THE FINANCIAL SERVICES TRIBUNAL

Case №: FSP24/2021

In the matter between:

NICOLAAS JACOBUS DU PLESSIS WESSELS Applicant

and

AFRICAN WEALTH ORGANISATION (PTY) LTD	First Respondent
JANDRE VAN WYK	Second Respondent
THE FINANCIAL SECTOR CONDUCT AUTHORITY	Third Respondent
THE COMMISSIONER FOR THE FINANCIAL SECTOR CONDUT AUTHORITY	Fourth Respondent

Tribunal: Adv William Ndinisa (chair), Adv K Magano and Ms Zama Nkubungu-Shangisa

Appearance for Applicant	Adv JH Sullivan instructed by Oosthuizen Le Roux & Janse Van Rensburg Attorneys
Appearing for 1st and 2nd Respondents:	Appeared in person: Mr Jandre van Wyk
Appearance for 3rd and 4th Respondents:	No appearance
Date of Hearing:	17 November 2021
Date of Decision:	21 January 2022

Summary: Failure to comply with section 14(1)(b) of the FAIS Act – not meeting jurisdictional fact – Section 14(2)(a) of the FAIS Act - the FSP must ensure that the debarment process is lawful, reasonable and procedurally fair. Breach of restraint of trade agreement – is not a ground for debarment.

DECISION

INTRODUCTION

1. The Applicant, Mr Nicolaas Jacobus Du Plessis Wessels, applies in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 ("FSR

Act"), for reconsideration of a decision by African Wealth Organisation contained in a letter dated 4 March 2021 (Pty) Ltd ("the Decision"). African Wealth Organisation (Pty) Ltd is a Financial Service Provider (FSP), is cited herein as the First Respondent.

2. The Second Respondent is Jandre Van Wyk, a director and a key individual of the First Respondent.

3. It is not apparent why the Third and the Fourth Respondents were cited in this matter, save for the fact that the Third Respondent is a regulatory authority task with, amongst other things, function of regulating and supervising financial institutions.

BACKGROUND

Essential context

4. On or about 1 November 2019 the First Respondent appointed the Applicant to a position of a Financial Planner. The employment relationship between the Applicant and the First Respondent lasted for a period not more than fifteen (15) months as the Applicant tendered his resignation on or about 12 January 2021.

5. The resignation of the Applicant from his employment set a stage for the beginning of litigious history between the First Respondent and the Applicant. The First Respondent approached the High Court in the North West Division, Mahikeng on urgent basis for a relief not germane to this matter. While the High Court matter was pending, the First Respondent

caused a notice of intention to debar dated 15 February 2021 to be delivered on the Applicant ("the Intention to debar").

Intention to debar

6. The Intention to debar, in essence, alleges that the Applicant had meetings/dealings with clients of the First Respondent and also prepared proposals. The clients referred to are Dr van Eck, BC and M Greyling, and JT Marx. Relevant date of complaint which refers to Dr van Eck is 24 November 2020. Further, relevant dates of complaints which relate to BC and M Greyling are 8 and 9 December 2020. A date linked to JT Marx is 4 January 2021.

7. Further, the Intention to debar states that the Applicant directed an email on 5 January 2021 to the competition of the First Respondent namely Mr JP Lombard from Cu-Brokers. There were emails which contained proposals of the aforementioned clients. It is stated that on 8 January 2021 more proposal were done on the clients.

8. As one of the grounds of debarment, the First Respondent states that the Applicant sent confidential information belonging to the First Respondent to another Financial Services Provider and that is in breach of contract of employment. The First Respondent, further, alleges that the Applicant failed to act in the best interest of clients and of the First Respondent by creating expectations that financial planning was done and exposing them (the First Respondent) to risk.

9. Further, the First Respondent alleged that the Applicant attempted to "poach" clients and employees belonging to it. In doing so, the Applicant, according to the First Respondent, used confidential client information and knowledge of internal business procedures. In summary, the First Respondent informed the Applicant that it intent to debar the Applicant for the reasons that he contravened the Financial Advisory and Intermediary Services Act 37 of 2002 ("the FAIS Act"), Chapter 2 of Board Notice 194 of 2017 and certain provisions of Protection of Personal Information Act 4 of 2013. The Applicant was invited to respond to the allegations.

