Ms Zenith Moloto (“**the Applicant**”) brings an application for the reconsideration of a debarment effected against her by UDM International (Pty) Ltd, (“**the Respondent**”) on 25 September 2020.
2. The parties have waived their rights to have the matter decided at a formal hearing and have agreed that it be decided on the papers. The agreement that the matter be decided on the papers was made in deference to the lockdown state which was ordered by the government after the declaration of a state of national disaster. The panel is grateful to the parties for agreeing to forego their rights to a formal hearing in the circumstances of the prevailing Novel Corona Virus-19 pandemic.

## B. ISSUES FOR DECISION

3. The issues to be decided are whether the debarment of the Applicant was in substantial compliance with section 14(3) of the Financial Advisory and Intermediary Services Act 37 of 2002 (“**FAIS Act**”), whether it was not vitiated by procedural irregularities and whether it meets the standard for substantive fairness.

## C. FACTUAL MATRIX

4. On 30 October 2017 the parties entered into a contract in terms of which the Applicant was employed by the Respondent on a temporary basis. The contract of employment was for an initial period of six(6) weeks. The initial period of six weeks was to be devoted to the Applicant’s on-the-job training. It appears that after the expiry of six weeks, the contract was extended to fifteen(15) weeks after which it was

made permanent without the parties negotiating terms of the permanent contract. It appears that although the terms of the permanent contract were not formally negotiated, the parties were *ad idem* about such terms. There is no argument between the parties that the contract between the parties was permanent in nature and substance. There is also an understanding between the parties that the Applicant was in the position of a financial services representative of the Respondent.

5. The allegations against the Applicant are that during the process of marketing and selling an insurance product telephonically to a client, she manipulated or forged the details of a banking account so that an account of a person who was not the client to whom the insurance product was sold, was debited with the premiums. The Respondent also accuses the Applicant of failing to close the sale by reading back to the client the terms of the policy that had been agreed to. Reading the terms of the policy or closing the sale is a normal requirement where policies are being sold telephonically. The closure is required and is used in order to ensure that both the seller and the client would be *ad idem* about what had been sold and bought.
6. The Respondent's allegation that there was manipulation or forgery in relation to the banking details arises from the fact that the Applicant was unable to complete the sale that she was busy with, because the client was not forthcoming with her banking details and the Applicant needed these in order to complete the sale so that she could use the sale towards reaching her targets.
7. The manipulation or forgery was discovered when Platinum Life was contacted by the owner of the banking account which was being debited with the premiums in respect of a policy that the owner of the account did not know about. The discovery

of the wrong account being debited with premiums led to a process which culminated in the debarment of the Applicant.

8. The Application is against the above-mentioned debarment.

#### D. THE APPLICANT'S VERSION

9. The Applicant's version is contained in a document entitled "*Re: Appeal for Debarment and Withdrawal*" dated 15 October 2019, which document formed part of her application to us for reconsideration of the decision to debar her.

10. In the above document, the Applicant concedes to the allegations as expounded by the Respondent, but states that what the Respondent refers to as manipulation or forgery of the banking details are in fact transgressions that came about as a result of the fact that she "*had no advanced knowledge of the system and proceedings as I was still new being assessed on a regular basis by the QA and team leaders who were positioned to each and every call I made to client, I completed an extended 15 weeks training programme then after I received a Certificate of Excellent work*"(sic).

11. Further exculpatory explanations by the Applicant are made in another document dated 29 October 2019 titled "*Re: UDM DEBARMENT TO MS ZENITH MOLOTO (ID NO. 870402 0316 08 8)*". The above document was in answer to a document from the Respondent which was received by the Financial Services Tribunal on 15 November 2019 and which contained "*underlying documents on which the decision was based together with further reasons as requested by your office*".

12. On page 10 of her document dated 29 November 2019 the Applicant states among other things that her actions were not intentional. She states that she did not gain

anything from the incident and that what she refers to as the mistake arose as a result of the client not reverting to her as she had promised. The Applicant further alleges that her failure to complete the closure was because she would only do so after she had received the account number from the client.

