

THE FINANCIAL SERVICES TRIBUNAL

Case No: FSP49/2023

In the matter between:

KAREN JOY HOWARD

Applicant

and

SA HEALTH BROKERS (PTY) LTD

Respondent

Summary: Procedural requirements for debarment by an FSP. The FSP takes the decision to debar, not the FSCA. The FSCA does not review, approve or confirm a debarment – Section 4.2 of the Guidance Note 1 of 2019.

DECISION

A. INTRODUCTION

1. The Applicant brings this application in terms of Section 230 of the Financial Sector Regulation Act 9 of 2017 ("the FSR Act").
2. The Respondent is a registered Financial Services Provider as contemplated in the Financial Advisory and Intermediary Act 37 of 2002 ("FAIS Act").
3. The parties have agreed that this matter can be decided on the papers filed, and this is that decision.

B. THE FACTS

4. The Applicant acquired the Respondent in 2012, and Gwen Elizabeth Martin ("Martin"), in turn, acquired 50% of the shareholding in the Respondent from the Applicant and became a director in 2018.
5. Accordingly, since 2018, the Applicant and Martin have been co-directors and equal shareholders of the Respondent.
6. The relationship between the Applicant and Martin deteriorated to the point that the Applicant sought to dispose of her shareholding in the Respondent. For the reasons set out below, it is unnecessary to delve deeper into the merits of the disputes between the Applicant and Martin, save to say that the Applicant alleges that the debarment process followed was not for a legitimate reason but for an ulterior motive.
7. The Applicant was served with a notice of intention to debar on 17 July 2023. The gravamen of the Respondent's argument was that the Applicant no longer complied with the honesty and integrity requirements of the FAIS Act and ought, in the absence of a satisfactory explanation, to be debarred. The notice also advised the Applicant *inter alia* that she had been removed as a representative of the Respondent.
8. The Applicant maintains that she made representations as to why she should not be debarred. The core of the Applicant's argument is that the intended debarment and the ultimate debarment were unlawful, unreasonable and procedurally unfair.
9. Martin and Presha Singh ("Singh"), the Respondent's outsourced compliance

officer, maintain that the Respondent did not take the decision to debar the Applicant but that it was:

9.1 On the advice of the FSCA that the Applicant was removed as a representative; and

9.2 The FSCA who debarred the Applicant.

10. The FSCA records the Applicant as having been debarred on 7 August 2023. Notice of debarment was not communicated to the Applicant by the Respondent, and it was only when the Applicant searched the FSCA website that she noted that she had been debarred.

11. Pending the outcome of this application, the Applicant successfully applied to this Tribunal for a suspension of the debarment ("the Suspension Application").

12. The position taken by the Respondent on who took the decision to debar the Applicant (i.e. the FSCA and not the Respondent) is made by both Martin and Singh in affidavits filed in opposition to the Suspension Application.

13. Following the Tribunal's Ruling on the Suspension Application, Martin filed an affidavit on 21 November 2023 and stated:

"I have considered the Applicant's application for suspension of her debarment and the feedback from the Tribunal. The Respondent and I will not oppose the Application for the Reconsideration of Debarment and will support the granting of the application."

C. LEGAL FRAMEWORK

14. Section 14(1)(a) of the FAIS Act provides the following:

"14. Debarment of representatives – (1)(a) *An authorised financial services provider must debar a person from rendering financial services which is or was, as the case may be –*

- (i) a representative of the financial services provider or*
- (ii) a key individual of such representative,*

if the financial services provider is satisfied on the basis of available facts and information that the person –

- (iii) does not meet, or no longer complies with, the requirements referred to in section 13(2)(a); or*
- (iv) has contravened or failed to comply with any provision of this Act in a material manner." (Emphasis added)*

15. Section 13(2)(a) of the FAIS Act provides that an authorised financial services provider must at all times be satisfied that the provider's representatives, and the key individuals of such representative, 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).
16. Section 13(1)(b)(iA) of the FAIS Act provides that a person may not act as a representative of an authorised financial services provider, unless such person meets the fit and proper requirements.
17. In terms of section 6A(2)(a) of the FAIS Act, fit and proper requirements include, *inter alia*, appropriate standards relating to personal character qualities of honesty and integrity.
18. Section 14(3)(a) provides that a financial services provider must, before debarring a person:

- 18.1 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;
 - 18.2 provide the person with a copy of the financial services provider's written policy and procedure governing the debarment process; and
 - 18.3 give the person a reasonable opportunity to make a submission in response.
19. Section 14(3)(c) provides that the financial services provider must immediately notify the person in writing of:
- 19.1 its decision;
 - 19.2 the person's rights in terms of Chapter 15 of the FSR Act; and
 - 19.3 any formal requirements in respect of proceedings for the reconsideration of the decision by the Tribunal.

D. DISCUSSION

Procedure

20. It is evident on the Respondent's own version that Martin and Singh misunderstood the debarment procedure and failed to comply with Section

14(3)(c), which renders the debarment process flawed and susceptible to reconsideration.

Ulterior Purpose

21. This Tribunal has held on several occasions that the debarment process is not to be utilised to settle contractual disputes or for ulterior purposes.
22. The fractious nature of the relationship between Martin and the Applicant infers that "debarment" proceedings were utilised by Martin in furtherance of her contractual disputes with the Applicant rather than on genuine grounds related to questions of honesty and integrity.

The Position of the FSCA

23. Section 4.2 of the Guidance Note 1 of 2019 confirms that the FSCA does not review, approve or confirm the debarment of a representative by an FSP.
24. The FSCA merely records the debarment in the Register for Debarred Representatives, which is published on the FSCA's website in terms of section 14(7) of the FAIS Act.
25. In the premises, Martin's suggestion that the FSCA took the decision to debar the Respondent is unsustainable.

E. CONCLUSION

26. In the circumstances, the application for reconsideration must succeed.

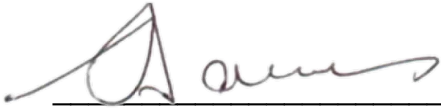
ORDER: The application for reconsideration is upheld.

Signed on 9 February 2024

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PJV Veldhuizen

(Member)

A handwritten signature in black ink, appearing to be 'LTC Harms', written above a horizontal line.

LTC Harms

(Deputy Chairperson)