THE FINANCIAL SERVICES TRIBUNAL

CASE NO: FSP56/2022

In the matter between:

THABISO MALATJE **APPLICANT**

and

FIRST NATIONAL BANK a division of FIRSTRAND BANK LIMITED **RESPONDENT**

Tribunal Members: MG Mashaba SC(Chair), E Phiyega and PKE Moloto-Stofile.

Appearance for Applicant:	In person.
Appearance for Respondent:	Adv L Minne.
Date of Hearing:	24 August 2023.
Date of Decision:	20 September 2023.

Summary: Application for reconsideration in terms of section 230 of the Financial Sector Regulation Act, Act 9 of 2017 ("the FSR Act") - fit and proper requirements – falsifying documents.

DECISION

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[1] This is an application for reconsideration in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 against the decision of the Respondent which was handed down on 1 October 2022 and received on 28 November 2022 by the Applicant.

[2] The applicant in this matter, Thabiso Malatje, is an adult male who from 1 May 2013 to 15 October 2013 was employed by the respondent at the FNB Tubatse Crossing branch as a branch consultant.

[3] To give proper context to this matter it is prudent to give brief factual background leading to the current application. The applicant stood accused of falsifying letters that were used as poof of address for customers who were opening new accounts by filling the missing information on their behalf. A customer would give the applicant a blank letter that was signed by the municipal official (a ward councillor in this case), with an official stamp of the municipality and the applicant would in turn complete the customers' personal details as well as their address on these letters. The applicant was charged with the following transgressions at a disciplinary enquiry held on 8 October 2021: –

[3.1] Charge 1: Falsifying of documents in terms of paragraph 4.2.6 of the Banks Disciplinary Code and Procedures in that it was alleged that on 14 July 2021 the applicant in his capacity as branch consultant falsified the proof of residence letter when he used a blank municipality letter obtained from the Fetakgomo Tubatse Municipality to complete the address details for a customer, Ms K Nkwane. Section 21 of Financial Intelligence Centre Act 28 of 2001 required all customers to be identified and verified before a business relationship could be established. In terms of the Act, the bank was required to obtain and verify, at minimum, a prospective customer's identity, address, and source of funds.

[3.2] Charge 2: Falsifying of documents in terms of paragraph 4.2.6 of the Bank's Disciplinary Code and Procedures and that it was alleged that on 14 July 2021 the applicant in his capacity as branch consultant falsified the proof of

residence letter when he used a blank municipality letter obtained from the Fetakgomo Tubatse Municipality to complete the address details of the customer, Mr W Mahole.

[3.3] Charge 3: Falsifying of documents in terms of paragraph 4.2.6 of the Banks Disciplinary Code and Procedures and that it was alleged that on 15 July 2021 the applicant in this capacity as branch consultant falsified the proof of residence letter when he used a blank municipality letter obtained from the Fetakgomo Tubatse Municipality to complete the address details of one customer by the name of Mr R Phasha.

[3.4] Charge 4: Falsifying of documents in terms of paragraph 4.2.6 of the Banks Disciplinary Code and Procedures and that it was alleged that on 15 July 2021 the applicant in this capacity as branch consultant falsified the proof of residence letter when he used a blank municipality letter obtained from the Fetakgomo Tubatse Municipality to complete the address details of one customer by the name of Ms Reatlegile Phasha.

[3.5] Charge 5: Falsifying of documents in terms of paragraph 4.2.6 of the Banks Disciplinary Code and Procedures and that it was alleged that on 16 July 2021 the applicant in this capacity as branch consultant falsified the proof of residence letter when he used a blank municipality letter obtained from the Fetakgomo Tubatse Municipality to complete the address details of one customer by the name of M Mathopa.

[3.6] Charge 6: Falsifying of documents in terms of paragraph 4.2.6 of the Banks Disciplinary Code and Procedures and that it was alleged that on 22 July 2021

the applicant in this capacity as branch consultant falsified the proof of residence letter when he used a blank municipality letter obtained from the Fetakgomo Tubatse Municipality to complete the address details of one customer by the name of Mr Mavusa.

[3.7] Charge 7: Falsifying of documents in terms of paragraph 4.2.6 of the Banks Disciplinary Code and Procedures and that it was alleged that on 20 July 2021 the applicant in this capacity as branch consultant falsified the proof of residence letter when he used a blank municipality letter obtained from the Fetakgomo Tubatse Municipality to complete the address details of one customer by the name of Mrs Unathi Thobiso.

