

# FINANCIAL SERVICES TRIBUNAL

Case No: A30/2023

In the matter of:

**SHUPING AND SHUPING**

Applicant

and

**FINANCIAL SECTOR CONDUCT AUTHORITY**

Respondent

Tribunal Members: Adv Chris Woodrow SC (Chair), Adv Tanya Golden SC and K E Moloto-Stofile (Attorney)

Appearance for the Applicant: Mr Shuping in person

Appearance for Respondent: Ms Ziyanda Mshunqane

Date of Hearing: 29 February 2024

Date of Decision: 22 March 2024

**Summary:** Application for Reconsideration of Decisions (a) to debar a natural person in terms of section 153(1)(a) of the FSR Act, and (b) to withdraw the authorisation/licence of an FSP in terms of section 9(1) read with section 9(2) of the FAIS Act.

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## DECISION

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### A. INTRODUCTION

1. This is an application for reconsideration filed by the Applicants, Shuping and Shuping Brokers CC ("Shuping Brokers CC") and Mr Shuping, in terms of sec

230(1) of the Financial Sector Regulation Act 9 of 2017 (“the FSR Act”). There are two decisions which are the subject of this application:

- 1.1. The FSCA’s decision dated 26 June 2023 to debar Mr Shuping in terms of section 153(1)(a) of the FSR Act; and
  - 1.2. The FSCA’s decision of 28 June 2023 to withdraw the authorisation of Shuping Brokers CC as a financial services provider in terms of section 9(1) read with section 9(2) of the Financial Advisory and Intermediary Services Act No.37 of 2002 (“the FAIS Act”).
2. The FSCA found that Mr Shuping no longer complied with the fit and proper requirements, particularly the character qualities of honesty and integrity as required in terms of section 8A of the FAIS Act read with section 8(1) of Board Notice 194 of 2017 (Determination of fit and proper requirements for financial services providers, 2017), as well as section 2 and section 3(1)(d) of the General Code of Conduct for Authorised FSPs and representatives (“the General Code”).
  3. We set out a summary of the legal framework before we deal with the facts which underpinned the FSCA’s decision to debar Mr Shuping and to withdraw the licence of his business, Shuping Brokers CC.

## **B. LEGAL FRAMEWORK**

4. Section 153(1)(a) of the FSR Act provides that the FSCA (the responsible authority for a financial sector law – in this case the FAIS Act) “... *may make a debarment order in respect of a natural person if the person has ... (a) contravened a financial sector law in a material way...*”.
5. Section 8A of the FAIS Act provides as follows:

*“Compliance with fit and proper requirements after authorisation*

*An authorised financial services provider, key individual, representative of the provider and key individual of the representative must-*

- (a) continue to comply with the fit and proper requirements; and*
- (b) comply with the fit and proper requirements relating to continuous professional development.”*

6. Chapter 2 of Board Notice 194 of 2017 published in Government Gazette No. 41321 (“the Board Notice”) sets out the fit and proper requirements relating to honesty, integrity, and good standing. In terms of section 8 thereof, an FSP must be a person who is honest and has integrity and be of good standing. Section 9 of the Board Notice lists incidents (without limiting the generality of s 8(1)) which constitute *prima facie* evidence that a person is not honest, or lacks integrity, or is not of good standing.
7. Section 9 of the FAIS Act provides for the suspension or withdrawal of a licence under certain circumstances.

8. In relation to an FSP's obligations to submit financial statements, section 19 of the FAIS Act provides that an FSP should maintain full and proper accounting records on a continual basis, brought up to date monthly; and must annually prepare, in respect of the relevant financial year of the FSP, financial statements. Section 19(2)(b)(iii) of the FAIS Act provides that such financial statements must *"... be submitted by the authorised financial services provider to the registrar not later than four months after the end of the provider's financial year or such longer period as may be allowed by the registrar."*

**C. THE RELEVANT FACTS**

9. Shuping Brokers CC entered into an 'intermediary services agreement' with 1Life Insurance Limited ("1Life") and rendered advisory and intermediary services under a broker's code issued to Shuping Brokers CC. Mr Shuping is the owner, a sole member and the key individual of Shuping Brokers CC.
10. 1Life advised the FSCA that it noticed possible irregularities into the long-term insurance policies that were submitted by the applicant in that several policy application forms had the same cell phone number and address. Subsequently 1Life found that the applicant had submitted three policy application forms under the pretext that they were for policy holders and for which 1Life issued the said policies.
11. The FSCA then initiated the debarment proceedings.

