THE FINANCIAL SERVICES TRIBUNAL

CASE NO: FSP33/2022

In the matter between:

BEVERLY DABROWA **APPLICANT**

and

PAULINA BIFNA & ASSOCIATES t/a PBA FINANCIAL SERVICES **RESPONDENT**

Tribunal Members: MG Mashaba (Chair), PR Long and Z Nkubungu-Shangisa

Appearance for Applicant:	In Person
Appearance for Respondent:	Ms N Gxilishe
Date of Hearing:	15 March 2023
Date of Decision:	21 April 2023

Summary: Application for reconsideration in terms of section 230 of the FSR Act of a natural person- fit and proper requirements – application for submission for further evidence.

DECISION

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[1] This is an application for reconsideration in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 against the decision of the Respondent which was handed down on 15 July 2022 and received by the Applicant on 18 July 2022.

[2] The Applicant was from 1 July 2017 employed by the Respondent as its sales representative reporting to the managing member of the company and was based at the company's premises in Rivonia. The Applicant is also the registered broker licensed to sell life insurance, health insurance, pension benefits investment and short-term insurance. However, during her tenure of employment with the Respondent she did not sell short term insurance policies.

[3] The Applicant indicated that during June 2022 her laptop that was issued to her by the Respondent required software and hardware upgrade and on 21 June 2022 she handed it to the Respondent. As a result of this developments the Respondent requested Mimecast and/or Odek Technologies, which is the Respondent's IT service provider, to inspect email communications between the Applicant from her email account to a certain email address: mike@bannock.co.za. During her employment relationship with the Respondent, the Applicant stored most of her employment documents and/or information in her email address cloud (internet storage) supported by Mimecast Cloud Archive.

[4] During the said investigation it was found that there were numerous email communications between the Applicant and one Mr Wilson. However, these emails were not in the Applicant's Office 365 mailbox which indicated that they were deleted.

[5] Mr Wilson was the director and key individual of a certain financial service provider (FSP) practising under the name and style Bannockburn Financial Services (Pty) Ltd which was a competitor to the Respondent. According to the Respondent, the emails between the Applicant and Mr Wilson indicated that: (a) there were client referrals made by the Applicant to Mr Mike Wilson; (b) the said clients were clients of the Respondent; (c)

pursuant to the referrals meetings were being held by Mr Wilson and / or the Applicant with the said clients; and (d) the Applicant received payment of commission for the referrals from Mr Wilson into her personal bank account.

[6] The Applicant was on 1 July 2022 dismissed from her employment with the Respondent following a disciplinary enquiry held on 24 June 2022 after being found guilty of gross misconduct. She was found guilty of:

[6.1] Gross Misconduct and/or Gross Dishonest conduct in that: –

(a) she was moonlighting and/or performing work for outside interest during company time;

(b) competing against the company;

(c) acting against the company and not disclosing outside interests to the company;

(d) soliciting her own business interests in breach of the contractual agreement.

[6.2] Failure to follow company policy and procedures as a result of her actions.

[7] The Applicant was not found guilty on a charge of gross dishonest conduct and/or gross negligence in that she distributed private and/or confidential client information and/or documents to a third party without the prior authorisation of the client.

[8] Subsequent to her dismissal on 1 July 2022, the Applicant was furnished with a Notice of Intention to Debar.The reasons advanced by the Respondent for the Applicant's debarment were that she:

[8.1] Breached client confidentiality in committing a data breach through sharing client details without their consent.

[8.2] Breached disclosure to clients in with earning commission with another FSP where she could have had the Respondent do the short term for the clients, and not disclosed the referral commission she was earning.

[8.3] She has not acted in the clients' best interests and that she has been looking at the personal financial gain by referring them to the other FSP.

[8.4] She has not acted honestly in not disclosing this referral arrangement in any compliance meeting when asked about referrals to other FSP's.

[8.5] She has not acted honestly and misrepresented herself in not disclosing this relationship and the earning of commission from another FSP to the Respondent.

[8.6] Theft of FSP revenue is referring the Respondent's clients to another short-term broker when they could be served within the Respondent.

[8.7] Working contrary to company policy in breaching the conflict of interest policy, fit and proper policy, information management policy.

[8.8] Acted in breach of copyright by sharing company documents and documents of Simply Comply which are copyright protected.

[8.9] Acted in breach of contract in terms of breaching clauses of the employment contract, thus affecting her honesty and integrity.

[8.10] Potentially materially contravening the FAIS Act in the presenting another FSP by visiting a client with them in lieu of setting up business.[1]

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[1] Page 22 of Part A of the Tribunal Record

[9] The Applicant was debarred on 18 July 2022[2]. Accordingly, on or about 17 August 2022, the Applicant applied to this Tribunal, in terms of section 230(2) of the Financial Services Regulation Act 9 of 2017 ('FSR Act'), for a reconsideration of the decision by the Respondent to debar her. In addition, both parties have applied in terms of section 232(5) of the FSR Act for the admission of further evidence. We will consider the latter issue first.

