

**THE FINANCIAL SERVICES TRIBUNAL**

Case Number: **FSP66/2023**

In the matter between:

**DERUSHA GOVENDER**

Applicant

and

**FIRST NATIONAL BANK,  
A DIVISION OF FIRST RAND BANK LIMITED**

Respondent

Tribunal Panel:

Judge D. Davis (Chair), Adv G. Goedhart SC  
and Adv M. Holland

For the Applicant:

The Applicant appears in person

For the Respondent:  
Pfano Mudau

Adv L. Minné

Date of Decision:

07 May 2024

*Summary: Application for Reconsideration in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 (“FSR Act”) – Debarment is justified in circumstances where the misconduct is serious enough to impugn one’s character traits of “honesty and integrity.”*

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**DECISION**

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## **INTRODUCTION**

1. The Applicant, Ms Derusha Govender, approached this Tribunal in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 (“the Act”), challenging the decision of the Respondent, dated 30 August 2023, to debar her (“the application”).
2. The Respondent, First National Bank, is an authorised Financial Services Provider (“FSP”) and the decision maker in this matter.

## **RELEVANT BACKGROUND FACTS AND CHRONOLOGY OF EVENTS**

3. The Applicant was employed by the Respondent as a branch consultant and, by virtue of her role, she is also a representative in terms of the Financial Advisory and Intermediary Services Act, 37 of 2002 (“the FAIS Act”).
4. The Applicant tendered her resignation from her employment on 23 May 2023. However, during the mandatory one month notice period, on 3 June 2022, the Respondent placed the Applicant on precautionary suspension. On 22 June 2022 the Applicant’s contract of employment was terminated.
5. On 30 August 2023 the Respondent debarred the Applicant due to the fact that the Applicant no longer complied with the fit and proper requirements of section 13(2)(a) of the FAIS Act, in that the Applicant was found guilty of committing numerous acts of dishonesty.

## **THE RESPONDENT'S CASE**

6. In the *“Notice of Intention of FAIS Act Debarment”*, dated 08 November 2022, which was sent by the Respondent and received by the Applicant on 08 November 2022, it states that, ***“A customer complaint... ..lead to an investigation which revealed that in your capacity as a Branch Consultant FAIS at Pinetown branch, you acted dishonestly when you manipulated your sales achieved during the period November 2021 – March 2022, by inflating the loan amounts for customers for the purposes of earning higher EV (embedded value)...”***
  
7. During the proceedings before this Tribunal it was explained that as part of the Respondent’s remuneration model branch consultants are incentivised to sell financial products by earning Embedded Value (“EV”) on such sales, which meant that, over and above their basic salary, branch consultants would receive a commission on the products that they sell. Simply put, the more expensive the financial product sold, the higher the sales reward value would be to the branch consultant concerned.
  
8. The investigation resulted in the following five charges being levelled against the Applicant:-
  - 8.1 ***“On the 12<sup>th</sup> of February 2022, you concluded a loan agreement of R51,000 (fifty one thousand rand) on behalf of... ..an illiterate FNB client. However, the customer only requested a loan amount of R1,000 (one thousand rand). When the customer queried this with you, you proceeded to transfer the amount of R50,000 (fifty thousand rand) back***

*into the loan account, earning EV on the total amount of R51,000 (fifty one thousand rand). As a consequence of your actions the customer was prejudiced in paying a much higher initiation fee and instalment amount. Your conduct was also in breach of the Banks's TCF principles".*

8.2 *"On 26 November 2021, you concluded a loan agreement of R51,000 (fifty one thousand rand) on behalf of... ...an FNB customer. However, the customer only requested a loan amount of R40,000 (forty thousand rand). You then proceeded to transfer the amount of R11,000 (eleven thousand rand) back into his loan account using his FNB App and still earning EV on the total amount of R51,000 (fifty one thousand rand). As a consequence of your actions the customer was prejudiced in paying a much higher initiation fee and instalment amount. Your conduct was also in breach of the Banks's TCF principles".*

