

IN THE FINANCIAL SERVICES TRIBUNAL

CASE: FSP/10/2018

In the matter between:

DIMAKATSO MATHEBULA

Applicant

and

TRACKER AGILITY (PTY) LTD

Respondent

DECISION

Summary: Financial Sector Regulation Act 9 of 2017 – Application for reconsideration of debarment by FSP – Failure to comply with sec 14(3) (a) of the Financial Advisory and Intermediary Services Act 37 of 2002.

1. INTRODUCTION

1.1. The Applicant is Ms Dimakatso Mathebula, who, before she was debarred, was employed as a financial services representative (FSR)

by Tracker Connect (Pty)Ltd a wholly owned subsidiary of, a registered financial services provider(FSP).

- 1.2. The Applicant had been employed for three years as one of approximately one hundred other financial representatives responsible for sourcing clients on behalf of the Respondent through the medium of a call centre service. It appears that representative did not receive a fixed salary but that the salary they obtained depended on the business that they brought to the Respondent during the month.
- 1.3. The reliance on earning a commission by bringing business to the Respondent in order for a representative's salary to be consequential made the environment within which the representatives worked highly competitive and stressful. Not reaching her or his target meant that a representative's remuneration at the end of the month would be miniscule. It seems that the Applicant was at risk of not reaching her target for January 2018, with the consequence that come month end her salary was likely to have been puny.
- 1.4. In order to avoid the risk of a diminution in her pay the Applicant came up with a stratagem to ensure that she reached her targets.
- 1.5. This stratagem consisted therein that she contacted an employee of one of the clients of the Respondent, and acting under false pretences, got the client's employee to believe that another employee who was

authorised to do so had agreed to the extension of a contract to cover the client's fleet for an additional twelve months. In truth the authorised employee had not given any such instruction or authority for the unauthorised employee to extend the contract.

- 1.6. The contract was extended by twelve months as a direct consequence of the Applicant's deceit.
- 1.7. As usually happens in such matters the fraud was discovered.
- 1.8. What happened after the fraud was discovered is not clear. It appears that the Applicant and her direct manager met and discussed the issue and that the Applicant was given a choice to resign from her position, failing which she would be taken through a disciplinary hearing. She was, according to her evidence, given leave for a week to sit at home in order for her to reflect on the choice which would be better for her.
- 1.9. The Applicant testified that while she was at home she was given an update her manager to the effect that actually she did not have much of a choice because the case against her was so watertight that she could not win it if she decided to opt for a disciplinary hearing instead of resigning. She was, so she testified, assured by her manager that she could avoid being debarred by opting to resign instead. The Applicant, trusting in the "superior wisdom" of her manager, who she believed had

the authority to give an undertaking that if she resigned she would avoid being debarred, duly resigned with immediate effect.

1.10. The Tribunal was informed that that manager who induced her had since left the Respondent's employment and that the Respondent was not in a position to counter the allegations by the Applicant.

1.11. Thirty days after she resigned she received a letter informing her that Respondent was intending to debar her and granting her an opportunity to make representations why she should not be debarred.

1.12. She was shocked by this new development but nevertheless proceeded to make representations. The representations did not take issue with the accusations proffered against her. She, despite her shock at the Respondent's change of undertaking, proceeded to make submissions.

1.13. The submissions did not dispute the allegations levelled against her, but were in the form of mitigating circumstances that she wanted to bring to Respondent's attention.