[3.8] Charge 8: Falsifying of documents in terms of paragraph 4.2.6 of the Banks Disciplinary Code and Procedures and that it was alleged that on 20 July 2021 the applicant in this capacity as branch consultant falsified the proof of residence letter when he used a blank municipality letter obtained from the Fetakgomo Tubatse Municipality to complete the address details of one customer by the name of Ms Mokele Komia.

[4] Paragraph 4.2.6 of FNB Disciplinary Code and Procedures provides that once found guilty with the offence of altering or falsifying any certificates or documents (e.g medical certificate, education documents and attendance register) the sanction for the first offender is summary dismissal and the offender's name sould be placed on REDS list. On the other hand, section 21 of FICA provides that:

21. Identification of clients and other persons.—*(1) When an accountable institution engages with a prospective client to enter into a single transaction or*

to establish a business relationship, the institution must, in the course of concluding that single transaction or establishing that business relationship and in accordance with its Risk Management and Compliance Programme—

(a) establish and verify the identity of the client;

(b) if the client is acting on behalf of another person, establish and verify—

(i) the identity of that other person; and

(ii) the client's authority to establish the business relationship or to conclude the single transaction on behalf of that other person; and

(c) if another person is acting on behalf of the client, establish and verify—

(i) the identity of that other person; and

(ii) that other person's authority to act on behalf of the client.

[5] During the disciplinary hearing the respondent argued that Section 21 of Financial Intelligence Centre Act 28 of 2001 required all customers to be identified and verified before a business relationship could be established. According to the respondent the bank was, in terms of the Act, required to obtain and verify, at minimum, a prospective customer's identity, address and source of funds. The respondent contended that the applicant failed to comply with this section of the FICA Act in that customer identification had to be done by an independent party and the applicant was not an independent party.

[6] Upon the completion of the disciplinary hearing the applicant was found guilty on all of the charges but for charges 2 and 7. He was then summarily dismissed from his employment. The applicant then referred his matter to the Commission for Conciliation,

Mediation and Arbitration (CCMA) for conciliation. The matter was heard on 9 December 2021 wherein the parties reached a settlement agreement to the effect that: (a) the respondent would treat the applicant's termination of employment as if it was voluntary resignation, and (b) the respondent would remove the applicant's name from the REDS list. An employee who is found to have been dishonest would be placed on the Banking Council Register of Dishonest Employees (REDS). The REDS enquiry would ordinarily take place after termination of employment.

[7] The applicant was served with a letter dated 29 March 2022 notifying him of the respondent's intention to debar him. In the said letter the respondent highlighted the grounds and reasons for the intended debarment as follows:

[7.1] The applicant did not meet and/or no longer complied with the requirements of Section 13 (2) (a) of the FAIS Act, specifically, the fit and proper requirement of honesty, integrity, and good standing; as provided for in Board Notice 194 of 2017: and/or

[7.2] The applicant contravened or failed to comply with the provision of the FAIS Act in a material manner as provided for in terms of section 3 (3) of the FAIS General Code of Conduct which states the following:

(3) A provider may not disclose any confidential information acquired or obtained from a client or, subject to section 4(1), a product supplier in regard to such client or supplier, unless the written consent of the client or product supplier, as the case may be, has been obtained beforehand or disclosure of the information is required in the public interest under any law.

[8] In its Notice of Intention to debar the respondent relied once again on the eight (8) charges which were put against the applicant in his initial disciplinary hearing which led to his dismissal. The applicant was afforded 14 days from the date of service of notice of intention to debar within which to make written submissions to be submitted by no later than 12 April 2022. He was subsequently debarred, and that decision was conveyed to him with a letter dated 1 October 2022.[1]

[9] It is important to highlight at this juncture the FAIS Panel's conclusions and reasons which led to the applicant's debarment:

[9.1] The applicant acted dishonestly when he finalized the ward councillor confirmation of address letters.

[9.2] The applicant was found to have completed the documents on behalf of a ward councillor which was tantamount to fraud and in so doing compromised his integrity.

[9.3] There was deliberate intent to complete the confirmation of addresses in order to successfully complete the account opening process for the benefit of an embedded value.

[9.4] His conduct was serious enough to affect his fit and proper status.

[9.5] There was clearly a breach of the honesty and integrity principles contained in the FAIS Act.

[1] Page 7 of Part A of the Tribunal Record.

[9.6] The applicant did not act in good faith and in the best interests of the business and customers alike.

[9.7] The applicant contravened the Banks Code of Ethics Policy and the Group Employee Conduct Agreement.

[9.8] The applicant was found to have breached section 9(1)(e) and (f) of BN 194 of 2017 that relates to honesty, integrity, and good standing.

