

THE FINANCIAL SERVICES TRIBUNAL

Case Number: FSP 49/22

In the matter between:

MPHO CAROLINE MASEBE

Applicant

and

STANDARD BANK OF SOUTH AFRICA LIMITED

Respondent

Tribunal Panel: S. Mahabeer SC
E. Phiyega
K. Naidoo

For the applicant: In person

For the respondent: Ms P Mathonsi

Summary: Debarment - What constitutes a representative as defined in the Financial Advisory Intermediary Services Act, 2002, when and under what circumstances does a person become a representative subject to debarment in terms of the Act

DECISION

PRELIMINARY MATTERS

1. On the morning of the virtual hearing, it was brought to the attention of the Tribunal panel that the applicant was no longer legally represented but that she had been served with the record, which includes a notice of set down. As directed by the panel, the applicant was contacted by the administrators telephonically and she agreed to attend the hearing.
2. When the hearing convened, the applicant submitted that she had believed that the matter was withdrawn when her erstwhile attorneys of record had withdrawn. The applicant was informed by the panel that the matter had been properly enrolled and was ready to proceed and she was advised of her right to seek legal representation, submit oral submissions, seek a postponement or seek for the matter to be determined on the papers.
3. The applicant opted for the matter to be decided on the papers.
4. The respondent did not oppose the Tribunal a determination on the papers but sought to make further oral submissions. The applicant opposed this.
5. Following a deliberation, the panel determined due to the applicant being unrepresented, that it would not be fair to permit oral submissions. The parties agreed that the matter could be determined on the papers.
6. This is the determination of the Tribunal.

THE ISSUE FOR DETERMINATION

7. The application is instituted in terms of section 230(1) of the Financial Services Regulatory Act, 2017 for the reconsideration of the respondent's decision to debar her in terms of section 14 of the Financial Advisory and Intermediary Services Act, 2002 (the "FAIS").
8. The premise to the debarment was that during the respondent's recruitment process to appoint the applicant as a financial planner, she withheld material information which she was obliged to disclose and made a false declaration. The debarment of the applicant was therefore based on non-compliance with the provisions of section 13(2)(a) of the FAIS and paragraph 2 of the General Code of Conduct for Authorised Financial Services Providers and Representatives.
9. The issue for determination is whether the debarment was justified in the circumstances.

THE FACTS

10. On 19 May 2022, the respondent offered the applicant employment as an Executive Financial Planner commencing on 1 June 2022.
11. As part of the recruitment process, the applicant had been required to complete a document entitled "*Honesty, Integrity and Good Standing Declaration*". On 28 April 2022, the applicant completed this document by answering "*True*" to all the questions. Specifically, the applicant confirmed

that she had not previously been removed from any office of trust for dishonesty and that she had never previously *“been refused a registration, approval, authorisation or license to carry out a trade, business of profession or had that registration, approval, authorisation or license suspended, revoked, withdrawn or terminated by a regulatory authority.”*

12. The applicant was informed by a written offer of employment dated 18 May 2022 that as a financial adviser, it was required of her to comply with the Fit and Proper Requirements contemplated in terms of the FAIS. For consistency, we shall refer to the position offered to the applicant as that of a financial planner, which entails that the applicant would possess personal character qualities of honesty and integrity, and the competence and operational ability to fulfil the responsibilities imposed by the Act.
13. It subsequently came to light that the applicant had withheld information pertaining to the fact that she was previously employed by the respondent as a teller but she was dismissed in 2016 for dishonesty and listed on the REDs System.
14. REDs is the acronym for the Register for Employees’ Dishonesty System. It is a system utilised by banks in the Republic for ensuring that employees who have been found guilty of dishonesty are precluded from obtaining employment within the banking system whilst they are listed on the REDs. A REDs listing is valid for a period of five years.
15. It is relevant to add that the applicant’s *curriculum vitae* which was submitted during the course of the recruitment process did not contain

any information pertaining to her previous employment with and dismissal by the respondent.

