THE FINANCIAL SERVICES TRIBUNAL

Case №: FSP 59/2019

In the matter between:

RACHE DU PLESSIS	**Applicant**
and	
STELLENBOSCH FINANSIELE ADVIESDIENSTE	**Respondent**

Tribunal: William Ndinisa (chair), Zweli Mabhoza and Gugulethu Madlanga

Appearance on behalf of Applicant:	Adv AC Diamond instructed by OAK Inc
Appearance on behalf of Respondent:	Mr JN Swart, attorney for Respondent
Date of Decision: 26 June 2020	

Summary: Application for reconsideration in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017- Section 14 of the Financial Advisory and Intermediary Services Act, 37 of 2002 – This method of regulation accepts that some institutional bias may be present and will be tolerated in proceedings.

DECISION

INTRODUCTION

1. The Applicant applies under section 230 of the Financial Sector Regulation Act 9 of 2017 ("FSR Act"), for reconsideration of a debarment decision of the Respondent reflected on the debarment notification form dated 22 August 2019 ("the Debarment").[1] The Applicant is Ms Rache du Plessis, who was a financial services representative of Stellenbosch Finansiele Adviesdienste, an authorised

[1] Bundle B, page 238

financial services provider. The latter is cited as the Respondent in this matter.

2. The basis of the Debarment is, according to the Respondent, the Applicant's non-compliance with the fit and proper requirements in as far as it relates to honesty and integrity. The Applicant, in turn, raised in her application dated 14 October 2019, a number of grounds in support of her reconsideration application and same will be considered hereunder. The Applicant supplemented her grounds of reconsideration and delivered a copy of same dated 2 December 2019.[2]

GROUNDS OF RECONSIDERATION

3. The first ground raised is that the Respondent did not comply with sections 8 and 9 of the Determination of Fit and Proper Requirements, 2017, Board Notice 194 of 15 December 2017 ("the 194 Notice"), read with the applicable provisions of the Financial Advisory and Intermediary Services Act No. 37 of 2002 ("the FAIS Act"). The Applicant states, amongst other things, the following as part of her ground for reconsideration: -

   3.1 the reasons given by the Respondent for the Debarment does not provide evidence that any of the grounds have been established;

   3.2 the Debarment Investigation Report dated 3 September 2018 ("the 2018 Report") produced for the Respondent does not constitute a hearing in a court of law and contains conclusions which are tenuous and based solely on circumstantial evidence;

[2] Bundle A, page 108

3.3 the 2018 Report cannot not be tendered as relevant evidence upon which the Applicant can be said not to be fit and proper in accordance with section 8 of the FAIS Act;

3.4 the grounds placed in the 2018 Report does not constitute proper evidence and is arbitrary and speculative;

3.5 the conclusions made from the evidence are speculative and was made without a hearing where any evidence may be tested. There is no evidence that the Applicant forged a signature, and has always denied doing so;

3.6 the allegation that the Applicant destroyed company files under investigation is submitted to be unsupported by the content of the report; and

3.7 the allegation that the Applicant has breached a fiduciary duty is submitted to be factually and legally unsound.

4. The second ground of reconsideration is that there was bias/conflict of interests in the decision made by the Respondent. The Applicant specifically state, amongst other things, that: -

4.1 The Mr Burger and Mr Esterhuizen of the Respondent's offices lead the investigation, which is submitted to have been grossly unfair;

4.2 The directors of the Respondent stand to gain immensely by the dismissal and debarment of the Applicant as she was earning R40 000 - R45 000 per month; and

4.3 After the Applicant submitted her resignation, the Applicant stood to gain by debarring her in order to prevent clients that were client of the Applicant from leaving the Respondent.

5. The third ground of reconsideration is that the Respondent did not comply with a mandatory provision of the 194 Notice. In relation to this ground, the Applicant stated that in terms of section 9(3) of the 194 Notice, the Applicant stated, amongst other things, the following: -

5.1 The Respondent, when assessing whether a person meets the requirements of section 8(1), must have regard to, *inter alia*, the seriousness of the person's conduct, whether by commission or omission, or behaviour and surrounding circumstances to that conduct or behaviour that has or potentially have negative impact on a person's compliance with section 8(1) of the 194 Notice;

5.2 The passage of time since the occurrence of the conduct or behaviour or behaviour that had negative impact on person's compliance with section 8(1) of the 194 Notice; and

5.3 The decision and the manner in which it was taken must be procedurally fair. The process has been decidedly unfair.

6. As stated earlier, the Applicant supplemented her grounds of reconsideration and noted, amongst other things, that:

6.1 It is a gross abuse for the Respondent to require the Applicant to prove

her innocence on the issue forgery in circumstance where there is no credible evidence;[3]

6.2 In respect of the safe keeping of the stamp of Mr Brink, the entire office had access to the stamp;

6.3 There is no reason to believe that, if the Applicant completed the date and time, and if the signature was indeed falsified, she would have been present or had knowledge of such falsification; and

6.4 On the issue of destruction of files of the company, the Respondent changed its version by stating that the Applicant deleted files under investigation from the server, not from the laptop.