12. The date and manner in which the Notice of Debarment and the Debarment notices were issued are not in dispute.
13. The FSCA sent (a) Notice of Intention to Withdraw Authorisation (in respect of the FSP, Shuping Brokers CC), (discussed in more detail under the next heading), and (b) Notice of Intention to Issue a Debarment Order (in respect of Mr Shuping). In terms of the notices, Shuping Brokers CC and Mr Shuping were afforded the opportunity to provide reasons why Mr Shuping should not be debarred and why the withdrawal of authorisation of the FSP licence should not be effected.
14. Mr Shuping responded in an email on 21 December 2022 but did not attach any proof of the allegations upon which his response was grounded. On 22 December 2022, the FSCA informed Mr Shuping that his bare denials were not sufficient and urged him to submit evidence by no later than 23 December 2022.
15. Mr Shuping then submitted statements signed by M L Nopela, MM Shuping and Ms Nada Tshotyana (“the policy holders”). The respective statements confirmed that the policy holders had taken out policies with 1Life and contradicted the version that 1Life had presented to the FSCA.
16. The FSCA rejected Mr Shuping’s explanation on the basis that although the three statements had different dates, they appear to have been written by the same

person and further that the signatures on the statements differed materially from the signatures on the application forms.

17. The FSCA found that Mr Shuping had represented to 1Life that Ms Montsioahae (Shuping), Ms. Nopela and Ms. Tshotyana had applied for the policies whilst that was not the case; and that he knowingly and intentionally submitted false personal information in Ms. Montsioahae, Ms. Nopela and Ms. Tshotyana's name without their knowledge and consent.

18. The FSCA consequently served on Mr Shuping:

18.1. a Notice of Debarment on 26 June 2023 which prohibited him from furnishing any financial advice or rendering any intermediary services as defined in section 3 of the FSR Act to financial customers for a period of five (5) years.

18.2. a Notice of Withdrawal of Authorisation on 28 June 2023 which withdrew the licence of Shuping Brokers CC to act as a financial services provider in terms of section 9(1) read with section 9(2) of the FAIS Act.

#### **D. THE WITHDRAWAL OF SHUPING BROKERS CC'S LICENCE**

19. Evident from the Notice of Withdrawal of Authorisation of the licence of Shuping Brokers CC is the fact that what weighed heavily with the FSCA in withdrawing the authorisation of Shuping Brokers CC was the finding of the FSCA that the licensee does not meet or no longer meets the fit and proper requirements. This

finding was based exclusively on the findings relevant to the debarment of Mr Shuping, namely that Mr Shuping had dishonestly contended that the policy holders had taken out policies with 1Life.

20. However, the FSCA also alleged that Shuping Brokers CC contravened section 19(2) read with section 19(1) of the FAIS Act in that:

20.1. An FSP must annually prepare financial statements in accordance with sections 19(1) and (2) of the FAIS Act and must submit those financial statements to the Authority not later than four months after the end of the provider's financial year. The Applicant's/Licensee's financial year end is 30 April, and it should therefore have submitted to the Authority its financial statements by 31 August of each year.

20.2. The Applicant/Licensee had failed to submit the financial statements for the following financial year(s) ended: 2016, 2017, 2018, 2019, 2020 and 2021. Therefore, Shuping Brokers CC contravened section 19(2) (read with section 19(1)) of the FAIS Act.

21. On 6 September 2022, Shuping Brokers CC received a Notice of Intention to Suspend its licence as a financial services provider in terms of section 9(1) read with section 9(2) of FAIS.

22. In the same notice Shuping Brokers CC was afforded an opportunity to provide reasons why the withdrawal of its authorisation should not be effected on the terms set out in the notice. Reasons were required by 6 October 2022.

