THE FINANCIAL SERVICES TRIBUNAL

Case NO: FSP17/2023

In the matter between:

MEDUPE CHARLES MATOANE	Applicant
And	
FIRST NATIONAL BANK a division of FIRSTRAND BANK LIMITED	Respondent

DECISION

Tribunal: Adv A.T. Ncongwane, SC (Chairperson),
K. Magano, and
K. E. Moloto-Stofile (members)

Hearing: 29 September 2023

Date of decision: 30 October 2023

Appearances:

On behalf of the applicant: In person

On behalf of the respondent: Adv L. Minné

Summary: **Two notices to commence the debarment process issued by the FSP. Both notices found to be defective and to have scuppered the fairness and reasonableness of the process. Debarment failed to comply with S. 14 (2), 14 (3) and 14 (5) of the FAIS.**

Introduction

[1] This is a reconsideration application of the applicant's debarment by the respondent ("FNB" or "FSP"). In terms of Section 230 of the Financial Sector Regulation Act No 9 of 2017 (the "FSR Act"), the applicant, as a person aggrieved by the decision, is entitled to apply to the Tribunal for its reconsideration. The decision to impose a debarment was taken on the 15th of March 2023 under Section 14 of the Financial Advisory and Intermediary Services Act 37 of 2002 (the "FAIS Act").

[2] The applicant is not challenging the merits of his debarment in his application. It seems that he is aggrieved by the procedure followed by FNB and raises procedural objections to his debarment. We deal furthermore with this aspect hereunder.

Salient facts

[3] The salient facts for the purpose of this decision are as follows:

[3.1] The applicant was dismissed by the respondent from being a financial service representative ("FSR"). At the respondent's disciplinary

hearing, he was, on his own admission, found guilty that he accessed a bank account of the respondent's customer without the customer's consent and divulged the customer's financial information to a third party.

[4] The applicant launched an application for the suspension of his debarment in terms of Section 231 of the FSRA. Section 231 stipulates that:

> *"231. Neither an application for a consideration of a decision nor the proceedings on the application, suspends the decision of the decision maker unless the Tribunal so orders."*

[5] This suspension application was considered by the chairperson of the Tribunal, who made a ruling that:

> *"The debarment is suspended due to the respondent not complying with Section 14 (5) of the FAIS Act of 2002 as amended in debarring the applicant."*[1]

[6] Accordingly, the applicant's main grounds for reconsideration of the decision in terms of Section 230 of the FSRA was that the respondent's proceedings commenced out of time, as it was initiated nine (9) months after his dismissal. And he was debarred eighteen (18) months after his dismissal and should the debarment have occurred soon after his dismissal,

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1 Ruling on the suspension of the debarment, page 20, part A- Record.

he could have been entitled to apply for reappointed already as the debarment would have run its course.

The debarment

[7] The applicant was debarred on the 15 March 2023. Prior to such debarment, a notice dated 17 December 2021 was issued by the respondent informing the applicant of its intention to debar him ("the first notice").

[8] The said notice was purportedly crafted in accordance with the provisions of Section 14 (5) of the FAIS Act whereby he was, *inter alia,* informed that he no longer met the fit and proper requirements. But the notice (hence referred to as a purported notice) stated that the requirements for fit and proper were set out in Section 12 (12) (a) of the FAIS Act. A reference to Section 12 (12) (a) was evidently incorrect, such a section does not exist in the FAIS Act.

[9] The dismissal was handed down against the applicant on the 7th of September 2021.[2] In terms of Section 14 (5), FNB was obliged to undertake a debarment process within six (6) months from the date that the applicant ceased to be an FSR of the FSP. The section is couched in peremptory language. The respondent had to commence with the debarment not later than 7th March 2022. FNB's intention to debar purportedly commenced with

2 Part B, DC ruling page 149 – 155.

the first notice referred above on the 17th December 2021. On the 31st December 2021 the applicant submitted his written submission in response to the FSP's intention to debar him, notwithstanding the FNB's notice that referred to a non-existent section.

[10] Having received the applicant's representations, FNB, peculiarly, opted not to do anything until the 2nd of June 2022, when it issued another notice, ("the second intention notice") again informing the applicant of its intention to debar him. This second intention notice could not have been issued in terms of Section 14 (5) of the FAIS Act since it was issued nine (9) months after applicant ceased to be an FSR of the FNB.

[11] This second intention notice, appears to have been the respondent's attempt to correct the first notice since it referred to the applicant's failure to comply with the requirements of Section 13 (2)(a) of the FAIS Act, and not the non-existing Section 12 (12)(a) of the FAIS Act. The respondent neither amended the first notice nor withdrew it, nevertheless, it seems to us, the respondent intended to substitute the first notice with a proper notice.

