IN THE FINANCIAL SERVICES TRIBUNAL

CASE NUMBER: FSP9/2020

In the matter between:

LAURA EVERSON Applicant

And

ECONORISK (PTY) LTD Respondent

Tribunal: Mr. JM Damons (chair), Mr. A Jaffer and Mr. N Nxumalo
For the Applicant: Mr. O Krause
For the Respondent: Ms. F Salijee

Hearing: 15th September 2020
Decision: 12th October 2020

Summary: Application for reconsideration of a decision in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 ("FSRA") – application to reconsider the debarment decision – procedure for debarment – Conduct which disqualifies a representative from the requirements of fit and proper – debarment procedurally fair but substantively unfair and thus set-aside

DECISION

INTRODUCTION

1. In this matter, the Applicant applied for reconsideration of the debarment decision dated 02nd December 2019[1]. After the debarment decision, the applicant filed an application for the reconsideration of a decision in terms of section 230(1) of the FSRA[2].

2. The applicant in this matter is Ms. Everson (the Applicant) a former Financial Services Representative (FSR) of Econorisk (Pty) Ltd (the Respondent) an authorized Financial Services Provider (FSP) and the Respondent in this matter.

3. The reconsideration application was filed with this Tribunal on the 11th January 2020. The application was opposed by the Respondent. This matter is thus considered on the written and oral submissions presented by the parties.

FACTUAL BACKGROUND AND COMPLAINT

4. The gist of the matter concerns an incident where the Applicant was debarred on allegations that she stole data and gave it to a competitor. The actual allegations that formed the basis of the debarment were formulated as follows:

> *"Kindly take notice that Econorisk (Pty) Ltd hereby gives Laura Everson notice in terms of section 14(3)(a)(1) of the FAIS Act of its intention to debar you from rendering financial services based on the ground that you have failed to satisfy the fit and proper requirement as contemplated in section 13(2) of the FAIS Act for the following reasons:*
>
> *1. You have failed to act with the necessary honesty and integrity as contemplated in the FAIS Act read with the Determination of Fit and Proper Requirements for Financial Services Providers , 2017 when you, together with Ms Maria Samaras, intentionally and without authorisation and unlawfully and in breach of your restraint of trade provisions (clause14) as contemplated in your contract of employment transmitted and disclosed confidential information belonging to Econorisk to an*

[1] See record of proceedings part A page 34
[2] See record of proceedings part A pages 1 - 33

unauthorised third party who is financial services provider and competitor and current employer of Samaras (PWV) whilst you were still a representative and employee of Econorisk. In so doing, you caused or sought to cause financial loss to Econorisk; acted in breach of your duty of good faith and to the detriment to your employer.

2. *You have failed to act with the necessary honesty and integrity as contemplated in the Determination of Fit and Proper Requirements for Financial Services Providers, 2017 when you, together with Ms Maria Samaras and PWV, unlawfully used and/or sought to unlawfully use, the confidential information so transmitted to PWV to the benefit of yourself / Samaras / PWV to the detriment of Econorisk, your employer."*[3]

5. The Applicant resigned as an employee of the Respondent on the 11th July 2019. The parties agreed that her last working day with the Respondent would be at the end of the month, being 31st July 2019.

6. On the 17th July 2019, the Applicant was suspended on allegations "*of serious misconduct relating to her duties to, inter alia, act with honesty and integrity*". The allegations for which she was suspended for are restated in paragraph 4 above. The Respondent also filed an urgent application at the Labour Court, raising issues about restraint of trade. The application was dismissed for lack of urgency, but the matter remains pending at the Labour Court.

7. The Respondent also instituted debarment proceedings as per the notice dated 08th August 2019[4]. The proceedings were to be presided over by an external chairperson i.e. Advocate Pieter Theron (Adv. Theron). The Applicant raised several points *in limine* regarding the debarment process. Adv. Theron as the presiding officer dismissed all the points raised and further ordered that the Applicant must file a supplementary affidavit to the proceedings that were pending before the Labour Court[5].

8. The debarment hearing was scheduled to proceed on the 31st October 2019, but the Applicant successfully interdicted the proceedings. The Court interdict

[3] See record of proceedings part A pages 53 - 54
[4] See record of proceedings part A pages 35 - 37
[5] The proceedings regarding the restraint of trade

barred the Respondent from proceeding with the debarment hearing before Adv. Theron. The order stated the following:

> *"[21] I grant the following order:*
>
> *[1] The first and second respondent (referring to Econorisk and Adv Theron) are interdicted from proceeding with the debarment hearing of the applicant to be heard either on 31st October 2019 or any other date, before the second respondent;*
>
> *[2] The order in [1] above shall operate as an interim interdict pending finalisation of the review application under case number 37158/2019 issued out of this court on 22 October 2019;*
>
> *[3] The first respondent (Econorisk) is directed to pay the costs of the application."*[6]

9. The Respondent then re-issued an amended debarment notice[7] on the 20th November 2019. The allegations remained the same accept that the Respondent had changed the presiding officer. The hearing was now to be presided over by one, Jonathan De Vries who was the Executive Head of Finance.

