THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: FSP34/2021

In the matter between:

MARTIN LOURENS APPLICANT

and

DISCOVERY LIFE LIMITED RESPONDENT

Panel: LTC Harms (chair), Ms Zama Nkubungu Shangisa and Ms Linda Ngcobo

For the applicant: Mr Herman Kocks of Coetzee Duvenhage Inc

For the respondent Adv MM Antonie SC and Adv N Ndlovu instructed by Werksmans Attorneys

Hearing: 18 May 2022

In re application for reconsideration of debarment of FSR – meaning of "advice" in sec 1 of the FAIS Act – referral may amount to advice

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DECISION

1 The applicant, Mr Herman Lourens, was employed by the respondent, Discovery Life Ltd, since August 2008. The employment contract records that Discovery appointed him as a financial adviser and full-time employee to market and sell

its products and policies and to provide financial services in relation thereto to existing and prospective clients of Discovery Life and the Discovery Group.

2 It also stated that he would market and sell the products and policies according to the policies, procedures and guidelines set down from time to time by Discovery Life and the Discovery Group.

3 He held a senior position at the time of his dismissal on 17 March 2021. Following his dismissal, Discovery (a financial services provider, "FSP") debarred him as financial services representative ("FSR") in terms of sec 14 of the Financial Advisory and Intermediary Services Act 37 of 2002.

4 That led to the present application (dated 26 May 2021) for reconsideration in terms of sec 230(1) of the Financial Sector Regulation Act 9 of 2017.

5 Section 14 obliges an FSP to debar an FSR, who it is satisfied on the available facts and information, that the FSR

> (a) no longer complies with the "fit and proper" requirements referred to in sec 13(2)(a) or
>
> (b) has contravened or failed to comply with any provision of the Act (with its extended meaning as defined in sec 1) in a material manner.

6 Dismissal and debarment are often parallel or overlapping proceedings but what justifies dismissal does not necessarily justify debarment, and vice versa. In this case, the disciplinary hearing dealt with both issues, and it is accepted that the debarment was based on the outcome of the disciplinary hearing.

7 The chairman of the hearing did not debar the applicant. The debarment decision, which by statute is that of Discovery, was a separate decision.

8 Discovery gave the following reasons for the debarment:

- Mr. Lourens was in breach of Sec 3 of the General Code of Conduct by not entering into a referral agreement with Mr. JWAC Zucher (Storm), SI Brokers or Ecsponent.
- Mr. Lourens was in breach of Sec 3(1)(c) of the General Code of Conduct in failing to disclose the conflict of interest and specifically, failing to disclose the personal financial benefit that he would receive when the clients whom he advised to invest with Ecsponent followed such advice.
- Mr. Lourens was in breach of Sec 13 of FAIS Act in that he provided advice and/or intermediary services to clients where he was not authorised to provide advice and/or intermediary services on Cat 1.8 product.
- Mr. Lourens failed to render financial services honestly, fairly with due skill, care and diligence and in the interests of clients and the integrity of the financial services industry in terms of Section 2 of the FAIS General Code of Conduct.
- Mr. Lourens was in breach of section 6A(2)(a) and 13(2)(a)(i) of the Financial Advisory and Intermediary Services Act, read together with Section 8(1) of the Board Notice 194 of 2017 - Determination of Fit and Proper Requirements for Financial Services Providers.
- In view of the evidence obtained, we are of the opinion that the merits of the case indicate that Mr. Lourens lacked the characteristics of honesty and integrity and did not act in the best interest of the clients and Discovery.

9 In summary, the case against him is that he advised three Discovery clients and one potential client to invest in an Ecsponent financial product. It was a preference share quoted on the JSE. The product category for shares is 1.8. He was not authorised or licensed by the FSCA to advise on this class of products because he had not completed the required training and examinations. (Discovery did not market a product falling in that category.) In addition, the information he gave the clients was materially wrong. Knowing that he was not

licensed, he purported to "refer" the clients to a Mr Zurcher (Storm) who completed the paperwork for the investment. Storm was also not licensed under category 1.8 but was said to act under supervision of someone who was. Ecsponent paid commission on the investment, which the applicant (75%) and Storm (25%) shared. The applicant did not disclose this (which he called a referral fee) to the clients. The scheme collapsed and the four clients, retirees, suffered material losses.