16. The date on which it was discovered that the applicant had withheld the information pertaining to her history with the respondent and provided the false information is not apparent from the papers before us; however, according to the respondent's heads of argument, it was discovered during "*the applicant's on-boarding*" -we assume this to be part of the process of uploading and registering the applicant as a financial planner on the respondent's system. It can be accepted that the date which the respondent relies on as the date when the applicant withheld the crucial information regarding her previous employment and dismissal was 28 April 2022: 28 April 2022 fell during the recruitment process and was when the Honesty, Integrity and Good Standing Declaration was completed by the applicant; it is also the date relied on by the respondent when it charged the applicant in the ensuing disciplinary hearing, which was held on 24 June 2022.
17. Following the discovery of the discrepancy between the non-disclosure and the incorrect information in the Declaration and *curriculum vitae* and what the respondent had discovered during the on-boarding process, the applicant was invited to provide a written explanation. She responded on 7 June 2022. Ultimately, the applicant admitted having been previously employed and then dismissed by the respondent following a dishonesty finding. Although she initially stated that she did not recall all the details giving rise to the dismissal, she did in fact set out the reasons but contended that the listing on the REDs System was unknown to her and in any event had expired.

18. The respondent did not accept the applicant's explanation and suspended her on 10 June 2022. A disciplinary hearing was held on 24 June 2022.
19. On 5 August 2022, the applicant was notified that pursuant to the disciplinary hearing she had been found guilty of:-

"Dishonesty on your part in that during April, when you applied for a role in the organisation, you failed to make a material disclosure relating to the fact that you had been previously dismissed and had been REDs listed for a dishonesty-related charge. Your conduct as set out above does not only place your integrity in question but goes against the Bank's values which you are fully aware of by virtue of having been previously employed by the Bank".
20. The applicant was dismissed on 24 July 2022 (although the letter informing her of the dismissal was dated 5 August 2022) and she was informed that as a result of the finding against her, she would be listed on the REDs and would also be debarred.
21. The applicant was subsequently formally notified by the respondent on 23 August 2022 that she had been debarred. The debarment at the Financial Sector Conduct Authority was effected on the same date.

THE LEGAL FRAMEWORK

22.

22.1 As mentioned, the respondent's decision to debar the applicant is founded in FAIS.

22.2 Section 2 of the General Code of Conduct published in terms of FAIS requires a financial services provider at all times to render financial services honestly, fairly and with due skill, care and diligence in the interests of clients and the integrity of the Financial Services Industry.

22.3 Section 8(1) read with section 7(1) of the Determination of Fit and Proper Requirements for Financial Service Providers and their representatives, 2017 states among other things that the representative must be a person who:-

22.3.1 has personal character qualities of honesty and integrity;

22.3.2 is in good standing;

22.3.3 is competent;

22.3.4 continues professional development;

22.3.5 possesses operational ability and financial soundness.

23. It is significant to note that in terms of the FAIS:-

- 23.1 a “representative” is “any person, including a person employed or mandated by the first mentioned person, who renders a financial service to a client for or on behalf of a financial services provider, in terms of conditions of employment or any other mandate ...”;
- 23.2 the debarment process is provided for under section 14 of the Act and, *inter alia*, an authorised services provider must debar a person from rendering financial services who *inter alia* has contravened or failed to comply with any provision of the Act in a material manner;
- 23.3 section 13(2)(a) provides that “an authorised Financial Services Provider must at all times be satisfied that the provider’s representatives, when rendering a financial service on behalf of the provider are competent to act and comply with the requirements contemplated in section 8(1) and sub-section 1(b)(ii) of the section, where applicable”;
- 23.4 a further jurisdictional requirement for qualifying as a representative of an authorised Financial Services Provider (“FSP”) is that the person’s name, business address, the capacity in which she is employed or mandated to provide financial services and the categories on which the person is competent to render financial services must be contained in a register as per sections 13(3) and (4) of the Act.

