

THE FINANCIAL SERVICES TRIBUNAL

Case No: **FSP44/2020**

In the matter between:

FAHDIA OSMAN

Applicant

and

**FIRST NATIONAL BANK A DIVISION OF
FIRSTRAND BANK LIMITED**

Respondent

Tribunal: H Kooverjie (chair), N Ndumiso, SM Maritz

For the applicant: Ms M Stander, Mjila and Partners Incorporated

For the respondent: Adv L Sisilana, instructed by Glover Kannieappan Incorporated

Summary: Debarment of representative: A representative's dishonesty, negligence or incompetence must be sufficiently serious to impugn the honesty and integrity of the representative.

DECISION

1. The applicant, Ms Osman instituted this application in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 (*"the FSR Act"*) for the reconsideration of the decision by the respondent (FNB) to debar her as a representative in terms of the Financial Advisory and Intermediary Services Act 37 of 2000 (*"the FAIS Act"*).

A CONDONATION

2. The applicant however failed to institute the said application timeously. The respondent does not oppose her condonation request. The Tribunal considered the grounds upon which the condonation was sought. We find that the non-timeous institution of this application was not deliberate and that good cause has been shown. The applicant furnished a reasonable explanation for the delay and set out in detail such explanation. Accordingly, condonation is granted.

B THE DEBARMENT

3. Ms Osman was employed as a multi skilled sales and services consultant at the FNB Langenhoven Park branch. She was at all relevant times a representative as defined in the FAIS Act.
4. On 14 June 2019, a disciplinary and debarment hearing (the first disciplinary debarment hearing) was held where Ms Osman was charged in terms of paragraph 4.2.1 of the Disciplinary Code and Procedure for committing the following offence:

“Theft, fraud, dishonesty or the unauthorised removal of any material from the bank, or from any personal premises where such material is kept.”

5. Accordingly, the disciplinary action for such offence is summary dismissal. The charge reads as follows:

“Dishonesty in terms of paragraph 4.2.1 of the Bank’s Disciplinary Code and Procedure in that it is alleged that on or about 28 May 2019, you conducted yourself dishonestly when you attended to completing customer documents pertaining to FNB client ‘MEJ Mandie Le Grange and/or Le Grange Haven and/or MEJ t/a Le Grange Haven’ by copying and pasting the customer’s signature onto such documents and/or when you created false document(s) for the customer in order to bypass the KYC tool/Bank rules.”

(our emphasis)

Ms Osman pleaded guilty to the aforesaid charge at the said hearing. She was dismissed as a consequence thereof and debarred.

6. The debarment hearing was held on 12 February 2020 (second hearing). The debarment panel then considered the submission provided by Ms Osman’s attorney on 12 February 2020.
7. It should be noted that FNB initiated the second process due to the fact that the Tribunal found that first debarment proceedings lacked fair process.
8. Consequently, the notice of intention to debar was issued on 28 February 2020. The debarment findings were as follows:
 - 8.1 Ms Osman no longer complied with the “*fit and proper requirements*” as set out in the determination of fit and proper requirements of financial services providers (Board Notice 194 of 2017 as amended).

- 8.2 As a FAIS representative, trust and transparency were expected from its employees.
- 8.3 In terms of section 14 of the FAIS Act, and a result of being found guilty, Ms Osman failed to render financial services honestly, fairly with due skill and diligence and in the interest of the clients and the integrity of the financial services industry.
- 8.4 As a result, she is no longer compliant with the fit and proper requirements as provided for in Board Notice 194 of 2017, which constitutes as a material non-compliance of the FAIS Act.

These grounds were also set out in the debarment letter dated 20 March 2020.

C THE APPLICANT'S CASE

9. Ms Osman submitted that she was employed by FNB 8 years and never committed any type of misconduct. In respect of the incidence in issue, she sought guidance from her colleagues. Instead, they reported her misconduct. Although she accepted the dismissal, she did not think that the sanction was appropriate. The facts according to Ms Osman are set out hereunder.
10. She was requested to open a sole proprietary business account for a client, Ms Mandie Le Grange. In doing so, she asked her colleague, Lerato, to check for the business name on the system. Lerato informed her that the business name differs on the KYC tool. Another colleague, Ané Nel, then informed her that there would be a KYC failure if the correct name is not inserted. Lerato then suggested that she change the name of the entity on the CUMN screen, print a new mandate and thereafter contact the customer for her signature. She

followed this advice.