10 The primary answer of the applicant was that he did not advise the clients but gave them "factual advice" or information on the Ecsponent product. Before dealing with the facts, it is necessary to consider the alleged procedural failures.

POLICY MATRIX

11 Under the heading "the legislative and policy matrix", the applicant alleges in the heads of argument that Discovery had failed to comply with its own internal procedures and matrix of authority. The complaint relates to the debarment decision post the disciplinary hearing and post submissions.

12 The first problem with the submission is that failure to comply with the matrix was not set out as a ground for reconsideration. The ground is nowhere alluded to in the 19-page grounds of objection or elsewhere in the record of some 1800 pages. It is a year later, and the applicant did not amplify the grounds even after the objection was raised in Discovery's heads of argument.

13 But, said Mr Kocks, the applicant sought to find evidence through an interlocutory application, which was dismissed. I quote from that decision:

> Discovery said about the first item that

> "The respondent has previously advised the applicant that all of the documents that were considered in the decision to debar the applicant have been included in the respondent's record, submitted to the applicant and the Tribunal on 25 June 2021. What transpired before the respondent's debarment forum is irrelevant to the determination of the main application. It is the only the finding and the reasons therefor that is relevant."

This is uncontroverted. The application is a disguised application for discovery, also called a fishing expedition.

14 Nothing has changed. The evidence on which the applicant was debarred is the evidence on record. The suggestion that there may have been further "evidence" is manifestly conjecture.

15 The second problem is that it was not suggested, and could not be, that failure to follow the internal process strictly led to any failure of justice. The statutory process was followed as set out in the debarment letter. As Mr Kocks accepted, if the facts on which the debarment was based were established, Discovery had to debar the applicant.

REFUSAL OF REQUEST FOR EXTERNAL LEGAL REPRESENTATION

16 Discovery's debarment policy and procedure states that an FSR has a right to a representative of his/her choice within Discovery but that "no external legal representation will be permitted at the FAIS hearing as it is an internal process." The applicant nevertheless applied for "external" legal representation and argued the issue at length before the chairman.

17 The grounds, in summary, were (quoting his attorney's preceding letter – p C 630):

- The seriousness of the allegations against my client;

- The far-reaching consequences it can have for my client;
- The possibility that my client may incriminate himself during the hearing;
- It is not a simple disciplinary hearing, but includes a debarment hearing; and
- My client is disadvantaged due to him having no legal background as opposed to other key individuals in the process.

18 The argument was prepared by or with the assistance of a legal practitioner. The chairman dismissed the application and gave, as one would have expected, short reasons.

19 The heads of argument state that the chairman dismissed the application for one reason only, and that is because there were no criminal charges against the applicant. This misstates the decision of the chairman. The applicant's own summary of the decision in the reconsideration application recites eight points and did not even raise this myopic "misdirection" while dealing over several pages with the issue of external representation.

20 The statement by the chairman about there being no pending criminal proceedings was made in the context of the applicant's concern (bullet point 3) that he might incriminate himself, and the chairman pointed out that he was entitled not to give evidence if that was his fear.

21 Mr Kocks conceded that the grounds raised by the applicant as to why he should have been entitled to external legal representation would apply to all or nearly all debarment proceedings: all have serious personal consequences.

22 The case was not complex, although the applicant complicated matters and it is probably true that, as he alleged, the case may have been shorter if he had representation.

23 He knew prior to the hearing what his defence was and that remained his defence: I gave factual information and not advice. Already during his first interview with the investigators it was noted how he ensured that he used the terms “referral” and “referral fee” and that he commented on using the correct terminology about not having given “financial advice” – the refrain during evidence and argument (C517).

REFUSAL TO CALL FURTHER WITNESSES

24 The allegations against the applicant concerned four clients. He wished to call numerous (initially potentially 25 – p C629) other witnesses (Discovery clients) to testify that in their instance he had not given them advice when they invested in Ecsponent. The chairman dismissed the request because the evidence would neither prove nor disprove the case he was called to meet.

