Legal update 10 of 2020: Case law on representatives/financial advisers being debarred after termination of their contracts

Introduction

There are several recent decisions of the Financial Services Tribunal (FST) relating to authorised representatives of financial services providers (FSP) being debarred under the Financial Advisory and Intermediary Services Act (Fais Act). Below are summaries of the cases where the representatives were debarred after termination of their contracts with the FSP and insight into what an FSP should do should they come across similar instances. We have also included more detail on the cases in the document.

Summaries

Case 1: Sanjay Sukdao vs Standard Bank (FSP13/2019) [2020] FST (21 January 2020)

Failure to make a fee disclosure to a client and being debarred after resigning

- The finding: This matter carries two important aspects. The first aspect is the failure by the representative to disclose fees applicable to a product, which is a breach of the Fais General Code of Conduct for authorised FSPs (the Code of Conduct) and making a client sign blank documents only to subsequently insert information without the client's knowledge, which is fraudulent conduct that can result in a representative being debarred. The second aspect is that a representative can be debarred by the FSP for misconduct during the period he was working as a representative of the FSP, even after the representative is no longer contracted to the FSP.
- What the FSP should do: When a representative is found to have committed a breach of the Code of Conduct, we must institute disciplinary proceedings against the representative as soon as possible. If the representative resigns from employment to avoid such disciplinary proceedings, we must proceed with the debarment in a manner that is procedurally and substantially fair.

Case 2: Tevin John Dube vs Clientèle Life Assurance Company Limited (FSP20/2019) [2020] FST (13 February 2020)

Requirements for debarment of a person who is no longer in the service of the FSP and where his whereabouts are unknown

- The finding: The debarment of the representative is procedurally unfair and therefore set aside. The decision to debar is remitted back to the FSP, as it did not attempt to locate the representative who was no longer in its service to deliver a notice of impending debarment. Sending the notice to the representative by email can only be accepted where it is used as means of last resort and other options have been exhausted.

- **What the FSP should do:** Where debarment of a representative whose service has terminated is warranted, the FSP should ensure that it commences the debarment process as soon as possible before it loses contact with the representative. Evidence of prior attempts to contact the representative to deliver the notice of intention to debar must be kept by the FSP if it ultimately sends the notice to the representative by email.

Case 3: Victor Chaane & Sipho Ginya vs NBC Holdings (Pty) Ltd (FSP10/2020) [2020] FST (12 May 2020)

Non-compliance with the procedural requirements. Representatives not given sufficient time before the debarment hearing. FSP cannot waive the statutory duty to debar a representative who does not meet the fit-and-proper requirements

- **The finding:** The debarment of the representatives is set aside and the decision to debar is remitted back to the FSP, as the representatives were not given sufficient time before commencement of the debarment hearing. The fact that the FSP and representatives settled the labour dispute in an amicable manner before the Commission for Conciliation, Mediation and Arbitration (CCMA) does not mean that the FSP cannot debar the representatives where grounds for debarment exist.

What the FSP should do: The FSP must ensure that a debarment process is lawful, reasonable and procedurally fair in that the representative is given sufficient time to prepare for the debarment hearing.

More detail of the cases

Case 1: Sanjay Sukdao vs Standard Bank (FSP13/2019) [2020] FST (21 January 2020)

Failure to make a fee disclosure to a client and being debarred after resigned

The applicant requested the FST to reconsider a decision by Standard Bank, as the FSP, to debar him. He was an employee and a representative of Standard Bank.
In September 2018, a client complained that the applicant had not disclosed the fees applicable to an investment product, which the client bought in September and October 2017. The client further complained that the applicant made her sign blank documents, which the applicant later completed without the client's knowledge.
Once Standard Bank became aware of the client's complaint, it asked the applicant to respond to the client's allegations. The applicant failed to respond to the allegations after having been given several opportunities.
He submitted his resignation on 1 December 2018.
Standard Bank notified the applicant on 7 December 2018 of the scheduling of a disciplinary hearing for 14 December 2018 to which the applicant objected and later failed to attend. The disciplinary hearing took place nonetheless in the applicant's absence and he was found guilty of the charges made, i.e. misconduct in that he contravened Standard Bank's financial advisory processes, the Fais Act and the Code of Conduct.

The FST considered the two aspects of this matter below:

- Was the post-resignation debarment competent?
  The FST considered a judgment by the Constitutional Court in the matter of *Toyota SA Motors (Pty) Ltd vs CCMA* where the Court held that an employer did not have the authority to discipline a former employee who had resigned from the employer's service. The FST also considered section 14(5) of the Fais Act, which provides that debarment of a representative who is no longer a representative of an FSP must be done within six months of that person having ceased to be a representative of the FSP. The FST held that the designation of a representative is governed by the Fais Act and not the employment contract, and it needed to pass through the following three gates for it to be lawful:
  - The reasons for the debarment must have occurred and become known to the FSP while the person was a representative of the FSP
  - The debarment process is lawful, reasonable and procedurally fair
  - The debarment of a person, who is no longer a representative of an FSP, is done not more than six months after the person ceased to be a representative of the FSP
- Was the debarment of the applicant procedurally fair?
  The FST found that the FSP provided the applicant with written notification of the disciplinary proceedings and also afforded him sufficient opportunity to make his representations. However, he failed to defend himself

against the allegations against him. The FSP notified the applicant of the outcome of the disciplinary proceedings and the possibility of his debarment. He was also given notice of the intention to debar him and given the opportunity to make representations.
His representations were considered by the FSP and the FSP decided to debar the applicant.

