

THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: A35/2020

AZWINDINI FREDDY MUSWEDE

APPLICANT

and

FINANCIAL SECTOR CONDUCT AUTHORITY

RESPONDENT

Application for reconsideration of debarment

DECISION

[1] On 4 August 2020, the FSCA issued the following debarment order:

The Financial Sector Conduct Authority, in terms of section 153(1)(a) of the Financial Sector Regulation Act, 2017 (FSRA), hereby makes the following debarment order:

Azwindini Freddy Muswede [the applicant] is prohibited for a period of five (5) years from:

(a) providing, or being involved in the provision of any financial services as defined in section 1 of the Financial Advisory and Intermediary Services Act 37 of 2002 ("the FAIS Act") to financial customers, and

(b) acting as a key person of any financial institution.

[2] The mentioned provision states that the responsible authority for a financial sector law (the FSCA) may make a debarment order in respect of a natural person if the person has contravened a financial sector law in a material way.

[3] The applicant applies for the reconsideration of the debarment in term of sec 230 of the FSRA. The parties have filed heads of argument but waived their right to a hearing and the application is accordingly decided on the papers.

[4] Inhalt was a financial service provider but was not licenced to act as a forex broker. Inhalt, nevertheless, at least since May 2018 advertised that it was a regulated forex broker and it conducted that business. Its FSP licence was withdrawn on 20 January 2020. Inhalt “appealed” the decision to this Tribunal but withdrew its reconsideration application on 8 June 2020.

[5] The applicant was employed by Inhalt for, he says, to start a brokerage arm focusing on pension and retail business. However, he applied for and was appointed the key individual of Inhalt during November 2018.

[6] On 2 December 2018, he appointed (or confirmed the appointment of) Mr Tonny Molise as a financial services representative of Inhalt. The document makes strange reading considering that Mr Molise was the only shareholder of Inhalt and a co-director. In the document Mr Molise confirmed that the applicant had brought it to his attention that the rendering of financial services must be done within the limitations on categories and subcategories which the licence has been issued and Mr Molise undertook to abide by the terms of the licence.

[7] Then for the inexplicable provision, which is the basis of the applicants' defence: Mr Molise acknowledged that the key individual (the applicant) would only be responsible for overseeing and providing guidance in relation to pension funds and retail benefits as authorised.

[8] A key individual is statutorily responsible for managing or overseeing the activities of the body (Inhalt) relating to the rendering of "any" financial service (FAIS Act 37 of 2002, sec 1 sv "key individual"). It is common cause that the applicant failed to do so and (apparently) limited himself to pension funds and retail benefits. The applicant could not by agreement forsake his legal obligations.

[9] The FSCA found as follows:

. . . you failed to ensure that Inhalt operates in line with its licence conditions. You further failed to perform your oversight role as the Key Individual of Inhalt which resulted in clients suffering financial loss. Moreover, you had a duty as a Key Individual to ensure that the marketing material issued by Inhalt complies with the legislative requirements and does not contain misleading information but failed to do so. The Facebook marketing material [of January 2019] was aimed at deceiving members of the public that they were dealing with FSCA approved forex broker when this is not the case.

[10] Although the applicant alleged that he had resigned as key individual on 15 February 2019, the factual finding cannot be faulted since the unlawful activities continued during his supposed watch. His resignation was not registered with the authority. The inescapable impression is that the applicant closed his eyes for the activities of his boss, Mr Molise, who ran the forex division.

[11] The FSCA concluded that this conduct reflects badly on his character of competence, honesty and integrity and cannot be taken lightly, and that the applicant no longer meets the fit and proper requirements for key individuals. It might be more correct to say that the applicant in a material respect does not have the necessary competence or integrity to be a key individual because, in the words of reg 9(1)(l) of Board Notice 194 of 2017, he demonstrated in a material respect a lack of readiness and willingness to comply with legal, regulatory or professional requirements and standards.

[12] Although his debarment as key individual is unimpeachable, the question arises whether that also means that he had to be debarred as financial service representative and if so, for the same period. I do not believe that the evidence on file established lack of honesty in a material respect, and the fact that a person is disqualified to be a key individual does not necessarily mean that the person is disqualified to be an FSR as the decision of the FSCA appears to assume.

[13] Justice will accordingly be served if para (a) of the order is set aside and referred to the FSCA for consideration of these issues. The FSCA will no doubt exercise its own judgment.

[14] In conclusion, the applicant would be well served if he does not use further abusive language in his engagement with the FSCA or blames the FSCA for his own failures. The applicant's claim for damages due to mental anguish does not fall within the jurisdiction of this Tribunal and his personal circumstances are not relevant in determining whether he should have been barred or for what period.

[15] ORDER: The order of the FSCA that the applicant be debarred from providing, or being involved in the provision of any financial services as defined in section 1 of the Financial Advisory and Intermediary Services Act 37 of 2002 ("the FAIS Act") to financial customers is

set aside and referred to the FSCA for reconsideration. The application is otherwise dismissed.

Signed on behalf of the Tribunal on 20 November 2020

A handwritten signature in black ink, appearing to read 'LTC Harms', written on a light blue background.

LTC Harms (deputy chair)