10. The Applicant did not make any submissions as directed to by the notice. The presiding officer stated the following as his decision:

> *"I confirm that you have not responded to the amended notice to debar you. In the circumstances and having considered the reasons for the debarment offered by Econorisk, this serves to inform you of your debarment as a financial services representative"*[8]

11. It is this decision that the Applicant seeks to have reconsidered.

GROUNDS FOR THE RECONSIDERATION

12. At the main the Applicant through her representative raised 5 grounds for reconsideration. The grounds can be listed as follows:

- The appointment of an independent chairperson to consider the debarment was in her view not fair.

[6] See record of proceedings part A pages 97 - 98
[7] See record of proceedings part A pages 53 - 55
[8] See record of proceedings part A page 34

- The failure of the Respondent to take into account the evidence on affidavit in the urgent Labour Court application, case number 37158/2019 as well as the evidence in the court papers in the urgent High Court matter under case number 37760/2019.

- It was also submitted that the Respondent failed to comply with the High Court order under case number 37760/2019.

- The Respondent failed to provide reasons for the debarment.

- Lastly it was submitted that the Respondent had ulterior motives in debarring the Applicant.

13. The Applicant argued in her papers and during the hearing that, debarment is a mechanism meant to protect the public from representatives who have demonstrated conduct of being untrustworthy. It was submitted that in this matter, the debarment was based on the Respondent motives alone.

14. It was argued on behalf of the Applicant that the presiding officer was biased. According to the Applicant, the appointed presiding officer (De Vries) was biased and he had prior knowledge of the merits and same disqualified him from acting as a presiding officer. Moreover, he had an interest in the matter.

15. It was also argued that the interdict obtained by the Applicant did not only relate to the debarment proceedings before Adv. Theron but relates to any subsequent debarment proceeding. Therefore, according to the applicant, the Respondent failed to comply with a Court interdict. It was also argued that the new notice that was issued by the Respondent did not give reasons for the debarment but simply refers to the previous notice which had been issued.

16. The Applicant disputed that there was information that she stole. She argued that she only sent through a list to an employee to show her prospective employers the type of clients and book value she handled. The said list was given to the employee before the said employee resigned from the Respondent. The Applicant argued that the test for debarment is honesty when dealing with the public. According to her, the current matter is purely a

contractual dispute. The Respondent is even claiming damages from her and the matter is still pending at the High Court. There was no evidence that she gave documents to third parties.

17. The Respondent argued that the interdict did not mean that they could not proceed with the debarment in any other manner. According to the Respondent, they could proceed with the debarment safe to state that before a different presiding officer. Secondly, it was argued that the second notice of debarment that was given to the Applicant referred to the same allegations that were stated in the initial notice. Therefore, the Applicant knew what the allegations against her were.

18. There were also submissions to the effect that because the Applicant did not respond to the debarment notice, there was only one version before the presiding officer hence his findings. The Respondent acknowledged that a single incident may not justify debarment but argued that in this case, such an incident warrants a debarment. According to them, the matter involved theft and distribution of confidential information.

19. It was argued that although the Respondent had an option to enforce a restraint of trade, same did not mean that they cannot debar the Applicant. Moreover, it was stated that although the notice does not talk to incident of theft, the merits do talk to same. The Respondent's representative was questioned about the fact that the allegations of theft were not proven, and he responded that the submissions were not refuted as the Applicant did not respond. Therefore, on the balance of probabilities, the allegations were found to have merits.

20. The Respondent's representative acknowledged that the dispute arose from a contractual relationship. According to him, an FSP can still debar a representative based on a "*delict committed by the employee*". He stated that the Applicant breached her fiduciary duties owed to the Respondent. He stated the Tribunal can determine if there was a breach of any fiduciary duty. The Applicant has never provided a credible explanation for the emails she sent, hence she was debarred.

21. During the proceedings, the Respondent's representative was specifically asked if the Applicant was given any notice which clearly indicated that the Respondent intent debarring her based on the allegations and findings which were against her. The response from the Respondent's representative was that he does not recall if ever the applicant was provided with such a notice.

LEGAL FRAMEWORK AND ANALYSIS

22. In terms of section 14(1) of the FAIS Act, an FSP is obliged to debar a representative from rendering financial services if the FSP is satisfied based on available facts and information that that representative no longer complies with inter alia the fit and proper requirements.