11. The customer was however unable to return on the same day to sign the said documents. Since the details have already been changed on the system, she asked Ané if she could cut out from the incorrect mandate and paste on the correct one. Ané merely informed her that she should carry on with the task. Upon that point, Ané failed to guide her at all. It was only after she effected the change that Ané informed her that the mandate is incorrect.
12. Upon being so advised the very next day, on 29 May 2019, Ms Osman made all the corrections on the account and a new mandate agreement and declaration was signed by the customer. The correct mandate was then scanned into the banking system. The mandate with the pasted name of the entity was dispatched for shredding and not utilized at all.
13. At the hearing, Mr Osman in fact admitted her wrongdoing but submitted that she did not do it intentionally. In her statement she quoted as follows:

“I realise what I have done is wrong and I didn’t do it intentionally. I really wanted to prevent a KYC failure and I made a bad decision. I sincerely apologise for my behaviour and in future I will seek help from someone who is willing to help me and not someone who misleads me. I do sincerely apologise and it will never happen again.”

D LEGISLATIVE PROVISIONS

14. In terms of section 14(1) of the FAIS Act, an authorized financial services

provider must ensure that any representative of the provider who no longer complies with the requirements referred to in section 13(2)(a) or has contravened or failed to comply with any provision of the FAIS Act, in a material manner, is prohibited by such provider from rendering any new financial service by withdrawing any authority to act on behalf of the provider.

15. Section 13(2)(a) of the FAIS Act requires that an authorized financial services provider must:

(a) at all times be satisfied that its representatives and the key individual of such representatives, are when rendering a financial service on behalf of the provider compete to act and comply with:

(i) the “*fit and proper requirements*”.

16. “*Fit and proper requirements*” are published under section 6A of the FAIS Act. Section 6A(2) states the “*fit and proper requirements*” include “*personal character qualities of honesty, integrity and competence*”. In Ms Osman’s case, she was debarred on grounds of dishonesty. No doubt this finding challenged her personal character qualities of honesty and integrity.

17. Guidance Note 1 of 2019¹ provides guidance on the application of section 14 debarments, particularly with regard to the rationale to be applied and the process followed when effecting debarments and highlight salient factors that require consideration when FSP’s effect debarments.

¹ Guidance Note on the debarment process in terms of section 14 of the Financial Advisory and Intermediary Services Act, 2002, was published in terms of section 141 of the Financial Sector Regulation Act 9 of 2019 (“*FSR Act*”)

E ENQUIRY INTO FIT AND PROPER REQUIREMENTS

18. The ambit of the enquiry determining fit and proper characteristics that a representative must conduct himself/herself with honesty and integrity and be of good standing. Further, the representative must meet certain prescribed standards of competence in that he/she must have the skill, knowledge and expertise needed for a proper discharge of his/her FAIS Act responsibilities.

19. Clause 3.4.2 of FNB's debarment policy *inter alia* stipulates:

"To decide if a person lacks in respect of the requirements of competence, honesty, integrity and good standing, FSP's in the group have to take into account:

- (i) any conduct by the representative which is dishonest;*
- (ii) any conduct which results in the representative not meeting the requirement of integrity and/or good standing...;*

20. The debarment policy specifically identifies instances where debarment should be considered. (Annexure "C") *inter alia* states:

"(1) If the representative was found guilty of any of the following subsequent to the disciplinary enquiry:

(1.1) theft;

(1.2) fraud;

(1.3) dishonesty;

(1.4) removal of any material from the bank or from any person or premises where such material is being kept;

(1.5) bribery;

(1.6) forgery;

*(1.7) altering or falsifying any certificates, education documents
and/or attendance register..."*

(our underlining)

21. However, assessing one's character of honesty and integrity necessitates its own enquiry. A debarment decision by an FSP constitutes the exercise of administrative action. Such action is subject to the specific requirements of section 14 of the FAIS Act as well as the requirements of the Promotion of Administration Justice Act, 2000 ("PAJA"). Therefore, it is required of FSP's in exercising their debarment power to act reasonably and rationally. This means that the decision taken by an FSP must be justifiable. FSP's must therefore debar within the framework of the law (an empowering provision). For the decision to be rational, relevant factors should be taken into account.
22. The issue for consideration is then did Ms Osman's conduct justify a debarment? Ms Osman's explained that she made a mistake at the bank and that she should have been given a written warning. Her conduct led to a KYC failure and in that regard, she should have been given a written warning. Her conduct was not intentional. She further submitted that the mandate with the pasted name was shredded. She had in fact proceeded with the correct procedure the next day where the mandate reflecting the proper details of the customer was signed.
23. Counsel for the respondent submitted that Ms Osman pleaded guilty to the charge levelled against her. The disciplinary policy warrants a dismissal in respect of such conduct. The respondent has no discretion in the process of

debarment in this instance. Pleading guilty to the dishonesty charge justified her debarment. This reasoning is flawed.

