THE FINANCIAL SERVICES TRIBUNAL

CASE NO: FSP59/2020

In the matter between:

HERMAN LLOYD Applicant

and

FNB STOCKBROKING AND PORTFOLIO MANAGEMENT (PTY) LTD Respondent

Tribunal: Adv T Ncongwane SC (Chair), Mr J Damos and Adv SM Maritz

Date of Hearing: 6 May 2021

Summary: Application for Reconsideration of Decision of FNB Stockbroking and Portfolio Management (Pty) Ltd in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 ("FSR Act") to debar a representative in terms of section 14 of the Financial Advisory and Intermediary Services Act, 37 of 2002 ("FAIS Act")

DECISION

A. INTRODUCTION

1. The Applicant, Mr Herman Lloyd ("the Applicant or the complainant or Mr Lloyd"), applied for the reconsideration of a decision taken by FNB Stockbroking and Portfolio Management (Pty) Ltd (FSP 182) and FNB Premium, a segment of FNB, a division of FirstRand Bank Limited (FSP 624) ("the Respondent"), dated 11 September 2020, to debar him in terms of section 14 of the FIAS Act.

2. The decision is one under section 14 of the FAIS Act and the application for reconsideration is under section 230 of the FSR Act. It is contended by the Respondent

that the Applicant no longer complied with the requirements of section 13(2)(a) of the FAIS Act read together with section 8(1) of the Board Notice 194 of 2017 in that the Applicant was involved in August 2018 in an act of creating false documentation with a false portfolio number and issuing it to a client of the Financial Service Provider (" the FSP") suggesting it belonged to the FSP.

B. CHRONOLOGY OF EVENTS

3. Prior to dealing with the relevant background facts it is important to state the chronological sequence of events:

3.1 The Applicant was appointed as a Relationship Manager with FNB Securities (Pty) Ltd at Willowbridge, Cape Town with effective date from 1 November 2015.[1]

3.2 The Applicant's alleged act of creating false documentation with a false portfolio number and issuing it to a client of the Respondent occurred on or about August 2018.

3.3 On 18 October 2018 the Applicant made a statement and confessed to his alleged wrongful act.[2]

3.4 On 18 October 2019 the Applicant resigned from FNB Stockbroking & Portfolio Management.[3]

3.5 On or about 28 October 2019/4 November 2019 Mr & Mrs Erasmus ("the clients or the Erasmuses") made a statement of the sequence of events

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[1] Applicant's Letter of Appointment, pp 24-42
[2] Applicant's Statement in respect of his wrongful act, Part B, pp1-2
[3] Applicant's Notice of resignation, Part B, p12

pertaining to the alleged wrongful act of the Applicant, which was sent to Mr Theo van Heerden, the Branch Manager at FNB, Willowbridge, Cape Town.[4]

3.6 On 18 February 2020 a Notice of REDS (Register of Dishonest Employees) Enquiry and Notice of Intention of FAIS Act Debarment were sent to the Applicant via text message communication. In the Notice of REDS Enquiry the Applicant was informed that the enquiry will be held on 9 March 2020 at 9:30 am and at FNB Willowbridge. The reasons for the intended debarment were stated as alleged falsifying of bank statements and dishonesty by Mr Lloyd in that he:[5]

> *"Charge 1*
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> *Altering or falsifying any certificates or documents in that it alleged that you created a bank statement that contained a false account number for an FNB client, (Mr Erasmus) in August 2018. The correct account number for Mr Erasmus is 234831 versus 349798 which was the falsified document number you created. You also presented the falsified documents to Mr Erasmus as a true reflection of the client's account.*
>
> *Charge 2*
>
> *Dishonesty in that it is alleged that on or about 21st August 2018 you proceeded a payment of R15 000 from your personal bank account into Mr Erasmus' bank account. You were dishonest in that you led the client to believe that the payment was from the Bank following his request to dematerialise the shares, where in fact, you paid the money*

[4] Statement of Mr & Mrs Erasmus, Part B, pp 3-6
[5] Notice of REDS Enquiry & Notice of Intention to Debar & proof of dispatchment, Part B, pp 13-17

from personal bank account because you did not process Mr Erasmus' request to dematerialise his shares as he requested."

