THE FINANCIAL SERVICES TRIBUNAL

Case №: FSP57/2022

In the matters between:

TRISHANTHA SINGH	Applicant
And	
MARSH PROPRIETARY LIMITED	First Respondent
JACO HITGE (decision maker)	Second Respondent

Tribunal Panel: Judge L Harms, KD Magano

Summary: Application for reconsideration of the decision of the FSCA to debar a natural person, fit and proper requirement.

DECISION

A. INTRODUCTION

1. The applicant launched this application for reconsideration in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 ("*FSR Act*"). The second respondent debarred the applicant after conducting an internal investigation which led to a disciplinary process against her.

2. Following the hearing, the applicant was found guilty and dismissed *inter alia* for contravening her employment contract. We pause to state that the disciplinary hearing was conducted after the applicant's resignation from

her employment with the first respondent. Through a letter from her legal representatives, the applicant informed the first and second respondents that she does not take issue with her dismissal because the decision to dismiss her was taken after her resignation.

3. The second respondent debarred the applicant on the basis that she lacked honesty and integrity in that she was found to be in unauthorised possession of the first respondent's trade secrets, confidential and proprietary information belonging to the first respondent.

B. FACTUAL BACKGROUND

4. The applicant was employed by the first respondent as a corporate client executive, a position which she occupied until her resignation on 29 August 2022. In her resignation letter, the applicant stated that her reason for the resignation was "*better employment opportunity*".

5. At all material times during her employment with the first respondent, the applicant was a key individual, as defined in section 1 Financial Advisory and Intermediary Service Act 37 of 2002 ("*FAIS Act*")[1]. Accordingly, she was bound by the General Code of Conduct for Authorised Financial Services Providers and their Representatives (*the code")* as well as the *"fit and proper requirements for financial Service providers."* As a key individual, the applicant stands in a trust relationship with the first respondent and its clients. Therefore, the applicant owed the first

[1] In terms of section 1 of the FAIS Act, a representative means any "*person . . . who renders a financial service to a client for or on behalf of an FSP in terms of conditions of employment or any other mandate, but excludes a person rendering clerical, technical, administrative, legal, accounting or another service in a subsidiary or subordinate capacity . . ."*

respondent a fiduciary duty to act in its best interest at all material times when rendering financial services to the first respondent's clients and the public at large.

6. The first respondent is an authorised Financial Services Provider ("*FSP*"). As an authorised financial services provider, the first respondent is bound by the provisions of the FAIS Act, which includes the duty to ensure that its representatives FSP meet the "*fit and proper requirements"* as set out in section 13(2) of the FAIS Act.[2] The provisions of section 13(2) of the FAIS Act place an obligation on the first respondent to debar an FSP who no longer meet the *"fit and proper requirements".*[3]

7. It is common cause between the parties that before her resignation, the applicant transferred the following information to her private Gmail email address:

   7.1. A document titled "ACE Allocation 20210101". This is a confidential /Proprietary Internal Marsh document containing a Marsh client listing with details of the clients' client executive, the client executive backup, the clients' renewal months and Marsh's income, as well as the placement allocation;

   7.2. A document titled "KZN Corporate_Client Allocation_20220713".

---

2 Section 13(2) provides: "*An authorised financial services provider must-*
(a) at all times be satisfied that the provider's representatives, and the key individuals of such representatives, are, when rendering a financial service on behalf of the provider, competent to act and comply with-
(i) the fit and proper requirements; and
(ii) any other requirements contemplated in subsection (1)(b)(ii);
(b) take such steps as may be reasonable in the circumstances to ensure that representatives comply with any applicable code of conduct as well as with other applicable laws on the conduct of business."