23. Our law provides guidance to parties on the procedure that must be followed in the event of an FSP invoking a debarment process. The FAIS Act states in section 14(2) that before effecting debarment in terms of subsection (1), the FSP must ensure that the debarment process is lawful, reasonable and procedurally fair.

24. Further, the FAIS Act states the following in section 14(3) (a) and (b):

*"(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....." (own emphasis)

25. An FSP is required, before debarring its representative, to give adequate notice in writing to the person stating its intention to debar the person, the grounds and reasons for the debarment.

26. Section 2(4) of the Determination of Fit and Proper Requirements for FSPs, 2008 (2), provides as follows:

> *"2(4) any of the following factors constitute prima facie evidence that an FSP, key individual or representative does not qualify in terms of subparagraph (1), namely that the FSP, Key individual or representative –*
>
> *(a) has within a period of five years preceding the date of application or the proposed date of appointment or approval, as the case may be, been found guilty in any criminal proceedings or liable in any civil proceedings by a court of law (whether in the Republic or elsewhere) of having acted fraudulently, dishonestly, unprofessionally, dishonorable or breach of a fiduciary duty"*

27. In this matter, both the procedure and the substance relating to the debarment has been placed in question. Regarding procedure, the issues raised relate to the Court interdict, the Second notice issued, and the debarment process being chaired by an external chairperson.

28. This Tribunal has noted the High Court interdict that was granted in relation to the parties. However, considering the contents of the court order itself, one cannot say with certainty that the order barred the Respondent from proceeding with the debarment process in any other manner. It is the view of this Tribunal that the court order only related to the proceedings having been presided over by Adv. Theron. Therefore the, proceeding before another chairperson did not mean that the Respondent failed to comply with the court

order. The Respondent cannot be faulted for having proceeded in any other manner as same was not prohibited by the court order.

29. This Tribunal has also considered the second notice that was issued to the Applicant. In our view the notice did indicate the allegations faced by the applicant. Moreover, the notice was just a repetition of the allegations that had been stated in the first notice. Therefore, the Applicant was aware throughout of the nature of the allegations that were levelled against her. The Respondent also cannot be faulted in this regard. The issue raised regarding an external chairperson, has in the view of this tribunal become academic as the Respondent abandoned the first proceedings before Adv. Theron.

30. There were also issues raised regarding the biasness of the second presiding officer (Mr. De Vries). However, this Tribunal is unable to address this aspect as the Applicant did not make any submissions before De Vries. Moreover, it is strange that the applicant would complain about the Respondent appointing an external chairperson. When the external chairperson is removed and an internal chairperson is appointed, she failed to raise any issue with the internal chairperson. It is the view of this Tribunal that appointing an internal person would have its disadvantages. The person would have some form of knowledge about the matter, but it does not follow that the person automatically is biased. Similarly, this Tribunal cannot fault the Respondent for appointing Mr. De Vries as the chairperson.

31. It is the view of this Tribunal that having consider the submissions made by the parties, the debarment of the Applicant was procedurally fair.

32. As stated above, the Applicant also raised issues pertaining to substance. At the main, the allegations relate to the Applicant giving stolen confidential information and forwarding same to an unintended recipient. It should be stated that there was no evidence presented before this Tribunal showing that the Applicant forwarded confidential information to an unintended recipient. Moreover, there is no finding of guilt or liability against the Applicant which would justify her debarment.

33. The Respondent's representative also confirmed during the hearing that this matter arises from a contractual dispute between the parties. It was also confirmed that there is a pending dispute relating to a damage claim against the Applicant. In the view of this Tribunal, there is no adverse finding made against the applicant which justifies the debarment. In the absence of a finding of guilty or liability, debarment cannot be justified. It thus follows that the debarment of the applicant should be reconsidered as there was no finding of guilty or liability against the Applicant. Moreover, there is still a pending court applications which are also to focus on the merits in this matter. This Tribunal cannot decide on whether the Applicant stole confidential information or not.

34. There is no evidence or adverse findings against the Applicant to justify the debarment of the Applicant. In this regard, the debarment of the Applicant is procedurally fair but substantively unfair.

35. The parties made submissions regarding costs. The Respondent argued that costs can only be awarded in exceptional circumstances. This Tribunal also share the same sentiments. Costs in such proceedings can only be awarded in exceptional circumstances. No such exceptional circumstances exist in this matter and thus no award is made in relation to costs.

36. As stated above, this Tribunal is of the view that the debarment of the Applicant is procedurally fair but substantively unfair.

37. Accordingly, in terms of section 234(1)(b)(ii) of FSR Act, this Tribunal makes the following orders:

37.1 The debarment of the Applicant is hereby set-aside;

37.2 No order as to costs.

Signed at PRETORIA on the 12th day of OCTOBER 2020 on behalf of the Tribunal

CHAIRPERSON
JM DAMONS