THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: FSP43/2020

In the matter between:

LESLIE VAN ROOYEN	Applicant
and	
FIRST NATIONAL BANK (division of FIRST RAND BANK LTD)	First Respondent
AZRAA HARPER	Second Respondent
SOPHIE LETSOALO	Third Respondent

Application for reconsideration of debarment as FSR - the reasons for a debarment must (a) have occurred and (b) become known to the financial services provider while the person was a representative of the provider.

DECISION

[1] The applicant applies for the reconsideration of his debarment as financial service representative by the Bank, his erstwhile employer and financial service provider. The other respondents were improperly cited, and no further reference will be made to them.

[2] The application before this Tribunal is in terms of sec 230 of the Financial Sector Regulation Act, 2017. The parties have filed heads of argument and waived their right to a formal hearing.

[3] The applicant's debarment was under sec 14 of the Financial Advisory and Intermediary Act 27 of 2002. Section 14(1)(a) states to the extent relevant that an authorised financial services provider must debar a person from rendering financial services who is or was, as the case may be a representative of the financial services provider if the financial services provider is satisfied on the basis of available facts and information that the person does not meet, or no longer complies with, the requirements referred to in section 13(2)(a).

[4] There is a qualification, namely that the reasons for a debarment must (a) have occurred and (b) become known to the financial services provider while the person was a representative of the provider.

[5] This qualification is often used by FSRs to resign once they suspect that the FSP might become aware of a misdeed and this matter is one of them. However, the statutory bar exists and must be respected.

[6] The applicant raised many issues about his REDS designation by the Bank and also some labour issues but those are not a concern of this Tribunal. Our jurisdiction is to consider whether the debarment was formally and materially justified.

[7] The applicant, save for the timing issue mentioned in [4], did not take issue with the debarment process followed by the Bank.

[8] As to timing, the following summary of the facts (in conformity with the record) was supplied by the Bank in its heads of argument.

[9] The Applicant was employed by the Bank from 1 September 2014 to the date of his resignation. He was employed to service a portfolio of the Bank's Premium middle to high income clients and acted as an FSR, in terms of the FAIS Act, for the Bank.

[10] On the 2 April 2020, at 10:57 am, the applicant (according to the Bank) uplifted a pledge (a hold/freeze/reservation of funds) in an amount of R2 624 039,00 which was placed on a business account, held in the name of a commercial business entity (hereafter referred to as "the Company"). The pledge had been placed on 12th September 2019, by the bank's fraud department, with a system remark indicating that: "ACCOUNT PLACED ON HOLD, SARS CONFIRMED THAT IT RECEIVED FRAUDULENT FUNDS, CASE ESCALATED TO FRAUD FOR FURTHER INVESTIGATIONS."

[11] On 3 April, at 19:08 pm, the Applicant resigned from employment, via an email to his line manager. The Applicant dated the accompanying letter April 4, 2020, and apologised for making such an abrupt exit, stating that his last day with the Bank would be 4 April.

[12] His line manager "accepted" his resignation, removed his access to the Bank's system and informed his colleagues that he had resigned "with effect tomorrow" (i.e. 4 April).

[13] On 4 April at approximately 07h42, the applicant sent his supervisor another e-mail withdrawing his resignation, to which she replied that she had noted the content.

[14] On 4 April at 11:18 am, the Head of Fraud for FNB Premium received an email, in confirmation of a telephone call with a Bank fraud analyst who had discovered that holds on the business account, which was under investigation, had been lifted, and that funds

in the account had been dissipated. The fraud analyst indicated that the Applicant had been responsible for the system instruction to uplift the restriction.

[15] On the 4th April at 11:35 am, the Head investigated whether the instruction to uplift had been a legitimate instruction that had filtered down to the Applicant in the course of his duties, or whether he was acting on a frolic of his own.

[16] On the 4th, the Applicant's management confirmed that no business reason or legitimate instruction had been received or filtered down to the Applicant to uplift the holds.

[17] The fraud team immediately traced the funds that were dissipated and holds where placed on all implicated accounts on the same day to secure the tainted funds.

[18] The decision to debar the applicant was based on the following:

> On the 2nd of April 2020, you uplifted a pledge of R2.6millon on the Business account of [the Company] without a valid business reason or the authority to do so, which was against the mandate of your role. Once the pledge was uplifted, monies were withdrawn from the account and deposited into various other accounts. Further to that, you misrepresented yourself at an FNB branch using your employee access card after you had resigned, in an attempt to uplift the hold on the account of one Ms [YM], one of the recipients of the funds that had been in the business account of [the Company]. You also attended a REDS enquiry on the 26th of May 2020 and charged with dishonesty, as a result you have been listed on REDS. It is dear that you were involved in the upliftment of the pledge and have benefited from the proceeds of your dishonest actions.

> Due to your conduct stated above, it was found that you did not comply with the Fit and Proper requirement of Honesty, Integrity and Good Standing as set out in section 8(1) of the Determination of Fit and Proper Requirements for Financial Services Providers (Board Notice 194 of 2017) read with section 9(1)(e) of the Fit and Proper requirements.

[19] The chronology shows that reasons for a debarment occurred while the applicant was a representative of the Bank and that the reason for his debarment had become known to the Bank while he was still a representative of the Bank.