3 In the matter between **Financial Services Board v Bartharm and Another** 2018 (1) SA 129 SCA, the SCA held that: "*Sections 13(2)(a) and (b), as also s 14(1) and (2), are couched in peremptory terms. Failing compliance with those provisions, the FSP itself is liable to sanction."*

This is a Confidential/Proprietary internal Marsh document containing information pertaining to 3 Marsh employees and their allocated clients, as well as Marsh's commission earnings in respect of these clients;

7.3. A series of Microsoft Teams messages (Microsoft Teams is the Marsh Internal Messaging System) between, *inter alia*, Anne Sammons ("*Anne")*, the applicant and Gail Nicol. In the Microsoft Teams message chat of 28 July 2022 at 10:22 am, Anne referenced Toyota, a Marsh client, as well as confidential information pertaining to Marsh's revenue in respect of this client;

7.4. A Confidential/Proprietary document titled "20220601_Shell Fuel Retailer_Renewal Letter Template". This template contains Marsh's intellectual property and amounts to a trade secret;

7.5. A Confidential/Proprietary document titled "20210611_Short List on Requirements for Fuel Retailer Liability Claim_SB";

7.6. A Confidential/Proprietary document titled "20210611_Third party claimant requirements_SB";

7.7. A Confidential/Proprietary document titled "Fuel Retail - General, Endorsement";

7.8. A Confidential/Proprietary document titled "Marsh Commercial Wording (Hollard)";

7.9. A Confidential/Proprietary document titled "20181026_Fuel

Retailers_Shell Owned Assets_General Endorsement_SB";

7.10. A Confidential/Proprietary document titled "20181026_Fuel Retailers_Products Summary_Shell Owned Assets_SB";

7.11. A Confidential/Proprietary document titled "20210611_MARSH PRODUCTS CLAIMS HANDLING PROCEDURE_Document SB";

7.12. A Confidential/Proprietary document titled "Issue 12 I June 2022 | Marsh Terms of Engagement Agreement I R15m I Locked (Deemed Acceptance)";

7.13. An email dated 15 July 2022 from Siphelele Mchunu (of Marsh) setting out client details, including policy numbers, client names, insurer details and policy type;

7.14. An email dated 20 July 2022 from V Gounder (of Old Mutual Insurance) attaching information pertaining to a Marsh client, Dewsbury, regarding their renewal, as well as the commercial schedule for this client for the insurance period 1 August 2022 to 31 July 2023;

7.15. An email dated 20 July 2022 from V Gounder (of Old Mutual Insurance) attaching an email regarding the renewal for a Marsh client, Sparex (Pty) Ltd;

7.16. An email dated 20 July 2022 from V Gounder (of Old Mutual Insurance), attaching a renewal letter and premium computation document in relation to a Marsh client, Sunfield Home School;

7.17. An email attaching 20 documents from the applicant’s Marsh email address to her Gmail email address. The 20 documents referred to above include Marsh intellectual property consisting of the Marsh pleasure craft claim form, the Marsh property loss claim form, the Marsh public liability claim form, the Marsh travel claim form, the Marsh windscreen claim form, the Marsh business all risk claim form etc.;

7.18. An email attaching a document titled “KZN Corporate Client Allocation” from the applicant’s Marsh email address to her Gmail address;

7.19. A document titled “KZN Corporate Client Allocation_202200712” from the applicant’s Marsh email address to her Gmail address;

7.20. A client’s email in respect of the “Reload Group” from the applicant’s Marsh email address to her Gmail address;

7.21. An email dated 20 July 2022 from V Gounder (of Old Mutual Insurance) attaching information pertaining to a Marsh client Dewburg, regarding their renewal, as well as the commercial schedule for this client for the insurance period 1 August 2022 to 31 July 2023;

7.22. An email dated 20 July 2022 from V Gounder (of Old Mutual Insurance) attaching a renewal letter and premium computation document in relation to a Marsh client Sunfield Home School;

7.23. A document titled “20220601_Sheff Fuel Retailer_Renewal Letter Template”;

7.24. A document titled “20210611_Short List on Requirements for Fuel Retailer Liability Claim_SB”;

7.25. A document titled “20210611_Third party claimant requirements_SB”;

7.26. A document titled “Fuel Retail - General Endorsement”. This document contains Marsh’s intellectual property and amounts to a trade secret;

7.27. A document titled “Marsh Commercial Wording (Hollard)”;

7.28. A document titled “20181026_Fuel Retailers_Shell Owned Assets_General Endorsement_SB”;

7.29. A document titled “20181026_Fuel Retailers_Products Summary_Shell Owned Assets_SB”;

7.30. A document titled “20210611_MARSH PRODUCTS CLAIMS HANDLING PROCEDURE_Document_SB";

7.31. A document titled “Issue 12 | June 2022 | Marsh Terms of Engagement Agreement | R15m | Locked (Deemed Acceptance)”;