8.3 *"On 04 January 2022, you concluded a loan agreement of R51,000 (fifty one thousand rand) for... ...an FNB Customer, who requested a loan amount of R15,000 (fifteen thousand rand). You then proceeded to transfer the amount of R19,700 (nineteen thousand seven hundred rand) back into his loan account and R16,268 (sixteen thousand two hundred and sixty eight rand) to the client's Revolving Credit account via the FNB Mobile App, earning EV on the total amount of R51,000 (fifty one thousand rand). As a consequence of your actions the customer was prejudiced in paying a much higher initiation fee and instalment amount. Your conduct was also in breach of the Banks's TCF principles".*

8.4 *"On 14 February 2022, you concluded a loan agreement of R51,000 (fifty one thousand rand) for... ...an FNB Customer, who requested a loan amount for R5,000 (five thousand rand). You then proceeded to transfer the amount for R46,000 (forty six thousand rand) back into her loan account earning EV on the total amount of R51,000 (fifty one thousand*

***rand). As a consequence of your actions the customer was prejudiced in paying a much higher initiation fee and instalment amount. Your conduct was also in breach of the Banks’s TCF principles”.***

- 8.5 ***“On 12 March 2022, you concluded a loan agreement of R100,000 (one hundred thousand rand) for... ...an FNB Customer, who requested a loan amount for R30,000 (thirty thousand rand). You then proceeded to transfer the amount for R70,000 (seventy thousand rand) back into the loan account using their device, earning EV for the full R100,000 (one hundred thousand rand). As a consequence of your actions the customer was prejudiced in paying a much higher initiation fee and instalment amount. Your conduct was also in breach of the Banks’s TCF principles”.***

## **THE APPLICANT’S CASE**

### **The grounds for reconsideration:**

9. The Applicant approached this Tribunal on essentially three grounds, comprising procedural and substantive aspects. The grounds for reconsideration may be summarised as follows:-

9.1 the Applicant alleges that, due to the fact that she was not found guilty of any misconduct during the time of her employment, her debarment was inappropriate;

9.2 her debarment was procedurally unfair due to the fact that the “*Notice of Intention of FAIS Act Debarment*” was delivered on 08 November 2022 and the decision to debar her was taken on 30 August 2023; and

- 9.3 the decision of the Respondent to debar her was not justified in the context of the charges levelled against her.

## **THE DEBARMENT**

### **The REDS hearing:**

10. The record before the Tribunal reflects that:-

- 10.1 On 22 August 2022 the Respondent sent a notice to the Applicant for her to attend a REDS (Register of Employees Dishonesty System) hearing, which was to be held on 29 August 2022, but due to the Applicant's availability was postponed for hearing and ultimately heard on 14 September 2022.
- 10.2 The Applicant participated in the REDS hearing held on 14 September 2022 and was represented by a union official.
- 10.3 After having considered the evidence presented at the REDS hearing, as well as the submissions by the Applicant, the chairperson of the REDS hearing found that the Applicant engaged in sales manipulation, and had disadvantaged FNB's customers by causing them to pay higher loan repayments and higher initiation fees than necessary. The chairperson of the REDS hearing recommended that the Applicant be found guilty of all charges and the Applicant was placed on the REDS list on 22 September 2022.

The debarment enquiry:

- 10.4 On 8 November 2022 the Applicant delivered the “*Notice of Intention of FAIS Act Debarment*”, wherein the Respondent notified the Applicant of the charges levelled against her and of the Respondent’s intention to debar her.
- 10.5 On 21 November 2022 the Applicant submitted written representations to the FAIS panel for their consideration, wherein she advanced reasons why she should not be debarred. In those submissions, the Applicant did not deny that she inflated each of the loans listed in the charges levelled against her.
- 10.6 On 30 August 2023, having considered the evidence submitted by the Respondent, which included statements by the individuals who laid the complaints against the Applicant, and the written representations submitted by the Applicant, the FAIS panel found that the Applicant was no longer fit and proper and she did not possess the personal characteristics of honesty and integrity as required by the FAIS Act; and
- 10.7 The decision to debar the Applicant was communicated to the Applicant via email on 30 August 2023 (“*the Notice of Debarment*”), and the Applicant was duly informed that she may approach the offices of the Financial Services Tribunal should she feel aggrieved by the debarment.

## **LEGAL FRAMEWORK AND ANALYSIS**

11. The relevant legislation and regulations in respect of this application is as follows:

11.1 the FAIS Act, read with *inter alia* the General Code of Conduct and the Determination of Fit and Proper Requirements, 2017 (“the Fit and Proper Requirements”), regulates the conduct of FSPs, key individuals and representatives;

11.2 section 2 of the General Code of Conduct states that an FSP must at all times render financial services honestly, fairly and with due skill, care, and diligence in the interests of clients and the integrity of the financial services industry.