3.7 On 13 March 2020 Mr Zacharia Might, FNB's Manager Industrial Relations advised Mr Japie Fourie of the Respondent that the personal details of Mr Lloyd will be placed on the Banking Council's Register of Employees Dishonesty System and that Mr Lloyd should be informed thereof.[6]

3.8 On 26 June 2020 a Notice of Debarment was sent to the Applicant informing him of his debarment as well as stating the reasons thereof. The Notice was sent to the following address: 1A Vierlanden Street, Durbanville, Cape Town, 7550, which the Applicant during the hearing confirmed is the address of his parents. During the hearing he further confirmed that he has received the notice.[7]

3.9 On 21 July 2020 the Applicant lodged an appeal against his debarment.[8]

3.10 A copy of the Respondent's Debarment Policy was sent to the Applicant via text messages (WhatsApp).[9]

3.11 On 11 September 2020 a letter was sent to the Applicant informing him of the dismissal of his appeal and confirmation of his debarment.[10] Copies of the Respondent's Notice of Dismissal of Appeal and Confirmation of Debarment were sent via text message (WhatsApp) and via email to the Applicant on 11 September 2020.[11]

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[6] Memo of Respondent's Industrial Relations Department, Part B, p 18
[7] Notice of Debarment, Part B, pp 19-20
[8] Applicant's Debarment Appeal Letter, p 21
[9] Proof of sending of Respondent's Debarment Policy to Applicant, Part B, p 103
[10] Respondent's Letter of Dismissal and Confirmation of Debarment, pp 22-23
[11] Proof of sending of Notice of Dismissal of Appeal and Confirmation of Debarment to Applicant, Part B, pp 104-105

3.12 The Applicant filed his application for Reconsideration of the decision in terms of section 230 of the FSR Act with the Financial Service Tribunal on 8 November 2020.

3.13 On 9 December 2020 the Respondent's indexed and paginated bundle of underlying documents on which the decision was taken were filed on the Financial Services Tribunal, in opposition to the Applicant's application for reconsideration of the decision.

3.14 In light of the above it is clear that the debarment process conducted by the Respondent was procedurally fair as at all relevant times the Applicant was duly notified of the procedural steps regarding the debarment process. The Applicant in any event does not dispute the correctness and fairness of the debarment process followed by the Respondent.

C. RELEVANT BACKGROUND FACTS

4. The following relevant back ground facts appear from the record filed:

4.1 The Applicant was a representative of the Respondent until his debarment on 26 June 2020.[12]

4.2 He was employed as a Relationship Manager with FNB Securities (Pty) Ltd at Willowbridge, Cape Town with effective date from 1 November 2015.[13]

4.3 On or about October 2016 he was approached by Mr Matthew Erasmus and his wife, Mrs Regina Erasmus ("the clients or the Erasmuses or Mr and Mrs Erasmus"), who wanted to dematerialise their shares held in certain traded

[12] Notice of Debarment, Record pp 19-21
[13] Applicant's Letter of Appointment, pp 24-42

companies and to dispose of some of those shares.[14] Dematerialisation is a process by which share certificates are, in effect, replaced by electronic ones.

4.4 Mr Lloyd advised Mr and Mrs Erasmus that it would take a few months to dematerialise their shares.[15] He then took their share certificates.[16] The process also required opening a share trading account in the name of one or other of the Erasmuses.[17]

4.5 On 28 October 2016 Mr Lloyd emailed Mr Erasmus informing him that he "*was busy opening the share trading account*".[18] It appeared that a year later nothing had been done in that regard. In explanation of this, Mr Lloyd emailed Mr Erasmus on 7 November 2017, saying:

"I spoke to Computershare this morning where the shares lie. They advised that there were big admin errors on their side, but everything should be handled by December.[19]

4.6 It appeared that what Mr Lloyd had said was doubtful because, Mr Lloyd himself later admitted, he had forgotten about the matter:

"I then completely forgot to open the account and start the dematerialisation process.[20]

