FINANCIAL SERVICES TRIBUNAL

CASE NO: FSP4/2018

In the application of:

ALETTA JOHANNA DAVIS Applicant

and

AC & E ENGINEERING UNDERWRITING MANAGERS (PTY) LTD Respondent

Tribunal: H Kooverjie (chair), Mr W Ndinisa and Mr L Makhubela

For the applicant: Adv F Terblanche instructed by VZLR Attorneys

For the respondent: Adv A Cook instructed by Crawford and Associates

Hearing: 5 October 2018

Judgment: 24 October 2018

Summary: Unfair process in respect of debarment; test for "***fit and proper person***"

DECISION

A APPLICATION FOR RECONSIDERATION

1. This matter becomes before the Tribunal in terms of Section 230(1)(a) of the Financial Sector Regulation Act, No 9 of 2017 ("***the FSR Act***"), where the applicant has applied for a reconsideration of the decision taken by the respondent, AC & E Engineering Underwriting Managers (Pty) Ltd ("***AC&E***"), the financial services provider (FSP). The FSP made its decision based on the recommendation of the chairperson who presided at the debarment hearing.

2. The essence of the recommendation made by the chairperson to AC&E regarding the fit and proper requirements of the applicant appears in paragraph 18 thereof where he states:

> "***Having regard to the submission of both the FSP and the provider, I prefer the version of the FSP to the effect that Ms Davis acted in a manner which was lacking in integrity and honesty and which was therefore in contravention in Section 6A of the FAIS Act which places a requirement on a representative to act with personal character, qualities of honesty and integrity. This breach provides the FSP the justification to, in terms of Section 14(1) of the FAIS Act, to seek the debarment of Ms Davis.***"

3. At all relevant times, the grounds for the debarment as cited by the FSP and which was summarised by the chairperson in the debarment hearing were as follows:

> "***1. That she is not a fit and proper representative as she failed to act with honesty and integrity;***
>
> ***(i) Disregarding an instruction advising her not to remove a list of confidential client information from the premises of the FSP;***
>
> ***(ii) Removing the said confidential list from the FSP's premises;***
>
> ***(iii) By contacting a broker of the FSP to provide them with a competitive service during her period of notice of termination of services from by while still in the active employment of the FSP;***
>
> ***(iv) Acting in cahoots with a company competing with the FSP during the period of notice of termination of services from the FSP;***
>
> ***(v) The essence of the grounds for the debarment sought by the FSP amounted to the fact that the representative, Ms Davis had conducted herself in a manner which is regarded to be dishonest and without integrity by alleged to have done items [1], (i to iv) above during her period of notice of termination of services from the Company and that for these reasons she is deemed to have acted in a manner deemed by the FSP to be unfit and improper of a representative."***

4. The applicant's application for reconsideration is premised on the following grounds namely that:

4.1 The procedure followed by the respondent was unlawful, unreasonable and procedurally unfair;

4.2 The chairperson and the respondent erred in finding that the applicant had failed to comply with the honesty and integrity requirements as referred to in Section 13(2)(a) of the Financial Advisory and Intermediary Services Act, 37 of 2002 ("***FAIS Act***").

4.3 The sanction imposed was disproportionate to the alleged misconduct of the applicant.

5. The salient facts for the purposes of this decision are as follows:

5.1 The applicant was debarred on 2 July 2018. Prior to such debarment, a notice was issued by the respondent informing the applicant of its intention to debar her. The said notice was crafted in terms of Section 14(5) of the FAIS Act whereby she was *inter alia* informed that she no longer met the fit and proper requirements as set out in Section 13(2)(a) of the FAIS Act.

5.2 On 4 May 2018, the applicant had resigned from her employment. On the same day the respondent requested an undertaking from the

applicant that she would not compete unlawfully with the respondent thereby intending to enforce a restraint of trade agreement.