1.14. After receiving her response the Respondent advised her that it was proceeding to have her debarred.

- 1.15. The Respondent then proceeded to inform the Financial Services Sector Authority (the FSCA) of Applicant's debarment. The Applicant was duly debarred by the FSCA and remains debarred as at writing of this decision.
- 1.16. It is important to note that after the decision to debar her had been taken, the Applicant was not informed of her rights in terms of section 228 of the Financial Sector Regulation Act 9 of 2017.
- 1.17. The section places, in peremptory language, an obligation on the decision maker to notify a person affected by a decision to debar her of that person's right to : (a) request reasons for the decision, and (b) to have the reasons reconsidered in terms of Part 4 of the FSRA.
- 1.18. There was an extensive debate between the Panel members and the representatives of the Respondent whether the Respondent had complied with its obligations to inform the Applicant of her rights in terms of section 228 of the FSRA.
- 1.19. The Respondent was adamant that by providing the Applicant with a copy of its debarment policy the Respondent had complied with its statutory obligation.
- 1.20. We cannot agree with this submission. The Respondent's debarment policy deals with issues of debarment in general whereas section 228

of FSRA deals with a specific decision affecting a person who the Respondent would have taken a decision to debar on the basis of an infringement of an issue dealt with in the debarment policy. Our reading of the section is that it is in respect of the specific decision to debar that the affected person has to be informed of her rights in terms of section 228 of the FSRA.

2. **ISSUES FOR DETERMINATION.**

2.1. The issues to be determined by the Tribunal are whether the Respondent had complied with the requirements of the section 14 (3) of the FAIS ACT before debarring the Applicant.

3. **LEGISLATIVE SCHEME**

3.1. In terms of section 14(1) of the Financial Advisory and Intermediary Services Act 37 of 2002 an FSP is obliged to debar an FSR from rendering financial services if the FSP is satisfied that, on the basis of information and facts that the FSR -:

3.2. Does not meet or no longer complies with the fit and proper requirements and any other requirements contemplated in subsection (1((b)(11) for the rendering of financial services as provided for in section 13(2)(a) of the FAIS ACT.

- 3.3. Three jurisdictional requirements have to be complied with before an effective debarment can be said to have been effected.
- (a) the reasons for the debarment must have occurred and become known to the FSP while the person sought to be debarred was a representative of the provider;
 - (b) before effecting a debarment, the FSP must ensure that the debarment process is lawful, reasonable and procedurally fair.
 - (c) A debarment in respect of a person who is no longer a representative of the FSP must commence within six months from the date on which the person sought to be debarred ceased to be a representative of the FSP.
4. An FSR aggrieved by a decision to debar her may, in terms of section 38 of the FAIS ACT, apply for the debarment to be reconsidered by the Tribunal.
5. See Further: Verne Thomas v Agm Mapsure Risk Management (Pty) Ltd : FSP 5/2018 at pages 2 paragraphs 7 – 14 and page 3 paragraphs 1 -14 and page 4 paragraphs 1-10
6. For a debarment to pass muster it must be lawful, reasonable and procedurally fair in the following respects as provided for in section 14(3) of the FAIS ACT which we quote :
- ' a financial services provider must-
- (a) before debarring a person-
 - (1) 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 concluded business, any measures stipulated for the protection of the interests of clients;

(2) provide the person with a copy of the financial services provider's written procedure governing the debarment process; and

(3) give the person a reasonable opportunity to make a submission in response;

(b) consider any response provided in terms of para(a)(111), and then take a decision in terms of subsection (1); and

(c) Immediately notify the person in writing of-

(1) the financial services provider's decision ;

(2) the person's right in terms of Chapter 15 of the Financial Sector Regulation Act; and

(3) any formal requirements in respect of proceedings for the reconsideration of the decision by the Tribunal. “

7. EVALUATION OF THE EVIDENCE

7.1. Compliance with section 14 (3) is imperative for a debarment to pass muster. The Applicant was notified by means of a letter dated 15 June 2018 of the Respondent's intention to debar her . The letter states among other things that details of the alleged contraventions are attached to the letter referred to above. However, during the

hearing it was conceded by the Respondent that no details were attached to the letter. This means that the obligation to provide the Applicant with grounds and reasons before she was debarred was not complied with. This further means that Applicant was not given a reasonable opportunity to make an informed submission.