4.7 It appeared that, a year later, there was no share trading account that Mr Lloyd had opened as instructed. Instead of opening the account, Mr Lloyd then lied to the Ersamuses and told them that an account had been opened with one of

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[14] Erasmus Statement Record, pp 122-125. See : Translated version of Erasmus' Statement, dated 4 November 2019
[15] Mr Lloyd's email statement Record, p 1; Erasmus Statement Record, p 124
[16] Mr Lloyd's email statement Record, p 1
[17] Mr Lloyd's Statement Record, p 1
[18] Erasmus Statement Record, p 124
[19] Erasmus Statement Record, p 124
[20] Mr Lloyd's email statement Record, p 1

FNB's Johannesburg branches. It appeared that this was untrue. In support of this lie, Mr Lloyd rendered to the Erasmuses what appeared to be a statement of affairs in relation to the account.[21] It appeared that the statement was in fact a forgery or a fake. The "*statement*" bore an invented account number (349798) and purported to be from one of FNB's Johannesburg branches.[22] The Erasmuses never received any further statements, for the simple reason that no share trading account existed.

4.8 On or about July/August 2018,[23] the Erasmuses instructed Mr Lloyd to sell some of the shares. As stated, by Mr Lloyd himself, the following transpired thereafter:

"The client contacted me again in August 2018 and asked me to sell R15 000 worth of shares. Because it wasn't dematerialized yet [way more than a year since the first request], I couldn't sell it.

I was so embarrassed about my lack of service and I then proceeded to pay the client from my personal account. I NEVER wanted to get this money back and never wanted reimbursement from the client.[24]

4.9 Mr Erasmus gave Mr Lloyd his banking details into which to transfer the R15 000.[25] The money was transferred to Mr Erasmus' account on 21 August 2018.[26] It appeared that Mr Erasmus thought that the money was from his share trading account (which Mr Lloyd never opened), when in fact it was from Mr Lloyd's own pocket but disguised as being from the fictitious share trading account held with FNB in Johannesburg.[27]

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[21] Erasmus Statement Record, p 124
[22] Record, pp 126-130
[23] Mr Lloyd says August, p 1 of his statement; the Erasmuses say July, p 124
[24] Mr Lloyd's email statement Record, p 1
[25] Erasmus Statement Record, p 124
[26] Erasmus Statement Record, p 124
[27] Erasmus Statement Record, p 124

4.10 Mr Lloyd did not deny and in fact he admitted that what he did was *"completely wrong"*:

"I know that my actions were unethical and completely wrong. It was done out of embarrassment and because I wanted to put the client in the best position possible."[28]

4.11 In light of the above it is clear that Mr Lloyd accepted that his actions were unethical and completely wrong, but despite this he insisted that he is not a dishonest person or a person that deserved to be debarred.[29] According to Mr Lloyd he *"made a mistake that he will forever be sorry for and that he will spend the rest of his working life atoning for.*[30]

4.12 As a result of what has been recounted above, the Respondent debarred Mr Lloyd on 26 June 2020.[31]

4.13 Mr Lloyd unsuccessfully appealed the debarment and the Respondent confirmed the debarment on 11 September 2020.[32]

4.14 Mr Lloyd's current application brought under section 230 of the FSR Act is for a reconsideration of the Respondent's decision to debar him.

D. RESPONDENT'S GROUNDS FOR DECISION TO DEBAR APPLICANT

5. The Respondent's reasons to debar the Applicant is based on the following:[33]

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[28] Mr Lloyd's email statement Record, p 1
[29] Mr Lloyd's email statement Record, p 5, para 9
[30] Mr Lloyd's email statement Record, p 5, para 9
[31] Notice of Debarment, Record, pp 19-21
[32] Dismissal of Appeal and Confirmation of Debarment, Record, pp 22-23
[33] Notice of Dismissal of Appeal and Confirmation of Debarment, pp 3-4

5.1 The Respondent's debarment was in accordance with the requirements of section 14 of the FAIS Act.

5.2 It was submitted by the Respondent that the Applicant no longer complied with the requirements of section 13(2)(a) of the FAIS Act read together with section 8(1) of Board Notice 194 of 2017, in that in August 2018, he was involved in an act of creating false documentation with a false portfolio number and issuing it to a client of the Financial Services Provider ("the FSP"), suggesting that it belonged to the FSP.