25 The submission is that despite the ruling,

> the chairman concluded in his findings on the charges that the applicant had advised “several clients” of the respondent to transfer their investments, the applicant had “persisted with a mission”, the “entire *modus operandi* was the same for each of the clients”, and the resultant total exposure for the respondent “is not limited to the four clients that the employee was charged with but affected 18 Discovery clients with an estimated investment value of around R36 million”.

26 The heads of argument, once again, misstate what the chairman had said in his *ex tempore* decision by quoting words and phrases out of context. One reads a document as a whole. The “several clients” referred to are the four clients involved. The modus operandi referred to that which was followed in respect of the four clients.

27 The last quotation was from another document, the reasons for dismissal. The emphasis was on the exposure of Discovery, not his guilt.

28 In any way, the applicant's attack is misplaced. The chairman did not take any decision to debar him. It was not his function, and he did not purport to exercise it. He merely made a recommendation. And it matters not whether the "misconduct" related to the four complainants only. If established, debarment had to follow as we understand Mr Kocks conceded.

BIASED PROCESS AND PRE-DETERMINED OUTCOME

29 Mr Kocks, in this part of the argument, simply repeated the applicant's allegations made during the hearing and in the application. When invited to corroborate the allegations with reference to the record and probabilities, he relied on two "facts" in addition to the refusal to allow external representation or similar fact evidence.

30 The one is a sentence on p D218 of the evidence where the chairman said that he agreed with the witness. Once again, the submission ignored the context. It all began with a question by the applicant whether the client had enough time to do his own investigations into Ecsponent before investing. (The applicant was attempting to establish that the client chose Ecsponent without advice because he was expert enough.) The witness dealt with the issue for ¾ of a page and then said that he did not have any relevant documents for the period. That is when the chairman said that he agreed.

31 There were no such documents before the chairman. Importantly, the applicant saw nothing untoward in the remark at the time and Mr Kocks had to trawl

through nearly 600 pages of evidence to find this phrase of four words to establish bias.

32 The second instance is stranger. At the end of the evidence of the third client, the applicant remarked that he wished to make a personal statement, expressing his personal opinion, that the three witnesses' evidence were very similar and it would appear that they were coached. The chairman responded that the applicant could deal with it during argument (pp D256-257).

33 The applicant in his own evidence went further when he said this (p D500):

> What I have to say to that, Mr Human, and I'm so glad you asked that - his (V's) version and [Mr and Mrs R's] versions are very similar to each other because they have been coached by their attorneys, and they only vaguely remember these things, only a portion of the advice. . . . So I don't want to say they are liars, but I want to say they were coached in what to say in this hearing by their attorneys, because they all have the same attorneys, according to their affidavits, and that's what I have to say about that, Mr Human.

34 The submission in the heads of argument is that the chairman should have responded to this concern (by calling the attorneys?) and should have dealt with it in his decision. Mr Kocks, when asked, was not prepared to subscribe to the applicant's conspiracy theory (one of many). There is simply no merit in these far-fetched submissions.

35 To conclude on procedural irregularities: despite the applicant's fertile mind, we do not find that the procedure was unfair. The attack was a distraction from the facts to which the applicant gave scant attention in argument before us.

"ADVICE"

36 The main legal issue concerns the meaning of "advice" in the FAIS Act because the essence of the case is that the applicant gave "advice" which he could not and should not have given to the four complainants. The applicant submitted, and we quote the argument, that the substance of this matter turns on this definition and the correct legal interpretation and application thereof to the facts; the giving of factual information is not advice, regardless of whether the factual information is correct or not; a client can make an investment decision without receiving any advice, and with or without factual information, whether provided by a representative or someone else; and the four complainants did not make their investments decisions that form the subject matter of these proceedings based on any advice given to them by the applicant.

37 The meaning of the term was the subject of the judgment in the Supreme Court of Appeal in *Atwealth (Pty) Ltd & others v Kernick & others* (116/2018) [2019] ZASCA 27; 2019 (4) SA 420 (SCA). The chairman relied on this decision.