- 7.2. The Respondent's notification to debar the Applicant was followed by a notification to debar dated 13 August 2018. The letter of the 13 August 2018 did not notify the Applicant of her rights in terms of Chapter 15 of the FSRA and was as such not in compliance with the Respondent's obligation to inform the Applicant of her rights inter alia to have the decision reconsidered.
- 7.3. The Respondent argued during the hearing that Applicant had been furnished with the its debarment policy and that as such would have been apprised of the Respondent's obligations as provided for in section 14(3) of the FAIS ACT.
- 7.4. We cannot agree with the reasoning as this would lead to a dilution of the procedural processes that the legislature has seen fit to enact in order to ensure that persons are debarred after a process that is lawful, reasonable and procedurally fair .
- 7.5. Another issue which in our view bedevilled the process, rendering it unlawful unreasonable and unfair, is the fact the Applicant was induced, under false pretences, to resign in exchange for an assurance that she would not be debarred if she agreed to and indeed resigned.

- 7.6. The fact that the Respondent was induced to resign in exchange for not being debarred is in our view inimical to the provisions of section 13(2) (a) of the FAIS Act, which provide that a debarred must be lawful, reasonable and procedurally fair. In our view the actions of the Applicant's Manager, consisting of a promise that if Applicant resigned she would not be debarred, while this was not the intention of the FSP that he represented does not pass the standard of lawfulness, reasonableness and fairness in section 13(2) of the FAIS Act.
- 7.7. We noted that although the Respondent's representatives seemed to have been surprised by the allegation of inducement to resign, this should not have come as a surprise. The Applicant had mentioned this aspect in her letter datedWe quote from the said letter " I resigned on the 15 March 2018 as I didn't want to go through the possibilities of being debarred as this is the only thing I'm good at and I wanted to still be able to apply for other jobs elsewhere "
- 7.8. It is our considered view that there was no compliance with the peremptory requirements of section 14(3) of the FAIS ACT.
- 7.9. Furthermore, in our view the inducement by a person in authority in the employment of the Respondent to the Applicant to resign in exchange for avoiding debarment while this was not the intention of the Respondent was clearly unlawful, procedurally unfair and unreasonable.
- 7.10. We have already pointed out that the representatives of the Respondent have indicated their intention not to oppose the

Applicant should she wish to apply for the debarment to be uplifted, were we to uphold the debarment.

7.11. In our deliberation regarding an appropriate order, we will take this fact into account.

8. POWERS OF THE TRIBUNAL

8.1. The Tribunal may, among other things in terms of section 234(1)(b)(11) of the FSRA make an order setting aside the decision and substituting the decision of the Tribunal in respect of a decision referred to in paragraph (b) or (c) of the definition of 'decision' in section 218. Section 218 of the FSRA defines "decision" inter alia as "(b) a decision by an authorised financial services provider, as defined in section 1 of the Financial Advisory and Intermediary Services Act, in terms of section 14 of that Act in relation to a specific person."

8.2. The Tribunal has the authority in terms of section 234(1)(b)(11) to make an order setting aside the decision of a financial services provider and substituting the same with its own decision.

8.3. Having regard to the fact there was non compliance with the peremptory provisions of section 14(3) of the FAIS ACT, we would normally set Respondent's decision to debar the Applicant aside

and remit the matter to Respondent for further consideration. However, for us to remit the matter to the Respondent for further consideration would be a waste of time as the Respondent has indicated that even if we were to uphold the decision to debar and the Applicant were to apply for its immediate uplifting, Respondent would not oppose its uplifting. The Respondent has indicated that she will apply for the debarred to be uplifted.

8.4. Our finding is that there was non compliance with the peremptory requirements of section 14(3) of Act.

8.5. For us to require the Respondent consider the matter further would be asking for the Respondent to undertake a mere academic exercise that has no useful purpose.

9. ORDER

We make the following order:

9.1. The Debarment of Dimakatso Mathebula Identity number 8511260843089 is hereby set aside with immediate effect;

9.2. There is no order as to costs.

Signed on behalf of the Tribunal panel at Pretoria on 11 November 2018


ADV. M. E. PHIYEGA (Panelist)