[12] In the result, the applicant was seized with two notices informing him about FNB's intention to debar him. The respondent took no trouble to communicate to the applicant as to which of the two notices was valid and applicable to his debarment.

[13] In response to the second notice, applicant again sent written representations to the respondent on the 15th of June 2022.[3] Again there was another lull in the matter. It was only on the 15th of March 2023 that the applicant received a notice from the respondent informing him that he has been debarred with effect from the 15th March 2023 in accordance with requirements of Section 14 of the FAIS Act.

The legal requirements

[14] In terms of Section 14 (1) of the FAIS Act an FSP is obliged to debar an FSR from rendering financial services if the FSP is satisfied that, on the basis of the information and the facts that the FSR:

[14.1] does not meet or no longer complies with the fit and proper requirements and any other requirements contemplated in Section 13 sub-section (1) (b) and (ii) for the rendering of financial services as provided for in Section 13 (2)(a) of the FAIS Act. Or has contravened or failed to comply with any provisions of the Act in a material manner.

[15] The FAIS Act requires that *"before effecting a debarment in terms of Section 14 (1), the FSP must ensure that the debarment process is lawful, reasonable and procedurally fair"* (the requirement is contained in Section 14 (2)).

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3 Record, pg 10, 22 June 2022, letter from Mr Matoane.

[16] Section 14 (3) provides that the financial services provider must, before debarring a person:

- give adequate notice in writing to the person stating its intention to debar the person, the grounds, and the reasons for the debarment ...
- provide the person with a copy of the financial services provider's written policy and procedure governing the debarment process, and
- give the person a reasonable opportunity to make a submission in response.

[17] The relevant provisions of the FAIS Act require a financial services provider to be competent, and to act as such, particularly that such provider must be fit and proper. Section 13 (2) (a) stipulates that an unauthorised financial services provider, such as the FNB, must:

> *"at all times be satisfied that the providers' representatives, and the key individuals of such representatives are, when rendering the financial services on behalf of the provider, competent to act, and comply with the fit and proper requirements and any other requirements contemplated in the Act."*

[18] In terms of Section 13 (1)(b) (1A), a person may not act as a representative of an authorised FSP unless such a person meets the fit and proper requirements in the Act and the Boards Notice[4]. An authorised FSP then has a correlative duty, in terms of Section 13 (2)(a) to ensure that at all times its representatives, comply with those requirements, which include

4 BN194 of 15 December 2017: Determination of Fit and Proper Requirements.

"any applicable code of conduct and applicable laws in the conduct of the business". This will include FNB's own ethical codes, its debarment policy and group policies and procedures. The respondent's debarment policy also emphasises that the notice should contain grounds and reasons for the debarment and the FNB panel must consider evidence provided and advise based on available facts and information, *inter alia*, whether:

- the employee / ex -employee was in fact in a FAIS role and
- the employee / ex –employee does not meet and/or no longer complies with the requirements of Section 13 (2)(a) of the FAIS Act and/or
- has contravened or failed to comply with the provisions of the FAIS Act in a material manner and
- the reasons for the potential debarment occurred and became known to the business unit / FSP while the employee / ex-employee was duly mandated as a FAIS representative of the relevant FSP, and
- it has not been longer / has been longer than six (6) months since the FAIS representative left the employ of the relevant FSP.[5]

[19] Accordingly, the role of this self-regulatory system, and that of the authorised FSP such as the FNB, is to ensure that their representatives are *"fit and proper persons to be entrusted with providing financial advice to the investing public"*.

[20] Where the FSP has formulated a view and upon the consideration of the available facts that the FSR no longer meets the fit and proper requirements, a lawful, reasonable and procedurally fair process must be adhered to in order to have the FSR debarred.

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5 FirstRand, FAIS Debarment Policy and Procedure page 19, para (b) and (d).

Compliance with Section 14 (5) and Analysis

[21] For the Tribunal to reconsider this matter, the powers are set-out in Section 234 of the FSR Act. The proper approach would be to have a comprehensive revisit of the circumstances as they are presented at the time of the application. This constitutes a fresh relook of the matter and the grounds filed by the applicant and the respondent's response are matters that must be considered.

[22] Section 14 (5) of the FAIS Act reads as follows:

> *"a debarment in terms of sub-section (1) that is undertaken in respect a person who no longer is a representative of the Financial Services Provider must be commenced not longer than six (6) months from the date that person ceased to be a representative of the Financial Services Provider."* (our own underlining)

[23] A meaning must be given to the requirements that the debarment process *"must be commenced"* within six (6) months of the person's ceasing to be a representative of the Financial Services Provider.

[24] A debarment process is commenced by giving a notice of the initiation of the proceedings.[6]The notice must meet the requirements specified in Section 14 (3) of the FAIS Act.

