THE FINANCIAL SERVICES TRIBUNAL

FSP29/2023

In the matter between:

KEREN DENISE MILLS Applicant

and

EASTERN CAPE MOTOR HOLDINGS (PTY) LTD Respondent

DECISION

Tribunal: W Ndinisa (Chairperson), N K Nxumalo and P R Long
Date of decision: 28 January 2024

For the Applicant : Adv S Sephton
For the Respondents : Ms C Viljoen

Summary: Application for reconsideration of the decision of an FSP to debar its representative, fit and proper requirements of "honesty" and "integrity".

Long (Ndinisa concurring):

Introduction

1. The respondent carries on a business as a retailer of motor vehicles and provides certain financial services for which it is licensed as a financial

services provider ("*FSP*"), as defined in section 1 of the Financial Advisory and Intermediary Services Act 37 of 2002 ("*FAIS Act*").

2. The applicant was a representative employed by the respondent as a finance and insurance marketer. The incident which forms the subject of this application for reconsideration relates to the following events:

2.1 the applicant facilitated a finance application for the purchase of a Ford motor vehicle by a customer of the respondent;

2.2 the customer had a change of heart and opted to purchase a Volkswagen motor vehicle instead;

2.3 the instalment sale agreement signed by the customer for the purchase of the motor vehicle however recorded the details of the Ford motor vehicle;

2.4 in the result, the agreement had to be updated with the details of the Volkswagen motor vehicle;

2.5 the updated agreement was signed by the customer electronically on 16 January 2023 together with the delivery note for the motor vehicle;

2.6 however, the signed agreement contained the incorrect engine and chassis numbers;

2.7 in the result, a third agreement was drawn up and signed by the customer together with the delivery note and the customer took delivery of the motor vehicle on 16 January 2023;

2.8 the signed delivery note, unfortunately, still contained the incorrect engine and chassis numbers;

2.9 '[t]o avoid inconvenience to the customer to sign a new delivery note', the applicant copied the customer's signature from the delivery note of 16 January 2023 and pasted it to a new delivery note dated 18 January 2023.

3. A disciplinary hearing was held on 2 February 2023. The 'charge' against the applicant was, essentially, one of misconduct in that she fraudulently altered an official document. The applicant initially pleaded not guilty. Subsequently, at the disciplinary hearing, she changed her plea to guilty which resulted in her dismissal.

4. On 8 February 2023, the respondent notified the applicant of its intention to debar her. The grounds for debarment were that the applicant *'deliberately altered a legal document for the purpose of inducing the bank into paying the transaction. We see this as an act of fraud which is a material breach of the Honest and Integrity Requirements as noted in Board Notice 194 of 2017. Furthermore you were untruthful when you were offered an opportunity to reveal your errors and wrongdoing*.' Further, that the applicant no longer meets the fit and proper requirements in terms of section 13 of the FAIS Act and Board Notice 194 of 2017.

5. The applicant was afforded an opportunity to make submissions, which she did. On 30 March 2023, the respondent issued a notice of debarment to the applicant informing her of its decision to debar her.

6. The applicant applies, in terms of section 230 of the Financial Sector Regulation Act 9 of 2017, for a reconsideration of her debarment. The grounds for reconsideration relied on by the applicant are two-fold: (1) the applicant alleges that the debarment process was incorrect and unfair; (2) the finding by the respondent that the applicant no longer complies with the fit and proper requirements is incorrect and should be set aside; and (3) the period of the debarment is excessive, and a 'suspended sentence' should instead be imposed.

Condonation

7. The applicant's heads of argument were filed out of time. The applicant has applied for the lateness to be condoned. The application for condonation was not opposed by the respondent and there is no prejudice to it. Having considered the matter, we grant the condonation sought.

The issue of procedure

8. The applicant was given notice on 31 January 2023 to attend a 'disciplinary investigation' on 2 February 2023. The investigation was in relation to the misconduct. The applicant complains that she was afforded only 'one clear working day' to prepare for the investigation and she was not allowed legal representation at the hearing.

9. The applicant in her debarment application lists several reasons why the disciplinary process was unfair which, in addition to the aforementioned complaints, includes the fact that she was not allowed to lead or cross-examine witnesses.

10. In addition, the applicant claims that the outcome of the disciplinary proceedings and the finding by the chairperson of those proceedings informed the debarment and that there was no separate debarment enquiry.

11. Section 14(2)(a) of the FAIS Act requires that an FSP, before effecting a debarment in terms of subsection (1), **must** ensure that the debarment process is lawful, reasonable and procedurally fair. Guidance Notice 1 of 2019 records that a debarment decision by an FSP constitutes the exercise of administrative action and it is required of FSP's in exercising their debarment powers to act reasonably, rationally, and fair.[1] What is fair in the particular circumstances, will depend on the context of each case.[2]

12. Section 14(3) of the FAIS Act provides as follows:

> *"(3) 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;*
>
> *(b) consider any response provided in terms of paragraph (a)(iii), and then take a decision in terms of subsection (1); and*
>
> *(c) immediately notify the person in writing of-*

[1] Guidance Notice 1 of 2019 at para 3.6.
[2] Section 3(2)(a) of PAJA.