5.3 It was further the submission of the Respondent that the Applicant's wrongful conduct was as follows:

5.3.1 He created a false bank statement with a false account number;

5.3.2 He paid the client R15 000 using personal funds creating the impression that the money was from the Bank;

5.3.3 His actions amount to dishonesty as he misled the client; and

5.3.4 His conduct has damaged the reputation of the FSPs of which he was a FAIS representative.

5.4 According to the Respondent the Applicant did not deny and in fact admitted that his conduct was unethical and wrongful.

E. THE APPLICANT'S GROUNDS FOR RECONSIDERATION OF THE RESPONDENT'S DECISION TO DEBAR[34]

6. The Applicant's grounds were as follows:

6.1 He admitted that he was in possession of the clients' share certificates, but he could not dematerialise them due to the complexity of the matter.

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[34] Application for reconsideration of decision of the Respondent, p 5

6.2 It was his submission that the statement that he presented to the clients was a true reflection of the value of their investments.

6.3 He stated that he merely wanted to help the clients to the best of his ability.

6.4 He stated that when the clients requested funds to be paid to them, he did not want to disappoint them or his employer and that he paid the monies to them out of his own account.

6.5 It was his submission that at no stage did he take any monies from his employer. He paid the monies out of his own account because he thought that it was the best, fairest and most just way to keep them as clients and to keep his employer happy.

6.6 He stated that he has since spoken to the clients and offered his sincerest apologies.

6.7 He did not deny and in fact admitted that his actions were wrong, but he stated that he never intended to mislead or hurt anyone as he was merely trying to help the client in the best manner that he saw fit.

6.8 He stated that he has always treated his clients to the best of his ability and has always acted in the best way for them.

6.9 He insisted that he is not a dishonest person or a person that deserved to be debarred. He stated that he made a mistake that he would forever be sorry for.

6.10 He stated that he has lost everything, his job, his income, his clients, friends and colleagues. He further stated that he has not had an income or the ability to work for more than 12 months.

F. APPLICABLE LEGAL PRINCIPLES AND ANALYSIS OF RESPONDENT'S DECISION TO DEBAR APPLICANT

7. As stated above the Respondent's decision to debar the Applicant is based on the requirements of section 14 of the FAIS Act in that the Applicant no longer complied with the requirements of section 13(2)(a) of the FAIS Act read together with section 8(1) of Board Notice 194 of 2017 in that he was dishonest, falsified a bank statement and presented it as a statement from the FSP ("forgery").

8. Section 14(1) of the FAIS Act provides that:

"(1)(a) An authorised financial services provider must debar a person from rendering financial services who is or was, as the case may be

(i) a representative of the financial services provider; or

(ii) a key individual of such representative, if the financial services provider is satisfied on the basis of available facts and information that the person

(iii) does not meet, or no longer complies with, the requirements referred to in section 13(2)(a); or

(iv) has contravened or failed to comply with any provision of this Act in a material manner;

(b) The reasons for a debarment in terms of paragraph (a) must have occurred and become known to the financial services provider while the person was a representative of the provider."

9. It is clear that section 14 of the FAIS Act is stated in peremptory ("must") terms in respect of representatives in that once a representative is debarred, then the FSP is obliged to withdraw authority from the representative and to remove his or her name from the Register of representatives (section 14(4) of the FAIS Act).