5.3 On 11 May 2018, the applicant agreed to a restraint undertaking for a period of 12 months. Also on 11 May 2018, the respondent then issued her with a suspension notice and required her to attend a disciplinary hearing scheduled for 7 June 2018. On the same day, the applicant then gave her notice for immediate resignation.

5.4 The respondent then commenced with the debarment proceedings. It is no mystery that the issue that sparked these proceedings was as a result of the purported confidential "***List***" which the respondent claims that the applicant had in her possession. Having perused such "***List***" at the hearing, we are of the view that this "***List***" certainly contained client information including the identity of the brokers, their monthly premiums as well as the fees charged in respect of these policies. It also identified the various brokers who had the respective clients on their books. In our view this is certainly information that the FSP would consider confidential as the details on the "***List***" would under normal circumstances not be shared with any of its competitors.

6. AC&E found her to be dishonest since they alleged that she lied about taking the "***List***" home despite being aware that it could never be removed from the employers' premises. Moreover she failed to return the said "***List***", despite being requested to do so several times. Furthermore the applicant was dishonest when she informed a client of AC&E that she was going to join a

competitor, "***King Price***" and that she intended to contact him with regard to engineering underwriting services with her new employer, King Price.

7. We have been advised that currently the applicant is employed with King Price and her debarment stands. Her employment with King Price is at this stage confined to administrative tasks.

B RELEVANT LEGISLATIVE PROVISIONS:

8. The relevant provisions of the FAIS Act requires of a financial services provider to be competent, and to act as such; particularly that such provider must be fit and proper; Section 13(2)(a) stipulates that an authorised financial services provider in this case, AC&E must:

> "***At all relevant 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, be competent to act and comply with:***
>
> ***(i) The fit and proper requirements; and***
>
> **(ii)** ***Any other requirements contemplated in sub-section 1(b)(ii)***."

9. Section 8 of the FAIS Act provides for the fit and proper requirements to be measured against the following categories namely:

> "***(i) personal character qualities or honesty and integrity;***
>
> ***(iii) Competence including experience, qualification and knowledge;***
>
> ***(iv) The applicant's financial soundness."***

10. Board Notice 194 of 2017 titled "***Determination of Fit and Proper Requirements for Financial Services Providers, 2017***" issued on 15 December 2017, sets out the criteria for fit and proper requirements of financial service providers (Board Notice).

11. Clause 4(1) read with Section 8(1) of the FAIS Act) stipulates the following:

> "***The fit and proper requirements for each of the categories of FSP, key individuals and representatives are:***
>
> ***(i)*** ***Personal character qualities of honesty and integrity, set out in chapter 2;***
>
> ***(ii)*** ***Good standing as set out in chapter 2;***
>
> ***(iii)*** ***Competence as set out in chapter 3;***
>
> ***(iv)*** ***Continue professional development set out in chapter 4;***
>
> ***(v)*** ***"Operation ability as set out in chapter 5; and***
>
> ***(vi)*** ***Financial soundness as set out in chapter 6."***

12. For the purposes of this decision, we will be focusing on the honesty, integrity and good standing characteristics of the applicant.

13. Clause 8(1) states that a person referred to in clause 7.1 must be a person who is:

> ***"(i)*** ***honest and has integrity; and***
>
> ***(ii)*** ***of good standing"***

14. Clause 9 of the Board Notice provides instances where a person is considered not to be fit and proper. Of relevance, clause 9(1)(a)(ii) that provides:

> "***theft, fraud, uttering a forged document, perjury or an offence involving dishonesty, breach of fiduciary duty, dishonourable or unprofessional conduct...***"

15. Clause 10 requires the FSP; in this case, AC&E and the key individual, Ms Fourie to disclose to the Registrar and a representative fully and accurately all information, not limited to information and relation to matters referred to in Section 9, which may be relevant in determining whether that person complies with the requirements relating to honesty, integrity and good standing.