[20] The applicant sought to meet this conclusion by firstly stating that dating the letter 4 April instead of the 3 April was an honest mistake "because the 4th of April 2020 was on a Saturday and both the Applicant and his immediate supervisor do not work on weekend which makes it impossible for the Applicant to resign when both the Applicant and his immediate supervisor are off duty" and that "upon receiving the Applicant's resignation, [his superior] terminated the employment contract on the system and a notification was sent to the Applicant informing him that his employment contract was terminated by the Respondent on the 3rd of April 2020."

[21] This explanation and submission (which are contradictory) are rejected. The letter means what it says, and a unilateral error does not change its effect. It was not a resignation with immediate effect but with effect at the end of 4 April. The Bank was bound by its terms. The allegation that it was impossible for him to resign over a week-end is nonsensical. He chose to resign on a Friday night, he relies on the "acceptance" of his resignation later that night, and he "withdrew" his resignation on the Saturday. If he could not have resigned outside office hours, it would have meant that his resignation

after office hours would have been ineffective. In addition, the Bank could not accept a resignation on other terms because, as the applicant himself says, resignation is a unilateral act. Since the applicant chose 4 April, the Bank could not have "accepted" the resignation on either 3, 4, or 6 April.

[22] There is one qualification to the above. The misrepresentation referred to occurred after the weekend and was therefore not a ground on which the Bank could have debarred him. However, the "misdemeanour" on 2 April (if established) on its own justified the debarment.

[23] The facts surrounding the misrepresentation are, however, relevant in considering the merits of the applicant's defence to the unlocking of the account. It should be noted that the applicant did not attack the merits of his debarment, stating in his reconsideration application that although he knows nothing of the charges, the merits were for another case (para 49 of his application).

[24] On 30 April, in other words within the same month, the Bank wrote to him asking for reasons as to why he

> "accessed FNB account 62652 458 516 in the name of [the Company] on 2 April 2020 when you were still in the employ of FNB. In addition as to reasons why you accessed the above-mention account, you need to clearly provide reasons in your affidavit as to why you have deleted the pledge on the same account on the same day. If you deny accessing the account and or removing the pledge, then please state so in your affidavit."

[25] His response was revealing. He said that he was unable to make a statement under oath because he had accessed and interacted with 50 portfolios per day over 67 months,

and that it was impossible to remember each. He complained that he had only been provided with "a company name and an account number" which he was not familiar with or could remember. He ignored the fact that he had the date, which was a day before his letter of resignation, and that he was not supposed to deal with corporate clients and had no authority to unfreeze accounts.

[26] He also chose not to answer the charges brought against him in the debarment proceedings.

[27] In his heads of argument, he did, however, attack the debarment on the merits in the following terms, and they will be considered:

> 25. The grounds for debarment are based on the allegations that the Applicant removed a hold/pledge from a business account and no any other evidence points out that indeed the Applicant removed the hold/pledge apart for the fact that the Applicants' access was utilized to remove the hold/pledge.
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> 26. The Applicants' access to the Respondent's system was compromised and the Responded is well aware of that factor because the Applicant reported his access being compromised to the Respondent on the 9th of March 2020, however the Responded chose not to take any action at all to secure the Applicants access to the Respondents' system which was compromised.
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> 27. If someone did successfully sign-in into the Respondents' system utilizing the Applicant's access on the 6th of March 2020 in the absence of the Applicant as per the incident which was reported to the Respondent on

> the 9th of March 2020, what guarantees are they that the Applicant indeed removed the hold/pledge when someone else had access to the Respondents' system using the Applicants' access.

[28] The allegation that access to his computer was compromised and that someone else was able to access his computer during March is a gross misrepresentation of the facts. The applicant had to work from home due to the lockdown. Access was a problem for many, not only for him. His Fusion froze and rebooting did not help. He was then told to work from the office, and with that he had issues. There is no suggestion that anyone had accessed his computer. He had problems logging in for one day.

[29] There are, nevertheless, two indisputable facts that corroborate the conclusion that it was the applicant who unfroze the account. A sizeable amount flowed immediately from the blocked account to the savings account of his 12-year-old daughter over which he has signing rights.

[30] The second fact concerns the misrepresentation. On 4 April, the Bank placed a block on all the accounts into which the frozen funds had been transferred. Mrs YM, who apparently controlled the Company account and was allegedly responsible for the VAT fraud on SARS was upset and attempted to obtain their release from those accounts. As the Bank stated in its argument, on 8 April, Mrs YM approached the Bank's Eastgate branch to enquire about the restrictions on her accounts. The Applicant accompanied her to the branch. He did not remain an observer to the situation and represented himself as an employee of the Bank although he knew that he had resigned and that his attempt to withdraw his resignation was unsuccessful. The Applicant went further to attempt to threaten and intimidate the branch staff into releasing the holds on YM's accounts. The

branch staff did not acquiesce, and the incident was escalated, resulting in the affidavit of Ms Van Wyk.

[31] The applicant did not address these facts which, contrary to his submission, do corroborate the Banks's version and which ineluctably underscore the conclusion that his defence is not credible.

The application is dismissed.

Signed on behalf of the Tribunal on 23 November 2020

LTC Harms (deputy chair)