The FST held that there was no basis to interfere with the FSP's decision to debar the applicant, as the post-resignation debarment was competent and procedurally fair.

Case 2: Tevin John Dube vs Clientèle Life Assurance Company Limited (FSP20/2019) [2020] FST (13 February 2020)

Requirements for debarment of a person who is no longer in the service of the FSP and where his whereabouts are unknown

The applicant was an authorised representative of the FSP. On 21 December 2018 a complaint arose from the FSP's quality assurance department that the representative had breached the FSP's procedure in the manner he captured a policy on 16 December 2018 and that his conduct amounted to fraud. The matter was brought to the attention of the representative on 17 January 2019 and he stated that he apologised and received training on the same day. The representative's employment also terminated on the same day. On 1 April 2019 the FSP issued a notice of debarment hearing and sent it to the representative's email address.

The representative argued before the FST that he did not receive the notice of debarment and that the email address to which the notice was sent was not his. He further argued that the FST had his correct contact details and that they had contacted him regarding other matters.

The FST found that section 14 (2)(b) of the Fais Act provides that if an FSP cannot locate a person for purposes of delivering a notice or document (for debarment), then after taking reasonable steps like sending the document to the person's email or physical address, the delivery of documents to the person's last known email or physical or business address will suffice. This means that the FSP has the obligation to locate the representative and only once the means of locating the representative have been exhausted, can the FSP send the documents to the last-known email or physical address of the representative.

Evidence shows that the FSP had the opportunity to locate the representative to ensure delivery of the notice of debarment but it did not do so. It merely sent the notice by email without verifying that it is the representative's correct email address. The FST held that the FSP failed to ensure that the process to debar the representative was lawful, reasonable and procedurally fair.

The FST set aside the debarment of the representative and remitted the decision to debar back to the FSP.

Case 3: Victor Chaane & Sipho Ginya vs NBC Holdings (Pty) Ltd (FSP10/2020) [2020] FST (12 May 2020)

Non-compliance with the procedural requirements. Representatives not given sufficient time before the debarment hearing. FSPs cannot waive the statutory duty to debar a representative who does not meet the fit-and-proper requirements

The representatives were employed by the FSP and they both sought to resign on 29 November 2019. The FSP refused to accept their resignation and placed them on suspension pending the outcome of a disciplinary hearing scheduled for 5 December 2019. The representatives ignored the disciplinary hearing, which proceeded in their absence. They were found guilty of five charges, the last one being that they acted inconsistently with the fit-and-proper requirements set out in the Fais Act, and they were dismissed on 12 December 2019. On 20 December 2019, the FSP issued a notice of intention to debar the representatives and served it on their attorney.
The representatives were given three full days to respond to the notice as 25 and 26 December 2019 were not working days. The representatives did not respond to the debarment notice and the FSP debarred them on 30 December 2019.

When approaching the FST to challenge their debarment, the representatives inadvertently challenged the grounds for their debarment as opposed to challenging the FSP's decision to debar them on 30 December 2019.
The representatives also argued that since the labour dispute with the FSP had been settled at the CCMA on the terms that the FSP accepts their resignation at 29 November 2019 and rescinds their dismissal, grounds for their debarment (which were founded in the disciplinary hearing of December 2019) have therefore fallen away.

The FST found that:

- CCMA proceedings are labour-related proceedings and have nothing to do with debarment in terms of the Fais Act
- A settlement agreement pertaining to labour issues, whether confirmed by the CCMA or not, does not affect a person's debarment, as the FSP had the necessary jurisdiction to debar when it did
- The representatives requested the FST to make a decision regarding their debarment and not to remit the matter back to the FSP for reconsideration. The problem with this is that the representatives did not ask for admission of additional evidence and they did not address the core complaints made against them by the FSP
- As the record stands, referring to the Judge's comments in the High Court matter involving the representatives where there are allegations of corruption, there is a *prima facie* case for their debarment
- The fact that there was a procedural error in their debarment does not mean that the public should be subjected to the risk created by persons who could potentially fail the 'fit-and-proper' test

The FST set aside the debarment of the representatives and remitted the matter back to the FSP for reconsideration of the decision.

While the cases set out above have resulted in the FST setting aside the decision by the FSPs to debar representatives, it must be borne in mind that remitting a decision back to a decision-maker for reconsideration does not mean that the decision-maker cannot make the same decision (i.e. to debar) once again. In fact, in most of these cases, it is reasonable and justified of the FSP to reinstate the debarment enquiry as the merits of the case warrants debarment. The FSPs' processes need to be amended to remove non-compliance with the Fais Act so they may be lawful, reasonable and fair.

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