THE FINANCIAL SERVICES TRIBUNAL

CASE No: FSP23/2023

In the matter between:

Mahomed Bilal Ismail Applicant

and

Wesbank a division of FirstRand Bank Limited Respondent

Tribunal Members: MG Mashaba SC (Chair), PR Long and W Ndinisa.

Appearance for Appellant: J Crawford

Appearance for Respondent: L Kannieappan

Summary: Application for reconsideration in terms of section 230 of the FSR Act of a natural person- fit and proper requirements.

DECISION

[1] This is an application for reconsideration in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 against the decision of the respondent to debar the applicant.

[2] The applicant was employed by the respondent at the premises of Tom Campher Motors in Aukland Park, a Volvo dealership ('the dealership'), where he had been seconded by the respondent since 2018. The applicant was placed

on the dealership's floor by the respondent as a Financial and Insurance Marketer (F&I's) to handle the finance and insurance aspects for customers. The applicant was responsible for validation of documentation received from clients, confirming customer income and affordability, KYC ('know your client') loading, providing final approval to invoice the respondent and to ensure payout by the respondent to the dealership for deals concluded.

[3] The applicant was instructed by the respondent's compliance department, represented by its compliance manager that he could facilitate the sale of value-added products but that he could not give financial advice. He was further instructed by the compliance manager and the area sales manager of the respondent to assist the respondent and the dealership to expedite the recovery of the latter's FSP license. Later the respondent instructed the applicant to ensure that the dealership could operate under the FSP license of the Independent Dealer Association (IDA).

[4] During February 2022 an existing customer of the dealership traded in a vehicle and purchased a new one. The said customer then instructed the applicant to add the same value-added products on the new vehicle which had previously been added on the old vehicle to be traded. This incident triggered a chain of events which shall be discussed hereinafter.

[5] On 27 June 2022 a charge sheet was drafted against the applicant wherein two charges were proffered against him as a result of the above transaction. Charge 1 was for refusing to execute a legitimate, fair instruction from a superior which was in terms of paragraph 4.2.3 of the respondent's Disciplinary Code and

Procedure, and charge 2 was for dishonesty, in terms of paragraph 4.2.1 of the respondent's Disciplinary Code and Procedure.[1]

[6] In support of charge 1 the respondent alleged that: (a) the applicant was notified on 23 September 2021 that the respondent was embarking on an exercise to ensure that all its F&I's (Financial and Insurance Marketers) needed to be dually mandated if they were selling dealer value added products. A recording of the initial meeting was also shared with the applicant, (b) the applicant was part of the MS Teams Meeting that discussed the risks and issues that would arise for non-compliance, (c) after the applicant had supplied the required documents it was discovered that the dealership's FAIS license had lapsed during 7 September 2011, (d) the applicant was then advised to stop the sale of dealer value-added products with immediate effect, and (e) it was found that the applicant continued to sell value-added products up until February 2022 when the respondent's Monitoring Centre of Excellence conducted a monitoring on 8 March 2022.

[7] In support of charge 2 the respondent alleged that: (a) the applicant dishonestly continued to sign the Dealer Record of Advice (ROA) reflecting the respondent's FSP number, (b) he was using the respondent's FSP number to facilitate the dealer products even though the respondent was not the product owner, (c) it was found that the dealer salesperson (applicant) was conducting sales, giving advice to clients and produced ROA's signed by the applicant, (d) by so doing the applicant inadvertently enabled the dealership to represent itself as an FSP where their FSP license was no longer valid, (e) there was a

[1] Page 33 of Part B of the Record.

concern that commission had been paid to the dealership from the insurance underwriters and the dealership in turn paid commission to the F&I's whilst it was not a licensed FSP and that this activity had been enabled by the use of the respondent's FSP license number possibly in the dealership's agreements with the respective insurance underwriters.

[8] Subsequent to the disciplinary hearing of 8 July 2022 the applicant was found guilty of all the charges. On 13 July 2022 the respondent's review panel found that the applicant was guilty of the charge of refusing to execute a legitimate, fair instruction from a superior in that he was notified on 23 September 2021 that the respondent was embarking on an exercise to ensure that all Wesbank F&I's needed to be dual mandated if they were selling dealer value added products (VAPS). It was found that even after being advised to stop the sale of dealer value added products (VAPS) the applicant continued to sell dealer value added products until February 2022 when the Wesbank Monitoring Centre of Excellence conducted a monitoring on 8 March 2022.