7.32. A letter in respect of Meduna Investments cc, an ex-Marsh client. This document contains information pertaining to an ex-Marsh client;

7.33. A document titled “20220504_The Consequence Management Framework (003)”;

7.34. A document titled “RISCS age analysis 18.07.2022” containing confidential Marsh information, including a comprehensive list of Marsh clients in the Commercial, Corporate, RM, Multinational, Specialty and Xpress business areas;

7.35. A document titled “Upper Corporate CE Self Audit Check List Corp SA”;

7.36. A document titled “18 Question Questionnaire Template for CFP Africa_”;

7.37. A document titled “BUSINESS QUALITY ASSURANCE FIRST LINE OF DEFENCE;

7.38. Four Marsh Terms of Engagement Agreement templates, all of which contain Marsh’s intellectual property;

7.39. A document titled “RUSH PAYMENT PROCESS NOV 2021”;

7.40. A document titled “Roles and Responsibilities”;

7.41. A document titled “Do you remember how to”;

7.42. A document titled “Fiduciary Operations Mailboxes and Escalations July 2022”;

7.43. A document titled “Fiduciary Finance Org Chart” containing names

and surnames of Marsh employees as well as reporting lines in respect of the Fiduciary Finance team;

7.44. A document titled “Invoicing Team Chart” containing names and surnames of Marsh employees as well as reporting lines in respect of the invoicing team;

7.45. A document titled "Calculation of Gross Profit”. This is an internal Marsh document which is confidential and proprietary to Marsh and amounts to a trade secret;

7.46. A document titled “Calculation of Gross Profit”. This is an internal Marsh document which is confidential and proprietary to Marsh and amounts to a trade secret;

7.47. A document titled “Cost of Risk Calculation”/ “BSI Steel Limited Cost of Deductibles – Summary as at 20/0612018”. This document is a Marsh document in respect of BSI Steel which sets out confidential information pertaining to BSI Steel Limited. The document contains BSI Steel's Cost of Risk (Premiums and Deductibles) as a % of their Turnover. This document contains information pertaining to an ex-Marsh client. BSI Steel was not a client in the applicant’s portfolio;

7.48. A document titled “BI extract and Standing Charges Calculation”/ “Insurance Gross Profit Extract for the year ended 31 December 2017”. This document is a template document created by Marsh

and is used to assist clients to determine their Gross Profit Sum Insured;

7.49. A document titled "CIT-Apportioned Premium Calculation". This document is a Marsh document/template used to calculate Premium Adjustments across Insurers on client placements and is used to ensure that the correct instructions are provided to the Central Invoicing Team (CIT) to raise adjustment premiums; and

7.50. A document titled "1 Premium Cale for VAT and Comm Diagram". This document is a Marsh document containing proprietary formulas and is used to net down a gross premium to a premium, net of commission, including VAT. This document is used to present renewal terms to a client.

8. When confronted about this, the applicant admitted that she transferred the above information to her private Gmail address. She also does not dispute that the above information contains confidential information the first respondent is contractually and legally obliged to protect.

9. The first respondent instituted disciplinary action and levelled the following charges against the applicant:

"Charge 1

Gross Misconduct is that during the period July 2022 to August 2022, you transmitted without authority Company / Client / Marsh Employee information to unauthorised recipient/recipients and is therefore now

in unauthorised possession of Company/ Client/ Marsh Employee Information.

Charge 2

Gross Dishonestly in that you, in anticipation of your resignation, sent Confidential / Proprietary Company / Client / Marsh Employee information to your personal or a third-party email address, thereby enabling you to access this information after you leave the employment of Marsh."

10. At the disciplinary hearing, the applicant acknowledged her conduct and confirmed that she transferred information to her Gmail address. She pleaded guilty to the charges levelled against her. However, she stated that her sole reason for transferring the above information to her private Gmail address was to use it "*in support of her CCMA complaints against the first respondent*".

11. The independent chairperson of the disciplinary hearing found the applicant guilty of the charges against her. In mitigation of her sentence, the applicant admitted the wrongfulness of her conduct and apologised for transferring the above information to her private Gmail address. She assured the first respondent that she did not transfer information to outside sources and that she had deleted the information from her computer. She also undertook to abide by the non-compete clause in her employment contract.

