

THE FINANCIAL SERVICES TRIBUNAL

Case №: **17/2020**

In the matter between:

MARGO DAVIDSON

Applicant

and

ABSA BANK LIMITED

Respondent

Tribunal: H Kooverjie (chair), L Makhubela and E Phiyega

Summary: What constitutes a fair debarment process in terms of section 14(3) of the Financial Advisory and Intermediary Services Act 37 of 2002 ("**FAIS Act**")?

DECISION

A THE APPLICATION:

1. This application for reconsideration has been instituted by the applicant in respect of ABSA's decision dated 29 September 2019, to debar her.

2. The application was premised on the basis that the decision to debar the applicant was unjustified and the debarment process was unfair.

3. At this juncture it is appropriate to note that the applicant has filed a condonation application for the late filing of the application. The respondent has not opposed

the condonation. This Tribunal has considered the reasons for the late institution of the application and finds that there is merit in that regard. Condonation is thereby granted.

4. Issue for determination ultimately is whether the applicant has made out a case for the setting aside of the debarment.

B BACKGROUND:

5. The debarment finding followed after a disciplinary inquiry was conducted. On 29 August 2019, the Chairperson found the applicant to be negligent in managing her practice and recommended her summary dismissal, including the REDS listing and the Financial Advisory and Intermediary Services Act, 2002 (***“the FAIS Act”***) debarment. The applicant then referred the unfair dismissal dispute to the CCMA for arbitration and the hearing was set down for 13 November 2019.
6. It is common cause that at the arbitration on 13 November 2019, the parties reached settlement in terms of which the applicant would resign instead of being dismissed and ABSA would not oppose the applicant’s application to set aside a debarment or the REDS listing (***“the Register of Employee’s Dishonesty System”***).
7. However prior to this agreement reached, ABSA had already on 29 September 2019 reported the debarment of the applicant to the Regulatory Authority.
8. It was argued by the applicant that she had not been properly informed of the

respondent's intention to debar her. She further argued that there was no act of dishonesty committed on her part. There has been no finding of dishonesty on her part. The only finding was that the applicant was guilty of not having full control over her practice.

9. At the hearing, ABSA indicated that they were not opposing the application since the parties had reached a settlement at the CCMS hearing that there was an undertaking by ABSA to apply for the upliftment of her debarment. They secured their attendance on the basis that they were obliged to do so.
10. We note from the record that ABSA indicated that the conduct of the applicant constituted serious misconduct in terms of the applicant's employment relations policy. On 23 July 2019, the applicant was served with a charge sheet and the disciplinary hearing was set down on 29 July 2019. The applicant was found guilty on charge 1 but not charge 2.
11. The summary of the Chairperson's findings are as follows:

"The employee is found guilty on charge 1 relating to acting with dishonesty, negligently in relation to the manager of her practice and in her role as representative to the ABSA Wealth FAIS licence as well as in her role as Financial Advisor Life Bank and ABSA Insurance and Financial Advisors. The employee breached a provision of the FAIS Act as a result of the falsification of clients' signature and initials on both 'letters of appointment' as well as 'record of advice', as confirmed by expert witnesses and ABSA's forensics. In terms of charge 2, no conclusive evidence is provided on all clients that without any doubt the financial status of clients was inflated for financial or any other gain by the

employee.”

12. Upon the outcome of the disciplinary hearing, ABSA applied for the debarment of the applicant in terms of section 14(1) of the FAIS Act. On 10 October 2019, the Regulator confirmed the debarment.

C THE LEGISLATIVE PROVISIONS:

13. Section 14 of the FAIS Act sets out the process for a fair debarment. In terms of section 14(1) of the FAIS Act, an FSP is obliged to debar a representative from rendering financial services if the FSP is satisfied on the basis of available facts and information that the representative no longer complies with *inter alia* the “**fit and proper**” requirements.
14. Section 14(2) of the FAIS Act requires that the debarment process be lawful, reasonable and procedurally fair.
15. Section 14(3)(a) and (b) reads:

“(3) A financial services 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 policies 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 term of paragraph (a)(iii), and then take a decision in terms of subsection (1); and ...

(own emphasis)

16. Furthermore the Guidance Note¹ on the debarment process is aligned to section 14 of the FAIS Act, which endorses a fair debarment process. The industry players should be familiar with this Guidance Note and were required to conform to the prescripts therein. We deem it appropriate to reiterate the provisions set out therein.