C GROUNDS FOR RECONSIDERATION:

(i) Unfair process:

16. The first issue which this panel has to determine is whether the debarring process was fair and reasonable? Essentially the salient contentions were that:-

16.1 the applicant was not given reasonable time before the debarment hearing to consider the allegations against her in the notice.;

16.2 the request for a postponement was refused by the chairperson;

16.3 she was not advised that her representations had to be under oath;

16.4 she was not given an opportunity to reply to the respondent's submissions, and these submissions in the so-called replying affidavit introduced evidence which the applicant was not able to address;

16.5 the applicant was not given access to the bundle of documentation which was presented to the chairperson at the time of the hearing; and

16.6 more pertinently, the applicant was refused a right to legal representation at the hearing.

17. The respondent set out the following procedure in its Section 14.5 notice namely that:

17.1 An independent chairperson will chair the debarment hearing which was to be held within a short space of time (on 7 June 2018).

17.2 She was advised that she may attend, alternatively she could make written submissions by 6 June 2018.

17.3 She was further advised that she was not entitled to any legal representation.

17.4 Her submission would be considered by the chairperson who would then make a determination.

17.5 The decision will then be communicated to her through her employer, AC&E.

18. More significantly the notice further advised her that AC&E will make submissions to the chair and she shall have an opportunity to make a submission in response. We note that this is in accordance with clause 10 of Board Notice 194 of 2017.

19. What appears to have eventually transpired is that the applicant attended the hearing with the legal representative and at the said hearing requested a postponement. The chairperson made a ruling regarding her right to legal representation and refused to grant the postponement. The debarment hearing had not continued but was adjourned after the applicant submitted that she would instead file written submissions. The chairperson granted her the opportunity then to file her written submissions.

20. At this juncture, it is necessary to note that she had not been given an opportunity to respond to the respondent's answering affidavit. An explanation proffered by the respondent's counsel was that the submissions of the respondent had already been contained in the Section 14.5 notice, and it was such submission which required a response from her.

21. Reference is made to the "*Guidelines on the debarment process in terms of Section 14.5*" issued on 5 November 2013 in terms of the FAIS Act, "***The Guidelines***" which this Tribunal finds instructive and applicable. The purpose

of the Guidelines was to explain the rationale and process to be followed by financial services providers when affecting the debarment of representatives as envisaged in terms of the FAIS Act.

Section 14(3)(a) of the said "***Guidelines***" thereof specifically stipulates that:

> ***"A financial service provider must before debarring a person, give adequate notice in writing to the person stating its intention to debar a person, the grounds and reasons for the debarment, and any terms attached to the debarment, including in relation to unconcluded business, any measures stipulated for the protection of the interest of clients."***

22. An FSP is required to allow the person a reasonable opportunity to make a submission in response. This is set out in Section 14(3)(b), which requires of the FSP to consider the response after (in this case) Ms Davis had made a "***submission in response***" and then only should a decision be made in terms of Section 14.1: namely whether it is satisfied that based on the available facts and information, a person:

> ***"(i) does not meet or no longer complies with, the requirements referred to in Section 13(2)(a) or;***
>
> ***(ii) has contravened or failed to comply with any provision of this Act in a material manner."***

23. The "***Guideline***" to the debarment process notes the purpose of a debarment. In terms of Section 14.1 of the FAIS Act a debarment is a regulatory instrument intended to rid the industry of incompetent and dishonest

representatives. A debarment should not be used to satisfy a provider's contractual or other grievances against a representative, unrelated to the fitness of competence requirements.

24. Furthermore a debarment must be effected for the purpose it was intended for. FSP's must appreciate and understand that they can terminate an agreement with the representative without debarring her. The debarment must relate to the non-compliance by the representative with the competency and integrity requirements as envisaged in Section 13(2)(a) read with Section 8(1)(a) of the FAIS Act and with any applicable code of conduct or law on the conduct of business as set out in Section 13(2)(b).