12. Parallel to the disciplinary proceedings, the second respondent issued a notice of intention to debar the applicant in terms of section 14 of the FAIS Act.[4]

13. The reason for the intended debarment was based on the applicant's "*lack of honesty and integrity*" in that she was found in unauthorised possession of the first respondent's confidential/propriety information, and she transmitted that information to unauthorised recipients during July 2022. The second respondent afforded the applicant an opportunity (five days) to make representation and give reasons why the second respondent should not proceed to debar her.

14. In response to the notice of intention, she made the following representations:

    14.1. The notice of intention to debar the applicant is procedurally unfair because the applicant was not afforded sufficient time to make her representations. Furthermore, she was coerced into deposing to an affidavit wherein she admitted that she transferred information to her private Gmail address.

---

[4] Section 14 states that:
"(1) An authorised financial services provider must ensure that any representative of the provider who no longer complies with the requirements referred to in section 13(2)(a) is prohibited by such provider from rendering any new financial service by withdrawing any authority to act on behalf of the provider and that the representative's name, and the names of the key individuals of the representative, are removed from the register referred to in section 13(3): Provided that any such provider must immediately take steps to ensure that the debarment does not prejudice the interests of clients of the representative and that any unconcluded business of the representative is properly concluded.
(2) For the purposes of the imposition of a prohibition contemplated in subsection (1), the authorised financial services provider must have regard to:
(a) information regarding the conduct of the representative as provided by the registrar, the Ombud or any other interested person; and
(b) any contravention of, or failure to comply with, any relevant provision of this Act by the representative.
(3) The authorised financial services provider must, within a period of 30 days after the removal of the names of a representative and key individuals from the register as contemplated in subsection (1), inform the registrar in writing thereof."

14.2. On the merits of the intention to debar her, the applicant stated that while she was found in unauthorised possession of confidential information, her conduct does not amount to dishonesty to justify her disbarment. She alleged that she transferred the work to enable her to work remotely.

14.3. She also stated that she was not receiving support from senior management and was racially discriminated against. Her sole intention of transferring the information to her private Gmail was to use it as evidence in her grievance before the CCMA.

14.4. There was no evidence that the applicant intended to use the information. As such, the inferential conclusion was that the applicant intended to use the information in her new employment is wrong.

15. Having considered the applicant’s representations, the second respondent proceeded to debar the applicant on the basis that her reasoning was neither sustainable nor plausible. According to the second respondent, there is no link between the alleged CCMA grievance and the first respondent's confidential information, which the applicant transferred to her Gmail address.

16. Unhappy with the second respondent’s decision to debar her, the applicant approached the Tribunal for reconsideration of the second respondent’s decision to debar her.

C. RECONSIDERATION

17. Section 230(1)(a) makes provision for an aggrieved person to apply to the Tribunal for the reconsideration of the decision, which includes a decision in terms of section 14 of the FAIS Act.

18. The second respondent debarred the applicant in terms of Section 14(1) of the FAIS Act. As we have already stated above, section 14(1) places a statutory duty on an FSP to debar a representative from rendering financial services if the FSP is satisfied that the representative no longer complies with the requirements set out in section 13(2)(a) of the FAIS Act.

19. Section 13(2)(a) requires an authorised FSP to, at all relevant times, be satisfied that its representatives and key individuals are, when rendering a financial service on behalf of the FSP, competent to act and comply with the fit and proper requirements.

20. Within the context of the FAIS Act, a fit and proper person is someone who is considered to have the necessary integrity, competence, and financial soundness to operate as a financial services provider. The Act does not provide a specific definition of what constitutes a fit and proper person, but it does set out a number of factors that must be taken into account when assessing a person's fitness and propriety.[5]

21. These factors include the person's honesty, integrity, reputation, their financial soundness and solvency, their competence and qualifications,

[5] Section 6A of the FAIS Act and published under Board Notice 194 of 2017, GG 41321, dated 15 December 2017.

and whether they have been convicted of any criminal offences or have been found guilty of any misconduct in relation to their business activities. A fit and proper person must be a person honest and has integrity, and be of good standing.[6]

22. There are three jurisdictional requirements for a debarment, namely:

22.1. The reason for debarment must have occurred or must have been known to the financial service provider while the person was a representative of the provider. This jurisdictional factor is a common cause between the parties. The reason for debarment occurred while the applicant was a representative of the first respondent.