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6 Zungu vs Sanlam Development Markets Limited 2002 (ZAFST17) at para 16, Section 14 (3)(a)(i) of FAIS.

Lawful, reasonable and procedurally fair process

The first notice of intention to debar

[25] The first notice referred to a non-existent Section 12 (12) (a) of FAIS as the first ground or reason furnished for the intended debarment. This is clearly wrong. Mr Minné argued that the first notice complied with Section 14 (5) of FAIS. When asked if whether indeed the first notice complied with Section 14 (5), why the respondent decided not to proceed with the debarment based on the first notice? And what was expected of the applicant when he received the second notice? It was contended on behalf of the respondent that whatever the respondent could have done is not relevant whether the first notice was valid or not and whatever steps the applicant could have taken is also not relevant whether the first notice was valid or not. The first notice, so the argument went, can only be impugned in the reconsideration application such as the one before us. According to Mr Minné, it is not legally relevant to consider the second notice.

[26] It was submitted further on behalf of the respondent that the citation of Section 13 (2)(a) of the FAIS Act in the notice of intention to debar is not a requirements in Section 14 of the FAIS Act and, in any event, the applicant would have been well aware of the correct Section. This contention, in our view, belies and does not appreciate the true meaning of Section 14 (3) of FAIS and the FNB policy, which make it obligatory that the notice must set out *"the grounds and the reasons for the debarment"*.

[27] In the heads of argument, it was submitted on behalf of the respondent that this Tribunal does not have to decide the issue whether the first intention notice was *"wrong"* or not, and whether it did not conform to criteria in Section 14 (3) of the FAIS.

[28] Counsel for the respondent, made much of the fact that the merits are firmly stacked against the applicant as he was *"complicit in the egregious act of misconduct and this could be established explicitly from the complainant's complaint."* He emphasised that the respondent had a problem with the dishonest and defective character of the applicant. His argument was predominated by the submission that the defectiveness or what he referred to as a *"procedural misstep"* with regards to the first intention notice must be seen by the Tribunal to be less serious than the breach committed by the applicant. We disagree; indeed, it may well be so, that the breach committed is serious, but it is also a well-known principle that merit can hang on the altar of procedural unfairness. More so that, it is clear from the provisions of FAIS that the legislature was intent in ensuring that sufficient protections are provided to both the FSP's and the FSR's , to achieve a fair and reasonable outcome from the process.

[29] Having said that, and turning to the first notice, it goes without saying that the first notice was a defective notice, a nullity that did not commence the debarment process and we conclude as such. The first notice did not constitute a proper, adequate notification. And the question whether the first

defective notice could have interrupted the running of the period contemplated in Section 14 (5) of the FAIS Act will also be negated by the facts of this matter.

[30] In his response to the first intention notice, the applicant stated the following, and I extricate what is relevant for the purposes hereof:

> *"I would like to put forward reasons why I think I don't deserve to be debarred"*
>
> ...
>
> ...
> *"I acknowledge and take full responsibility of what transpired on the 16th of August 2021 by not following procedure in terms of verifying the client before I go into their profile. I have clearly stated that I only confirmed payment for my client and nothing else, I did not indulge any information to anyone that day."*(sic)[7]

[31] In our view, the only way the first notice could have interrupted the running of the time period is by the applicant acknowledging and admitting that his conduct is susceptible to debarment. No such admission was contained in his submission made on the 31st of December 2021. It will therefore be anomalous to allow the giving of the defective notice to commence a debarment process, as this will not be legally tenable. We conclude that the first intention notice was defective, invalid and did not constitute a proper adequate notification.

<u>The second notice of intention to debar</u>

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7 Record, page 5, applicant's submissions.

[32] The second intention notice was served after the prescriptive period of six (6) months has ended from the date the FSR ceased to be employed by FNB and therefore did not conform to the provisions of both Section 14 (5) and with Clause 2.3.1 of the respondent's debarment policy, in material respects.[8]

[33] It is also significant to note that FNB debarment policy provides that a notice of intention to debar must be sent within five (5) working days of the FSP finding the facts and information that supports that debarable offence, and this process is to commence within six (6) months of the employee leaving the employ of the FSP.[9]

[34] The submission that the delay occurred due to the respondent not been able to setup a FAIS panel within five (5) working days of receiving a response from the ex-employee or after fourteen (14) days having lapsed for submission of a response holds no merit.

[35] After being served with the notice of intention to debar, on the 17th December 2021, the applicant responded on the 31st of December 2021. The process initiated by the first notice of intention to debar, can be reasonably inferred that it was abandoned by the respondent until the second notice of intention to debar was issued on the 2nd of June 2022. We

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8 FirstRand FAIS debarment policy and procedure: Clause 2.3.1 provides that the FSP is ultimately responsible for ensuring compliance with Section 14 of FAIS and is responsible to implement a fair procedure.