23. The FSCA found that Shuping Brokers CC failed to provide reasons why the withdrawal of its authorisation should not be effected. The FSCA then withdrew the licence and notified Shuping Brokers CC of its decision on 28 June 2023.

#### **E. THE SUBMISSIONS OF THE PARTIES**

24. Mr Shuping appeared in person and made oral submissions to the panel.

25. He contended that he was unfairly treated and denied his right to be heard because the FSCA relied exclusively on the forensic report received from 1Life which identified the three disputed policies as fraudulent and rejected his evidence and the statements signed by the three policy holders without contacting the policy holders themselves.

26. He complained that he was never given a chance to explain any discrepancies on the policy application forms. According to Mr Shuping, the first time he had come to know of the 1Life forensic report was when he received the notice of intention to debar him. 1Life never gave him a copy of the report and never afforded him an opportunity to respond to the allegations of fraud against him. He did not have access to the alleged “*fraudulent*” policy application forms. The funeral policy application forms had been completed online (on a tablet device



provided to him by 1Life), and unlike other insurance companies 1Life had not provided him with copies of the applications.

27. Counsel for the FSCA maintained that the process followed to debar Mr Shuping was fair because:

27.1. The “*Notice of intention to issue a debarment order*” and the “*Notice of intention to withdraw*” issued respectively on 6 September 2022 and 21 November 2022 were legally compliant. These notices invited Mr Shuping to make representations as to why the FSCA should not proceed with the intended regulatory actions.

27.2. Mr Shuping made use of the opportunity to state his case on 21 December 2022. There were subsequent further engagements between the FSCA and Mr Shuping where he had responded to the notice and where he dealt with the various allegations set out therein.

28. Mr Shuping contended that the process of debarment was unfair in that the FSCA failed to properly investigate the allegations presented by 1Life and failed to conduct the necessary disciplinary hearing. In doing so it failed to follow due process and denied him the right to *audi alteram partem*.

29. Mr Shuping submits that the decision to debar him and withdraw his licence was ultimately influenced by a material error of law as the FSCA failed to follow a fair

procedure and ultimately denied him his common law right of *audi alteram partem*.

30. He submitted that the sanction of debarment and the withdrawal of authorisation as licensee was not fair in the circumstances, and it was not a decision that a reasonable decision maker could have made.
31. Mr Shuping reiterated that Ms. Montsioahae, Ms. Nopela and Ms. Tshotyana had voluntarily applied for funeral policies and had signed all the relevant documents. He maintained that the policies were not opened fraudulently with false information as 1Life and the FSCA contend.
32. Knowing that there were two materially conflicting versions before the tribunal, the FSCA itself in its heads of argument proposed that the Tribunal should exercise its powers in terms of section 232(5)(a) of the FSR Act and direct the policyholders to appear before the Tribunal.<sup>1</sup> Section 232(5)(a) provides that "*the person presiding over a panel- (a) may, on good cause shown, by order, direct a specified person to appear before the panel at a time -and-place -specified in the order to give evidence, to be questioned or to produce any document*". The Authority's proposal is premised on the fact that what was said to 1Life by the policy holders is contradictory to what they indicated in the statements provided by Mr Shuping. The FSCA pointed out that the Tribunal adopted a similar approach in the matter of *John Henry Elmsue Murray v FSCA* (A37/2021). In this matter, the panel directed in terms of section 232(5)(a) of the FSR Act that a

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<sup>1</sup> Part B of the Record: pp 1D-1E, paras 10-15

witness who deposed to two contradictory affidavits appear before the Tribunal.

The FSCA submitted that *it would be expedient to resolve the matter by way of the proposed directive in terms of section 232(5)(a) of the FSR Act*. This approach is consistent with the Tribunal's jurisdiction that it has wide powers to consider a matter afresh, with or without new evidence or information.