13. In other words, the Applicant pleaded what may loosely be referred to as confession and avoidance in regard to the accusation that she faced. Her concession that she made a mistake is, in our view, not an unconditional admission of guilt as far as the allegations against her are concerned.

#### **E. THE RESPONDENT'S VERSION**

14. The Respondent's version is that the Applicant was part of a team of tele marketers employed to sell short-term insurance products which the Respondent had been contracted by Platinum Life to market and sell on its behalf. The Respondent avers that all the tele marketers received training in respect of the product as well all the protocols relating to the conclusion of a sale and recording same on the system. The Applicant, according to the Respondent, also received the requisite training.
15. The Respondent accuses the Applicant that on 1 December 2017, she created a bank account number that did not belong to the client that she was selling the insurance policy to. The allegation is that the banking details which were put forward as those of the client that had purchased the policy, in fact belonged to another person who had nothing to do with the transaction that the Applicant had worked on. The Applicant is furthermore accused of not reading back to the client what is referred to as a "closure", which she is required to do in order to enable the client to confirm that her details have been properly captured and that a valid contract of the sale of the policy had come into effect.

16. The Respondent avers that the information relating to the policy that had been sold to the client was furnished to Platinum Life for them to issue a policy to the client and for the correct client's bank account to be debited with the monthly premiums. Having received the details relating to the policy which the Respondent had sold on its behalf, Platinum Life issued the policy and commenced with the monthly debits on the bank account that had been supplied to it by the Respondent.
17. It was only after the real owner of the bank account that was being debited with the monthly premiums complained to Platinum Life that her account was being debited by them without her authorization, that the account problem came to the attention of the Respondent.
18. The complaint by the owner of the bank account that was being debited was received by Platinum Life on 16 August 2018 and referred to the Respondent the following day. The Applicant was confronted with the allegations and asked to explain the disparities between what she had held up as the correct information and the complaint that had been received by Platinum Life.
19. On 17 August 2018 the Respondent, through one of its employees, Ashlyn Michaels prepared what is referred to as a "Bank Details Query. The findings on the Bank Details were the following: *"TSR at fault. Client provided the account number as 012626862 and agent captured the wrong account."*
20. The above findings were brought to the attention of the Applicant and an explanation was demanded from her.

21. On 24 August 2018 the Respondent was suspended from duty. The suspension was to last until the outcome of a disciplinary hearing that was to be held in due course. The Respondent was informed that should she wish to appeal against the suspension, she had to do so within 24 hours of receipt of the letter of suspension.
22. It is significant to note that the letter of suspension does not inform the Respondent of the reason for the suspension. She was merely told of the suspension and informed that she may appeal within 24 hours, should she be inclined to do so. This aspect is mentioned *obiter* and is not taken into account in the determination of this matter.
23. Again, on 24 August 2018 the Respondent was served with a Notice of a Disciplinary Hearing. The charges against the Applicant were framed as follows: "*Breach of contract, Gross Dishonesty and Gross Misconduct in the event of a trained person (sic)*".
24. In elaboration of the allegations against the Applicant, it was stated that in a sale submitted on 1 December 2017, the client, an Ms I Shisana, provided the Applicant with account number 012626862 and that the Applicant told the client that the account number is incorrect and that a call back was arranged to contact the client.
25. It is stated that the reason for arranging the call back was to grant the client, Ms Shisana, an opportunity to verify her account details to the Applicant to enable the latter to complete the sale. It is recorded that the client could not be reached, despite numerous attempts by the Applicant.
26. Although nothing further is recorded about what happened between the period that client had to revert to the Applicant and when the client information was sent to

Platinum Life, it is recorded by the Respondent that although client's correct account number is 012626862, the account number that was captured on the system as 001268686.

