

**THE FINANCIAL SERVICES TRIBUNAL**

**CASE NOS.: FSP25/2022 and FSP26/2022**

In the matter between:

**ELIZABETH VAN HEERDEN**

**FIRST APPLICANT**

**ANDRE MARAIS**

**SECOND APPLICANT**

**and**

**UNIGRO INSURANCE BROKERS (PTY) LTD**

**RESPONDENT**

Re: Reconsideration of debarment as FSRs

**DECISION**

- 1 The applicants were employees and financial service representatives of the respondent, an insurance broker and financial services provider. The respondent has a small branch in Marble Hall that concentrates on short-term insurance for the agricultural sector. The applicants and two other staff members gave notice of termination of their employment, and this gave rise to suspicion that they were about to compete with the respondent and that they would filch clients and use the respondent's confidential information. The suspicion that they intended to compete was not unfounded and it is probable that a competitor of the respondent sought to highjack the business of the branch with the assistance of the applicants and their co-employees.
- 2 The respondent suspended the applicants and then initiated debarment proceedings against them in terms of sec 14 of the Financial Advisory and Intermediary Services Act (FAIS) 37 of 2002. It engaged the services of "retired" Judge Tuchten to conduct the

hearing and decide whether the applicants should be debarred from performing any financial services under the Act.

- 3 The charges against them were, as broadly described by Tuchten J, that they in the present case each formed and executed a plan, while they were still employed by and representatives of the FSP, to advance the interests of Succession (the competitor) by making clients' information available to Succession, assisting Succession to sign existing or prospective clients of the FSP up as clients of Succession by inducing such clients to take out policies through Succession rather than the FSP, and facilitating this process by acting as conduits through which Succession documents were provided to such clients or prospective clients.
- 4 Despite their vigorous defence, Tuchten J found them “guilty” of “the broad charge of forming and executing a plan to filch confidential information and use it to enable Succession more effectively to compete with the FSP” and debarred them on behalf of the respondent.
- 5 The applicants apply for reconsideration of their debarment in terms sec 210 of the Financial Sector Regulation Act 9 of 2017 and the parties have waived their rights to a formal hearing. This is, accordingly, the decision of the Tribunal.
- 6 The respondent raised a point in limine, namely that the applicants should first have exhausted their internal remedy of appeal before applying for reconsideration. There is no merit in the submission. The exhaustion principles under administrative law do not apply to and the internal rules of the respondent cannot override the statutory right which is contained in sec 210.
- 7 Then a general comment on the respondent’s submissions. The Tribunal does not sit on appeal of the decision of Tuchten J and the general rules governing appeals on fact or

law do not apply. The Tribunal must reconsider the matter, i.e., it must be satisfied that the debarment was procedurally fair and substantially correct.

- 8 That said, it should be noted that the applicants did not, in their reconsideration application, raise any issues about the correctness of the factual or legal findings of Tuchten J (set out in great and careful detail in some 91 pages) save two. Although they said that this does not mean that they accept his other findings, the fact is that unless something is challenged or strikes the eye the Tribunal is justified to accept the correctness of the findings of the learned Judge in performing the agreed adjudicating function.

- 9 The main ground is this:

It must be noted that at any time, as an employee or a representative, I had the freedom to choose and determine my own destiny and future employment. When seeking employment elsewhere, it is not a scheme, nor is it fraudulent or dishonest. Secondly, clients do not "belong" to an FSP, client can choose who they want to do business with. There was no "stealing" of clients, there was only free choice.

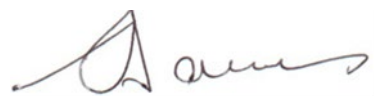
My dispute with Unigro, and by their own admission, is primarily a contractual one, which revolves around my decision to leave. This is where Unigro and the Judge got it wrong. The contractual dispute is separate and independent from a verdict of debarment processed under FAIS. It does not automatically follow that a contractual dispute should also trigger a debarment process under the FAIS Act. These are two separate and independent issues.

- 10 Although the contractual and FAIS duties may have different origins they may overlap. A breach of contract may, on the facts, amount to a breach of a FAIS duty and in this case the "forming and executing a plan to filch confidential information and use it to enable Succession more effectively to compete with the FSP" is not only a contractual

issue. The issue was not the right to terminate the employment contract; it was the circumstances surrounding the termination.

- 11 At the very least, they were guilty of a breach of sec 13(1)(c) of FAIS having rendered financial services in respect of financial services other than in the name of the financial services provider of which such person is a representative and of breaching a fiduciary duty in terms of reg 9(1)(f) of BN 194 of 2017: DETERMINATION OF FIT AND PROPER REQUIREMENTS FOR FINANCIAL SERVICES PROVIDERS, 2017. That was done by agreement and therefore amounted to a “scheme” or arrangement or conspiracy, and “filching” remains filching, whether in breach of contract or otherwise.
- 12 One cannot serve two masters, and one may not attempt to do so. To use a bucolic comparison, one may not sow your own fields with your employer’s seed.
- 13 The secondary ground is –  
  
that no clients were prejudiced. No client acted as witnesses and no client complained that they were stolen from, lied too, or defrauded. All of these allegations came from Unigro in their capacity as FSP, not clients.
- 14 The focus of FAIS is to protect clients and the public but that does not mean that actual prejudice is a prerequisite for a debarment. The public is at risk if an FSR is prepared to filch confidential information or acts on behalf of an FSP without being that person’s registered representative.
- 15 The applications are dismissed.

Signed on 20 September 2022.



LTC Harms (deputy chair)