24. It may be that the disciplinary action listed in the disciplinary policy may be summary dismissal.
25. When considering one's character, one cannot always determine same by having regard to one's act or one class of act. A character analysis is necessary to draw one's conclusion. It can therefore not be gainsaid that in determining honesty and integrity, it is necessary to know as much as possible about that person.²
26. In this instance reference is made to **Hamilton Smith & Company v The Registrar of Financial Markets** (at p.5), where the Appeal Board expressed as follows:

"To determine where a person is 'of good character and integrity' involves a moral judgment. In arriving at that judgment it is necessary to have regard to the matter in which the person concerned has conducted himself not only in his private life but also in his dealings with those with whom he has come into contact professionally or in the course of his business. A distinction is sometimes drawn in this context between 'character' and 'reputation'."

27. This judgment at length laid down the precedent for defining the concept

² **AJ Davis v AC & E Engineering Underwriting Managers (Pty) Ltd**, Case No: FSP4/2018 dated 24 October 2018

“*honesty and integrity*” – in summary:

- The dictionary meaning of integrity is “*soundness of moral principle; the character of uncorrupted virtue, especially in relation to truth and fair dealing; uprightness, honesty, sincerity.*”
- A person’s “*character*” is what he in fact is, whereas his “*reputation*” is what other people think he is.
- The determination of whether a person is of sound character involves a moral judgment. In arriving at that judgment it is necessary to consider the person’s manner of conduct, not only in respect of his private life but also in business dealings.
- The quality of a person must be judged by the person’s acts and motives, meaning behaviour and the mental and emotional situations accompanying the behaviour.
- Character cannot always be estimated by one act or one class of act. As much about a person as is known will form the evidence from which the inference of good or bad character is drawn.³

Therefore, it is necessary to know as much as possible about the person.⁴

³ Ex parte Tziniolis [1967] 1 NSW 357 Holmes at 377

⁴ See also AJ Davis v AC & E Engineering Underwriting Managers (Pty) Ltd, Case no: FSP4/2018 dated 24 October 2018

28. Having contextualized the test for the “*fit and proper*” requirements, we must be mindful of the facts when considering this matter.
29. In Ms Osman’s case, it was found that her one action led to her debarment. As alluded to above, one’s character cannot be determined by one act. The understanding of what constitutes honesty and integrity must be considered in the context of the facts and circumstances of each matter. Ms Osman’s character requirements of fitness and proper must further be considered in light of any ill-founded motives at the time she committed the misconduct.
30. It was not disputed that she indeed sought the assistance from both her colleagues, Lerato and Ané. Lerato confirmed that Ms Osman approached Ané and sought assistance. If she was advised and given guidance, she would not have proceeded with her actions. The fact that she completed the mandate under the said circumstances could not constitute a dishonest act.
31. It must be emphasized that a single act of dishonesty, negligence, incompetence or mismanagement may not by itself constitute *prima facie* evidence or absence of honesty and integrity. Such dishonesty, negligence or incompetence or mismanagement must be sufficiently serious to impugn the honesty and integrity of the person concerned.⁵ Ms Osman’s conduct, even one which constitutes dishonesty had to be serious to impugn her character of “*honesty and integrity.*”
32. The relevant factors that the respondent failed to take into account in deciding on whether Ms Osman’s character became corrupted are the following:

⁵ **AJ Davis v AC & E Engineering Underwriting Managers (Pty) Ltd** matter.

(1) The motive behind cutting and pasting the signature was to expedite the execution of the client's instructions and not to defraud or otherwise harm the client or cause her loss – the *bona fide* of her motives are evident from consulting with her senior colleagues.

(2) Once she was told it was incorrect, she shredded the mandate and did not utilize it. The client came in the following day to authenticate what she sought to validate by cutting and pasting the signatures. These factors are not consistent with a dishonest character.

33. Accordingly, in this instance the respondent's finding of dishonesty is not justified. In the premises, the debarment was not justified and thus cannot be sustained.

34. The following order is made:

- (1) the application for reconsideration succeeds;
- (2) the debarment be set aside from date of this order.

SIGNED at **PRETORIA** on this **16th** day of **MARCH 2021** on behalf of the Panel.



ADV H KOOVERJIE SC

With the Panel consisting also of:

N Ndumiso

SM Maritz