10. On 24 February 2021 the Applicant delivered his response to the Intention to debar. The salient preliminary points listed in the Applicant's response to the Intention to debar are summarised as follows: -

10.1 The First Respondent did not, according to the Applicant, refer to the matter as urgent or substantially prejudicial to the clients or the general public to warrant the debarment process to be carried out on urgent basis;

10.2 The First Respondent has not complied with the jurisdictional factors and/or requirements set out in section 14 of the FAIS Act. In support of this section, more specifically section 14(1)(b) of the FAIS Act, the Applicant refers to paragraph 3.1 of the First Respondent's (the FSP) Replying Affidavit to the High Court Urgent Application. The relevance of this point is that the First Respondent confirmed under oath that the alleged reasons for

Applicant's debarment become known to the First Respondent (the FSP) subsequent to the Applicant's leaving the service of the First Respondent and having ceased to act as representative;

10.3 Further, the Applicant refers and relied on paragraph 3.1.4 of Guidance Notice 1 of 2019 ("the Guide") and such Guide states, amongst other things, that if the reason for debarment occurred or only become known after the representative had ceased to be a representative of the FSP, the FSP may not debar the representative, and must refer the matter to the Financial Sector Conduct Authority ("the Authority");

10.4 Furthermore, the Applicant took an issue that the First Respondent instituted the debarment process and, according to the Applicant, the First Respondent basically took the law into its own hands;

10.5 Further, the Applicant states that the First Respondent has no debarment policy and for that reason it cannot comply with the FAIS Act and therefore he (the Applicant) is placed in an invidious position in that he cannot meet the case put forth by the First Respondent; and

10.6 The First Respondent is, according to the Applicant, attempting to satisfy contractual grievances by abusing the debarment process.

11. In opposing the Intention to debar, the Applicant stated that he is extremely prejudiced by the vague and unsubstantiated averments made

by the First Respondent for failure to attach various documentations referred to in the Intention to debar. For instance, the First Respondent referred to emails involving a certain Mr Lombard associated to the "*welcome to the winning team"* title and according to the Applicant, same emails were not attached.

12. In respect of the allegations made about Mr and Mrs Greyling, the Applicant stated that he had never done proposals while he was in the employ of the First Respondent. The Applicant maintained that Mr and Mrs Greyling were never clients of the First Respondent. Further, the Applicant stated that Mr JTM Jansen van Rensburg (who was wrongly referred to as JT Marx) was never a client of First Respondent.

13. The Applicant maintained that Mr Lombard of the Consult-Us Brokers had authority from the concerned clients referred to in the Intention to debar to obtained quotations. Further, the Applicant explained that a certain Ms De Beer from Bright Rock Insure wrongly sent documents by email to him. On noticing the error, the Applicant further explained that the same mails were forwarded to Mr Lombard.

14. The Applicant persists that there is no tangible evidence that he had provided personal information of any client to Lombard. According to the Applicant, Mr and Mrs Greyling and Mr Jansen van Rensburg were never clients of the First Respondent.

15. After having received the response of the Applicant, the First Respondent took a decision to debar the Applicant, as evident from the content of the

letter dated 4 March 2021. The content of the aforementioned letter is interchangeably referred to herein as the Notice of Debarment or the Decision.[1] It is the Decision that is challenged by the Applicant before this Tribunal.

GROUNDS OF RECONSIDERATION

16. The Applicant challenges the Decision on specific grounds and same are summarised as follows:

    16.1 The Intention to debar and the Notice of Debarment and the evidence therein contained differ materially;

    16.2 The First Respondent debarred the Applicant under circumstances where the jurisdictional factors appearing in section 14 of the FAIS Act were not met;

    16.3 The debarment process followed by the First Respondent were flawed; and

    16.4 The First Respondent failed to adequately consider evidence proffered by the Applicant in a form of affidavit.

17. It is worth noting in passing that the Applicant brought an application to suspend the operation First Respondent's Decision in terms of section 231 of the FSR Act and same was granted by the Deputy Chairperson of the Tribunal on 30 March 2021.

[1] Record A, pages 27 - 30

LEGAL MATRIX AND ANALYSIS

18. Section 14 of the FAIS Act provides a legislative framework for a debarment process. The relevant provisions for purposes of this matter are contained in section 14(1)(a) and (b) which states the following: -

"(1)

(a) An authorised financial services provider must debar a person from rendering financial services who is or was, as the case may be-

(i) a representative of the financial services provider; or

(ii) a key individual of such representative, if the financial services provider is satisfied on the basis of available facts and information that the person-

(iii) does not meet, or no longer complies with, the requirements referred to in section 13(2)(a); or

(iv) has contravened or failed to comply with any provision of this Act in a material manner;

(b) The reasons for a debarment in terms of paragraph (a) ***must have occurred and become known*** *to the financial services provider while the person was a representative of the provider."* (own emphasis)

19. Further, section 14(2) and (3) of the FAIS Act provides guidance on how a debarment process is to be conducted. The relevant provisions state the following: -

"(2)

(a) Before effecting a debarment in terms of subsection (1), the provider must ensure that the debarment process is lawful, reasonable and procedurally fair.

(b) ....