38 The applicant's heads of argument ignored the SCA judgment and instead relied on an earlier decision of the predecessor (in a sense) of this Tribunal in which the present chair sat, namely that of *LPJ Financial Services (Pty) Ltd and another v The Registrar of Financial Service Providers* A 45/2015.[1]

39 The interpretation of "advice" of the SCA appears to be less restrictive than the interpretation in *LPJ* especially where the SCA (at para 30) said that

> the difficulty with these contentions was that, even if they had merit, on a careful parsing of the language of the FAIS Act, the presentation by Ms Moolman constituted, in ordinary parlance, the giving of financial advice, at least in the form

[1] KMBT_654-20160629141013 (fsca.co.za).

of product information, to the Kernicks. It was advice on which they clearly intended to rely and on which they were entitled to rely, coming as it did from a professional financial advisor from whom they had sought that advice.

40 We do not believe that there is otherwise a difference between the two cases as far as interpretation is concerned. They dealt with different facts and had different outcomes.

41 Section 1 defines "advice" as follows:

"advice" means, subject to subsection (3) (a), any recommendation, guidance or proposal of a financial nature furnished, by any means or medium, to any client or group of clients—

(*a*) in respect of the purchase of any financial product; or

(*b*) in respect of the investment in any financial product; or

(*c*) . . . ; or

(*d*) . . .,

and irrespective of whether or not such advice—

(i) is furnished in the course of or incidental to financial planning in connection with the affairs of the client; or

(ii) . . ..

42 The qualification, "subject to subsection (3)(a)", to the extent relevant reads:

advice does not include—

(i) factual advice given merely—

(*aa*) on the procedure for entering into a transaction in respect of any financial product;

(*bb*) in relation to the description of a financial product;

(*cc*) in answer to routine administrative queries;

(*dd*) in the form of objective information about a particular financial product; or

(*ee*) by the display or distribution of promotional material;

(ii) an analysis or report on a financial product without any express or implied recommendation, guidance or proposal that any particular transaction in respect of the product is appropriate to the particular investment objectives, financial situation or particular needs of a client.

43 Sub-paragraph (ii) is formulated in the negative. Stated in the positive it says that an analysis or report on a financial product with any express or implied recommendation, guidance or proposal that any particular transaction in respect of the product is appropriate to the particular investment objectives, financial situation or particular needs of a client amounts to "advice".

44 Once there is any express or implied recommendation, guidance or proposal, the "advice" is not "merely" factual. The express or implied recommendation, guidance or proposal provides for "more".

45 According to the oral argument the applicant gave factual information which brought the clients to a forked road, and they chose which road to follow without being advised.

46 Although the argument focussed on the (3)(a)(i) exception, it would also apply to the definition of "advice", which requires a "recommendation, guidance or proposal" to purchase etc. a financial product.

47 The issue may be refined to pose the question whether the applicant "merely" (which means "only as described and nothing more") gave factual advice relating to procedure, description, or objective information about the Ecsponent product or whether he (at least impliedly) recommended, guided (showed the way) or proposed that the product was appropriate to the particular investment objectives, financial situation or particular needs of each complainant.

48 The submission, if it was one, that incorrect information can be factual information, is wrong. Incorrect information is called “factoids”. Facts are matters that are known to be true or to exist. The belief that something is true does not make it true and so, too, the belief that something is a fact does not make it a fact as illustrated by the flat earth believers.

49 Although the applicant attacked the complainants’ evidence as lacking credibility, the attack was in general terms and not with reference to anything in the record. The applicant, not always supported by Storm, was not a satisfactory witness. His evidence in chief was a prepared statement and during cross-evidence he used “crib notes” to remind him what he had to say. He was argumentative and repetitive and sought to divert blame and found many conspiracies.

50 Despite this, the answer can on the probabilities be found in the common-cause facts and the documentation. That was the approach the chairman followed, and we intend to do so too.

51 Three of the clients were existing clients of Discovery who had been serviced by the applicant for many years. They sought his advice on their retirement plans and investments. The fourth was referred to the applicant, who met him in Discovery’s office building, by one of the others for advice on his pension pay-out.