[9] With regards to charge 2 the applicant was found to have acted dishonesty in that (a) he continued to sign the Dealer Record of Advice (ROA) which reflected the respondent's FSP number, (b) he was using the respondent's FSP number to facilitate the dealer products even though the respondent was not the product owner, (c) it was found that the applicant was conducting sales, giving advice to clients and produced Dealer Record of Advice (ROA) signed by him, (d) by doing so the applicant inadvertently enabled the dealership to represent itself as an FSP where in fact its FSP license was no longer valid, (e) there was concern that a commission was paid over to the dealership from the insurance underwriters and that Tom Campher Motors had in turn paid over commission

to the F&I's without being a licensed FSP and that this activity had been enabled by the use of the respondent's FSP license number possibly in the dealership agreement with the respective insurance underwriters.[2]

[10] On 26 July 2022 the respondent issued to the applicant a notice of summary dismissal. The applicant appealed the decision on 2 August 2022 and on 12 August 2022 his appeal was dismissed.[3] The applicant was debarred and was notified of the debarment in a letter dated 4 April 2023. As reflected in the said letter of 4 April 2023 the reasons for the applicant's debarment was as a result of being found guilty of all charges in the disciplinary hearing and as a result that the applicant no longer complying with the fit and proper requirements set out in the Determination of Fit and Proper Requirements for Financial Services Providers (Board Notice 194 of 2017), as amended, in that the applicant no longer met the requirements of honesty, integrity and good standing.[4]

[11] Subsequent to the applicant's debarment on 4 April 2023 the parties reached a settlement agreement on 6 June 2023 at the CCMA, under case number GAJB16737-22, whereby they agreed amongst other things, that the respondent would remove the applicant's name from the REDS (register of dishonest employees) database by 13 June 2023 and the respondent would withdraw its notice of intention to debar the applicant dated 29 August 2022.[5] Subsequent to this agreement the respondent, through its legal department, confirmed that the respondent was withdrawing the notice of intention to debar

[2] Page 36 of Part B of the Record.

[3] Page 32 and 46 of Part B of the Record.

[4] Page 44 of Part B of the Record.
[5] Page 48- 50 of Part B of the Record.

and that the respondent would not be opposing the applicant's reconsideration application.[6]

[12] We find it bemusing that the parties on 6 June 2023 at the CCMA had agreed, amongst other things, that the respondent would withdraw its notice of intention to debar the applicant dated 29 August 2022 notwithstanding the fact that the respondent had already debarred the applicant on 3 April 2023 which notice was served on the applicant on 4 April 2023. We find it disingenuous that the respondent would agree to withdraw its notice of intention to debar the applicant dated 29 August 2022 only to debar him on 3 April 2023. Furthermore, there is a paradox in the respondent's case in that on the one hand it agreed to remove the applicant's name from the REDS (register of **dishonest** employees) database by 13 June 2023 but yet debarred him for non-adherence to the principle of **honesty**, integrity and good standing.

[13] As the matter stands before us the applicant has been debarred as a result of the decision taken on 3 April 2023. Therefore, the settlement agreement entered into between the parties at the CCMA on 6 June 2023 for the respondent to withdraw its notice of intention to debar the applicant dated 29 August 2022 has been overtaken by events (debarment). This Tribunal is therefore required to determine, irrespective of a settlement agreement, whether the applicant's debarment was procedurally and substantially fair.

PROCEDURAL FAIRNESS

[14] As already indicated above that the applicant during the disciplinary proceedings was charged with refusing to execute a legitimate, fair instruction

[6] Page 51- 52 of Part B of the Record.

from a superior which was in terms of paragraph 4.2.3 of the respondent's Disciplinary Code (charge 1). He was subsequently found guilty of the said charge. However during the debarment proceedings the first charge was no longer about refusing to execute a legitimate, fair instruction from a superior which was in terms of paragraph 4.2.3 of the Disciplinary Code but instead it was altered to "Do not meet and/or not comply with the requirements of section 13 (2) of the FAIS Act, specifically, the Fit and Proper requirement of Honesty and Integrity in A board Notice 194 of 2017 because you are dishonest… "

[15] The applicant was during his disciplinary hearing never called upon to answer to a charge of not meeting and/or not complying with the requirements of section 13 (2) of the FAIS Act, specifically, the Fit and Proper requirement of Honesty and Integrity which carried a possible sanction of a debarment. The applicant was charged with a lesser offence of refusing to execute a legitimate, fair instruction from a superior which was an exclusively labour dispute and had nothing to do with the integrity of the applicant and fit and proper requirements.

