

# **THE FINANCIAL SERVICES TRIBUNAL**

Case No: FSP60/2022

In the matter between:

**ASANDA MBIKO**

**APPLICANT**

and

**METROPOLITAN**

**FIRST RESPONDENT**

**LUCILE SCHMIDT**

**SECOND RESPONDENT**

*Summary: Fairness of debarment proceedings*

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## **DECISION**

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### **INTRODUCTION**

1. The Applicant brings this application in terms of Section 230 of the Financial Sector Regulation Act 9 of 2017 ("the FSR Act").
2. The First Respondent is a registered Financial Services Provider as contemplated in the Financial Advisory and Intermediary Act 37 of 2002 ("FAIS Act")
3. The Second Respondent is a Regional Manager of the First Respondent.
4. The Respondent employed the Applicant as a Financial Advisor on 1 August 2021.
5. The Applicant resigned on 29 April 2022 with immediate effect.
6. The First Respondent provisionally debarred the Applicant on 7

September 2022 and invited the Applicant to make representations, whereafter, the First Respondent would reconsider the provisional debarment and make a final decision.

7. The First Respondent, having considered the Applicant's representations, finally debarred the Applicant on 14 October 2022 because she no longer met the requirements of Section 8(1) of the FAIS, in that she materially contravened the FAIS Act and was no longer a fit and proper person.

8. The Applicant challenged the Respondent's decision to debar her. The Applicant complains *inter alia* that she:

8.1 had resigned from the First Respondent by the time the First Respondent debarred her and suggested that the First Respondent's Debarment Policy, Procedure, and its terms were no longer applicable to her at that time;

8.2 was not given an opportunity to present written submissions in answer to the allegations at the hearing held in her absence;

8.3 took issue with the decision maker's consideration of the evidence tendered by the First Respondent to the decision maker.

## **THE FACTS**

9. During her period of employment, information arose indicating possible fraud by the Applicant. A forensic investigation ensued, and the subsequent forensic report confirmed clear evidence of fraudulent acts perpetrated by the Applicant.

10. The internal investigation uncovered *inter alia*:
  - 10.1 unauthorised policies issued;
  - 10.2 issued policies with electronic signatures which could not be linked with clients.
  - 10.3 at least 24 policies that were recommended for cancellation;
  - 10.4 evidence that the Applicant had benefitted from the sales of unauthorised policies.
11. In compliance with the FAIS Act, the First Respondent was required to commence debarment proceedings, which it did. The First Respondent debarment procedure comprises the following:
  - 11.1 Step One: Issue the Notification of Debarment Hearing;
  - 11.2 Step Two: The Enquiry;
  - 11.3 Step Three: Provisional Determination of Debarment;
  - 11.4 Step Four: Consideration of Further Representations;
  - 11.5 Step Five: Determination of Debarment.
12. The First Respondent timeously notified the Applicant of the debarment enquiry date, time, and place. Furthermore, the Applicant was provided details of the alleged fraud as part of Step One. The Applicant elected not to respond to the Notice (Step One) or attend the Enquiry (Step Two).

13. As indicated above, the First Respondent provisionally debarred the Applicant on the 7<sup>th</sup> of September 2022, considered the Applicant's representations contained in an email of the 21<sup>st</sup> of September 2022, and finally debarred the Applicant on the 14<sup>th</sup> of October 2022. The First Respondent indicated in its communication of the final debarment to the Applicant that it had considered the Applicant's representations and that nothing contained therein supported any reason not to debar the Applicant.

## **LEGAL FRAMEWORK AND ANALYSIS**

14. In determining whether the debarment was conducted substantively and procedurally fairly, the jurisdictional factors in terms of the FAIS Act must be present. Section 14(3)(a)(i)-(iii) of the FAIS Act reads as follows:

*"(3) A financial services provider must-*

*before debarring a person*

- (i) give adequate notice in writing to the person stating its intention 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 debarment process; and*
- (iii) give the person a reasonable opportunity to make a submission in response;"*

15. The process for effecting a debarment to ensure that the requirements prescribed by section 14(3) of the FAIS Act are complied with is

summarised in Guidance Notice 1 of 2019 (The Guidance Notice).

16. Further, the FAIS Act states:

16.1 in section 14(2) that the Financial Service Provider must ensure that the debarment process is lawful, reasonable, and procedurally fair before effecting the debarment.

16.2 in section 14(5) that the debarment in respect of a person who is no longer a representative of the financial services provider must be commenced not longer than six months from the date that that person seeks to be a representative of the financial services provider.

17. The parties waived the right to a formal hearing and agreed that the Tribunal could decide this matter on the papers filed. On the papers, nothing was established to gainsay the First Respondent's version that the debarment procedure was procedurally fair and substantively fair.

18. In the circumstances, the Tribunal can find no grounds to interfere with the decision to debar the Applicant.

**ORDER:** The application for reconsideration is dismissed.

Signed on 18 April 2023



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**PJ VELDHUIZEN & LTC HARMS (Deputy Chair)**