52 There was accordingly a fiduciary relationship between the applicant and the complainants.

THE FINDINGS OF THE CHAIRMAN

53 The chairman of the disciplinary committee reached this conclusion:

It is fair to conclude that the entire modus operandi was the same for each of the clients, the most salient being that the meeting was initially arranged with the client by the employee. During the meetings the client was furnished with a plan, which plan included a referral to Storm given the Ecsponent product's high yields, 11.25% when reportedly compared to the Discovery guaranteed income plan of 6% to 7%. It has to be pointed out that no evidence was produced to show that this comparison was ever made. And in his own version the employee did not request formal points. The employee would then obtain a quotation from Ecsponent via Storm which he then sent to the client. A meeting would then be arranged with Storm where the client would then proceed to complete the required documentation and would then sign for the financial product. The client would then transfer the investment money to Ecsponent on the same day. The eventual meeting with Storm where an investment would have been procured was a fait accompli, the completion of the application document merely served as a kind of mechanical tick-box exercise and more concerning is that all of these clients had already made payment to within hours or minutes of the conclusion of the meeting with Storm. Taken on the balance of probabilities, the clients' versions are more probable for the following reasons: the clients, apart from Mr Ramezesky, were all unsophisticated investors. It is highly unlikely that such an investor would remove their life savings from a secure investment and entrust such funds to the employee had they not sought financial advice from him.

It becomes clear that the employee abused the trust of the gullible investors and exposed them to risk and harm as the Ecsponent scheme was not in keeping with their risk profile, which required minimal risk. The employee assured all of his clients that their investments were entirely safe and guaranteed. In fact, by doing so he ventured into a field of investment in which he was not licensed to give

advice on and therefore not properly qualified to make these assurances. In not properly researching the scheme and not properly taking into account the information that was readily available on Ecsponent's website, which expressly shows that this is a high-risk investment and there were no guarantees, the employee failed to show the necessary levels of due diligence.

In so doing, he failed to exercise the skill, care and diligence, which are expected of a financial advisor. As a result of the failure, the employee exposed Discovery Life and its clients to risks. In so doing, they lost substantial amounts of their investments and suffered extreme prejudice as a result of these investments. The total exposure is not limited to the four clients that the employee was charged with but affected 18 Discovery clients with an estimated investment value of around R36 million.[2]

54 Neither in his written or oral argument did Mr Kocks address the particular facts. The mantra was that the chairman had failed to find that Storm and not the applicant that given "advice". (The chairman referred to it as the applicant's "mission", but "mantra" may be a more appropriate description.) We intend to deal in some some detail and repetition with the facts in the case of Mr K. The facts of the other three complainants were not much different and do not require individual assessment.

THE CASE OF MR R

55 Mr R and his wife had been clients of Discovery and of the applicant for many years. They reached retirement age. The applicant, in his capacity as financial adviser and investment adviser, prepared separate retirement plans for them. This set out their respective income need which must have been determined

[2] D 665. We earlier dealt with the last sentence.

during a previous meeting when it was realised that Discovery's products could not satisfied their full need.

56 The applicant had before done "research" on the Ecsponent product, which he had bought. He could not sell the product because it was a preference share scheme which was not covered by his license. He had an informal agreement or understanding with Storm that he could "refer" clients to him. Storm also did not have a 1.8 licence, something the applicant may not have known, but he is said to have been acting under the supervision of someone who was authorised.

57 To do an income calculation that would satisfy Mr R's requirements, the applicant obtained a quotation from Storm for the Ecsponent product. For this he provided Storm with the necessary financial and personal information of Mr R.

58 With that in hand and the Discovery information available the applicant prepared a plan explaining how the income objective could be attained. This could only happen (because Discovery did not have an appropriate product) if the "guaranteed income investment" in the Ecsponent product would be made that would provide a return of 11.5% and considering the low dividend income tax rate.

59 In other words, the applicant informed Mr R that (a) the capital was guaranteed (it was later explained that the capital was guaranteed by a pledge of R2 for every R1 invested); (b) the guaranteed annual return would be 11.5%; and (c) this income would be tax friendly.

60 Mr R would be referred to Ecsponent for making the investment.

61 In puffing the value of Ecsponent, the applicant told Mr R that he had researched Ecsponent and he, too, had invested in Ecsponent.

62 The applicant then referred Mr R to Storm to do, as Storm said, the paperwork, because the applicant did not have the requisite licence.