(i) the financial services provider's decision;

(ii) the persons' rights in terms of Chapter 15 of the Financial Sector Regulation Act; and

(iii) any formal requirements in respect of proceedings for the reconsideration of the decision by the Tribunal."

13. Accordingly: a representative must be given notice of the FSP's intention to debar, which notice must set out the grounds and reasons for debarment; the representative must be given a copy of the FSP's debarment policy; the FSP must afford the representative a reasonable opportunity to make submissions; and the FSP must consider those submissions prior to making a decision.

14. On the evidence before us all these requirements were complied with. Whilst in some instances FSPs conduct oral hearings when debarring a representative, the FAIS Act itself does not require that an oral hearing or enquiry be held prior to debarment.

15. The respondent maintains that the debarment and the disciplinary enquiry were two different processes. There is nothing before us that suggests otherwise. We therefore find that the process of debarment was procedurally fair and complied with the prescripts in the FAIS Act.

16. In any event, there is nothing wrong with an FSP relying on the factual findings of the disciplinary inquiry that preceded the debarment proceedings as part of the grounds for debarment.[3]

[3] *Associated Portfolio Solutions (Pty) Ltd and another v Basson and others* [2020] 3 All SA 305 (SCA) at paras [30] to [32].

On the merits

17. Section 8A of the FAIS Act provides as follows:

> *"**Compliance with fit and proper requirements after authorisation***
> *An authorised financial services provider, key individual, representative of the provider and key individual of the representative must-*
> *(a) continue to comply with the fit and proper requirements; and*
> *(b) comply with the fit and proper requirements relating to continuous professional development."*

18. Board Notice 194 of 2017 ('the Board Notice') was published in Government Gazette No. 41321. Chapter 2 of the Board Notice sets out the fit and proper requirements relating to honesty, integrity, and good standing. In terms of section 8 thereof an FSP must be a person who is honest and has integrity and of good standing. In turn, section 9 of the Board Notice lists incidents which constitute *prima facie* evidence that a person is not honest or lacks integrity or good standing. This includes an incident where a person has been removed from an office of trust for theft, fraud, forgery, uttering a forged document, misrepresentation, dishonesty, breach of fiduciary duties or business conduct (section 9(1)(e)).

19. Section 9(3) of the Board Notice requires that in assessing whether a person meets the requirements of section 8(1)(a), due regard must be given to various factors namely:

19.1 The seriousness of the persons' conduct, whether by commission or omission, or behaviour and summarising circumstances to that conduct or behaviour that could have a negative impact on a person's compliance with section 8(1);

19.2 The relevance of such conduct or behaviour that has or could potentially have a negative impact on the person's compliance with section 8(1), to the duties that are or are to be performed, and the responsibilities that are or are to be assumed by that person; and

19.3 The passage of time since the occurrence of the conduct or behaviour that had a negative impact on the person's compliance with section 8(1).

20. In *Hamilton Smith & Company v The Registrar of Financial Markets*[4] the Appeal Board stated that:

> "*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'."*

21. The issue is whether the applicant lacks the personal qualities of honesty and integrity. Although not defined in the FAIS Act, this Tribunal has held that the phrase means defect of character, unsoundness of moral principle and corrupted virtue. [5]

22. The motor vehicle was financed by Motor Finance Corporation ("*MFC*"), a division of Nedbank, and in each instance, it appears that MFC became aware of and raised the errors in the documents. The applicant contends that her conduct does not amount to fraud and did not induce MFC to pay the purchase

[4] Appeal Board decision dated 1 September 2003
[5] *Rampersadh v FNB* FSP50/2021 dated 13 June 2022 at paras [33].

price of the motor vehicle to the dealership. In addition, the applicant contends that the delivery note is immaterial, the correct contract was concluded, the motor vehicle was delivered to the customer and the correct amount was paid by MFC to the respondent.

23. The applicant also contends that on the day of the incident she was standing in for a colleague. She was required to facilitate the transaction on the MFC system which is different to the Wesbank system ordinarily used by her. The applicant states that after the third contract was signed, the customer took delivery of the motor vehicle. It was then found out that the delivery note records the incorrect description of the motor vehicle. The applicant contends that: '*I ought to have called the client in to sign the correct delivery note which would accord with version 3. This would have been the correct process to enable payment to be made . . . This was a mammoth error of judgment on my part, but was never done with the intention of defrauding anybody, inducing a payment which was not due or acting in a fashion which would embarrass the Company*.' The applicant also contends that her conduct was negligent, she was embarrassed for making so many errors and did not want to inconvenience the customer to sign another document. In her submissions to the respondent, the applicant also expressed remorse for her lapse in judgment.