22.2. Before effecting a debarment, the FSP must ensure that the debarment process is lawful, reasonable and procedurally fair. The procedural fairness is in dispute. The applicant alleges that the debarment was procedurally unfair. We deal with this issue later in this ruling.

22.3. A debarment that is undertaken in respect of a person who no longer is a representative of the FSR must be commenced no longer than six months from the date that the person ceased to be a representative of the FSP. This issue is common cause between the parties. The debarment was undertaken within six months after

6 Section 4(1) read with Section 8(1) of the FAIS Act

the applicant ceased to be a representative of the first respondent.

D. GROUNDS FOR RECONSIDERATION

23. The issues which call for determination in this reconsideration application are:

    23.1. Whether the FSP was required to exhaust the internal disciplinary hearing before commencing with the debarment process;

    23.2. Whether the applicant was afforded adequate notice in the intention to debar her as required by section 14(3) of the FAIS Act; and

    23.3. Whether substantive grounds of debarment were established.

24. We turn to consider the grounds for reconsideration below.

    i. Failure to exhaust the internal disciplinary process before commencing with the debarment process

25. The applicant contends that the debarment was procedurally unfair based, *inter alia,* on the following grounds:

    25.1. The second respondent failed to take into consideration the evidence led by the applicant at the disciplinary hearing of 15 September 2022 before he made a decision that the applicant ceased to comply with the fit and proper requirements;

    25.2. The second respondent took the decision without considering the

fact that while she was employed by the first respondent, she had access to the first respondent's proprietary information. Whilst she was found in unauthorised possession of confidential information, her conduct does not amount to dishonesty to justify her disbarment. She alleges that she transferred the work to enable her to work remotely.

25.3. According to the applicant, the second respondent appears to have put the cart before the horse by initiating the debarment process before the formal disciplinary process commenced and without the chairman finding that the applicant was guilty of gross dishonesty.

26. In the case of **Associated Portfolio Sanctions and Another v Basson and others**,[7] the Supreme Court of Appeal (SCA) considered the interplay between disciplinary inquiries convened under the Labour Relations Act) and debarments of representatives under the FAIS Act and it held:

> *"[35]…. The very purpose of giving Mr Basson notice of the contemplated resolutions was to afford him the opportunity to make representations. To suggest that this amounted to pre-judgment is unsustainable, otherwise, every administrative decision requiring a 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 inevitably would have a history to speak of – and be*

---

7 554/2019) [2020] ZASCA 64 (12 June 2020)

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 the FAIS Act…."

27. In the notice of intention to debar the applicant, the second respondent notified the applicant of the reasons for his intention to debar her. The notice of intention to debar further draws the following facts to the applicant's attention:

"…..you have also been called to attend the disciplinary hearing, and your evidence at the hearing will be taken into consideration in relation to your debarment.

We record that you have also been served with a Notice to Attend a Disciplinary Hearing, which notice sets out the charges against you and which will be used in support of the debarment."

28. The above extracts cannot be interpreted to mean that the respondents prejudged their case by commencing the debarment before the finalisation of the disciplinary proceedings against the applicant. It is clear from the notice itself that the notice of intention to debar the applicant required the applicant to make representations and state why she should not be debarred. The notice also informs the applicant that evidence to be led at the disciplinary hearing was going to be taken into consideration in relation to her debarment.

29. In terms of Guidance Note 1 of 2019, the debarment may form part of employment-related disciplinary proceedings which may be embarked on by the employer against the representative. The FAIS Act does not prescribe that the FSP may not issue a notice of intention to debar the applicant prior to the conclusion of the internal disciplinary proceedings against the key individual. The applicant's argument is, therefore, not supported by the FAIS Act and the guidance note.

