

THE FINANCIAL SERVICES TRIBUNAL

Case No: FSP30/2023

In the matter between:

SKYELER HENN

Applicant

and

DEALER FINANCIAL SERVICES CC

Respondent

Tribunal Panel: C Woodrow SC (Chairperson), PR Long and KD Magano

Appearance for the applicant: Ms S Henn (In person)

Appearance for the respondent: Mr F Geoffrey

Date of hearing: 17 August 2023

Date of decision:

Summary: Application for reconsideration of debarment – procedural fairness of the debarment as envisaged in section 14(2) and (3) of the Financial Advisory and Intermediary Services Act 37 of 2002

DECISION

INTRODUCTION

1. The applicant applies for the reconsideration of her debarment in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 ('FSR Act'). The respondent debarred the applicant as a representative in terms of

section 14(1) of the Financial Advisory and Intermediary Services Act 37 of 2002 ('FAIS Act').

2. The applicant challenges the debarment both on procedural and substantive grounds.
3. The respondent opposes the reconsideration application. The parties attended a virtual hearing of the application.

FACTUAL BACKGROUND

4. The respondent is a Financial Services Provider ('FSP'), as defined in section 1 of the FAIS Act. The applicant is a representative of the respondent.
5. The applicant was mandated as a representative of the respondent to sell financial products on behalf of Fuzion Motor Group (Pty) Ltd ('FMG'), a juristic representative of the respondent.
6. The applicant claims that she is a partner (via an entity, Blackbird Finance (Pty) Ltd)) in Fuzion Preowned (Pty) Ltd ('Fuzion'), a wholly owned subsidiary of FMG. The applicant's involvement with Fuzion included the authorisation of certain payments.
7. Fuzion accused the applicant of misappropriating funds. It is alleged that the applicant instructed a debtor of Fuzion to pay an amount which was due to Fuzion to her personal bank account (R42,000.00) and to a certain attorney's trust account (R358,000). The details of the dispute between Fuzion and the applicant have culminated in litigation between them, the

particulars of which need not detain us for present purposes.

8. The applicant was called by Fuzion to attend a disciplinary hearing on 6 April 2023 (to be chaired by an external chairperson booked via a labour consultancy) (the “**disciplinary proceedings**”). The applicant disputed the lawfulness of the disciplinary proceedings because, according to her, she was not an employee. She regarded herself as a partner and the partnership having been dissolved in January 2023, there was no basis in law for Fuzion to initiate disciplinary action against her. Further, there was litigation between Fuzion and her. For this reason, the applicant elected not to attend the disciplinary hearing.
9. The disciplinary proceedings took place on 6 April 2023 in the absence of the applicant. The evidence shows that these proceedings were disciplinary proceedings taken by Fuzion against the applicant, alleging that it (Fuzion) was the applicant’s employer. The outcome of the proceedings was that the applicant “... *would be found guilty as charged and the recommended sanction would have been summary dismissal ...*” however, as the applicant “... *is self-employed, disciplinary action can no longer be applied by the Company [Fuzion]...*”.
10. The respondent, armed with the knowledge of the accusations against the applicant, made a decision to debar the applicant.
11. Section 14(2)(a) of the FAIS Act requires that an FSP, before effecting a debarment in terms of subsection (1), “... *must ensure that the debarment process is lawful, reasonable and procedurally fair.*” Guidance Notice 1 of

2019 records that a debarment decision by an FSP constitutes the exercise of administrative action. Such action is subject to the requirements of section 14 of the FAIS Act and the overarching requirements of PAJA. It is required of FSP's in exercising their debarment powers to act reasonably and rationally. The process must also be procedurally fair.

12. In what follows, we establish whether these requirements were in fact complied with.

COMPLIANCE WITH PROCEDURE

13. Section 14(3) of the FAIS Act provides as follows:

(3) 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 uncompleted 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 debarment 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.*

14. The applicant's case in relation to the debarment procedure as undertaken by the respondent is as follows *inter alia*:

- a. A proper process for the debarment was not followed.
- b. She was not served with a written notice of intention to debar nor was she given a copy of the respondent's written policy and procedure governing the debarment process.
- c. She was not invited by the respondent for a hearing, but by Fuzion/FMG (with whom she alleges a partnership via 'Blackbird Finance').
- d. She was never afforded an opportunity to make submissions regarding the intended debarment.
- e. She was not notified of her debarment by the respondent, and instead

the debarment came to her attention when she received a notice from the Financial Sector Conduct Authority ('FSCA') on 1 June 2023 of her debarment by the applicant. Upon further investigation she discovered that the debarment was effected on 12 April 2023.

15. On the respondent's own version, the applicant was not given notice in writing of an intention to debar the applicant, the grounds and reasons for the debarment, and any terms attached to the debarment *et cetera*. On the respondent's own version there was noncompliance with section 14(3)(a) of the FAIS Act.
16. The respondent also states it informed the applicant telephonically of the outcome of the proceedings held by FMG. The respondent states that the applicant received written notice and the reason for debarment from the FSCA (in June 2023). This does not constitute compliance with section 14(3)(c) of the FAIS Act.
17. It appears that the representative of the respondent reviewed the information from the disciplinary proceedings (post the disciplinary hearing), and in terms of his 'investigation' found that the applicant had acted dishonestly, and then sent a 'debarment notification' to the FSCA.
18. The procedure laid down in section 14(3) of the FAIS Act is peremptory and unambiguous. An FSP that intends debarring a representative *must* give notice in writing to the representative of its intention to do so. Together with the said notice, the FSP *must* provide the representative with a copy of its debarment policy.

19. If the FSP is unable to locate a person in order to deliver a document or information under section 14(3), after taking all reasonable steps to do so, including dissemination through electronic means where possible, delivering the document or information to the person's last known e-mail or physical business or residential address will be sufficient.¹
20. It is a common cause that the respondent did not give the applicant notice of its intention to debar her. The respondent relies on a purported telephone call in terms of which the applicant was informed of the respondent's intention to debar her.
21. The telephone call is wholly inadequate especially since the respondent, having had a relationship with the applicant spanning over four years, had sufficient means to contact the applicant including by way of electronic mail. The debarment policy purportedly sent to the applicant was sent to her in 2019. This appears to have been done during a course registration process, not the applicant's debarment.
22. Moreover, insofar as the respondent implies that the disciplinary proceedings afforded the applicant an opportunity to be heard in relation to her debarment, cannot suffice as compliance with section 14(3)(a)(iii) of the FAIS Act. The respondent appears to conflate the disciplinary proceedings by Fuzion with that of debarment.

¹ Section 14(2)(b) of the FAIS Act.

23. It is clear that the respondent did not comply with the requirements of section 14(3) of the FAIS Act, nor with Guidance Notice 1 of 2019. The debarment proceedings were procedurally irregular and unfair. For this reason, the reconsideration application stands to be upheld. A determination as to whether the applicant complied with the substantive requirements is therefore not necessary.

24. In the result, the following order is made:

The decision to debar the applicant is set aside and remitted for further consideration.

SIGNED AT PRETORIA ON THIS 29TH DAY OF SEPTEMBER 2023.

Signed on behalf of the Tribunal panel.



Adv KD Magano