[16] This Tribunal notes the applicant's argument that the respondent did not rely on the first charge of non-compliance with an instruction but converted same to a dishonesty finding post dismissal without due process. The charge of not meeting and/or not complying with the requirements of section 13 (2) of the FAIS Act, specifically, the Fit and Proper requirement of Honesty and Integrity was never at the heart of the applicant's disciplinary hearing which led to his subsequent debarment. It is worth noting that the debarment decision taken against the applicant was a consequence of a charge of not meeting and/or not complying with the requirements of section 13 (2) of the FAIS Act. Further, it is worth noting the debarment process is a distinct statutory process from an

internal disciplinary process and the respondent's notice of intention to debar received on 29 August 2022 marked the commencement of the debarment process. Therefore, the alteration or change of the ground to be based on section 13(2) of the FAIS Act, is of no consequence.

SUBSTANTIVE FAIRNESS

[17] During the applicant's disciplinary hearing two witnesses were called by the respondent, namely, K M (within the Monitoring Sector of Excellence) and the compliance manager. The compliance manager is the FAIS compliance administrator for the respondent. She confirmed that an exercise was conducted to ensure that the respondent's FAIS F&I's were dual mandated at their dealerships. She confirmed that she had informed the applicant that his dealer licence had lapsed and that he was requested via email to stop selling dealer value added products until the dealership's FSP license was renewed. The applicant could sell WesBank value-added products as was mandated by the respondent (WesBank) around September 2022.

[18] Before the hearing of this matter the applicant submitted an application to submit additional documents. This additional information consists of a 100-page bundle of documents which includes a transcript of the initial disciplinary hearing. The representative for the respondent indicated during the present hearing that the respondent would not be opposing the admission of the additional evidence.

[19] The second witness called by the respondent in the disciplinary proceedings was Kimaal Manning ('Manning') who is a regulatory and compliance analyst

within the respondent's monitoring centre of excellence. His testimony was to the effect that in March 2022 the respondent's monitoring centre of excellence undertook a monitoring exercise where it was found that dealership's value-added products had been sold by the F&I as recently as 11 February 2022. Upon further inspection it was found that the FSP licence number reflected on the dealership's record of advice was that of the respondent and that an incorrect record of advice was being used and handed to its customers. It was required that value-added products sold by the respondent be subjected to an agreement with the value-added product provider.

[20] The dealership's record of advice reflected the respondent's license number and as such there was a concern that there was no agreement between the value-added products providers (the dealership in this instance) and the respondent. According to Manning, dealership salespersons who were not mandated FAIS representatives and who were not working under supervision, provided advice to clients and were not subject to oversight. Whether advice provided by these salespersons was factual is unknown and any complaints which might stem from this advice might negatively impact the reputation of the respondent in the future with the client and providers.[7]

[21] To his defence the applicant testified that on 6 August 2018 he was placed on the dealerships floor by the respondent as the Financial and Insurance Marketer to handle the finance and insurance aspect for the customers. He conceded that it was indeed discovered that the dealership's FAIS license expired in September 2011 which was 7 years prior to him being appointed in his role as

[7] Page 37 of Part B of the Record.

the F&I Manager in 2018. His argument was that the information to the effect that the dealership's FAIS licence had expired in September 2011 was only discovered on 21 October 2021 after he had already submitted the documentation related to the value-added products to the respondent. It was thereafter when the issue of the license was *flagged* by the respondent.