24. During the hearing we asked the representative of the respondent what the nature of the delivery note was in relation to the transaction. We were informed that prior to the bank releasing the funds for the purchase of a motor vehicle it requires both a completed and signed instalment sale agreement

and delivery note. Absent a delivery note with the correct details and signature of the customer, the bank will not release the funds to the dealership.

25. The customer signed the delivery note on 16 January 2023 and on the same date took delivery of the motor vehicle. The error was identified somewhere between 16 and 18 January 2023. On the latter date the applicant copied and pasted the customer's signature, changed the date on the delivery note and forwarded the altered note to MFC for it to release the funds. The applicant intentionally misrepresented to MFC that the documents required for the transaction were signed by the customer. The delivery note was an essential part of the transaction. This the applicant knew. It is therefore *incorrect* for her, to state it politely, to allege that the document was not material for the transaction. Her conduct was therefore intentional, not negligent.

26. Since the delivery note is an essential part of the transaction, the consequence of a copied signature or altered document without authorisation could undermine the transaction should a dispute ever arise between MFC and/or the respondent and the customer. This the applicant fails to appreciate by downplaying the nature of the delivery note.

27. She contends that she did not want to inconvenience the customer and she felt embarrassed. However, she had other options available to her, she could have sent the delivery note to the customer for electronic signature as she had done with the instalment sale agreement, or she could have gone to meet the customer to obtain the signature since it was her error. Instead, knowing that the funds were being withheld by MFC, the applicant elected to manually copy and paste the customer's signature and in so doing, in essence, intentionally

misrepresented to MFC that the customer has signed the delivery note, in order to induce MFC to release the funds to the respondent.

28. In addition, if mere embarrassment is what caused the applicant, a representative with extensive experience in the financial sector, to alter a document without a client's authorisation and compromise her integrity, she ought not to be burdened with the enormous responsibility of rendering financial services.

29. Accordingly, the facts support the respondent's finding that the applicant lacked honesty and integrity. In the premises, the Tribunal can find no grounds to interfere with the respondent's decision to debar the applicant.

30. Moreover, we have considered the minority decision of our colleague concerning the applicant's conduct in the context of the 'transaction'. We respectfully disagree.

31. In mitigation the applicant contends that the transaction was 'genuine' in that MFC paid the purchase price to the respondent and therefore the respondent did not suffer any loss, the customer took delivery of the motor vehicle, and the applicant did not gain any benefit from her conduct. The applicant entirely misconstrues her conduct in the context of the incident. First, the legitimacy of the transaction is of no concern to us and even if it was, it can hardly be argued that the transaction, tainted by an unauthorised signature, is legitimate. However, we make no finding on this aspect.

32. As the Tribunal we are asked to assess and regulate conduct. Thus, the issue is whether the conduct of a representative in copying and pasting a customer's

signature onto a document without their authorisation offends the FAIS Act and the principles of honesty and integrity. We find that it does.

33. On the issue of a 'suspended sentence' or suspended debarment, this Tribunal does not have the jurisdiction to suspend a debarment in the manner contended for by the applicant's counsel.

Order

34. The following order is made:

34.1 The late filing of the applicant's heads of argument is condoned.

34.2 The application for reconsideration is dismissed.

Signed on behalf of the Tribunal on 30 January 2024.

_____

PR Long

NXUMALO:

35. I have read the main decision. I agree with its conclusion and much of the reasoning. However, there are some aspects where my approach, arrears of emphasis and analysis differ from it, hence this separate decision.

36. It is common cause that the applicant cut the client's signature from the previous incorrect delivery note and pasted it on to the new corrected delivery. In so doing, she misrepresented that the client had signed the new corrected delivery note when he in fact did not.

37. Nevertheless, this is not a straightforward case of fraudulent misrepresentation. Far from it. The greatest difficulty in this case is that the misrepresentation in question does not pertain to the substantive genuineness and legitimacy of the transaction but to the regularity of the delivery note.

38. Whilst most incidents of dishonesty typically relate to the substance of the transaction in question and involve some form of personal gratification for the offender, in the present case the dishonesty is limited to the form of the documentation evidencing delivery. The transaction itself was genuine: the vehicle was sold and delivered to the correct purchaser and MFC had incurred the liability to pay the purchase price in terms of a valid instalment purchase agreement. The dishonesty involved misrepresenting that the customer had signed the corrected delivery note, by cutting the customer's signature from the previous version of the delivery note and pasting it on to the new one. The sole purpose being to avoid asking the customer to come and sign the document for the fourth time. The customer subsequently signed the corrected delivery note and MFC made the payment.

39. Admittedly, intentional misrepresentation is dishonest. The problem here is that the irregularity of the delivery note places this case in the borderline between a financial service rendered *qua* representative and a generic administrative service rendered *qua* employee. If it had been a cash sale, for

example, the same incident could have rendered it a pure case of misconduct in an employment sense and not falling within the provisions of FAIS.

40. However, because the purchase was financed by a loan from MFC the incident occurred in the rendering of an intermediary service.

41. For these reasons, I agree with the order made in the main decision.