



moment OF TRUTH

Legal update 6 of 2020: Case law on financial adviser-related matters

Introduction

There have been recent cases that affect financial advisers. Below is a summary of these cases and insight into how we handle such matters. We have also included more detail on the cases in the document.

Summary

Case 1: De Beer vs Coetzer t/a Downstream Trading (case number: Fais 05821/13-14/GP 1)

A financial services provider (FSP) must render suitable advice and make the necessary disclosures when advising clients.

- **The finding:** The FSP violated the Financial Advisory and Intermediary Services (Fais) Act and General Code of Conduct by failing to give proper advice and not making the necessary disclosures to the client.
- **How we deal with this:** We ensure that our appointed advisers and intermediaries provide our clients with the highest standard of advice and intermediary services.

Case 2: AM Kgabo vs Independent Risk Distribution South Africa (FSP41/2019)

Debarring of a financial services representative for no longer meeting the fit and proper requirements of honesty and integrity.

- **The finding:** The Financial Services Tribunal (FST) could not find any reason to set aside the decision to debar a

financial services representative for no longer meeting the fit and proper requirements of honesty and integrity.

- **How we deal with this:** If an independent financial services representative is debarred, that person will no longer be accredited by us.

Case 3: Malleeson vs Liberty Group Limited (case number: FSP38/2019)

Dismissal of an application for the reconsideration of a decision to debar a financial services representative.

- **The finding:** The FST dismissed an application for the reconsideration of a decision to debar a financial services representative on the grounds of fraud.
- **How we deal with this:** Any allegation of fraud against an appointed representative will be thoroughly investigated. If such allegations are proven to be true, we will debar that representative.

More detail on the cases

Case 1: De Beer vs Coetzer t/a Downstream Trading (case number: Fais 05821/13-14/GP 1)

The FSP violated the Fais Act and General Code of Conduct by failing to give proper advice and making the necessary disclosures to the client.

Ms De Beer was a former employee of Netcare. Ms Coetzer was a sole proprietor who traded under the name Downstream Trading and was a registered Financial Services Provider (FSP).

In 2011, Ms Coetzer contacted Ms De Beer and told her that she had unclaimed shares in Netcare. Ms De Beer met with Ms Coetzer who advised Ms De Beer to sell her Netcare shares and use the proceeds to buy shares in Unimin African Resources (Pty) Ltd, which Ms De Beer agreed to do. The Netcare shares were sold for R750 000. R600 000 of that was used to buy the Unimin shares and R150 000 was used to invest in Platfields. According to Ms De Beer, Ms Coetzer did not inform her that she paid commission, of 20% of the value of the transaction, which amounted to R178 000.

In 2012, Ms De Beer asked Ms Coetzer to help her sell the Unimin and Platfields shares. That is when she became aware that the Unimin shares had been converted to ordinary shares which could not be sold and the Platfields shares were only worth R3 000. Ms De Beer lodged a complaint with the Fais Ombudsman (the Ombud) and asked for repayment of the R750 000.

Ms Coetzer denied providing financial advice and intermediary services even though she was licensed to do both. She stated that she conducted business as a tracing agent in respect of unclaimed dividends and securities. She claimed that she worked off a database that she was provided with and after tracing the individual she would assist with replacing share certificates. In turn, she charged a fee of 20% of the value of the transaction, which was R178 000.

Ms Coetzer was asked to make further submissions to the Ombud and she provided a copy of a document which both she and Ms De Beer signed. The document stated that Ms

De Beer confirmed that she was fully advised regarding the purchasing of shares and the risk of doing so.

The document would appear to be a standard document that can be used for any share transaction; no specific information was provided with regards to the Unimin investment or what was disclosed to Ms De Beer with regards to Unimin.

The Ombud found that Ms Coetzer's actions resulted in the replacement of the Netcare shares with the Unimin shares. This fell within the definition of advice. The document signed by both Ms De Beer and Ms Coetzer created a relationship to render financial advice. Ms Coetzer therefore had a duty to comply with the Fais Act and General Code of Conduct which she failed to do. The Ombud also found that she failed to disclose the risks to Ms De Beer and failed to show that the recommendations made were appropriate to Ms De Beer's needs.

The Ombud upheld the complaint and ordered that Ms Coetzer pay R750 000 to Ms De Beer.

Case 2: AM Kgabo vs Independent Risk Distribution South Africa (Case number: FSP41/2019)

The FST could not find any reason to set aside the decision to debar a financial services representative for no longer meeting the fit and proper requirements of honesty and integrity.

In 2018, Ms Kgabo was appointed as a financial services representative under the supervision of the Independent Risk Distribution South Africa (IRDSA). In 2019, the Hospital Authorisation Department of Affinity Health received a call from a member, Ms Maseko, requesting admission for hospitalisation for childbirth. Ms Maseko was already in the third trimester of her pregnancy and her expected delivery date was 6 March 2019. Ms Kgabo had sold the product to Ms Maseko on 11 September 2018 and the policy started on 1 October 2018. There was a standard 12 month waiting period for pre-existing conditions and for that reason Ms Maseko's claim was immediately rejected.

Ms Maseko lodged a complaint with Affinity Health. She stated that at the point of sale, she was told by Ms Kgabo

to not disclose her pregnancy. She provided screenshots of conversations between herself and Ms Kgabo confirming this. In March 2019, Ms Kgabo was given notice to attend debarment proceedings and was given a chance to make written submissions which she did not do. The Independent Risk Distribution South Africa then made the decision that Ms Kgabo was no longer fit and proper and no longer met the requirements of honesty and integrity.

In July 2019, Ms Kgabo lodged an application for reconsideration with the FST on the basis that she was not aware of the debarment proceedings. The notice had not been sent to her correct email address. Ms Kgabo did not submit any grounds for reconsideration. She admitted her conduct fell short of the fit and proper requirements.

The FST could not find any grounds to set aside Ms Kgabo's debarment. It stated that she could be reappointed provided she met the legal requirements.

Case 3: Malleeson vs Liberty Group Limited (case number: FSP38/2019)

An application for the reconsideration of a decision to debar a financial services representative on the grounds of fraud was dismissed.

Mr Malleeson was appointed by Liberty Group Limited (Liberty) as a financial services representative. He was allocated a company called Hereford Pelican (Pty) Ltd. In September 2018, Liberty's forensics department received a request to investigate allegations of fraud from a client, Mr CM Mulder, based on fraudulent payments made from his policies.

The investigation showed that payments were made from Mr Mulder's policies without his knowledge and it appeared from the evidence that Mr Malleeson had committed the fraud. The evidence appeared to show that two bank accounts were opened in Mr Mulder's name using false information and money was transferred into those accounts.

Liberty took action against Mr Malleeson. After finding him guilty of fraud and breach of contract, he was debarred. He then applied to the FST for reconsideration of the decision to debar him.

The FST found that there was enough evidence linking Mr Malleeson to the fraud. There was a clear link between Mr Malleeson's account and the two accounts opened in Mr Mulder's name. The Mulder accounts appeared to have been opened with a transfer from Mr Malleeson's account. Liberty could also prove that there were multiple transfers from the so-called Mr Mulder accounts to several bank accounts in Mr Malleeson's names that were worth, in total, R187 000. Mr Malleeson denied any knowledge of the accounts opened in Mr Mulder's name and claimed that someone could have stolen Mr Mulder's identity. However, he could not give a proper explanation as to why those transfers were made into his accounts within a number of days.

The FST dismissed the application.

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