17. The prerequisite for initiating a debarment process is that the debarment must have occurred or have become known to the FSP while the person was still a representative of the FSP (the first requirement); and the debarment must commence no longer than 6 months from the date that the person ceases to be a representative of the FSP (the second requirement).² Clause 3.1.4 of the Guidance Note qualifies the said requirements namely:

(a) In respect of the first requirement, if the reason for the debarment occurred or only became known after the representative had ceased to be representative of the FSP, the FSP may not debar the representative and must refer the matter to the authority.

¹ Guidelines on the debarment process in terms of section 14(1)

² Clause 3.1.3 of the Guidance Note, Guidance Note on the debarment process in terms of section 14 of the Financial Advisory and Intermediary Services Act, 37 of 2002, Financial Sector Regulation Act 2017

- (b) Regarding the second requirement, the FSP may proceed with the debarment notwithstanding the fact that the person at the time of the commencement of the debarment process was no longer a representative of the FSP.

18. Before debarring a representative, the FSP is required to ensure that:

- adequate notice is given to a person in writing stating its intention to debar the person;
 - the grounds and the reasons for the debarment;
 - the FSP should also through the “**Notice**” provide the person with a copy of its written policies and procedures governing the debarment process.
- (Section 14(3)(a)(ii)).³

The FSP should also through the “**Notice**” give the person a reasonable opportunity to make a submission in response (section 14(3)(a)(iii)) of the FAIS Act.

19. All the available facts and information must be considered including the response received from the FSP as well as information regarding the conduct of that person must be considered.
20. Once a decision is taken to debar or not to debar a person, the decision must be communicated in writing and reasons must be furnished, as well as advise the debarred person of his/her right of recourse through having the decision

³ Clause 3.2 of the Guidance Note
See also **Laubser v Discovery and Others** FSP12/2019 decision of the FSP dated 26/06/2020; **Basson v Luck, Liberty** FSP 13/2019, decision of FSP dated 03/08/2020.

reconsidered by the Tribunal (section 14(3)(c)) of the FAIS Act.

21. Clause 3.4.2 specifically states that:

“A debarment process may form part of the employment related disciplinary proceedings which may be embarked upon by the employer against the representative. Should the FSP conduct a disciplinary hearing with the representative, it is advisable for the FSP to combine its policies and procedures governing the debarment process with the FSP’s policies and procedures in respect of the disciplinary hearings. In the event that this is not done, the FSP can not summarily debar a person based on the outcome of the disciplinary hearing without following the steps set out in section 14(3).”

D WAS DEBARMENT JUSTIFIED?

22. The inquiry that follows is whether the debarment was justified? Section 14(3)(b) further requires that the applicant’s response must be considered before a decision can be made.

23. In order for a representative to be debarred, there must be:

23.1 non-compliance by a representative or a key individual of such representative with a ***“fit and proper”*** requirements as postulated by section 13(2)(a) of the FAIS Act; or

23.2 a contravention or failure to comply by a representative or a key individual of such representative with the provision of the FAIS Act in a **material manner**.

24. Financial Services Providers have to be cautious not to effect debarments in instances where the appropriate enquiry into the conduct of their employees is not made in accordance with the FAIS Act. Often FSP's effect debarments in contractual or other grievance matters. The enquiry as to whether a debarment is justified is a separate enquiry.

25. This entails an enquiry as to whether the applicant failed to meet:

- personal character qualities of "***honesty and integrity***";
- whether he had contravened the provisions of the FAIS Act in a material manner?

26. In determining whether the "***fit and proper requirements***" were met, the following are considered namely:

- (a) Personal character qualifies of "***honesty and integrity***";
- (b) Competence which includes experience, qualifications, operational ability, continuous professional development and financial soundness.

27. Section 13(2) stipulates that:

"An authorized financial services provider must:

(a) at all times be satisfied that the "provider's representatives, and the key individuals of such representatives, are when rendering a financial service on behalf of the provider, competent to act and comply with:

(ii) fit and proper requirements and

(ii) any other requirements contemplated in section 13(1)(b)(ii)."

28. No such enquiry was conducted in determining whether the applicant was fit and proper. Furthermore there has been no negative finding of dishonesty on her part.
29. In the premises the Tribunal finds that the debarment process was not only unfair, but that the debarment was unreasonable and unjustified.
30. In the premises therefore the following order is made:
- (1) the decision to debar the applicant is set aside.

SIGNED at **PRETORIA** on this **3rd** day of **SEPTEMBER 2020** on behalf of the Panel.



ADV H KOOVERJIE SC

With the Panel consisting also of:

L Makhubela

E Phiyega