7. We do not intend to dissect every listed ground of reconsideration as supplemented, for the reason that they are interrelated and also to avoid an unnecessary lengthy decision.

FACTUAL MATRIX

8. The Applicant has been in the employ of Respondent since 1 October 1999 and was subsequently appointed as a financial services representative during 2004, selling insurance products.[4] As part of her duties, she was tasked to assist clients of Respondent with registration of trust and estate planning. In short, the Applicant was a representative and a general trust administrator.[5]

---

[3] Bundle A, page 108 -109
[4] Bundle A, page 41
[5] Record A, page 24

9. In respect of registration of trust deed, it was necessary to appoint accounting officers. The record reflects that Mr Nicolaas Brink, who is an accountant, was appointed as an accounting officer for any trust that was registered by the Respondent. For purposes of this matter, the role of Mr Brink appears to cover the period from 2013 to 2018, when he lodged a complaint with the Respondent.

10. On or about 17 May 2018, Mr Elmar Esterhuizen, who was a key individual and a chief executive officer of the Respondent at that time, and the Applicant, received a report alleging that a person in the employ of the Respondent had forged the signature of Mr Brink in his capacity as commissioner of oath and appointing him as an accounting officer on JMN Trust without his consent and knowledge.[6] It appears that the report was sent to all members of staff at the offices of the Respondent and a feedback was invited from all staff members affected.

11. Further, the record reflects that the Applicant was afforded an opportunity to respond to the allegations of forgery of Mr Brink's signature and she denied that she forged the signature.[7]

12. Factual disputes started emerging when the Applicant was shown the copies of the trust documents containing a stamp filled with date and place. According to the record, the Applicant confirmed that the date and place filled in the stamp resembles her handwriting and she believed that she wrote it in.[8] The Applicant's version though is that to the best of her knowledge, having worked with Mr Brink for so many years already, the signature on the trust deed looked like Mr Brink's

---

[6] Bundle A, page 20
[7] Bundle A, page 20
[8] Bundle A, page 44

signature.[9]

13. A further factual dispute emerged when the Respondent noted the conduct of the Applicant in not providing a feedback on the allegations of forgery, while other staff members responded to Mr Brink's email on or about 18 May 2018. It appears that the Respondent was not impressed with the Applicant's lack of response to the email of Mr Brink. However, it is worth noting that the Respondent stated that the non-response was only a small aspect of the consideration when the Respondent investigated the forgery.

14. It is apparent from the record that the Applicant vehemently deny that she ever forged Mr Brink's signature on any document.[10]

15. Further, an allegation in respect of destruction of client's record was made against the Applicant and same is contained in 2018 Report produced by the Respondent. On 18 June 2018 Ms Deidre Steenbok, who works in the Respondent's office, was requested by Ms Estresia Barnard, who was absent from work on that day, to check her emails in her laptop. Both Ms Barnard and Ms Steenbok work in the offices of Respondent. Ms Steenbok thereafter took possession of Ms Barnard's laptop to make the requested attendances.

16. At about 13h00 on that day and while Ms Steenbok was not at her desk, she saw the Applicant in possession of Ms Barnard's laptop and a document relating to a trust deed under investigation was opened. Ms Steenbok also noticed the Applicant opening the Outlook page on Ms Barnard's laptop. Upon investigation, Ms Steenbok discovered that the documents relating to JMN Trust folder on the

[9] Bundle A, page 44
[10] Bundle A, page 65

laptop had been deleted. This incident was reported to Mr Esterhuizen.[11]

17. Mr Esterhuizen requested a meeting with the Applicant and Ms Steenbok and the allegations against the Applicant were discussed. According to the 2018 Report, produced by the Respondent, the Applicant acknowledged that she has in fact deleted documents from her own and Ms Barnard's laptop. The report stated that an emotional Applicant walked out of the boardroom, cleared her desk and handed a resignation letter to Mr Esterhuizen.

18. On or about 1 July 2019, the Applicant, through her legal representatives, had an opportunity to respond to the content of the 2018 Report ("the July Response"). In respect of the allegation of destruction of document, the Applicant stated, amongst other things, the following,

    18.1 The Respondent created an impression that the Applicant acted clandestinely to destroy the documents, which is denied;

    18.2 The Respondent has confirmed that it is in possession of a copy of the trust deed under investigation; and

    18.3 Further, confirmed that the original was with the Master of the High Court.

19. The 2018 Report reflects that on or about 13 July 2018 the Respondent's information technology service providers recovered the deleted document from the Respondent' server. The Respondent stated that the Applicant, through this conduct, allegedly attempted to remove the evidence on the company property

[11] Bundle A, page 28

and exposed herself to a charge of obstruction of justice.[12] The Applicant denied these allegations.

