THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: FSP52/2022

In the matter between:

CHERYLISE FOURIE APPLICANT

and

SAVVY BROKERS (PTY) LTD RESPONDENT

In re reconsideration of debarment as FSR.

DECISION

1 This is the second round of the applicant's debarment as FSR by the respondent, her former employer. The applicant's first attempt at reconsideration was successful, and the case remitted to the respondent. The applicant was again debarred, she unsuccessfully applied for a suspension and her second reconsideration application is the subject of this decision.

2 The parties waived their right to a formal hearing.

3 For an understanding of the issues in the present application is will be convenient to refer at length to the first decision.

4 The applicant stood accused of fraudulent transactions in her capacity as FSR of the respondent, an FSP. This led to a disciplinary process in which the applicant was provided with a charge sheet setting out her alleged transgressions. The respondent appointed a labour broker to conduct the proceedings. Following

custom, the applicant resigned the morning of the hearing before it could commence. The chairman proceeded in her absence and found her guilty as charged and recommended that she be dismissed by the respondent, which happened.

5 On the same day, namely 28 April 2022, the respondent informed the applicant of the outcome of the disciplinary hearing and added the following:

> Kindly do take note to the following, based on the recent outcome of the hearing held, we are informing you that we will be approaching the FSCA a for debarment based on the dismissal and charge of gross dishonesty, which is a principle you are required to have an industry, honesty and integrity, unfortunately in this case I am obliged to report this and apply for debarment, which we are in the process of.

6 On 6 May, the chairman considered the question of debarment in the light of her findings in the disciplinary hearing and recommended that the applicant be debarred by the respondent, and on 9 May the respondent filed a debarment form with the FSCA, debarring the applicant on the ground of gross dishonesty.

7 The applicant's attorneys reacted immediately by raising procedural issues about the process followed in debarring the applicant and this was followed by an application to this Tribunal for reconsideration. It is unnecessary to mention more than one ground, which is this:

> The purported notice of the FSP's intention to debar me, dated 28 April 2022 (Annexure "D" to the answering affidavit) does not constitute a notice of the FSP's intention to debar me but rather conveys an outcome, without affording me a

reasonable opportunity to make representations. This notice is also delivered prior to the consideration of Labour Logic [the broker] dated 6 May 2022.

8 Section 14(3)(a) of the FAIS Act 37 of 2002 states that 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 policy and procedure governing the debarment process; and
>
> (iii) give the person a reasonable opportunity to make a submission in response.

9 Despite the argument to the contrary, the respondent failed to comply with these provisions. The letter of 28 April was insufficient and shows a misunderstanding of the process. An FSP does not in these circumstances apply to the FSCA for the debarment of the representative. That the FSP does and merely registers the debarment with the FSCA.

10 That means that the debarment must be set aside and referred back to the respondent to follow the formal requirements of the Act: see *Thomas vs AGM Mapsure Risk Management (Pty) Ltd* (case FSP5/2018).

11 Thus far the history and now on to the next chapter of this unedifying matter.

12 The respondent, ostensibly in consequent of the order of the Tribunal to follow the formal requirements of the Act as set out in sec 14(3)(a), issued on 17 August 2022 a notice of its intention to debar the applicant "as a consequence of you being found guilty of dishonesty and fraud during an internal disciplinary hearing held on 28 April 2022".

13 She was invited to deliver written submissions within seven days. No indication of a hearing date was given although mention was made of her right to representation.

14 The respondent's procedure governing debarments provides for 'preferably' 30 days' notification of the hearing, that representations are to be under oath, that legal representation would be permitted and that the person in question would be allowed an opportunity to have access to documentation to be presented at the hearing.

15 The notice gave rise to a flurry of correspondence between the applicant's attorneys and the respondent. The response of the applicant does not speak well of her case which was, basically, a bare denial with an alternative that the acts of which she stood accused of do not amount to fraud but relate to internal administration.

16 In any event, the procedural issues raised were that the process did not comply with the prescribed procedure, that the charge was vague, and that the applicant required detail, including the underlying evidence, on which the charges were based.

17 I shall first deal with the disciplinary procedure on which the case against the applicant was based. It will be recalled that she resigned (ineffectively, obviously) minutes before the hearing. She refuses to disclose her reasons of which there could be two only. But that is by the way.

18 The problem for the respondent is that the disciplinary proceedings were not conducted as a debarment or joint disciplinary/debarment proceeding and therefore did not follow the respondent's own debarment rules. In particular, the chairman approached the matter on the basis that if someone does not attend such proceedings, that person waives the right to rely on procedural defects.

19 In addition, it is unclear on what and whose evidence and which documents the chairman relied. There is an unsigned document written by an unnamed person containing allegations in support of the charge sheet – but that is all. The statement by the chairman that she had considered all the facts and evidence presented to her does not bear scrutiny – the record contains none of this.

20 The main problem though is that the principal case against the applicant was based on 20 instances of fraud consisting of not informing clients of an administration fee and failing to disclose to the respondent this fact, which meant (I suppose) that the applicant had made sales on a false representation of the amount to be debited, that the clients were wrongly debited and that the respondent paid the fee as commission to its "agents". The instances were not particularised. And when the applicant, for purposes of her defence against the debarment, requested the information the respondent refused to provide it on the basis that it was either confidential information or trade secrets and because

of some or other provision of POPI. The labour consultant, who was appointed to conduct the debarment proceedings upheld this objection as not being unreasonable.

21 I disagree. Although a party to administrative proceedings is not entitled to discovery the refusal to provide basic information necessary for conducting a defence was not only unreasonable; it was unlawful. There is no way in which material evidence may be withheld from an opponent/accused on the basis that it is confidential information or for protection of personal information. It is not possible in criminal, civil or administrative law.

22 There is a second problem that goes to the root of the proceedings and that is that the labour consultant applied the res judicata rule arguing that the chairman had found (in her invalid debarment advice) on the facts and evidence before her that the applicant lacks the qualities of honesty and integrity and should be debarred, therefore she is to be debarred.

23 Res judicata is also the answer given by the respondent to the present application.

24 I once again disagree. For one, the chairman made no final decision. She advised the respondent whether there were grounds for the summary dismissal of the applicant. The respondent acted on the advice/opinion and dismissed the applicant. In other words, the first decision was that of the respondent and not of the chairman. Thereafter she advised the respondent to debar the applicant. That “decision”, if any, was void as held in the first decision. It was for the

respondent to have made the decision, which it did by informing the Authority of the debarment.

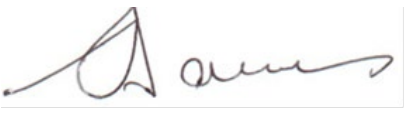
25 The second broker also did not decide anything. She advised the respondent to debar the applicant and her advice was based on the opinion of the first broker. She did not consider the matter independently and her decision to ignore the respondent's procedure and deny the applicant basic access to the information was wrong.

26 The respondent cannot rely on its own first invalid decision as a basis for res judicata. That would make a caricature of sec 14.

27 The respondent was told by this Tribunal in the ruling to follow the prescribed procedure. It did not and that means that the debarment must be set aside. Since the respondent had two bites at the cherry already it would be wrong to remit the matter to the respondent for reconsideration. The respondent will not be able, in the light of its answering affidavit (especially para 4.3), to make a decision which will not have the appearance of bias.

ORDER: The debarment is set aside.

Signed on behalf of the Tribunal on 31 January 2023.

 LTC Harms (deputy chair)