11.3 section 8(1), read with section 7(1) of the Fit and Proper Requirements, states, amongst other things, that the representative must be a person who is (i) honest and has integrity and (ii) of good standing;

11.4 FSPs must ensure that their representatives and key individuals are fit and proper persons to be entrusted with providing financial advice to the investing public. Thus, FSPs are charged with a duty to take reasonable steps to ensure that representatives comply with any applicable code of conduct and applicable laws in the conduct of business; and

11.5 accordingly, if it is found that a representative has committed an act of dishonesty sufficiently serious to impugn the honesty and integrity of the

representative, the FSP must ensure that the representative is debarred in terms of section 14(1) of the FAIS Act (our emphasis).

### Procedure

12. In respect of debarment processes, section 14(2)(a) of the FAIS Act requires that before effecting a debarment, the provider must ensure that the debarment process is lawful, reasonable and procedurally fair.
13. An FSP is required, before debarring its representative, to give adequate notice in writing to the person stating its intention to debar the person, the grounds and the reasons for the debarment.
14. The record before the Tribunal indicates that:-
  - 14.1 The Respondent notified the Applicant by way of an email on 8 November 2022 of the charges levelled against her and of its intention to debar her should she be found guilty;
  - 14.2 the Applicant was afforded a fair opportunity to make representations at the debarment enquiry; and
  - 14.3 the Applicant did not deny that she inflated each of the loans listed in the charges levelled against her.

### Findings on Procedure

15. With regard to the Applicant's contention that she was never found guilty in any hearing or enquiry, the record reflects that the Applicant was found to have acted dishonestly in both the REDS and FAIS enquiries, being processes in which she participated.
16. In any event, this Tribunal has previously expressed its view that the fact that an applicant who was not found guilty of any misconduct during the time of his/her employment is irrelevant for the purposes of an application for reconsideration.<sup>1</sup>
17. With regard to the Applicant's contention that her debarment was procedurally unfair due to the fact that the "*Notice of Intention of FAIS Act Debarment*" was delivered on 08 November 2022 and the decision to debar her was taken on 30 August 2023, the FAIS Act does not stipulate a time period in which an FSP must take a debarment decision. It instead requires that a FAIS panel be convened within a certain period of time following certain events.
18. Based on the reasoning above, it is the view of the Tribunal that the debarment was procedurally fair.

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<sup>1</sup> *Thupetsi Phineas Lamola v FNB* [2024] (FSP62/2023) (26 January 2024)

### The Merits

19. All five of the charges levelled against the Applicant centred around elements of dishonesty and the Applicant's *modus operandi* is clearly evident in the record before the Tribunal.
20. At the hearing before the Tribunal, the Applicant did not deny that she inflated each of the loans listed in the charges.
21. The Tribunal thus finds that there is no merit in the Applicant's argument that the decision to debar her was not justified in the context of the charges levelled against her and the evidence submitted at the debarment hearing.

### **CONCLUSION**

22. It is the view of the Tribunal that the Applicant committed serious misconduct, which misconduct impugns her character of honesty and integrity, thus, the Respondent's finding on the Applicant's guilt must be upheld.
23. The Tribunal concludes that, on the merits, the debarment was warranted and justified.<sup>2</sup>

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<sup>2</sup> *White v Liberty Group Limited* (FSP47/2023) [2023] ZAFST 169 (6 December 2023); *Hlongwa v Assupol Life Limited and Another* (FSP56/2023) [2024] ZAFST 3 (9 April 2024)

24. As stated above, the debarment process involving the Applicant was procedurally fair and was justified on the merits.
25. The Applicant was afforded a fair opportunity to to make representations during the debarment enquiry.
26. In the circumstances, the Tribunal finds no reason to interfere with the First Respondent's decision to debar the Applicant.

**ORDER:**

27. The application for reconsideration is dismissed.

Signed on behalf of the Tribunal on 07 May 2024.



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**Adv Mustaque Holland**

With the Panel consisting also of:

**Judge D. Davis** (Chair) and **Adv G. Goedhart SC**