20. After its investigation of the allegations, the Respondent came to the following findings which are contained in the 2018 Report:

"Based on the review of all the available documentation and interviews with witnesses, the findings are that Ms du Plessis:

(a) misused her position of trust by instructing administration staff to submit forged trust deed documents to the Master of the High Court and other relevant institutions,

(b) misrepresented services which were included in the trust registration process and doing so misused the position of trust with client,

(c) appears to have or to have been involved with the forgery of Mr Brink's signature or in the alternative has knowledge of who did and was party to the misconduct, or at least has not exercised due care over the stamp entrusted to her.

(d) Intentionally destroyed company files, in particular the file under investigation." [13]

21. It goes without saying that the Respondent relied on the 2018 Report to come to the above decision of the Debarment of the Applicant on 22 August 2019.

LEGISLATIVE FRAMEWORK

22. Section 8A of the FAIS Act states that an authorised financial services provider, key individual, representative of the provider and key individual of the

[12] Record A, page 28
[13] Bundle A, pages 29 - 30

representative must – *(i)* continue to comply with the fit and proper requirements; and *(ii)* comply with the fit and proper requirements relating to continuous professional development.

23. Further, sections 8(1) and 8(2) of the 194 Notice, which deal with fit and proper requirements, and more specifically with aspects of honesty, integrity and good standing, state the following:

"*(1) A person referred to in section 7(1) must be a person who is –*

(a) honest and has integrity; and

(b) of good standing.

(2) In determining whether a person complies with subsection (1), the Registrar may refer to any information in possession of the Registrar or brought to the Registrar's attention."

24. Section 9 of the 194 Notice provides a list of incidents indicating when a person is not honest, or lack integrity, or good standing. It is worth noting that section 9 therein does not affect the generality of section 8(1) of the 194 Notice.

25. In respect of procedure to be observed when a financial services provider (FSP) contemplates to debar a representative, section 14(3) of the FAIS Act provides the following: -

"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 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

(c) immediately notify the person in writing of-

(i) the financial services provider's decision;

(ii) the persons' rights in terms of Chapter 15 of the Financial Sector Regulation Act; and

(iii) any formal requirements in respect of proceedings for the reconsideration of the decision by the Tribunal.

26. It is noted that the Applicant took, amongst other things, issue with the biasness of the approach adopted by the Respondent in arriving at the Determination. Further, the Applicant contends that the Respondent is conflicted in this matter as it stands to benefit from debarring the Applicant.

BIAS AND CONFLICT OF INTEREST

27. The Applicant was represented by Mr AC Diamond who persisted on the bias and conflict of interest aspects of the application. Mr Swart appeared on behalf of the Respondent.

28. The grounds of reconsideration states, amongst other things, that there was conflict of interests in the decision made by the Respondent.[14] The Applicant specifically stated that the directors of the Respondent stand to gain by her dismissal and debarment as: -

28.1 she was earning around R40 000 – R45 000.00; and

28.2 prevented her clients from leaving.

29. The Applicant submitted that the process of the Respondent in investigating the Applicant lacked transparency and that there were no checks and balances to ensure that evidence was not ignored or tempered with.[15]

30. In the case of *Associated Portfolio Solution (Pty) Ltd & Another v Basson & Others*[16] ("*the Basson case*"), Mr Basson, who was registered representative and a key individual of both Associated Portfolio Solutions (Pty) Ltd and Pentagon Financial Solution (Pretoria) (Pty) Ltd, challenged the decision of the latter on the basis, among other things, that the FSPs are bias and pre-judged the matter. Although Basson (the representative) succeeded at the high court, the Supreme Court of Appeal took the following view: -

"*Curiously the objection based on bias was never raised prior to the debarment. In any event, nothing on the record supports the argument that the debarment was made for reasons other than those prescribed in the FAIS Act. The very purpose of giving notice of the contemplated resolutions was to afford him the opportunity to make representations. To suggest that this amounted to pre-*

[14] Bundle A, page 8 - 9
[15] Bundle A, page 53
[16] (554/2019) [2020] ZASCA 64 (12 June 2020)

judgement is unsustainable, otherwise every administrative decision requiring prior hearing would be susceptible to being set aside on account of pre-judgment. Moreover, the FAIS Act vests the power to debar in persons who will inevitably would have a history to speak of – and be aware of the misdeeds of – what may be described as an errant representative. ***This method of regulation thus accepts that some institutional bias may be present and will be tolerated in respect of debarment proceedings in terms of FAIS Act***.[17](own emphasis)

31. It is our understanding that an FSP, operating withing the context of FAIS Act, is likely to have institutional bias and there should be some degree of tolerance. Otherwise all administrative decisions, including debarment decisions, may be viewed to be tainted by pre-judgement. However, this approach, which is in line with the *Basson case*, does not mean that the parties can operate outside of the applicable legislative framework prescribed by the law.

