

THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: FSP17/2021

In the matter between:

DANA MINNEBEL YERUSHALMY

APPLICANT

and

ABSA INSURANCE AND FINANCIAL ADVISERS (PTY) LTD

RESPONDENT

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Application for the reconsideration of a debarment under sec 14 of the FAIS Act: the reasons for a debarment must have occurred and become known to the financial services provider while the person was a representative of the provider.

DECISION

[1] The applicant was debarred by the respondent, Absa, as financial service representative in terms of sec 14 of the FAIS Act 37 of 2002. The applicant applies for the reconsideration of her debarment under sec 230 of the Financial Sector Regulation Act 9 of 2017. The parties waived their right to a formal hearing and the application is therefore decided on the papers filed.

[2] The applicant was employed by Absa for some 25 years. She had reached the age when she could voluntarily retire and become entitle to her retirement benefits in term of rules of the pension fund to which she belonged. She chose to have access to her pension benefits but, at the same time, join a competitor of Absa. Absa was of the view that if she intended to join a competitor she had to resign, which would have meant that the restraint of trade clause in her employment contract would have come into effect. Absa, accordingly, thought that her retirement was a ruse to evade her contractual obligations and that she was dishonest in pretending to retire while she in fact resigned.

[3] This gave rise to the charge that “on 26 June 2020, you misrepresented your employment termination reasons in that you applied for early retirement from Absa and subsequently joined another employer” which led to her debarment on the ground that she was no longer a fit and proper person to be a FSR because she lacked the necessary “personal character qualities of honesty and integrity”.

[4] The charge was misconceived. It is based on the underlying false assumption that if one retires under the terms of your employment contract and pension fund rules you will or may no longer work whether for a competitor or otherwise. If the applicant was entitled to retire and take up another employment, her motive in picking the retirement option is irrelevant and does not reflect on her personal qualities of honesty and integrity as an FSR. This was not only a contractual dispute but one without merit.

[5] The further charges against the applicant were

- a) On 13 May 2020, you breached clause 2.2.4 of the Absa Group Acceptable Use Standards by emailing client email addresses to your personal email address without approval from your Regional Manager;
- b) On 6 August 2020, you breached a restraint of trade employment and clause 25 by approaching our Client Craig Farham, Deon James and Dennis Levy;
- c) On 6 August 2020, you breached post termination employment contract clause 25 by contacting Absa clients;
- d) On 11 August 2020, you attempted to move Absa clients to Sanlam Private Wealth by requesting information on 6 Trust accounts”.

[6] Section 14 requires that the reasons for a debarment must have occurred and become known to the financial services provider while the person was a representative of the provider.

[7] The applicant's employment with Absa terminated on 31 July 2020. It follows that Absa had no jurisdiction to debar the applicant on grounds (b) to (d). The charges are, in any event, tenuous.

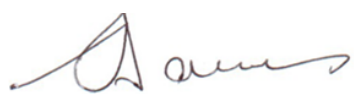
[8] That leaves charge (b), the alleged breach having occurred during her employment, which leaves the question whether Absa knew of the breach on or before 31 July.

[9] The applicant placed this in issue. Apart from the bold and bald allegation by the attorney for Absa, there is nothing on record to suggest that Absa knew of the breach at the appropriate time. Had there been any doubt about the matter, the letter of Absa of 29 July displaces it. At that late stage, two days before her retirement, Absa was only concerned with the retirement/resignation issue and did not raise, what is potentially serious, the misappropriation of Absa's confidential information.

[10] Since the jurisdictional requirements for a debarment of the applicant by the respondent are lacking, the debarment must be set aside, and it will not make sense to refer the matter back for reconsideration.

ORDER: The application is upheld, and the debarment set aside.

Signed on behalf of the Tribunal on 7 July 2021.

A handwritten signature in black ink, appearing to read 'LTC Harms', is enclosed in a thin black rectangular box.

LTC Harms (deputy chair)

*Amus*