25. Section 3(iv) specifically states:

> "***Providers must use the power to debar within the framework of the law. Debarment must be affected for purposes it was designed for and decisions of the providers must be supported by the law. When the provider considers a debarment, it must only take relevant factors into account. Failure to take relevant factors into account or giving consideration to irrelevant factors may render the debarment unlawful.***"

26. The debarment has to be rational and reasonable. This means that the action taken by the provider must make sense and be justifiable, given the information that is available to the person who makes a decision or takes the action.

27. It is settled law that a debarment by an FSP is an administrative act. It is also trite law that the administrative decision irregularly taken remains effective and will stand until set aside. At all relevant times it remains an administrative decision.[1] In this instance therefore, the debarment decision stands unless it is set aside by the Tribunal.

28. Therefore such administrative decision must be reasonable, fair and lawful. The right of a fair hearing lies at the heart of the rule of law. The crucial aspect of the rule of law that a decision should not be made without affording the other side a reasonable opportunity to state his/her case.

29. As set out in **De Beer v Central Local Council and South-Central Local Council and Others 2011(11) BCLR 1109 CC, Yacoob J at para 12** held the following:

> "***This Section 34 fair hearing rights affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court, lies at the heart of the rule of law. A fair hearing before court as a pre-requisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair or inconsistent with the Constitution Court must interpret legislation and Rules of Court where it is reasonably possible to do so, in a way that would render the***

[1] Odendaal v ABSA Brokers (Pty) Ltd and Another 2015 JOL 34944 FB at para 20 and also the Appeal Board's decision under case no A9/2016 in the matter between Michelle Holllenbach v Registrar of Financial Service Providers and Another dated 15 September 2016 at para 12.

proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity can only be given by ensuring that reasonable steps are taken to bring a hearing to the attention of a person affected..."

30. Having regard to the aforesaid we are inclined to find that fair process was not followed in respect of the decision. Our findings are premised on the following reasoning namely:

30.1 The debarment hearing was intended to have given both parties the platform to make their perspective submissions. The proceedings herein instead dealt with the issue of whether the applicant had a right to legal representation. The chairperson eventually denied her right to legal representation. It was on that basis, that the applicant decided to file written submissions. Although the debarment hearings are to be conducted expeditiously and with the minimum formalities, it could not mean that a party's rights to a fair hearing should be compromised.

30.2 As alluded to above, the "***Guidelines***" and the "***Board Notice***" make provision for proceedings to be reasonable and procedurally fair and that the parties should be able to make submissions in response.

30.3 The Section 14(5) notice, in our view, is in accordance with the legislative prescripts which allows the applicant to make "***submissions***

in response" to AC&E submissions. Even if her legal representatives may not have advised her appropriately, the fact remains that she did not have an opportunity to respond to the allegations set out in the respondent's affidavit.

30.4 It further appears that the pack (bundle) of documents which the chairperson was furnished with, was not presented to the applicant at the hearing. Having no insight as to what the contents of the said documents were, the Tribunal cannot meaningfully comment on its relevance or influence it may have had on the chairperson.

30.5 A further issue Is whether the applicant was afforded reasonable time to have prepared for the debarment hearing. It was argued on behalf of the respondent that the debarment hearing was intended to be an expeditious process and the refusal of her right to legal representation was justified. At all relevant times the applicant was given an opportunity to make a "***submission in response***", which she did by way of her written submission.

31. We note that the said Section 14(5) notice was issued on 1 June 2018 and the hearing was scheduled for 7 June 2018.

32. In accordance to the requirements of fair administrative action even Section 3(2)(b) of PAJA makes provision for an applicant to the right to procedurally fair administrative action. This includes being given adequate notice of the

nature and purpose of the proposed administrative action, and a reasonable opportunity to make representations.

33. We reiterate that the Section 14(5) notice expressly informed the applicant that she would be able to make submissions to the chair and she shall have an opportunity to make a submission in response. In our view the said Section 14(5) notice could never have been envisaged to constitute the respondent's submissions.