FURTHER EVIDENCE

[10] The test for the admissibility of further evidence on appeal is well established (*S v de Jager* 1965 (2) SA 612 (A) at 613C – D). An applicant must meet the following requirements:

a) there must be a reasonably sufficient explanation, based on allegations which may be true, why the new evidence was not led in the court a quo;

b) there should be a prima facie likelihood of the truth of the new evidence; and

c) the evidence should be materially relevant to the outcome of the case. Further evidence is allowed only in exceptional cases.

[11] In *De Aguiar v Real People Housing (Pty) Ltd*[3] the court emphasised that '[i]t is incumbent upon an applicant for leave to adduce further evidence to satisfy the court

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[2] Annexure H of Part A of the Tribunal Record.
[3] 2011 (1) SA 16 (SCA) para 11.

that it was not owing to any remissness or negligence on his or her part that the evidence in question was not adduced at the trial.'

[12] The Applicant opposes Respondent's application for the admission of further evidence on the basis that the evidence was not adduced by the Respondent during her disciplinary hearing and debarment process. As a result, she could not respond to the new evidence nor could she lead evidence to contextualize or counter it.

[13] In turn, the Applicant also seeks to admit further evidence in the form of affidavits. In her application for submission of further evidence the Applicant submitted that during the disciplinary hearing and the subsequent debarment process she did not call any witnesses nor submit any affidavits as she did not understand that her unsubstantiated evidence had low evidentiary value. She was of the view that if she appeared at the hearing and relayed her version honestly, and truthfully answered all the questions that were put to her, that would be sufficient to prove her case.[4]

[14] This further evidence is, according to the Applicant, entirely credible, consisting of affidavits from direct witnesses who corroborate her version which was already before the decision maker when her debarment was considered. The further evidence would also have a direct bearing on the credibility of the evidence and on the relevance of this matter.

[15] In considering the first leg of the test for the admission of the further evidence, the Tribunal has regard to the explanation proffered by the parties as to why the new evidence was not led in the debarment proceedings.

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[4] Page 3 at Paragraph 1 of Part C of the Tribunal Record

[16] Accordingly, in respect of the Applicant, The Respondent indicated that it does not oppose the Applicant's application for the admission of further evidence. The Respondent did not enjoy the same favour from the Applicant.

[17] The applicant claims that she was not aware that she needed to corroborate her evidence during the debarment proceedings. However, on her own version, after the decision-maker in the disciplinary hearing concluded that the Applicant had not submitted sufficient evidence in support of her defence, the Applicant sought to remedy the inadequacy in the debarment proceedings by adducing supporting letters and emails from the clients she is alleged to have referred to Mr Wilson.

[18] Moreover, the Applicant was advised during her disciplinary hearing that she had a right to call witnesses in support of her defence. She was also informed of her right to have the disciplinary hearing postponed so as to call witnesses. She declined. The Applicant was dismissed on 1 July 2022, on the same day she received a Notice of Intention to Debar.[5] Despite her complaint about the 'timeframes' provided for the debarment proceedings, the Applicant was afforded a period in excess of a weeks to submit evidence in support of her defence during the debarment process. The Applicant also conceded during the hearing that there were no procedural prejudice in the process of her debarment.

[18] In addition, the further evidence consists of affidavits from Mr Carl Dabrowa, Mr Michael Wilson, Mr Brandon Dabrowa and Ms. Chudoba. Mr Carl Dabrowa is the Applicant's husband and Mr Brandon Dabrowa is her son. Ms. Ansie Chudoba submitted a supporting statement during the Applicant's debarment process. And Mr Wilson and the Applicant were in constant communication 'for years'. We find it improbable that the

[5] Page 22 of Part A of the Tribunal Record.

Applicant could not procure the evidence from these parties during her disciplinary hearing or the debarment process.

[19] The Respondent also seeks to adduce new further evidence consisting of, inter alia, email correspondence between the Applicant and Mr Wilson as well as proofs of payment in support of the allegations that the Applicant earned a commission. The email communication between the Applicant and Mr Wilson was the catalyst for the disciplinary hearing which led to the Applicant's ultimate debarment. Before the Tribunal, the Respondent seeks to adduce additional emails which it has retrieved subsequent to the applicant's debarment. The Respondent claims that it was unable to retrieve the emails prior to the debarment due to the fact that it had limited amount of Mimecast storage space. The Respondent also claims that additional storage was too costly and therefore it was unable to retrieve the emails.

