THE FINANCIAL SERVICES TRIBUNAL

Case No: FSP59/2023

In the matter between:

GCINUMZI VINCENT NTSIBANDE Applicant

and

MEDSAFU BROKERS CC Respondent

Tribunal:	Adv W Ndinisa (Chair), Adv SM Maritz, and Prof M Sigwadi
For Applicant:	Adv R Ngobeni, instructed by Mnisley Inc
For Respondent:	Mr LJ van der Merwe, instructed by Gresse and Stapelberg Inc
Date of hearing:	19 February 2024
Date of decision:	26 March 2024

Summary: Reconsideration application in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 – debarment of representative in terms of sec 14(1) – honesty and integrity

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DECISION

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1. The applicant applies for reconsideration in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 ("the FSR Act") of the decision of the respondent to debar him in terms of section 14(1) of the Financial Advisory and Intermediary Services Act, 37 of 2002 ("the FAIS Act"). The respondent's decision to proceed with the submission for the debarment

of the applicant to the Financial Sector Conduct Authority ("FSCA") is found in an undated letter addressed to the applicant's erstwhile attorneys.[1] On 1 September 2023, a copy of the FSCA's notice of debarment was sent to the applicant's current attorneys.

2. The main reason for the applicant's debarment is that he is no longer fit and proper, with specific reference to a lack of honesty, integrity and good standing as required for the fulfilment of his role.

3. The applicant and the respondent entered into a written contract titled "*Independent Contractor Agreement*" ("the agreement") on or about 9 June 2021 and his role as an independent contractor and an agent, were *(i)* to market and sell policies, *(ii)* to provide financial services and, *(iii)* to provide administrative services in relation to the policies of existing and prospective clients of the respondent.[2]

4. Part of the scope of the applicant's contractual obligations were, amongst other things, that:

"*The Agent shall not under any circumstances, canvass for, or transact any business for the Agent's own accounts or for the account of any person other than MEDSAFU Brokers."*[3]

[1] Record, Part B, page 14.
[2] Record, Part B, page 2.
[3] Record, Part B, page 2.

5. According to the respondent, and on 24 July 2023, a compliance meeting was held to investigate the concerns about the applicant which had been brought to the attention of the respondent. This led to a full investigation of the applicant's company email address. It is the version of the respondent that during that investigation, it was discovered that the applicant had been working in the role of a *"New Development Business Manager"* for another brokerage firm ("the other brokerage firm").

6. Further, it is the version of the respondent, amongst other things, that email correspondence was found between the applicant and a third-party entity where both the applicant's Medsafu email address and the other brokerage firm's address were used. It is the respondent's submission that in the abovementioned correspondence Medsafu's client lists were shared with a third party.

7. Furthermore, it is the respondent's version that the agreement states that the applicant shall keep all business and client information confidential.

8. According to the respondent, the applicant has therefore failed to act with integrity and honesty.

9. It is the version of the applicant that regarding his role of New Business Development Manager in the other brokerage firm, this issue was

addressed with the respondent and verbal consent was reached that the applicant may work with the other brokerage firm pending the finalisation of a written agreement from the respondent.

10. The applicant further submitted regarding the use of his personal email and the Medsafu email addresses, that personal email address was used and copied his Medsafu working address. The applicant alleged that this issue pertains to a labour dispute and not a debarment issue.

11. The applicant averred that there was no working relationship between the respondent and the third-party entity. It was the applicant's submission that the respondent did not uphold the standard of honesty and integrity by invading his (the applicant's) privacy when logging into his personal email address.

12. The written submissions of the parties as stated above demonstrate that all parties in this matter were aware of the allegations and counter-allegations made in this matter. We shall now turn to the grounds of reconsideration.

13. The applicant submitted that the respondent did not inform him (the applicant) of its intention to debar him. On 26 July 2023 the applicant was, amongst other things, requested to attend a disciplinary hearing regarding

a potential violation of the FAIS Act relating to honesty and integrity ("the initial letter").