34. The submissions of the respondent were set out in the answering affidavit which the applicant had not been given an opportunity to consider. The answering affidavit addressed aspects which the applicant should have been afforded an opportunity to respond thereto. This certainly flies in the face of fair process.

D RECONSIDERATION OF THE MATTER:

35. For this Tribunal to reconsider this matter, its powers are set out in Section 234 of the FSR Act. The proper approach would then be a comprehensive revisit of the circumstances as they are presented at the time of this application.[2] Hence it constitutes a fresh relook at the matter. The grounds for reconsideration filed by the applicant and the respondent's response thereto are additional matter which have to be considered.

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[2] South African Airways Soc v BDFM Publishers (Pty) Ltd 2016(2) SA 514 6J

36. What we have to determine is whether the applicant lacked the integrity and honesty requirements as set out in Section 13(2)(a) read with Section 8(1)(a) of the FAIS Act, and Board Notice 194.

37. The applicant's counsel in his heads at paragraph 13 stated the following:

> "***Even it should be held that the applicant did take the list home and that she lied about the fact that she had obtained employment of King Price while she was employed by the respondent, that in itself would not clearly justify the finding that the applicant is not a person who is honest, has integrity and good standing.***"

38. Counsel for the respondent raised the following contentions:

38.1 This applicant failed to comprehend that the taking of a very sensitive and confidential "***List***" home contrary to direct instructions and then lying about it, goes to the heart of her honesty and integrity.

38.2 It is irrelevant whether she utilised the "***List***". All that the respondent was required to demonstrate was "***potential prejudice***".

38.3 Consequently the respondent was justified in debarring her. The communication from a Mr Rossouw who had recorded the nature of the conversation between himself and Ms Davis in an email dated 15 May 2018 constitutes unfavourable evidence against her and reads:

"***Hiermee bevestig ek Michael Rossouw van Rossbern dat ek 'n probleem ondervind het en vir Alta geskakel het waartoe sy nie geantwoord het nie. Sy het my later wel teruggebel en my meegedeel dat sy nie langer vir AC&E werk nie en nou haar eie "engineering boek" gaan opbou by King Price en dat sy my gaan kom sien om my huidige AC&E kliënte oor te skuiwe na haar toe.***"

38.4 A further obstacle in Ms Davis' way was that Mr Isaac confirmed that the applicant had informed him that she had taken the "***List***" home. When she was instructed to return the "***List***", she failed to do so. The respondent therefore held the view that she breached her fiduciary duty in that regard:

38.5 She has knowingly been untruthful and provided false and misleading information.

39. The grave act of dishonesty presents itself upon taking the "***List***" containing confidential information, keeping it in her possession even after she resigned and moreover denying this fact. Such conduct demonstrates that she lacks the honesty and integrity requirements as envisaged in Section 13 of the FSR Act.

40. At all relevant times Ms Davis denied ever taking the "***List***" home and that she utilised the information thereon to further her own interests. There is no dispute that this "***List***" was given to her long before her resignation namely 15 April 2018 and that the "***List***" was accessible at the employer's premises, in

Mr Isaac's office. The applicant's counsel persisted with the argument that a dispute of fact exists regarding the facts, more particularly whether she had taken the "***List***" home.

41. Our authorities have, extensively over time, defined what the characteristics of a "***fit and proper person***" should be. We note that the chairperson did not seek authoritative guidance in this regard (debarment hearing). The characteristics of honesty and integrity is a paramount quality that every financial services provider must possess. The *locus classicus* on this aspect is **Hamilton Smith & Company v The Registrar of Financial Market's**[3] matter. In the said decision the Appeal Board expressed itself as follows:

> "***To determine whether a person is a good character and integrity involves a moral judgment. In arriving at that judgment, it is necessary to have regard to the manner in which the person concerned conducted himself not only in his private life but also in his dealings with those whom he has come into contact professionally or in the course of his business...***"

42. In **Ex parte Tziniolis [1967] 1 NSWR 357 Holmes JA at 377** described the term "***good character***" as follows:

> "***Good character is not a summation of acts alone but relates to the quality of a person. The quality is to be judged by acts and motives, that is to say behaviour and the mental and emotional situations accompanying that behaviour. However character cannot always be***

[3] Appeal Board decision of the Financial Services Board dated 1 September 2003

estimated by one act or the class of act. As much about a person is known, will form the evidence from which inference of good character or not of good character is drawn."

