

Legal update 11 of 2020: Case law on debarment of representatives/financial advisers being set aside due to defective debarment notices.

Introduction

There are several recent decisions of the Financial Services Tribunal (FST) relating to the debarment of authorised representatives of financial services providers (FSP) under the Financial Advisory and Intermediary Services Act (Fais Act). Below are summaries of cases where the debarment was procedurally unfair due to a defective notice of debarment 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: Sesinyana Leotlela vs Old Mutual Life Assurance Company (SA) Limited (FSP35/2019) [2020] FST (27 February 2020)

Non-compliance with the procedural requirements.
Defective notice of intention to debar

- **The finding:** The debarment of a representative is set aside and the decision to debar is remitted back to the FSP, as the notice of intention to debar was defective, by not conforming to the requirements set out in section 14 (3)(a) of the Fais Act (i.e. notice does not disclose the reasons for the intention to debar).
- **What the FSP should do:** The FSP must ensure that a debarment process is lawful, reasonable and procedurally fair in that the notice of intention to debar sets out the reasons for the intention to debar.

Case 2: Andiswa Jaku vs Old Mutual Finance (Pty) Ltd (FSP62/2019) [2020] FST (5 March 2020)

Non-compliance with the procedural requirements.
Defective notice of intention to debar

- **The finding:** The debarment of a representative is set aside and the decision to debar is remitted back to the FSP, as the notice of intention to debar was defective, by not conforming to the requirements set out in section 14 (3)(a) of the Fais Act (i.e. notice does not disclose the reasons for the intention to debar).
- **What the FSP should do:** The FSP must ensure that a debarment process is lawful, reasonable and procedurally fair in that the notice of intention to debar sets out the reasons for the intention to debar.

Case 3: Lerato Pertunia Borole vs ABSA & Another (FSP27/2019) [2020] FST (21 April 2020)

Non-compliance with the procedural requirements.

Representative not furnished with evidence of her alleged misconduct, which is the basis for the intention to debar, and not given the opportunity to cross-examine witnesses whose statements were used to debar her

- **The finding:** The debarment of a representative is set aside and the decision to debar is remitted back to the FSP as the representative was not given the documents

More detail of the cases

Case 1: Sesinyana Leotlela vs Old Mutual Life Assurance Company (SA) Limited (FSP35/2019) [2020] FST (27 February 2020)

Non-compliance with the procedural requirements.

Defective notice of intention to debar

The applicant was a representative of the FSP employed as a financial adviser until her resignation from employment on 5 September 2018. The FSP did not accept her resignation and placed her on suspension pending investigations into allegations that were made by an anonymous caller who alleged that the representative misrepresented that she had worked for African Bank between 2001 and 2003 on her résumé to gain employment with the FSP by fraudulent means.

The representative argued that she was having problems with her husband, who she was separated from, and that he had threatened to “*make her life a living hell*”, which threat she had communicated to her manager before the anonymous call was made to the FSP. She believes that it was her estranged husband, who made the anonymous call with a view to stir up trouble for her at work. The FSP’s forensic investigators contacted African Bank to establish if the representative had worked for them between 2001 and 2003. The forensic investigators were advised that there was no record of the representative having ever worked for African Bank. This led to the FSP’s decision to institute debarment proceedings, which took place on 5 December 2018, against the representative.

At the debarment hearing, the chairperson asked the representative if she felt that she had sufficient time to prepare for the hearing. Her response was that she did not

which prove her misconduct and she was not given the opportunity to cross-examine witnesses at the debarment hearing.

- **What the FSP should do:** The FSP must ensure that a debarment process is lawful, reasonable and procedurally fair in that the representative is furnished with the documents relied upon to prove the alleged misconduct and the representative must be given the opportunity to cross-examine witness at the debarment hearing.

understand why the FSP wanted to have her debarred. The chairperson adjourned the proceedings for 45 minutes to allow her the opportunity to obtain evidence that she worked for African Bank between 2001 and 2003, and that she did not make a misrepresentation in her résumé when she applied for her role with the FSP. The representative did not find any evidence to support her résumé and the proceedings were postponed to 12 December 2019 to allow her a further opportunity to obtain evidence and/or witnesses to corroborate her employment history, as stated in her résumé. On 12 December 2018 the hearing was postponed again to 14 December 2018 to allow the representative a further opportunity to obtain evidence, only this time from the Department of Labour as African Bank had advised her that it did not have her employment records dating as far back as 2001. The hearing would not resume on 14 December 2018 but the chairperson was to make a decision on that date depending on the evidence produced by the representative. The representative argued before the FST that she did not have the chairperson’s email to send her evidence to him, as agreed by 14 December 2018, so she asked her former line manager, who was part of the proceedings, for his email address and he did not furnish her with it until 18 December 2018. On 18 December 2018, the chairperson delivered a decision for the debarment of the representative, as he had not received her evidence. That is what led to the representative’s application for reconsideration of her debarment before the FST.