(3) A financial service provider must-

(a) *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**;*

(b) *consider any response provided in terms of paragraph (a)(iii), and then take a decision in terms of subsection (1); and*

(c) *immediately notify the person in writing of-*

(i) *the financial services provider's decision;*

(ii) *the persons' rights in terms of Chapter 15 of the Financial Sector Regulation Act; and*

(iii) *any formal requirements in respect of proceedings for the reconsideration of the decision by the Tribunal."* (own emphasis)

20. Furthermore, the Authority has provided guidance to financial services providers on, amongst other things, what is to be considered in instituting debarment processes. The Guide, a copy of same has been attached to the records before us, states in paragraph 3.1.4 that: -

"*The first requirement means that, if the reason for debarment occurred or only become known after a representative had ceased to be a representative of the FSP, the FSP may not debar the representative and*

must refer the matter to the Authority." (own emphasis)

21. The Guide appears to have been crafted in line with the provisions contained in section 14(1)(b) of the FAIS Act, quoted herein above.

22. In respect of jurisdictional fact, our courts[2] have stated and acknowledged that up on a proper construction of the legislation concerned, a jurisdictional fact may fall into one or other of two broad categories. It may consist of a fact, or state of affairs, which objectively speaking, must have existed before the statutory power could validly be exercised. In such a case, the objective existence of the jurisdictional act as a prelude to the exercise of that power in a particular case is justiciable in a court of law. If the court finds that objectively the fact did not exist it may then declare invalid the purported exercise of the power.

23. Counsel for the Applicant, Adv JH Sullivan submitted that the First Respondent has not complied with the provisions of section 14, more specifically section 14(1)(b) of the FAIS Act in that the reasons advanced by the First Respondent for the debarment of the Applicant became known to the First and Second Respondents after the Applicant had left the services of the First Respondent as a representative. The Second Respondent, who appeared in person and for the First Respondent, did not have a plausible response to persuade this Tribunal otherwise. The records before us demonstrates that the First and Second Respondents

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[2] *Democratic Alliance v The President of the RSA & others* (263/11) [2011] ZASCA 241 (1 December 2011), at paragraph 118

fell short of acting within the constraints of section 14(1)(b) of the FAIS Act.

24. The Applicant, in his heads of argument, referred this panel to a previous decision of this Tribunal where the application of section 14(1)(b) of the FAIS Act was considered.[3] After having satisfied itself of non-compliance with section 14(1)(b) of the FAIS Act, this Tribunal concluded in that case that the falling short of compliance means that the FSP did not have jurisdiction to debar the applicant. This case is no different. This panel is satisfied that on the facts before it, the First Respondent had no jurisdiction to debar the Applicant. In our view, this should mark the end of the enquiry in this matter. Holding a contrary view will, in our view, encourage the First Respondent to act out of the ambit of the law and therefore unlawful.

25. We note the Applicant raised more grounds of reconsideration. For instance, the Applicant stated that the First Respondent issued an Intention to debar and thereafter debarred the Applicant on the basis of evidence not made available to hm. Further, the First Respondent could not, in our view, provide a plausible explanation. For instance, the Applicant submitted that he was not provided with an opportunity to respond to various annexure attached to the Decision[4] and the First Respondent could not counter that submission. It goes without saying that failure to provide the Applicant with documentation prejudice the

[3] *MC Dlamini v Peter John Farham t/a P & E Brokers* FSPSO/2020
[4] Record, Part A, at page 17

Applicant and therefore unreasonable and unlawful.

26. In respect of the merits of the matter, more specifically on the allegations that the Applicant acted dishonestly without any integrity, and posed risk to the First respondent, it is our view that the First Respondent did not adequately consider the explanation proffered by the Applicant. For instance, the Applicant submitted that the clients whose information is affected, did provide some form of authority to a third party.

27. Further, the allegations of breach of restraint of trade on its own does not appear to sustain a ground for debarment.[5]

28. We therefore find that for the reasons stated herein above, the Decision of the First Respondent dated 4 March 2021 is not sustainable in law and therefore is set aside.

29. We note that the Applicant sought a cost order against the First and Second Respondents. This Tribunal is aware that it may, in exceptional circumstances, make an order that a party to proceedings on an application for consideration pay some or all of the costs reasonably and properly incurred by the other party.[6]

30. This panel does not find exceptional circumstances existing in this matter to warrant a cost order. It is our view that in situations where parties are not legally trained, conduct their own debarment processes as the First

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[5] *Gontse Itumeleng Michael Kekana v B-Sure Africa Insurance Brokers (Pty) Ltd* FSP20/2021, dated decision of the Tribunal, 21 April 2021

[6] Section 324(2) if the FSR Act

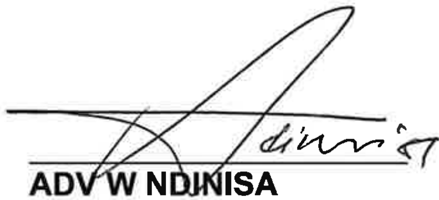
and Second Respondents did and as a result falling short of complying with the relevant laws, is not out of the ordinary or exceptional.

ORDER

(a) The application for reconsideration is successful and the Decision of the First Respondent dated 4 March 2021 is set aside.

(b) No costs order.

Signed on behalf of the Tribunal



ADV W NDINISA

With the Panel consisting also of:

Adv K Magano

Ms Z Nkubungu- Shangisa