30. As we have stated above, section 13(2)(a) requires an authorised FSP to, at all relevant times, be satisfied that its representatives and key individuals are, when rendering a financial service on behalf of the FSP, competent to act and comply with the fit and proper requirements. It is clear from the notice of intention to debar the applicant that when is issuing the said notice, the second respondent was no longer satisfied that the applicant as its representative key individual, complies with the fit and proper requirement. This can be gleaned from the notice wherein the FSP states that *"the reason for the proposed debarment is based on your lack of honesty and integrity in that you are/were in unauthorised possession of Confidential/Propriety Marsh Proprietary Limited ("Marsh" or "the Company")/Client/Marsh Employee Information and you transmitted the Company/Client/ Marsh Employee Information to unauthorised recipient/ recipients during the period July 2022 to August 2022 in breach of inter alia your Employment Agreement."*

31. By issuing this notice, the second respondent was complying with the statutory obligations imposed by the FAIS as soon as he became aware

of the facts, which negatively impacted on the applicant's compliance with the fit and proper requirement.

32. This ground of reconsideration that the second respondent should have exhausted the internal disciplinary procedures before issuing a notice of intention to debar at the applicant is unsustainable and is rejected.

ii. *Failure to give adequate notice*

33. The applicant's complaint is that the first and second respondent's conduct of instituting a multi-pronged attack and a swarming attack gave rise to the applicant being given in sufficient time to make submissions as required by section 14(3)(a)(i) of the FAIS Act. The applicant contends that she did not have fair and ample opportunity to file written submissions relating to her debarment.

34. A similar argument to this one has also been raised before the SCA matter between **Associated Portfolio Sanctions and Another v Basson and others.**[8] The SCA rejected the representative's contention that he was not given an opportunity to make representations on the following basis:

> *"The letter addressed by the appellants' attorneys to Mr Basson (dated 4 May 2017 - almost two weeks prior to the date of the meeting) and the notices attached thereto were an express invitation to Mr Basson to attend the meeting of the appellants' boards on 17 May 2014. He was expressly invited to make representations in*

[8] *supra*

relation to the proposed resolutions. Mr Basson's attention (and that of his attorneys) was drawn pertinently to the findings of the chairperson in the disciplinary process and the effect those had on his position as a financial service provider…

….the fact that in the disciplinary hearing, Mr Basson was not required to address issues of his honesty and integrity or whether he was a fit and proper person, weighed heavily with the high court, leading to the finding that there was a failure to afford him an opportunity to make representations. Whilst it is correct that the disciplinary enquiry was not directly concerned with whether Mr Basson was a fit and proper person to represent APS and Pentagon, the disciplinary inquiry afforded him the opportunity to respond to the transgressions under consideration, the nature of which pertinently implicated his honesty and integrity."

35. The SCA further rejected the court a quo's finding that a separate debarment factual inquiry should have been held in order to comply with procedural fairness. It held as follows:

"…. [t]he argument that a 'debarment factual inquiry' should have been held in compliance with procedural fairness prescripts is unsustainable. It was clear in the notices of 4 July 2017 that the outcome of the disciplinary hearing was the factual basis for the meetings and the proposed resolutions. The facts established in the disciplinary proceedings impacted directly on Mr Basson's honesty

and integrity, raising the issue squarely whether he met the crucial requirement of a fit and proper person to be a representative and key individual under s 8(1) of the FAIS Act Any further inquiry would have been absurd and unnecessary, particularly as it could hardly be accepted that whilst not a fit and proper person qua employee, he could nonetheless be a fit and proper person qua representative. To insist on a further inquiry in these circumstances would be to place form above substance."

36. While the five-day period set out in the notice of intention to debar does not seem to be adequate, we note that the second respondent agreed, at the applicant's request, to extend the period within which the applicant had to file her response. The second respondent's submissions are that the applicant responded to the notice of intention twice. On the first occasion, the first respondent did not address the fit and proper allegations against her. She admitted her guilt and apologised. When her attorneys came on record, they responded to the fit and proper allegations against the applicant. It appears that the applicant was given adequate notice to make representations.

37. We reject the applicant's contention that the first and second respondents ought to have conducted a separate factual inquiry for debarment proceedings. This ground of reconsideration is dismissed.

iii. *<u>Fit and proper requirements</u>*

38. The last ground of reconsideration is based on substantive grounds. The

substantive issues in dispute turn on the honesty, integrity and good standing characteristics of the applicant.