[22] As a result therefore he could not be held responsible or charged for insubordination as the FAIS license expired in 2011 and neither him nor the respondent (and the dealership) were aware. According to the applicant between October 2021 to September March 2022 , although his line manager (the area sales manager), compliance, risk administrator and the business assurance specialist were aware of the lapsed FSP licence for 5 months, there was no effort to coach, guide, support or advise the applicant what the correct processes to be followed were or to mitigate any risk from the respondent's department.[8]

[23] In response to the second charge relating to dishonesty for continuing to sign the dealership's record of advice reflecting the respondent's FSP number, the applicant avers that he was not aware that the FSP number reflecting in the dealer's record of advice document was that of WesBank and not that of the dealership. According to him he merely facilitated the administration process and at no point did he make any recommendations on products to customers or offer advice. The salesperson would merely provide him with the information of the customers and their election concerning the value-added products and

[8] Page 39 of Part B of the Record.

he would administer the process by finalising the documentation and forward it to the respondent.

[24] Upon proper analysis of the facts of this case it is not in dispute that the respondent in its ruling on the Findings and Sanction of the Disciplinary Hearing held on 8 July 2022 summates that the applicant was responsible for validation of documentation received from clients, confirm customer income and affordability, KYC/loading, providing a final approval to invoice the bank and also to ensure payout to the dealership for deals concluded.[9] The applicant had no direct contact with the customers.

[25] In response to charge 1, for refusing to execute a legitimate instruction from a superior in that the respondent continued to sell value-added products until February 2022, the respondent averred that the applicant was merely facilitating an administration process and at no point did he make any recommendations on products to customers or offer advice. The salesperson, who engaged the customers, would provide the customers' information to the applicant to process and forward to the respondent. The applicant submitted in his application for reconsideration that a particular repeat customer of the dealership, as alluded to hereinabove, traded a vehicle and purchased a new one. The customer then instructed the salesperson that he wanted the same dealer value-added products he had applied to the traded vehicle. The applicant, on instruction of the salesperson, merely added to products and was neither requested nor did he give advice to the customer.

[9] Page 37, under paragraph 3 (Management Case) of Part B of the Record.

[26] This evidence by the applicant before us that he was neither requested nor did he give advice to the customer was not challenged and instead the respondent elected a "*stand by the ruling*" approach. The evidence presented before us does not support the conclusion that the applicant gave advice to customers. We accept the applicant's version, which was never challenged, that he simply printed the record of advice from the Signo system, which remained intact and was not altered in any way by the applicant, it was an automated document. The applicant could not alter the record of advice (which still reflected the respondent's FSP number) and was in any event not permitted to change the record of advice.

[27] It should be understood that the applicant was debarred as a result of a single transaction which occurred on 11 February 2022. Based on the facts before us there was no element of dishonesty when the applicant assisted a returning customer to sign Dealer Record of Advice which was printed from the Signio system reflecting Wesbank's FSP number which the applicant had no authority to change nor was he aware that it was not the dealership's FSP number.

[28] We agree with the applicant's argument that the second charge of dishonesty proffered against the applicant is contradictory in that it states that applicant inadvertently enabled the dealership to represent itself as an FSP. Inadvertently means *without intention* or *accidentally*. It therefore cannot be correct that the applicant acted dishonestly when the applicant, nor the respondent, was aware that the dealership's FSP license had lapsed nor that the FSP license reflected in the documentation was that of the respondent and not the dealership. This is one of the many cases where employers use labour disputes to debar FSP representatives. Debarment proceedings should not be used by FSP's to satisfy

contractual or other grievances. FSP's may, subject to contract, terminate an agreement with the representative and key individual without debarring him/her, where the reason for the termination of the contract does not constitute grounds for debarment. Debarment proceedings should not be used for ulterior purposes.[10]

[29] In the current case the parties reached a settlement agreement on 6 June 2023 at the CCMA, under case number GAJB16737-22, whereby they agreed amongst other things, that the respondent would remove the applicant's name from the REDS (register of dishonest employees) database by 13 June 2023 and the respondent would withdraw its notice of intention to debar the applicant dated 29 August 2022. It is clear from the above settlement agreement that the debarment proceedings were unnecessary and should not have been instituted against the applicant in the first place.

[30] In the result, we are not satisfied that debarment was justified.

In the premise the following order is made:

ORDER:

(a) Applicant's application for the admission of further evidence is granted.

(b) The application for reconsideration is granted and the applicant's debarment is set aside.

[10] See: Guidance Notice 1 of 2019

SIGNED in PRETORIA on 25 January 2024 on behalf of the Panel.

MG Mashaba SC (Chair)

With the Panel consisting of:

PR Long.

W Ndinisa.