14. In the initial letter the respondent was invited to and given an opportunity to respond to the respondent's allegations against him. Furthermore, the initial letter informed the applicant that the outcome of the hearing may, amongst other things, include debarment.[4]

15. On or about 31 July 2023 the applicant's erstwhile attorneys, Masango attorneys, requested that the respondent furnished them with the detailed and specific charges to which the applicant is called upon for him (the applicant) to present himself and respond thereto.

16. After the above request, the respondent furnished the applicant's erstwhile attorneys with the requested information pertaining to the charges. The response is contained in an undated letter of the respondent ("the second letter").[5] The second letter stated the following regarding the charges:

> "*1. Evidence obtained that clearly indicates that Mr Ntsibande is no longer fit and proper, with specific reference to lack of honesty, integrity and good standing as required for the fulfilment of his role as prescribed by the Financial Advisory and Intermediary Services*

[4] Record, Part B, page 11.
[5] Record, Part B, page 13.

Act 37 of 2002,

2. *The evidence referred to above pertains to the fact that Mr. Nsibande, whiles being contracted to Medsafu Brokers CC, approached the Medsafu clients with the aim to move clients over to an opposition broker firm.*

3. *A breach of confidentiality whereby Mr. Ntsibande shared personal client information with 3rd party entities without consent of Medsafu Brokers and client, which is in breach of Mr Ntsibande's Independent consultant agreement as well as the Protection of Personal Information Act 4 of 2013."*

17. The applicant submitted that he was never provided with a debarment policy. During the hearing of this matter the respondent's legal representative conceded that the respondent did not provide the applicant with a copy of the written debarment process policy.

18. With reference to the applicant's submission that he was not informed of the respondent's intention to debar him, this Tribunal notes that both the initial letter from the respondent, dated 26 July 2023, as well as the second letter referred to the possibility of debarment. The issue to be determined is whether it is sufficient to constitute a notice of intention to debar.

19. The debarment process in terms of section 14 of the FAIS Act starts with a notice of intention to debar. More specifically section 14(3)(a) states, amongst other things, 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;'' (own emphasis)

20. The initial letter dated 26 July 2023 did indicate that the outcome of the hearing and/or meeting may include debarment. Further, both the initial letter and the second letter referred to the conduct of the applicant in terms of the FAIS Act. This Tribunal determines that even though the respondent did not issue a document, or a letter specifically titled "*notice of intention to debar"* the applicant was duly notified and should have been

aware that the process may include debarment.

21. It appears from both the initial letter, dated 26 July 2023, read with the second letter (letter containing charges), that the applicant was aware and informed of the evidence (grounds and reasons) against him, which indicated that he (the applicant) was no longer a fit and proper person with specific references to a lack of honesty, integrity, and good standing in terms of the FAIS Act. This information was duly conveyed to the applicant as well as to his erstwhile attorneys at a meeting held on 7 August 2023. It further, appears from the record that the applicant was informed of the grounds (lack of honesty, integrity and good standing in terms of the FAIS Act) and the reasons (being, *inter alia*, that he (the applicant) approached Medsafu's clients with the aim to move clients over to an opposition broker firm and that he breached confidentiality by sharing the respondent's personal client information with 3rd party entities without the consent of respondent) for the disciplinary hearing and his debarment.

22. The applicant was afforded the opportunity to make representations at a hearing initially scheduled for 2 August 2023, which meeting was, at the request of the applicant's erstwhile attorneys, rescheduled for 7 August 2023.

23. After having considered the documents, this Tribunal finds that the applicant was duly informed that the disciplinary hearing may result in his debarment. As previously stated, the applicant and his erstwhile attorneys was provided an opportunity to make representations. This Tribunal is satisfied that the process was reasonable and procedurally fair.[6] It should be noted that the applicant was at all relevant times duly legally represented.