27. Following on the above, a disciplinary hearing was held on 5 September 2018. The Applicant pleaded not guilty to the three charges against her. It appears from the record that the employer had one witness. It does not appear from the documents at our disposal that the Applicant called any witnesses or testified in her own defence.
28. The Applicant was found guilty of breach of contract and gross dishonesty. The reason given for the finding of guilt is that she "*changed the banking details of a client . Training received. No remorse*" (sic).
29. The Applicant was dismissed on 5 September 2018.
30. On the 11 September 2018 the Applicant was served with a Notification of Intention to Debar. The Applicant was informed that the Respondent intended to debar her for breach of contract and gross dishonesty in that she is alleged to have falsified a client's account details and further that she submitted the sale without reading a closure to the client.
31. It appears that the Respondent, from the outset, was intent on relying on the results of the disciplinary enquiry and was not going to embark on a debarment process as envisaged in section 14(3) of the FAIS Act. This is clear from the final paragraph of the Notice of debarment where the following appears: "*Due to the nature of the charges brought against you in the disciplinary enquiry held on 05 September 2018, and the finding of guilt on the charges (as mentioned above), you have 5 working days from receipt of this notice to respond to the email address provided to make*



*submissions thereto, after the consideration of your submission a final decision will be made regarding possible debarment."*

32. The Applicant objected to the debarment being held before her matter to the CCMA had been heard and finalised by that body. It does not appear that this objection was ever considered by the Respondent. In any case the objection was ill advised as there is no requirement that a debarment has to defer to CCMA processes being finalised before being considered.
33. The debarment hearing was held on 11 September 2018 and the Applicant was debarred and dismissed on the same day.
34. We repeat, as was noted in the preceding paragraphs, that the debarment was based on the results of the disciplinary hearing held on 5 September 2018. The notice of debarment was the only notice ever to have been issued by the Respondent.

## **F. LEGAL FRAMEWORK**

35. For a debarment to pass muster it must be effected after a process that is lawful, reasonable and procedurally fair as contemplated in section 14 of the FAIS Act has been followed. What constitutes a lawful, reasonable and procedurally fair process is set out in paragraph 3.2 of the FAIS Guidance Notice No 1 of 2019, which provides:

*"3.2 Requirements for debarment*

Section 14(3) of the FAIS Act sets out the requirements with which an FSP must comply when debaring a person. These requirements must be contained in an FSPs policies and procedures governing its debarment process<sup>1</sup>. The following steps aim to record these requirements in a practical manner:

Step 1. Give adequate notice in writing to the person:

- *The notice should state:*
  - *the FSP's intention to debar the person;*
  - *the grounds and reasons for the debarment. Grounds refer to factors stated in paragraph 3.1.1 and reasons mean the facts that inform these factors; and*
  - *any terms attached to the debarment, including, in relation to unconcluded business, any measures stipulated for the protection of the interests of clients (section 14(3)(1)(a)(i));*
  
- *The FSP should, through the notice, provide the person with a copy of its written policies and procedures governing the debarment process (section 14(3)(a)(ii));*
  
- *The FSP should further, through the notice, give the person a reasonable opportunity to make a submission in response (section 14(3)(a)(iii)).*

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<sup>1</sup> Section 14(3)(a)(ii) of the FAIS Act.

*What constitutes “adequate notice” and “reasonable opportunity” will depend on the circumstances of each case. For example, where there are reasonable grounds to believe that substantial prejudice to clients or the general public may occur, this may warrant that debarment proceedings are carried out on an urgent basis.*

*It has been noted that representatives approach the Authority, after the debarment, to request the documentation and reasons for the debarment by the FSP from the Authority. In this regard, the Authority urges the FSP to also provide a representative with the documentation that informed the decision to debar the representative when it gives the representative notice of its intention to debar the representative. This will also enable the representative to formulate a proper response.*

**Step 2: Consider** (together with all available facts and information) any response received from the person that the FSP intends to debar (section 14(3)(b)), and (where applicable) have regard to information regarding the conduct of the person that is furnished by the Authority, the Ombud or any other interested person (section 14(6)).

**Step 3: Take a decision** whether or not to debar the persona and immediately notify the person in writing of –

- the FSP’s decision;
- the person’s rights in terms of section 228 of the FSR Act, i.e. the right to –

- i. request reasons for the decision; and
- ii. have the decision reconsidered by the Tribunal (section 14(3)(c)).”

36. It is only after the above have been complied with that a financial services provider may proceed to debar a representative. Because of the peremptory nature of the above requirements, non-compliance with them renders the process fatally flawed.