63 This was followed by an appointment with Storm, which the applicant arranged. Such a meeting could only be held once Mr R had the funds ready for immediate transfer to Ecsponent. The applicant prepared the withdrawal forms to release his funds, which Mr R signed.

64 The meeting took place, Storm having been brought (or accompanied) to Mr R by the applicant. Storm asked perfunctory questions and answered questions, if any. He did the paperwork (which was not much more than a box tick exercise) with the assistance of the applicant. This is corroborated by the form that Storm completed in the presence of the applicant, and which was signed by Mr R. It stated that Storm was "only doing this investment on advice of their Discovery adviser." As the chairman said,

> This became particularly clear during Storm's testimony when he clearly and in no uncertain terms indicated that the clients referred to him by the employee were not his clients. In his opinion he merely facilitated the transaction to procure the investment.

65 Mr R then, at the request of the applicant and Storm, transferred the funds to Ecsponent. The applicant requested him to send him proof of payment, which he did. The applicant and Storm sought to explain the reason for this request, but it remains inexplicable unless one accepts that the applicant had a material interest in the outcome of the investment: he had to know whether and when he would receive his share of the commission.

66 As mentioned, the applicant and Storm shared the commission. There was a dispute as to whether the applicant had informed Mr R of any fee. The applicant said that he had told him that he would earn a referral fee. He did not on his own evidence say that it would be 75% of the commission and it was not in writing.[3] Neither the applicant nor Storm could give a rational explanation for the split. The fee he earned could not by any stretch of imagination be considered a referral fee. The apparent answer is that the diversion of Mr R from Discovery was the more valuable part of the business. The role of Storm was peripheral and if he gave advice (and not just answered questions from persons who have already decided to invest) his advice was additional and confirmational.

67 Why would the applicant refer the complainants to Storm if he would have earned commission at Discovery, he asked rhetorically? The apparent answer is that he could not satisfy the clients' needs with a Discovery product and he might have lost that business if he did not "refer" them in the manner he did.

68 Tellingly, when Ecsponent collapsed, Mr R turned to the applicant for an explanation and assistance and not to Storm.

69 The only reasonable conclusion that can be reached on these facts is that the applicant did not "merely" provide Mr R with factual information. He went much further, he guided him from the beginning to end, past the fork in the road to Ecsponent, holding his hand lest he should waver. Facts morphed into advice, as Mr Antonie aptly remarked.

[3] The applicant admitted during the "sentencing" stage that he had breached para 3 of the Code, which requires written notification of personal interest and remuneration.

70 On a conspectus of the evidence, we find that the applicant at the very least impliedly recommended to Mr R that the Ecsponent product was appropriate to his particular need, and he guided him in purchasing the product. The decision to purchase the Ecsponent product was taken before they reached Storm. Advice had been given and the referral was but a step in the process to earn commission.

71 If the applicant had conducted any due diligence and for instance read the documents that Mr R was required to sign by Storm, he would have known that the preference shares were quoted on the Stock Exchange; that their value was determined by offer and demand and not fixed; that dividends only were payable; and that the product (whether interest or capital) was not guaranteed. Even Storm could not give the client correct information. The applicant was reckless to wade into unchartered waters and take his clients along – giving the implied assurance of its value by telling them that he had all made this successful investment.

CONCLUSION

72 As said, the applicant's argument did not engage the facts which one considers holistically and not piecemeal. We find that the facts establish that the applicant breached the FAIS Act in a material manner and that he failed to comply with his FAIS obligations and that, in the circumstances, it was correctly found that he no longer complied with the "fit and proper" criteria of the FAIS Act and Code of Conduct.

73 Discovery asks for a costs order against the applicant. That is permissible only if exceptional circumstances are present. This matter falls on the borderline, especially if regard is had to the baseless allegations the applicant made against

all and sundry. On the other hand, some slack must be allowed for someone who fights for his reputational and financial survival. Applying the "attorney-and-client" costs test, we do not believe that the circumstances were exceptional justifying a costs order.

ORDER: THE APPLICATION FOR RECONSIDERATION OF THE DEBARMENT IS DISMISSED.

Signed on behalf of the Tribunal panel.

LTC Harms

26 May 2022