[10] In the main the applicant's argument for reconsideration was that (a) the decision to debar him was taken without his version been heard by the panel, (b) the parties agreed at the CCMA that the Applicant would withdraw his labour dispute case against the respondent without admitting guilt in exchange for the respondent not to debar him or submitting his name for listing under the REDS and (c) the documents which were handed to him by clients as proof of address were issued by the local councillor and local municipality official, signed and stamped by the said officials. They were then handed over to clients for them (clients) to complete their addresses. The client would in turn ask assistance from him because the customers were afraid that they would make alterations to the forms.

PROCEDURAL ASPECT

The decision to debar him was taken without his vision been heard by the panel.

[11] The applicant was served with notice of intention of debarment dated 29 March 2022 and was notified to make written submissions before 12 April 2022. According to the notice of debarment the applicant was debarred without his version being heard as no submissions from him were received for consideration. The applicant argues that he

made his submission and delivered them to one Mr Edmond Botha on 11 April 2022 who according to his knowledge was at all material times employed by the respondent responsible for labour and/or industrial relations.

[12] The applicant has attached Annexure TM 02 to his application for consideration titled 'In response to notice of debarment' which he argues is the same document that he submitted to Mr. Edmond Botha on 11 April 2022 in response to the Applicant's Notice of Intention of Debarment. He submits that the respondent's failure to consider his submissions, as already alluded to above, justifies the tribunal to consider his application as he was not afforded his constitutional right to be heard prior to a decision being taken.

[13] The applicant's response (Annexure TM 02) to the notice of debarment is undated and there is no proof of service on the respondent. During submissions the applicant was adamant that he served his submissions on Mr. Edmond Botha. I do not deem it necessary to make any determination on the veracity of the Applicant's version that he indeed served his submissions on Mr. Edmond Botha or not. That point does not take this case any further.

[14] It can be safely concluded that the applicant's submissions were not considered when he was debarred. However, when considering this application, we took into account his submissions as contained in Annexure TM 02. I am therefore of the view that since the applicant's submissions were considered by this panel this then cures and addresses any possible procedural prejudice he might have suffered due to his submission not being considered. Procedural irregularities may, depending on circumstances, be cured by a procedurally fair appeal.[2] I accordingly find no merit in the Applicant's submission

[2] Amanda Dolores v Laetitia Niemec & Others v Constantia Insurance Co Ltd and Others PA01/2021; ZD Mqadi v The Financial Sector Authority Regulator A40/2020.

that the fact that his submission was not taken into account prior to him being debarred warrants his debarment to be set aside only on this point.

A CONSIDERATION OF THE MERITS

[15] The applicant argued that the parties agreed at the CCMA that he would withdraw his labour dispute case against the respondent without admitting guilt in exchange for the respondent not to debar him or submitting his name for listing under the REDS. However, Annexure TM 03 records that the employer shall treat the employee's termination of employment as voluntary resignation and that the employer shall remove the employee's name from the REDS list. Nowhere is it recorded that the applicant would withdraw the matter in the CCMA without admitting guilt in exchange for the respondent not to debar him.

[16] The applicant furthermore stated in his letter responding to the notice of debarment (Annexure TM 02) that he had a recording of the meeting confirming the terms of the settlement agreement. The applicant has failed to produce any objective facts, except him saying so, that one of the terms of the settlement agreement at the CCMA was that the respondent would not move for his debarment. We are however of the view that even if there was such an agreement to the effect that the respondent would not debar him this Tribunal should be bound by the terms of such an agreement. It would be improper for this Tribunal to endorse and abide by the terms of a settlement agreement which negates its powers to investigate the question whether an FSP's representative fit and proper status.

[17] There are no objective facts to confirm the applicant's version that one of the terms of the settlement agreement was that the respondent would not move an application for his

debarment save for his voluntary resignation and his removal from REDS listing. I accordingly reject the applicant's version that one of the terms of the settlement agreement between the parties was that the respondent would not move an application for his debarment. Neither do I find it necessary to decide whether one of the terms of the settlement arrangement was to the effect that the respondent would not move an application for debarment of the applicant. Even if the parties agreed on such a term such a condition would not limit the Tribunal powers to investigate the applicant's fit and proper status.

The debarment findings.

[18] The applicant was debarred after being found guilty to have falsified of 8 residents' confirmations when he completed the ward councillor's letter. During the disciplinary hearings the applicant admitted having completed 5 of the clients' forms. The FAIS panel concluded, amongst other things, that the Applicant's conduct of completing the documents on behalf of a ward councillor was tantamount to fraud and in doing so compromised his integrity. It was the respondent's case that the applicant falsified municipal letters that were used as proof of address for new account openings for customers by filling in the missing parts. The customers gave him letters that were signed by the municipal official and stamped with the official stamp of the municipality. He then recorded the customer's personal details on the letter as well as an address given by the client.