32. We hold the view that the process of debarment in this matter was in line with the provisions of section 14 of the FAIS Act, more particularly the procedure stated in section 14(3) of the FAIS Act. In other words, the Applicant was informed of the allegations laid against her and had an opportunity to make representations, before the Debarment decision was made. We therefore do not find the grounds of conflict of interest and bias to be sustainable.

MERITS OF THE ALLEGATIONS

33. The Respondent, according to the 2018 Report, made the finding that the Applicant misused her position of trust by instructing administrative staff to

[17] Basson case, par 35

submit forged trust deed documents to the Master of the high court and other relevant institutions.[18] The Applicant denies the allegation of forgery. We have carefully considered the content of the records before us and we could not find any evidence to support this allegation. No person or affidavit(s) from any staff member of the Respondent or statement that lay basis for this contention. This finding is devoid of substance and therefore not sustainable.

34. Further, the Respondent stated in its findings that the Applicant misrepresented services which were included in the trust registration process and in doing so misused her position of trust with client. Although it is not clear from the record on the nature of services what was misrepresented, it is apparent that the complaint in this matter is, amongst others, the forgery of Mr Brink's signature. The Applicant denied this allegation. On careful consideration of the record before us, there are no facts, or evidence which support this claim. The statement that the Applicant might have filled in the date and place on the stamp, does not support the conclusion that the Applicant has forged Mr Brinks' signature. We therefore hold the view that this allegation lacks substance and therefore is not sustainable.

35. Furthermore, the Respondent states in its findings that the Applicant appears to have been involved with the forgery of Mr Brink's signature or in the alternatively has knowledge of who did and was party to the misconduct, or at least had not exercised due care over the stamp entrusted to her. The Applicant had denied the allegation on forgery of signature and we reiterate our view that there is nothing of substance that connect the Applicant and the forgery of Mr Brink's signature.

---

[18] Bundle A, page 29

36. In respect of the due care of the stamp of Mr Brink, the Applicant provided a version to the effect that Mr Brink left his stamp for commissioner of oath to her office and that there were other employees who had access to it and were allowed to remove it from Applicant's office. This is not specifically denied by the Respondent. On careful consideration of the record before us, we find no substance in this allegation and could not fathom how the same could impact the integrity and honesty of the Applicant. It is therefore not sustainable.

37. The last finding noted on the 2018 Report is that the Applicant intentionally destroyed the company files, particularly the file under investigation. The record reflects the following: -

37.1 On or about 14 June 2018 the Respondent discussed the outcome of its investigation and noted, amongst other things, that the JMN Trust document is the only document found in the file;[19]

37.2 On or about 18 June 2018, upon investigation, Ms Steenbok noted that the folder of the JMN Trust on the laptop of Ms Barnard has recently been opened and documents had been deleted;[20] and

37.3 On or about 19 June 2018, an IT service provider of the Respondent recovered the deleted files from the Respondent's sever backups and those were the JMN Trust.[21]

38. The Applicant stated, according to her July 2019 Response, that she was aware of the following[22]: -

38.1 The sever retained a copy;

---

[19] Bundle A, last sentence in paragraph 51, page 28
[20] Bundle A, paragraph 43, page 27
[21] Bundle A, paragraph 46 page 28
[22] Bundle A, pages 46 - 47

38.2 The Respondent was in possession of a copy;

38.3 The original was in possession of the Master of the High Court; and

38.4 She deleted the folder from her own computer and the computer of the assistant; and

38.5 The electronic copy of the document was not removed from the server.

39. Further, the Applicant stated that she deleted the folder from her own computer and the computer of her assistant, to ensure that the document is not distributed to third parties such as beneficiaries of the Trust or any interested party.

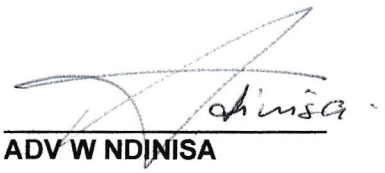
40. We note that the Respondent replied to the aforesaid and submitted, amongst other things, that the aforesaid responses are hindsight.[23] However, we are of the view that the submissions of the Applicant in this regard, are reasonable.

41. In the premises therefore, we hold the view that the application for reconsideration should succeed.

ORDER

(a) The application for reconsideration is successful; and

(b) The Debarment of the Applicant is set aside.



ADV W NDINISA

With the Panel consisting also of:

Z Mabhoza

G Madlanga

[23] Bundle A, page 66