33. Ms Nada and Ms Maria Shuping appeared before the Tribunal.
34. Ms Nada confirmed that she knew Mr Shuping who was married to her aunt, Thokozile. Mr Shuping assisted her with a funeral policy. She later received her policy document by mail. She confirmed her signature on the statement which Mr Shuping had submitted to the FSCA. She denied that she ever received a call from anyone at 1Life questioning whether she took a policy with Mr Shuping.
35. Ms Maria Shuping gave evidence before the Tribunal through the assistance of an interpreter. She confirmed that she is related to Mr Shuping. She confirmed he assisted her to apply for a funeral policy, and that 'Nono Zondo' was going to pay for the policy. She stated that she had signed for the policy on a 'cell phone' (which was a reference to the tablet that Mr Shuping had been provided with by 1Life). She identified and confirmed her signature on her statement which Mr Shuping had submitted to the FSCA.
36. In its heads of argument, the FSCA submitted the onus was not that of proving a case beyond reasonable doubt which is the standard in criminal cases. It cited

the Supreme Court of Appeal decision of *Pather vs FSB* where the SCA held the following:

*“In rejecting the argument that the Commission could not reasonably make a determination of fraud if, on the evidence, there was room for reasonable doubt, the court held; ‘[w]e disagree that this standard of proof applies. We see no error in the Commission’s statement of the appropriate standard’.”*<sup>2</sup>

37. With regards to the decision of the FSCA to withdraw the licence of Shuping Brokers SCC as a FSP, Mr Shuping alleged that he had applied for exemption from the obligation to submit financial statements in 2015 and referred the Tribunal to “Annexure A Form” with heading: “*Annual Return for Exemption of Eligible FSPs and Eligible Limited by Product From Requirements Pertaining to Audited Financial Statements*”. According to Mr Shuping, the FSCA had failed to respond to his application. When he did not hear from the FSCA, he assumed that he had been exempted and subsequently did not submit his financial statements for the 2016 financial year end and subsequent years.
38. Counsel for the FSCA conceded that the FSCA had not responded to Mr Shuping’s application for exemption and that it had not at all engaged him on his application and his failure to submit his AFSs for the period 2016 to 2022. The

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<sup>2</sup> Part B of the Record: Heads of Argument, p 7, paras 22-28

legal representative for the FSCA could not provide the panel with any explanation for this.

39. According to Mr Shuping, he has suffered great prejudice as a result of the debarment and the withdrawal of authorisation of Shuping Brokers CC. He has been unemployed since 26 June 2023. He is prohibited from furnishing any financial advice or rendering any intermediary services as defined in section 3 of the FSR Act to financial customers. He has also been prohibited as licensee from concluding any new business as envisaged by the FAIS Act. He has suffered financially and will continue to suffer financially as Shuping Brokers CC was his only source of income.
40. At the hearing he conveyed to the panel that he was required to pay an amount of R 20 000.00 to his attorneys for legal fees, and his attorney had to withdraw as he could not afford the further legal fees.

## **F. ANALYSIS**

41. The issues before the Tribunal can be summarised as follows:
  - 41.1. Whether the FSCA was justified in its decision to debar Mr Shuping in that he no longer met the fit and proper requirements as an FSP.
  - 41.2. Whether the FSCA was justified in withdrawing the licence of Shuping Brokers CC.

42. It is not in dispute that the FSCA did not conduct its own investigation, and that it relied solely on the information which 1Life had submitted to it which included a forensic report.
43. It is also not in dispute that Mr Shuping was not aware of the investigation which 1Life had conducted, as this had not been communicated to him previously.
44. Given that Mr Shuping had submitted statements from the three policy holders which materially contradict the FSCA's conclusion that he had fraudulently signed up the policy holders, it was necessary to resolve the two conflicting versions by hearing from the policy holders themselves which the Tribunal did in terms of section 232(5)(a) of the FSR Act.
45. Mrs Shuping and Ms Tshotyana both confirmed that they voluntarily took out life policies with Mr Shuping who had assisted them with the process. Ms Shuping confirmed that the policy application process was done electronically on a tablet which they both confirmed albeit that Mrs Shuping referred to a cell phone. They corroborated Mr Shuping's version that the policies were taken out with their permission and that they signed the application. Both Ms Tshotyana and Mrs Shuping confirmed their respective statements. Both the witnesses were credible.
46. In our view, the written statements provided by the policy holders were sufficient to create a material dispute of fact. In our view, faced with such dispute, the FSCA could not have arrived at the decision that they did. The FSCA ought not

to have debarred Mr Shuping, and consequently should not have withdrawn the authorisation of Shuping Brokers CC based on the aforesaid findings. We have now heard the *viva voce* evidence of the witnesses. In our view, the findings of the FSCA upon which it based its decisions were materially wrong. We deal with this further below.

