

THE FINANCIAL SERVICES TRIBUNAL

CASE NO: FSP 78/2023

In the matter between:

RAEES ALLY

APPLICANT

and

FIRST NATIONAL BANK

RESPONDENT

(FNB COMMERCIAL FINANCIAL ADVISORY)

DECISION

Panel Members: M F Legodi JP, G Goedhart SC and S Khumalo SC

Hearing Date: 12 August 2024

Date of Decision: 20 August 2024

Introduction

1. The decision of 19 September 2023 by the first respondent, First National Bank (FNB) to debar the applicant from rendering financial services as contemplated in section 14(1)(a) (iii) of Financial Advisory and Intermediary Services Act No. 32 of 2002 (FAISA), has become the subject of a dispute in this application for reconsideration filed in terms of section 230 of the Financial Sector Regulation Act No 9 of 2017 (FSRA).
2. Section 14 (1) (a) (iii) of FAISA provides that an authorised financial services provider, must debar a person who does not meet or no longer complies with requirements referred to in section 13 (2) (a) or has in terms of paragraph (a) (iv) of section 14 (1) contravened or failed to comply with any provision of FAISA in a material manner.
3. Section 13 (2) (a) referred to above provides that an authorised financial services provider (provider), must at all material terms be satisfied that the provider's representatives, and key individuals of such representatives, are, when rendering a financial service on behalf of the provider, competent to act, and comply with the fit and proper requirements; and any other requirements contemplated in subsection (1) (b) of section 13 (2).
4. The respondent opposes the application on three grounds: First, that the application is out of time. Second, that the procedural aspects raised by the applicant have no merits. Lastly, it is contended that there are no merits for the Tribunal to set aside the decision for debarment.

Brief background facts

5. The applicant was employed by FNB and served as its representative to render financial services and to assist clients in handling their portfolios. The applicant

has been such a representative of FNB from 1 November 2016 until 19 September 2023. He was debarred on 19 September 2023 in terms of section 14(1)(a)(iii) referred to in paragraph 2 above, after FNB had instituted an investigation and after having considered the findings and recommendations into the applicant's conduct.

6. The findings and recommendations resulted in the impugned debarment decision taken on 19 September 2023. The allegations were that on 18 January 2023, the applicant misled FNB by implementing a deal for a client (a doctor by profession), that was significantly different from what was presented to and approved by the Deal Makers Forum on 13 January 2023.
7. The Deal Makers Forum (the Forum) is an internal body set up by management within FNB to approve deals of a complex nature prior to the deal being finalised with a client. This is to ensure compliance with the oversight function of the Key Individual of the Financial Service Provider, that is, (FNB) in the instant case.
8. In this case, the deal having been approved on 13 January 2023 by the Forum, the applicant on or about 17 January 2023 concluded a different deal with the client without the approval of the Forum. Subsequent thereto, the FNB's Key Individuals person, contacted the client, with a view to confirm the correctness and details of the deal as presented to the Forum by the applicant. The client responded by stating that she was not aware of certain details of the deal, including the significant up-front commission to be paid to the applicant on the implementation of the deal. It was this which led FNB to institute an investigation.
9. The investigation revealed that the deal that the applicant presented to the client differed materially from what was approved by the Forum referred to in paragraphs 6 and 7 above. The difference was about the retirement annuity platform the client was put on, the commission structure payable to the

applicant and other material factors, such as the penalty clause. FNB considered this to be an act of material dishonesty by the applicant.

Preliminary issues at play

10. Two preliminary issues are raised in these proceedings. The first issue concerns alleged non-compliance with the provisions of section 14(5) of the FAIS Act. The section provides that a debarment in terms of subsection (1) undertaken in respect of a person who no longer is a representative of the financial services provider, must be commenced not longer than six months from the date that the person ceased to be a representative of the financial services provider.
11. According to the respondent, the application by the applicant is brought essentially on procedural ground, the allegation being that the respondent did not adhere to the provisions of section 14(5) of FAIS. There is no merit to the applicant's contention. The applicant's employment relationship with the respondent was terminated on 23 May 2023. The notice of intention to debar the applicant was issued on 4 September 2023. This is the date on which the debarment proceedings commenced and is within six months from the date on which the applicant was dismissed. The preliminary issue regarding non-compliance with section 14 (5), must therefore be dismissed.
12. I now turn to deal with the second preliminary issue which was raised by the respondent. This seems to have been prompted amongst others, by what appears in an affidavit deposed to by the applicant on 1 December 2023 for the purpose of this application.
13. In the affidavit, the applicant states as follows:

“I have been dismissed from work unfairly. My company sent me an intention of debarment to which I responded. Thereafter they claim that they have not received any reasons and sent me a notice of debarment.