39. The applicant contends that the Tribunal should reconsider and set aside the second respondent's decision based on the following grounds:

39.1. During her tenure of employment with the first respondent, she did not get any support from management and was racially discriminated against. She transferred the first respondent's confidential and proprietary information to her private Gmail because she wanted to use it as a backup in her grievance before the CCMA.

39.2. The first and second respondents failed to consider that when she was still employed by the first respondent, she had access to the applicant's confidential and intellectual proprietary information. Therefore, she was a lawful possessor of that information. She transferred that information to also enable her to work remotely.

39.3. The first and second respondents failed to prove that the applicant intended to use the proprietary information for her benefit or the benefit of any third party, and as such, they failed to prove that she no longer complies with the fit and proper requirements.

40. The second respondent disputes the applicant's grounds for reconsideration. The second respondent's version is that the applicant's explanation for sending the information to her private email is not

plausible. The second respondent relies on the following grounds:

40.1. None of the proprietary and confidential client information the applicant sent to her Gmail account would have aided her in the CCMA because that information relates to the first respondent’s intellectual property and had nothing to do with the applicant’s grievance; and

40.2. The applicant's laptop automatically backed up information, thus enabling her to work remotely.

41. The following facts are common cause between the parties:

41.1. The contract of employment precludes the applicant from being in unauthorised possession of trade secrets and intellectual proprietary information of the first respondent;

41.2. The applicant was found in unauthorised possession of the first respondent's trade secrets and intellectual proprietary information;

41.3. The applicant was charged with *gross dishonesty* for being in possession of unauthorised confidential information belonging to the first respondent. The applicant pleaded guilty and was found guilty of being gross dishonest.

42. We struggle to establish a link between the nature of the information found in the applicant’s Gmail and her allegations that the sole purpose of transferring information to her private email was to use it as evidence in the CCMA. The applicant also fails to explain and establish the nexus.

43. It is difficult to comprehend how client listing, commissions and pricing information would assist to show that she was racially victimised and abused by the first respondent's senior staff members. The first and second respondents were left to speculate on the connection between the information found in the applicant's private email and her reasons for transferring that information to her private email. They correctly concluded that the applicant's explanation was neither plausible nor sustainable. The information found in her private Gmail account would not have aided her to prove her case before the CCMA.

44. We also note that even though the applicant alleges that she intended to use the information in the CCMA, she did not attach any document to show that there was a pending dispute before the CCMA. She does not take the Tribunal into her confidence by placing enough facts before the Tribunal regarding the alleged dispute and how the information found in her Gmail address would have helped her to prove her case.

45. We, therefore, agree with the first and second respondents that the applicant's explanation is neither plausible nor sustainable.

46. Turning to the second ground, the applicant does not dispute that during her tenure of employment with the applicant, she was given a company laptop which backed up information and would enable the applicant to work remotely. We also pause to state that having access to information as an employee does not entitle the applicant to transfer the information to her private Gmail address without being authorised to do so. Not only

does that conduct amount to a breach of her employment contract with the first respondent, but it also amounts to dishonesty because the applicant knew that she was not allowed to transfer that information to her private email but nevertheless proceeded.

47. Even if we were to accept her version, we note from the charge sheet that the applicant transferred information of BSI steel, which was not a client in the applicant's portfolio. These facts alone do not support her argument that she was a "lawful possession" of information that does not form part of her portfolio. This fact alone demonstrates her dishonesty and lack of integrity.

48. We, therefore, reject her submissions that the second respondent failed to take into account that she was a lawful possessor of that information. The fact that she deleted the information does not assist her because that deletion was after she had been found in unauthorised possession of the first respondent's confidential information.

49. In **S v Matyityi**,[9] the court held that:

> *"There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus, genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful and*

---

[9] [2010] ZASCA 127; 2011 (1) SACR 40 (SCA)

not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere, and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed, what has since provoked his or her change of heart, and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case."

50. Although the state of an accused person is in the context of criminal proceedings, those considerations apply no less in this context. The applicant admits to transferring information to her private Gmail address, however, she does not seem to appreciate the wrongfulness of her conduct and the extent of the potential harm to the first respondent's business if that information lands in the wrong hands. She also does not seem to be remorseful of her conduct.