[19] The FNB Guidance on Address Verification documents/records laid down the criteria to be applied in assessing the acceptability of an address verification document. According to the said guideline the criteria laid down is that the document to be utilised as proof of address must contain the names/initials, surname of the customer as well as the details

of the physical residential address and must be on the official letter head/stationary of the institution/authority issuing the document. This information must correspond with the details as provided by the customer to the bank.

[20] In a nutshell the applicant's case is that he was assisting customers to complete their proof of residence municipal forms. Customers came in with incomplete forms and he would fill in the forms on their behalf. According to him there was no intention of deceiving anyeone or to be dishonest. The applicant further submitted that he was not aware that what he was doing was wrong.

[21] I find it hard to believe that the applicant was not aware that what he was doing was wrong. Firstly, the applicant ought to have been aware that FNB Disciplinary Code and Procedure made it a dismissible offence for altering or falsifying certificates or documents. Secondly, FNB Customer Due Diligence, in paragraph 21.1, laid down a criterion for an acceptable documentation for address verification. One of the requirements is that the document which serves as an address verification document must be an independent form of proof of address. In other words, the document purporting to be a proof of address must be completed by an independent person. Thirdly the applicant underwent rigorous training offered by the respondent, involving amongst other things, Introduction to FAIS supervision 2020 (Assessment) and Introduction to FAIS supervision 2020 (eLearning). I therefore find it highly improbable that the applicant was not aware that what he was doing was in contravention of relevant legislation and company's policy.

[22] The applicant further submitted that there was no intention of deceiving someone or to be dishonest. It is plausible that the applicant was simply assisting members of the public

in completing the proof of residence forms but that does not make his actions right. Even the road to hell is paved with good intentions. He was aware of what was required from him as an FSP representative and he derelicted from those duties. In terms of section 13(2)(a) of the FAIS an authorised FSP must, at all times, be satisfied that its representatives and key individuals are competent to act and that they comply with the fit and proper requirement. FSPs are charged with the duty to take reasonable steps to ensure that representatives comply with any applicable code of conduct and applicable laws in the conduct of business.

[23] The objective of the FIC Act is, among other things, to help combat money laundering, the financing of terrorism and other related activities. All accountable institutions designated under the FIC Act are obliged to comply fully with its requirements. The respondent is a licensed Financial Services Provider (FSP) under the Financial Advisory and Intermediary Services (FAIS) Act, No. 37 of 2002 and an accountable institution under the FIC Act. The FSCA is responsible for supervising and enforcing compliance of FSPs with the FIC Act. The applicant, by not verifying clients' proof of address through an independent source compromised the respondent to money laundering, financing of terrorism and other related activities.

[24] The question in this matter is whether the applicant can be trusted to faithfully act and discharge all of the duties and obligations as an FSP. The applicant breached his fiduciary duty towards the respondent. He ought to have been aware that he could not complete documents on behalf of a ward councillor. The applicant's submission that completing documents on behalf of the ward councillor was to assist customers to open new bank accounts does not mitigate his actions in any way. I draw parallels between

this matter and the case of Law Society v Du Toit 1938 OPD 103, where the following profound remark was made regarding an application for the removal of an attorney:

"The proceedings are instituted by the Law Society for the definite purpose of maintaining the integrity, dignity and respect the public must have for officers of this court. The proceedings are of a purely disciplinary nature; they are not intended to act as punishment for the respondent... It is for the courts in cases of this nature to be careful to distinguish between justice and mercy. An attorney fulfils a very important function in the work of the court. The public is entitled to demand that a court should see to it that officers of the court do their work in a manner above suspicion. If we were to overlook misconduct on the part of officers of the court, if we were to allow our desire to be merciful to overrule our sense of duty to the public and our sense of importance attaching to the integrity of the profession, we should soon get into a position where the profession would be prejudiced and brought into discredit."

[25] The above remarks resonate with the facts of this matter. If we overlook misconduct of FSP representatives, if we were to allow our desire to be merciful to overrule our sense of duty to the public and our sense of importance attaching to the integrity of the profession, we will soon get into a position where the financial sector is prejudiced and brought into discredit.

[26] Based on the facts we are satisfied that the panel did not misdirect itself in its administrative decision to debar the applicant. The decision is justified, and the reasons in support of the decision are rational, considering the information that was available to the respondent.

In the premise the following order is made:

(a) The application for reconsideration is dismissed.

SIGNED at PRETORIA on this 20 day of SEPTEMBER 2023 on behalf of the Panel.

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MG Mashaba SC (Chair)

With the Panel consisting also of:

E Phiyega and

PKE Moloto-Stofile.