24. Regarding the merits of the matter, the thrust of the allegations against the applicant is that he, whilst being contracted to the respondent, approached the respondent's clients with the aim to move them over to an opposition broker firm. Further, the respondent stated that the applicant shared personal client information with third party entities without the consent of Medsafu.

25. Although the applicant denies the allegations against him, he states that his personal email address was used and copied in the respondent's email address. According to the applicant, this is labour related, not a debarment issue. Further, the applicant stated that there was no working relationship between the respondent and the third-party entity in question. Furthermore, he stated that he had the verbal consent of the respondent that he may work with another brokerage firm.

[6] FAIS Act, sec 14(2)(a).

26. The FAIS Act provides in section 13(2)(a) as follows:

"An authorised financial services provider must –

(a) ***at all times be satisfied that the provider's representatives****, and the key individuals of such representatives, are, when rendering a financial service on behalf of the provider, competent to act, and* ***comply with-***

(i) the fit and proper requirements; *and*

(ii) any other requirements contemplated in subsection (1)(b)(ii);" (own emphasis)

27. Further, the Determination of Fit and Proper Requirements, 2017,[7] and more specifically section 7 read with section 8 state, amongst other things, that the fit and proper requirements relating to honesty, integrity and good standing apply to representatives. At all relevant times, the applicant was a representative of the respondent.

28. The Supreme Court of Appeal stated the following in respect of section 14(1) of the FAIS Act:

"…*A representative who does not meet those requirements lacks the character qualities of honesty and integrity or lacks competence and*

[7] BN 194 in GG 41321 of 15 December 2017.

thereby poses a risk to the investing public generally. Such a person ought not to be unleashed on an unsuspecting public and it must therefore follow that any representative debarred in terms of s 14(1), must perforce be debarred on an industry-wide basis from rendering financial services to the investing public."[8]

29. The respondent bears the onus to proof on a balance of probabilities the facts it relies on.

30. The conduct of the applicant by sharing information with third-party entities is established on the record before this Tribunal. There is no explanation by the applicant why the respondent's client lists were shared.[9]

31. The record before us contains email correspondence with reference to various dates of communication between the applicant and a third-party entity. For example, an email sent on 5 August 2022, by the applicant (his name appears thereon as the sender) regarding feedback on a medical aid presentation.[10] Further, an email from a third-party entity to the applicant's, dated 8 July 2023, and what appears to be a response

[8] *Financial Services Board v Barthram and Another* (20207/2014) [2015] ZASCA. 96; [2015] 3 All SA 665 (SCA); 2018 (1) SA 139 (SCA) at par 16.
[9] Record, Part A, page 16 and Part B, page 22.
[10] Record, Part B, page 15 – 16.

from the applicant sent on 10 July 2023 regarding a consolidated report of all the employees.[11]

32. It is the respondent's submission that the above conduct of the applicant was without its (the respondent's) consent. The version of the applicant that he obtained a verbal consent from the officials of the respondent (which is denied by the respondent) is not substantiated with any evidence.

33. There is no explanation by the applicant regarding "*the medical aid presentation"* and "*the latest update lists"* emails sent a third-party.

34. This Tribunal finds no reason to deviate from the respondent's submission that the applicant has failed to act with integrity and honesty.

35. In respect of the sanction imposed by the respondent, the latter, as a financial services provider, must in terms of section 14(1)(a) of the FAIS Act debar a representative, if it is satisfied on the facts and information before it, that the representative is no longer a fit and proper person.

36. Having considered the applicant's grounds of reconsideration, this Tribunal finds no reason to deviate from the decision of the respondent to

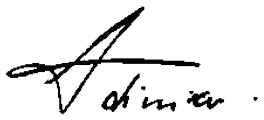
[11] Record, Part B, page 17.

debar the applicant.

ORDER:

1. The application for reconsideration is dismissed.

Signed on the 26th day of March 2024.



ADV W NDINISA (Chair)
signed for and on behalf of the panel

Adv SM Maritz and
Prof M Sigwadi