51. The last ground to consider is whether the respondents were correct to debar her on the basis that she lacks integrity and honesty. She states in the application that the respondents failed to prove that she intended to

use the information in her new employment, and as such, they failed to show that she failed to prove that she no longer meets the fit and proper requirements.

52. The information that was found in the applicant’s email constitutes confidential intellectual information and trade secrets of the first respondent. This information is by itself, very sensitive and should not be transferred without the authority of the first respondent. The harm that the first respondent could suffer if its confidential intellectual proprietary information ends up in the wrong hands cannot be gainsaid. Being in authorised possession of the first respondent's trade secrets and intellectual proprietary information can have serious consequences for the first respondent. If this information ends up in the wrong hands, the first respondent could:

52.1. Lose its competitive advantage in the market;

52.2. Suffer reputational damage if it becomes known that its trade secrets and proprietary information have been compromised; and

52.3. Suffer financial losses because trade secrets and intellectual property are valuable assets which the first respondent invested significant resources in developing. It can also lead to financial losses for the company, both in terms of the loss of the value of that information, and the associated legal costs. The second respondent is exposed to the risk of being sued by its current and former clients if their information, which the first respondent was

contractually obliged to protect, ends up in the wrong hands.

53. Lastly, can the applicant, in light of the above facts, be considered to be an honest person with integrity? We answer this question with reference to case law quoted below.

54. With regard to the element of dishonesty, the court in **Jones v Gordon**[10] attempted to define this concept, and the learned judge commented:

> *"He was not honestly blundering and careless, but he must have had a suspicion that there was something wrong and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind – I suspect there is something wrong and If I ask questions and make further enquiry, it will no longer be my suspecting it, but my knowing it and then I shall not be able to recover – I think that is dishonesty."*

55. The question is not whether the first and second respondents proved that the applicant intended to pass on the information to third parties or used it to her benefit. It is rather whether the applicant is a person who can safely be trusted with her employer's sensitive information such as the one found in her Gmail address, or whether she can be trusted to faithfully act and discharge all of the duties and obligations as an FSP. It was reasonable for the second respondent to infer from the established facts that the applicant intended to have access to this information after her

[10] 1877 2 App CAS 616 HL at page 629

departure from her employment and to use it for her benefit or the benefit of a third-party.

56. The applicant intentionally breached her employment contract by transferring to her private email sensitive, confidential intellectual proprietary information belonging to the first respondent as well as the first respondent's trade secrets. She was aware that her contract of employment does not allow her to be in unauthorised possession of her employer's information. She knew or ought to have known that if this information landed in the wrong hands, it could harm the first respondent. She, therefore, breached her fiduciary duty towards the respondent. Based on the cases quoted herein and the established facts, we find that the applicant is dishonest and lacks integrity.

57. The chairperson's findings in the disciplinary hearing also impacted the applicant's honesty and integrity, and as such, the second respondent was mandated by the FAIS Act to take action.

58. As long ago as **Law Society v Du Toit**[11], it was said in regard to 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*

[11] 1938 OPD 103

> *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."*

59. Although the quote above deals with an attorney, it is equally applicable to the case of an FSP. Debarment is not aimed at punishing the applicant but rather to ensure and maintain the honesty and integrity required from an FSP. A person like the applicant ought not to be unleashed to the unsuspecting public.

60. Therefore, there can be no doubt that there was rational connection between the facts that were found to have been established and the decision to debar the applicant.

E. CONCLUSION

61. We are satisfied that the second respondent did not misdirect himself in his administrative decision to debar the applicant. The decision is justified, and the reasons underpinning the decision are rational, taking into account the information that was available to the second respondent. The fact that the debarment will cause career limiting prospects and violate

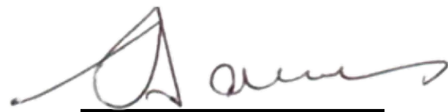
the applicant's right to gainful employment is in itself a natural consequence of the debarment upon a finding of misconduct of serious proportions as dishonesty.[12]

F. ORDER

62. The following order is made:

62.1. The application for reconsideration is dismissed.

SIGNED AT Pretoria **ON THIS** 12 **DAY OF APRIL 2023.**



JUDGE L HARMS
(on behalf of the panel)

[12] See para 32 of **Marisa Stander v The First National Bank A Division of First Rand Bank Limited** case no FSP68/2019