## **G. CONCLUSION**

47. The salient facts before the tribunal are largely uncontroverted.
48. The FSCA made the decision to debar Mr Shuping based on a report which it had received from 1Life. It did not conduct its own investigation to verify the allegations and findings by 1Life that Mr Shuping had essentially committed a fraud. The FSCA made the decision to debar Mr Shuping on unverified and hearsay evidence. In aggravation, such decisions were made when confronted with material disputes. Had the FSCA conducted its own investigation it would have been placed in possession of the true facts surrounding the conclusion of the policies and that the policies were completely above board. Yet, it took the drastic and far-reaching decision to debar Mr Shuping to his prejudice.
49. The FSCA's decision to debar Mr Shuping was irregular and unlawful.
50. The reconsideration application on this basis must succeed.

51. The primary basis upon which the FSCA decided to withdraw the licence of Shuping Brokers CC is based on the findings made against Mr Shuping. The FSCA contends that there is an intrinsic link between an FSP and its only key individual (Mr Shuping). The fact that Mr Shuping was debarred on the basis that he no longer met the honesty and integrity requirements triggered the withdrawal of the licence of Shuping Brokers CC. Those findings were wrong, and accordingly the primary basis for the withdrawal of the licence/authorisation of Shuping Brokers CC also fails.
52. In respect of Shuping Brokers CC's failure to submit financial statements as contemplated in s 19 of the FAIS Act, the facts demonstrate that Mr Shuping had applied for an exemption from submitting financial statements. It is not in dispute (and counsel for the FSCA conceded) that the FSCA had not replied to the application for exemption nor did it engage Mr Shuping for several years on his failure to submit financial statements.
53. According to Mr Shuping, he did what he was required to do and he did not understand the position to be that he had to submit AFSs annually.
54. The correct position may be that an application for exemption had to be submitted annually, but the FSCA's silence and failure to address the issue clearly made Mr Shuping believe that his application was granted and that nothing further was required of him. This impression was not dispelled by the FSCA. The position was created by the FSCA and it cannot now seek to rely on its own failure to prejudice Mr Shuping further by withdrawing the licence for this reason.



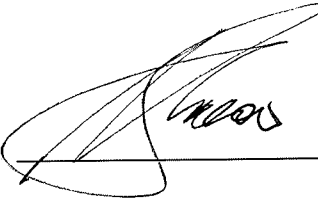
55. Be the aforesaid as it may, it is clear that the primary reason for the withdrawal of the licence was based upon the findings of the FSCA regarding the conduct of Mr Shuping. The evidence shows that those findings were clearly wrong. Had the correct evidence been before the FSCA, it is probable that the FSCA would not have exercised its discretion in terms of s 9 of FAIS to withdraw the licence / authorisation.
56. The application for reconsideration must accordingly succeed.
57. Mr Shuping suffered great prejudice because of his debarment and the withdrawal of Shuping Brokers CC's licence. He was not able to earn an income and he was not able to conduct his business. The manner in which the FSCA debarred Mr Shuping was not only deficient but caused Mr Shuping significant harm. The circumstances, in our view, constitute exceptional circumstances and warrant a costs order against the FSCA.
58. We make the following Order:

#### H. ORDER

- (a) The application for reconsideration is upheld, and the decision of the FSCA of 26 June 2023 (the debarment decision in respect of Mr Shuping) and of 28 June 2023 (the decision to withdraw the licence of Shuping Brokers CC) are set aside and remitted to the FSCA for further consideration.

- (b) The FSCA shall pay 50% of Mr Shuping's and Shuping Brokers CC's legal costs associated with this application.

Signed on behalf of the Tribunal on 22 March 2024.



A handwritten signature in black ink, appearing to read 'K E Moloto-Stofile', is written over a horizontal line.

K E Moloto-Stofile

On behalf of the Panel