I then enquired this with HR and revert back (sic) to me. After 60 days they have not reverted back to me, and I found out that I have been debarred. I have also not signed notice of debarment based on this ... and circumstances. Therefore, my debarment appeal to the Financial Services Tribunal is a few days late”.

14. In terms of section 230 (2) of FSRA the application for reconsideration must be made, (a) if the applicant requested reasons in terms of section 229, within 30 days after the statement of reasons was given to the person, or (b) in all other cases, within 60 days after the applicant was notified of the decision or such longer period as may on good cause be allowed. In this case, the reasons for debarment were furnished together with the notice.
15. In terms of subsection (3), an application in terms of subsection (1) must be made in accordance with the Tribunal rules. Rule 8(b) of the consolidated rules of the Tribunal contains the same provision as in subsection (2) of section 230.
16. On 4 September 2023, the notice and reasons for the intended debarment was provided to the applicant. He was informed that he was entitled to make written submissions regarding the intention to debar him. He was given 14 days indulgence to provide such submissions if any. According to the respondent, no submissions were received despite several other emails acknowledging the letter that was sent to him.
17. On 19 September 2023 the debarment proceedings were proceeded with. A final decision was taken to debar the applicant based on lack of honesty, integrity and good standing.

18. On 22 September 2023 a notice of debarment was sent to the applicant notifying him that he has been debarred. On the same day at 3:46pm, the applicant acknowledged receipt thereof and responded as follows:

“Please note that I would like to appeal my debarment. I will send you an updated document soon”.

19. What is quoted above was in response to an invitation extended to the applicant wherein he was required to indicate if he wanted the Tribunal panel to reconsider the debarment as per the notice that FNB had sent earlier on 22 September 2023.

20. In paragraph (i) of the debarment letter that was sent to the applicant at 13:36 on 22 September 2023, the applicant was informed as follows:

“As we have provided you with reasons for the debarment above, you must apply for reconsideration of debarment decision within sixty (60) days from date of this notification of the debarment decision.”

21. The applicant was further informed that he could hand deliver or send by registered post the reconsideration application to the address of the Tribunal, which address was provided in the letter. The email address of the Tribunal was also provided, and the applicant was informed that he could transmit his reconsideration application electronically by using the email address of the Tribunal so provided.

22. Therefore, the suggestion as quoted in paragraph 13 above that *‘after 60 days they have not reverted back to me, and I found out that I have been debarred...’*, must be seen in the context of what is explained in paragraphs 16 to 21 above.

23. Despite the applicant being provided with the necessary information to enable him to approach the Tribunal for reconsideration in terms of section 230, he did not adhere to the timeframe for the submission of the application. The applicant

was notified about the debarment on 22 September 2023, and he only filed his application for reconsideration on 1 December 2023.

24. His attempts to blame his lawyers for the delay in the light of the above, must be rejected. The information contained in the letter of debarment dated 22 September 2023 was clear and unambiguous. He was told to file his application for reconsideration within 60 days and where such application could be lodged, should he feel aggrieved by the debarment decision. He ignored this and instead filed the application for reconsideration out of time and without a formal application for condonation.

25. For an applicant to succeed in an application for condonation in terms of section 230(2), and the applicable rule referred to earlier, a good cause has to be shown. That is, reasons for the delay and good chance of success on merits must be explained or shown. The applicant has dismally failed in this regard. Just on this finding alone, and without fully getting into the merits of the case, the application for reconsideration has to be dismissed.

26. It suffices for this purpose, to mention that the applicant was accused of dishonesty for presenting a deal to a client that did not reflect the deal that was approved by the Forum. The deal that was presented to the client is said to have been materially different from the one approved by the Forum, particularly regarding the retirement annuity platform, the commission structure payable to the applicant as well as the penalty clause.

27. All these allegations are more clearly outlined in a replying affidavit by the Provincial Head and Key Individual of the respondent. She explained in the affidavit deposed to on 15 March 2024 how the applicant dishonestly presented and implemented a product to a client that was not approved by FNB, through its Forum. This affidavit disposes of the applicant's argument that the same Key

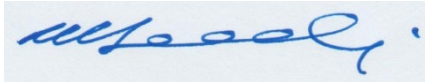
Individual had given him the go-ahead to implement the deal without the Forum's approval.

28. The deal he presented to the client, had it have not been cancelled, would have resulted in him earning R115 000.00 upfront commission instead of R517.00 commission per month as approved by the Forum. Without making a final determination on the merits, the application has to be dismissed on procedural grounds for failure to file the application for reconsideration timeously and for failure to make a case for condonation.

Order

The application for reconsideration is hereby dismissed.

Signed in Irene- Gauteng as a presider and on behalf of the panel members on 20 August 2024

A handwritten signature in blue ink, appearing to read 'M F Legodi', is written on a light blue rectangular background.

M F LEGODI