ANALYSIS

24. The definition of “*representative*” and the provisions of the FAIS to which we have referred render it apparent that an individual will be regarded as a “*representative*” in terms of the Act when the following conditions are present:-
- 24.1 the person must act in terms of a contract or mandate granted by the FSP to act on its behalf;
 - 24.2 she must be registered as such in a register retained by the authorised FSP, which register is to be updated on a regular basis and available to the Financial Services Conduct Authority for inspection purposes;
 - 24.3 the register must contain the representative’s names, business address, the categories of competence and finally whether she provides the financial services as an employee or a mandatory.
25. As mentioned, the allegations relating to the applicant’s non-disclosure of crucial information were made on 28 April 2022 and discovered during the period that she was being on-boarded. The applicant was debarred in August 2022 and the debarment was based wholly on the results of the disciplinary hearing.

26. Whilst the respondent's reasons for dismissing the applicant are not in dispute, reconsideration of the debarment implicates the consideration of different factors.
27. We are firstly of the view that the listing in 2016 of the applicant on the REDs is of no moment as it had expired the year before the recruitment of the applicant in 2022.
28. The applicant commenced her employment with the respondent on 1 June 2022. There is no indication that during the period when it was discovered that the applicant had withheld information pertaining to her previous employment and dismissal by the respondent, she was in fact registered as a representative of the respondent. Nor is there any indication that she was engaged in rendering financial services to clients on behalf of the respondent at the time.
29. We find that the fact that a person is employed by a bank does not necessarily translate to that person being a "*representative*" of the bank as contemplated in the FAIS.
30. The appointment as a "*representative*" of an FSP is a deliberate process which comes into effect following a proper engagement. The individual must be appointed or given a mandate to the effect that she is a representative of the FSP and her details must be maintained in a register as required in terms of section 13.

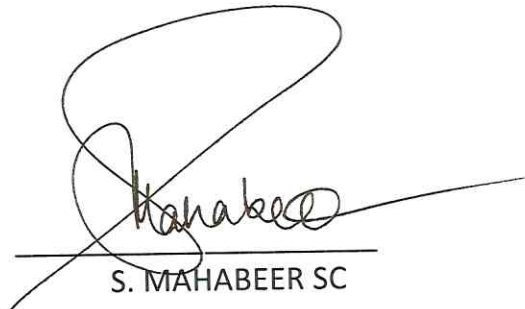
31. It is apparent that although the applicant was offered a position as an Executive Financial Planner, which offer was accepted, the process to on-board and register her as such was not yet complete – what was completed was the process to *employ* her.
32. This Tribunal has on several occasions opined that labour relations issues do not constitute sufficient cause for debarment. A debarment does not necessarily follow from an adverse finding in a disciplinary hearing held in terms of the Labour Relations Act. A debarment must stand on its own and must be as a result of non-compliance with the provisions of the FAIS Act and the General Code of Conduct.
33. Here, it appears that the process to ensure that the applicant fitted the category of representative was still in progress when she withheld the information on 28 April 2022. The discovery of the applicant withholding of information occurred early in the process and although she was appointed in May 2022, it would appear that she was almost immediately suspended and the matter was referred to respondent's disciplinary process. This led to a suspension of the process that would have led to the applicant progressing to an appointment as a representative of the respondent.

CONCLUSION

34. We find on the evidence that at all material times, the applicant was not a “*representative*” as defined under the FAIS but an *employee* of the respondent. The debarment process thus did not avail to the respondent and consequently, the debarment effected on 23 August 2022 was incorrect.
35. The debarment of the applicant falls to be set aside.

ORDER

36. The debarment of the Mpho Caroline Masebe dated 23 August 2022 is set aside.
37. There is no order as to costs.



S. MAHABEER SC
(on behalf of the panel)

30 May 2023