9 Respondent's debarment policy, page 20, para F.

draw the reasonable inference from the respondent's unequivocally stating in the notice of debarment dated the 15th of March 2023 that:

> *"With reference to the notice of intention to debar dated 2nd June 2022, this letter serves to inform you that the FAIS panel considered the matter, and a decision was taken to proceed with your debarment..."*

[36] The respondent explicitly states in the notice of debarment that it relied on the second notice of intention to debar dated the 2nd June 2022. The defectiveness of the second notice is chronicled by its non - compliance with Section 14 (5) of FAIS. It is not disputed that this notice is a fundamentally defective notice. Consequently, any reliance on that notice would be fated to failure. Mr Minné's submission was that the Tribunal should regard the second notice of intention to debar, as *pro non scripto*. In this regard, the respondent appears to have spectacularly failed in its attempt to correct the first notice by issuing the second notice way out of time.

[37] Despite Mr Minné's submission in terms of which he disavowed the second defective intention notice, on the facts, the respondent relied on that notice as the notice which commenced the debarment process. Even though the respondent relied on the second intention notice, the FAIS panel failed to consider the applicant's submissions made on the 22nd of June 2022 in response to the second intention notice. In the debarment notice, the respondent informed the applicant that it considered the applicant's submissions that were received on the 31st of December 2021 which

representations were, intricately made long before the date of the issuing of the second intention notice. This created a predicament, for the respondent's case.

[38] We take note of an incredibly disquieting procedure applied by the respondent in this matter. It took the respondent more than six (6) months to correct the first intention notice, which merely required the amending of a reference to a wrong section or simply to issuing of a proper notice timeously. A notice purporting to be a proper notice was issued nine (9) months after the dismissal. It further took the FNB's FAIS panel fourteen (14) months to be constituted and to sit on the debarment hearing or meeting, after the applicant's dismissal. And it took the respondent eighteen (18) months after the applicant's dismissal to issue a notice of debarment.

[39] When quizzed about these undue and unreasonable delays in the process, counsel for the respondent simply brushed it aside by contending that the applicant has not raised any prejudice as he did not suffer any, and the applicant only focused on the defectiveness of the second notice. A further clarity was sought from counsel, and his further submission was that the FNB panels are getting more and more busy and that resulted in a complicated bureaucratic process making it difficult to constitute the panels within a short period. This reason was given as the cause for the delay.

[40] It was conceded, correctly so, in our view, that the delays were unreasonable. And that, as stated by Mr Minné, *"there has been a variety of*

confusion in the manner in which FNB has handled the matter". It was argued however, that the *"procedural missteps"* did not lead to the invalidity of the debarment. In our view, there is no logic and legal basis to make that conclusion from the conspectus of the available facts. The grounds for reconsideration were mainly centred on the lack of fairness and reasonableness in the process. Every submission made on behalf of FNB, failed to address how the *"procedural missteps"* can be assumed to have met the requirements of Section 14 (2) of FAIS. Conversely, those contentions confirmed to us that the non-compliant approach by the respondent, unprocedurally and illegally violated the requirement that the process must be lawful, reasonable, and procedurally fair.

[41] Respondent's counsel endeavoured to reframe the respondent's case by arguing that the notice relied on by the respondent is the first intention notice. Perspicuously, this submission is not supported by the facts. Even if we were to find merit in the submission, it will still not assist the respondent as it still leads to the logical conclusion that no debarment hearing or meeting occurred, following the issuing of the first intention notice. In our view, the first intention notice failed to produce any lawful, reasonable, and procedurally fair debarment process foreshadowed in Section 14 (2) of FAIS due to it being defective and/or procedurally flawed.

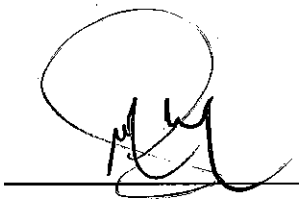
[42] Consequently, the two notices of intention to debar were defective, invalid, and scuppered the lawfulness, fairness and reasonableness of the process.

[43] Our ruling does not justify a further consideration by the respondent and there will be no purposes to be served by remitting the matter to the respondent.[10]

[44] In the premise, the following order is made:

[44.1] The application for reconsideration is granted.

[44.2] The debarment of the applicant is set aside forthwith.



AT NCONGWANE SC, CHAIRPERSON

With the panel consisting of:
K. Magano, and
K E. Moloto-Stofile
Date: 30 October 2023

[10] D. Mathebula v. Tracker Agility (Pty) Ltd FSP/10/2018