The FST found that the notice of the debarment hearing did not contain the reasons and grounds for debarment, which was why the representative did not know why the FSP intended to debar her when she appeared at the hearing on 5 December 2018. The FST considered sections 14(3)(a)

and (b) of the Fais Act, which required an FSP that intended to debar a representative to give adequate notice to such representative, including the reasons and grounds for debarment, and consider the representative's response to the case made against her before debarring the representative. The FST held that the notice given to the representative was defective, as it did not provide her with the reasons and grounds for her intended debarment. The numerous opportunities given to the representative to obtain her evidence did not cure the defect, as the notice did not comply with section 14(3)(a) of the Fais Act. The representative's debarment was set aside by the FST and the matter was remitted back to the FSP.

Case 2: Andiswa Jaku vs Old Mutual Finance (Pty) Ltd (FSP62/2019) [2020] FST (5 March 2020)

Non-compliance with the procedural requirements.
Defective notice of intention to debar

The representative was employed as a branch manager of the FSP until she resigned on 20 May 2019. According to the FSP, forensic investigations had already commenced against the representative when she resigned. However, they had not been concluded.

The FSP conceded before the FST that the debarment process followed in this matter had been found to be procedurally unfair and set aside in another similar matter held in the FST (see *C.T Khoza v Old Mutual Finance (Pty) Ltd (RF) FST24/2019*). The unfairness in the process followed by the FSP arose from the debarment notice, which did not disclose the reasons and the grounds for the intention to debar. The debarment notice only notified the representative that the reasons for debarment were "non-compliance with fit and proper requirements based on (a) lack of honesty, integrity and good standing". The debarment notice, dated 21 August 2019, invited the representative to make a written submission by 7 September 2019 with reasons to why she should not be debarred.

The representative did not make any written submission and she did not attend the debarment enquiry. According to her, she only learnt of her debarment on 11 October 2019 and immediately challenged the decision.

The FSP conceded that the debarment notice did not disclose the full reasons of the allegations that led to the debarment of the representative and that she might have not been fully aware of all the allegations against her. Section 14(2)(a) of the Fais Act requires that the

debarment process must be lawful, reasonable and procedurally fair.

The FST found that the FSP's failure to comply with the fairness requirement rendered the representative's debarment unlawful. The FST set aside the representative's debarment and remitted the decision back to the FSP for reconsideration.

The matter was referred back to the PFA for reconsideration.

Case 3: Lerato Pertunia Borole vs ABSA & Another (FSP27/2019) [2020] FST (21 April 2020)

Non-compliance with the procedural requirements.
Representative not furnished with evidence of her alleged misconduct, which was the basis for the intention to debar and she was also not given the opportunity to cross-examine witnesses whose statements were used to debar her

The applicant was a representative of the FSP, employed as a sales consultant until her resignation from employment on 3 December 2018. When the FSP accepted her resignation, it did not advise her of any pending investigation against her. In March 2019, the FSP sent the representative a notice of her debarment hearing based on misconduct for:

- Theft of a vacuum sack
- Exposing clients' information by taking such information out of the branch without authorisation
- Accepting money from a client

The representative was debarred by the FSP, hence her application for reconsideration of the FSP's decision in the FST. The representative argued that her debarment should be set aside by the FST for the following reasons:

- The debarment was unlawful, as she was no longer an employee nor a representative of the FSP at the time of her debarment.
- The chairperson of her debarment hearing was unreasonable by refusing her postponement request, furnishing further particulars and considering relevant factors such as video footage, and not allowing her legal representation.
- She was not allowed to cross-examine witnesses relied upon by the FSP. The witnesses were not called. However, their statements were used in the proceedings

and she was not furnished with the statements prior to the hearing;

- The investigation which the FSP alleges to have been pending against her at the time of her resignation was not underway when she resigned. No investigation was concluded against her and she has not been furnished with a copy of the outcome or report; and
- The chairperson of the hearing was biased.

The FSP argued that an investigation was carried out and concluded. It also conceded that the representative was not given the opportunity to cross-examine witnesses whose statements the FSP relied upon.

The FST focused on only one argument made by the representative as it formed the main part of their decision, i.e. the representative was not afforded the opportunity to cross-examine witnesses. The FST found that:

- In debarment proceedings, the FSP must give the representative the opportunity to be heard and to challenge the evidence placed against her. This is in line with the rules of natural justice;
- The representative disputed that she did anything wrong. This means that there is a dispute of fact. However, no witnesses were called nor were they cross-examined. Where there is a dispute of fact, cross-examination is crucial to determine the probabilities in each version. The representative could not ask any questions to her accuser to prove that she did not commit any misconduct as she was not given the

opportunity and that went against the principles of natural justice.

- The representative was not furnished with a copy of the forensic report relied on by the FSP. The report was not produced even at the FST. That showed that the representative was not furnished with crucial documents relevant to her debarment.
- The failure by the FSP to properly put its cases against the representative and the failure to provide crucial documents rendered the process procedurally flawed and unfair.

As a result, the FST set aside the debarment of the representative and remitted the decision back to the FSP for reconsideration.

While the cases set out above 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 that they may be lawful, reasonable and fair.

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