43. In defining the word "***integrity***" - the Oxford English dictionary reads:

> "***The soundness of moral principle; the character of uncorrupted virtue especially in relation to truth and fair, dealing, uprightness, honesty, sincerely. These definitions suggest that in determining whether a person is "of good character and integrity" it is necessary to know as much as possible about that person and his or her background or put differently, to know the whole person.***"

44. In applying the aforesaid considerations when determining the fitness of the applicant, one has to know as much about the person, specifically the quality of the person. In these circumstances it is common cause that she was employed with the respondent for at least 4 years. In those 4 years, there is no record of any complaint regarding her honesty and integrity characteristics nor had there ever been any finding of misconduct against her. The issue of her dishonesty arose as a result of her being in possession of the "***List***".

45. At this juncture we note the submission made by the respondent's counsel that she acted without any integrity when she filed her resignation on the same day the debarment proceedings were instituted. It may be that she attempted to avoid the debarment proceedings at all costs. For the purposes of this decision, we are required to consider same when assessing her character in terms of Section 8.

46. Isaac confirmed that she has taken the "***List***" home, which she denies. Even if Isaac's version is accepted, this was the first act of her purported "***dishonesty***". There is no evidence that she had utilized this "***List***" towards creating her own engineering underwriting book. We can however understand that at the time it was reasonable for the respondent to draw such an inference since she had access to the "***List***" after her resignation, whether in Isaac's office only or both in Isaac's office and at home.

47. We take cognisance of the guiding principles that one's moral character cannot be measured by her conduct in respect of the "***LIST***", that is one act. As alluded above, prior to this there never appeared to be any complaints against her as a representative.

48. The chairperson failed to consider her fit and proper requirements in accordance with the relevant principles. Consequently the respondent relied on the recommendation of the chairperson when debarring her.

49. At some point counsel for the applicant submitted that the applicant's fit and proper characteristics should be assessed in respect of her conduct as a financial services provider towards her client and in such environment. We cannot agree with this submission. The authorities are clear that one has to assess these qualities in accordance with one's whole person and it should not be limited to the person's professional environment.

50. In **AGM v Registrar of Financial Services Providers, Case No A45/2014, para 36**, the Appeal Board held:

> *"...to determine the necessary honesty and integrity indeed requires a moral judgment, taking into account a person's conduct in both her private life and her interaction with others. An inference is drawn from her (actions) and motives, not once but over a period of time or through a number of incidents..."*

51. In light of the aforesaid principles set out by our authorities, we do not find that her conduct fell short of the honesty and integrity requirements as envisaged in Section 8 of the FAIS Act. It cannot mean that every act of dishonesty justifies a debarment. In this instance the applicant's character regarding her integrity and honesty cannot be faulted to the extent that it justifies a debarment. If anything, the employer had alternative recourses against her for her failure to adhere to the restraint agreement, if so proven. Her moral character has to be assessed in accordance with her "***whole person***". One's character cannot always be determined by one act or class of act.

52. We therefore find it appropriate to set aside the respondent's decision of debarment.

The following order is made:

(1) the application succeeds;

(2) the respondent's decision to debar the applicant is set aside from date of this decision.

Signed at **PRETORIA** on this **24TH** day of **OCTOBER 2018** on behalf of the Tribunal.

CHAIRPERSON
H KOOVERJIE