10. The Supreme Court of Appeal has held in this regard in *Financial Services Board v Barthram and Another 2018 (1) SA 139 (SCA) at para 15* that:

> *"[15] Section 13(2)(a) and (b), as also section 14(1) and (2), are couched in peremptory terms. Failing compliance with those provisions the FSP itself is liable to sanction."*

11. Section 13(2)(a)(i) of the FAIS Act provides that a representative must be *"fit and proper"*. Section 6A(2) of the FAIS Act gives a definition, by way of a list, of what *"fit and proper"* includes:

> *"(2) Fit and proper requirements may include, but are not limited to, appropriate standards relating to –*
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> *(a) personal character qualities of honesty and integrity;*
>
> *(b) competence, including-*
>
> *(i) experience;*
>
> *(ii) qualifications; and*
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> *(iii) knowledge tested through examinations determined by the registrar;*
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> *(c) operational ability;*
>
> *(d) financial soundness; and*
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> *(e) continuous professional development."*

12. In terms of section 7(1) of Board Notice 194 of 2017 ("the Board Notice") the fit and proper requirements relating to honesty, integrity and good standing apply to all FSPs, key individuals and representatives. At all relevant times Mr Lloyd was a representative of the FSP and as such these requirements applied to him.

13. Section 8(1) of the Board Notice states that a person referred to in section 7(1) must be a person who is –

(a) honest and has integrity; and
(b) of good standing.

14. Section 8(2) of the Board Notice states that in determining whether a person complies with subsection (1), the Registrar may refer to any information in possession of the Registrar or brought to the Registrar's attention.

15. Section 9(1) of the Board Notice is expressly a non-exhaustive (not a *numerus clausus*) list of examples of what would *prima facie*, be evidence of that a person is dishonest.

16. As stated above the requirements of a "*fit and proper person*" in terms of section 6A(2) of the FAIS Act include "*personal character qualities of honesty, integrity and competence*". *In casu*, the Applicant was debarred on the grounds of dishonesty and forgery.

17. It is a fact that Mr Lloyd did not deny and in fact he admitted that what he did was "*completely wrong*":

> "*I know that my actions were unethical and completely wrong. It was done out of embarrassment and because I wanted to put the client in the best position possible.*"[35]

18. In our view it is not necessary for a specific "test" to determine that Mr Lloyd's conduct was dishonest, as forgery (or falsification) of a bank statement and misrepresentation (or a lie) thereof to a client presenting it as a document from the Respondent although it was not true, is by any standard wrong and dishonest and lacks integrity.

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[35] Mr Lloyd's email statement Record, p 1

19. In *Julian Singh v FNB (Case No.: FSP40/2020)*, the Tribunal regarded forgery of a signature as a ground to debar the representative. The Tribunal did not get bogged down in "tests" because it saw what any person would see, namely that forgery is dishonest.

20. In this case Mr Lloyd admitted to the following conduct:

20.1 That he failed to carry out instructions from his clients for more than a year. In our view that qualifies as incompetence and on that basis alone the Respondent was justified to debar him to act as a representative of the FSP.

20.2 That he lied to his clients and said that he had opened the share trading account when he had not done so.

20.3 That he created a fake/false bank statement, which apparently reflected the affairs of the non-existent share trading account.

20.4 That he paid the clients out of his own pocket/account to create the impression that the clients had a share trading account.

21. From the above it is clear that Mr Lloyd's conduct (which he admitted to) does not constitute a single act of dishonesty, negligence, incompetence and misrepresentation, but reflects a litany of dishonesty and wrongdoing over a period of a year.

22. Furthermore, once it was found by the Respondent that Mr Lloyd is no longer fit and proper to act as a representative of the FSP, it is irrelevant whether his dishonest conduct had no consequences and/or let to no harm.[36]

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[36] See : *Barthram case para 16 supra*

23. In light of the above, this Tribunal finds no basis to interfere with the Respondent's decision. The Applicant is referred to the Guidance Note in terms of the FAIS Act, 37 of 2002, published on 18 December 2017, in respect of the reappointment of debarred representatives.[37]

G. ORDER

The following order is granted:

1. The Applicant's application for reconsideration is dismissed.

2. No order as to costs.

SIGNED at PRETORIA on this 31st day of MAY 2021.

ADV SM MARITZ

With the Panel consisting also of:

ADV T Ncongwane SC (Chair)

MR J Damos

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[37] See:
https://www.fsca.co.za/Regulatory%20Frameworks/Guidance%20Notes/Reappointment%20of%20Debarred%20Representatives.pdf#search=Reappointment%20of%20debarred%20representatives