37. In the matter under consideration, the process for a valid debarment as prescribed in section 14(3) of the FAIS Act and expounded in the guidance notice referred to above was not followed. The whole process of debarment of the Applicant was based on the results of a disciplinary hearing.

#### G. EVALUATION OF THE EVIDENCE

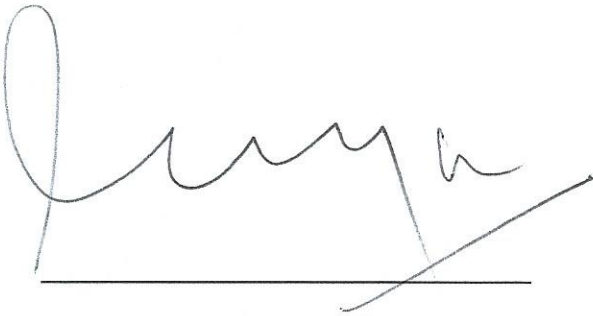
38. As stated previously, the debarment of the Applicant was based on the result of a disciplinary hearing which was held on 5 September 2018. That this is the case is clear from what is captured in the final paragraph of the Notice of Debarment dated 11 September 2018 where the Applicant is informed that *"due to the nature of charges brought against you in the disciplinary enquiry held on 05 September 2018 and the finding of guilt on the charges (as mentioned above), you have 5 working days from receipt of this notice to respond to the email address provided to make submissions thereto, after the consideration of your submission a final decision will be made regarding possible debarment"*.

39. No further steps to comply with the peremptory requirements for lawfulness, reasonableness and procedural fairness were followed before the Applicant was debarred.
40. In our view there has been massive failure on the side of the Respondent to comply with the peremptory requirements for a valid and lawful debarment.
41. Furthermore, it needs emphasising that a disciplinary hearing per se cannot take the place of a debarment process as prescribed in the FAIS Act and the guidance notice referred in the preceding paragraphs. Merely drawing the attention of a person to a disciplinary hearing and doing nothing further to comply with the requirements for lawfulness, reasonableness and fairness as prescribed in the FAIS Act and expounded in the guidance notice will not make ensuing debarment valid.
42. As was recently stated by Judge Harms in *Malesela Thomas Tihako v African Bank Ltd* FSCA Tribunal case number FSP7/2020 (3) *"it needs to be stated that the CCMA proceedings are labour related proceedings and have nothing to do with FAIS debarment – the laws differ, the rules differ and the tribunals are different and have different competencies although the same facts may be relevant although not necessarily applicable in both senses"*.
43. On the substantive side there are also serious irregularities which vitiate the debarment. For example, one of the underlying documents that the Respondent alleges to have used in arriving at the decision to debar Applicant is an investigation report dated 17 October 2018. The investigation report was compiled a month after the debarment of the Applicant. The report was received by the tribunal reception on 15 October 2019.

44. In other words, the report was compiled after the applicant had been taken through the debarment process referred to above. The report would not have been available at the time when the debarment process was undertaken, even though the Respondent avers that its reasons for the debarment are based partly on it. It stands to reason that the Applicant would not have had the opportunity to respond to the allegations contained in that report at the debarment hearing.
45. We are satisfied that both on procedural and substantive grounds the Respondent did not act in a manner that was reasonable, lawful and fair to the Applicant.
46. Even as we remit the matter to the Respondent, the decision maker, we draw the Respondent's attention to the provisions of section 14(3) of the FAIS Act that if the person sought to be debarred is no longer a representative of the financial services provider, the debarment must commence within six(6) months from the date from which the person ceased to be a representative of the financial services provider. It would be prudent for the Respondent, as he reconsiders the matter, to bear the above in mind.

**H. THE ORDER**

47. The debarment of Zenith Moloto (ID: 870402 0316 08 8) dated 17 September 2018 is set aside.
48. The matter is remitted to the Respondent for reconsideration.
49. There is no order as to costs.

A handwritten signature in black ink, appearing to read 'M.E. Phiyega', is written over a solid horizontal line. The signature is fluid and cursive, with a large initial 'M' and a long, sweeping underline that extends to the right.

**M.E. PHIYEGA**

**ON BEHALF OF THE TRIBUNAL**

**22 MAY 2020**