[20] However, according to the Respondent it received a quote for larger storage on 31 July 2022 which was significantly lower than previously quoted for. However, the Applicant was already debarred at that stage. After receiving the notification of the Applicant's application for reconsideration on 12 August 2022, and during the compilation of the response to the application, the Respondent accepted the quote on 18 August 2022 to retrieve additional emails with the intention to prove the Applicant's misconduct. However, a letter from the service provider shows that the initial quote was obtained as early as 23 October 2020, in excess of two years before the debarment of the Applicant. The Respondent did not seek to increase its storage space and access the archived emails during the course of the disciplinary and debarment proceedings. It simply accepted that it was too costly based on a quote dated two years prior and had the Respondent enquired from the service provider, prior to the Applicant's debarment, about the costs, it could have retrieved the 'further evidence' at that stage i.e., had the

Respondent exercised reasonable diligence and care there would be no need for the application to adduce further evidence.

[21] Section 232 (5) of the Financial Sector Regulation Act 9 of 2017 provides as follows:

> **"232. Proceedings for reconsideration of decisions.**—(1) In proceedings for reconsideration of a decision—
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> (5) The person presiding over a panel—
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> (*a*) may, **on good cause shown**, by order, direct a specified person to appear before the panel at a time and place specified in the order to give evidence, to be questioned or to produce any document; and
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> (*b*) must administer an oath to or accept an affirmation from any person called to give evidence." (own emphasis)

[22] In the result, neither party has shown good cause by way of a reasonably sufficient explanation as to why the new evidence was not led in the debarment proceedings. In addition, there are no exceptional circumstances in this matter justifying the admission of further evidence.

A CONSIDERATION OF THE MERITS

[23] During the hearing a lengthy debate ensued with Ms N Gxilishe concerning the manner in which the grounds for debarment were formulated by the Respondent.

[24] Furthermore it appeared to us that most of the charges, if not all, preferred against the Applicant's breach of her employment contract, save for alleging [that the Applicant] '*potentially materially contravening the FAIS Act in representing another FSP by visiting a client with them in lieu of setting up business*.'

[25] However, in the ruling by the decision maker, reliance is placed on sections 14(1) and 13(2) of the FAIS Act, read with Board Notice 194 of 2017, in particular sections 9(1)(a)(ii), 9(3) and 10 thereof. The Applicant's debarment was, as per the ruling, premised on the fit and proper requirements as stipulated in section 13(2) of the FAIS Act read with section 14(1)(iii) thereof. This is however not apparent from the grounds of debarment as communicated to the Applicant.

[26] In any event, it was the Respondent's case during the debarment proceedings and before the Tribunal, that the conduct of the Applicant in being party to the aforesaid 'arrangement' i.e., referring clients of the Respondent to Mr Wilson (another FSP), receiving a commission for doing so and by failing to disclose it to the Respondent, was dishonest.

[27] The issue for determination by the Tribunal is whether the Applicant's failure to disclose the referrals to the Respondent's compliance officer as required by her employment contract and the fact that she earned a referral commission for doing so, is dishonest for purposes of the FAIS Act.

[28] This very same question was posed to the Respondent during the hearing. The Respondent could not point to a single provision in the FAIS Act, or other legislation, that prohibits the Applicant from referring clients to another FSP and earning a referral

commission for doing so. Reference was only made to the prohibitions as contained in the Applicant's employment contract.

[29] However, the respondent relied on the sections of the Board Notice as referenced above. Section 9(1)(a)(ii) of the Board Notice does not find application in that it contemplates a finding of dishonesty in civil or criminal proceedings. Section 9(3), quoted out of context by the decision maker, is reserved for the 'Registrar' and therefore also does not find application in the debarment proceedings. Section 10 places an obligation on an FSP to disclose all information which may be relevant in determining whether that person complies or continues to comply with the requirements relating to honesty and integrity. The section clearly contemplates disclosures in relation to the rendering of financial services. Outside the scope of the Applicant's employment contract, the Respondent has not been able to point to a single regulatory provision that requires the Applicant to disclose the referral arrangement.

[30] The reasons for debarment proffered against the Applicant mostly relate to 'her breach of contract', 'working contrary to company policy' or 'breaching clauses of her employment'. The evidence proves that the Respondent acted in breach of her employment contract with the Respondent in so far as receiving a referral commission. Her commission structure (which was an Annexure to her PBA contract) precluded here from receiving commission, be it referral fee or referral commission, for her short-term insurance clients. However, a dismissal cannot lead to an automatic debarment of a representative.

[31] In the result, we are not satisfied that debarment was justified. The guidelines on debarments clearly stipulate that debarment should not be used by FSP's to satisfy contractual or other grievances against a representative, unrelated to fitness or

competency requirements. Debarment proceedings should not be abused for ulterior purposes.[6]

In the premise the following order is made:

(a) Applicant's application for the admission of further evidence is refused.

(b) Respondent's application for the admission of further evidence is refused.

(c) The application for reconsideration is granted and the Respondent's debarment is set aside.

SIGNED at PRETORIA on this 21 day of APRIL 2023 on behalf of the Panel.

MG Mashaba SC (Chair)

With the Panel consisting also of:

PR Long

Z Nkubungu-Shangisa

[6] See: Guidance Notice 1 of 2019