

**IN THE FINANCIAL SERVICES TRIBUNAL**

**CASE NUMBER: FSP2/2020**

In the matter between:

**MONIQUE VAN DER BERG**

Applicant

And

**EASTVAAL FINANCIAL SERVICES (JACO TAJAARD)**

Respondent

Tribunal: Mr. JM Damons (chair), Mr. A Jaffer and Mr. L Makhubela

For the Applicant: In Person

For the Respondent: Mr. J Taljaard

Hearing: 21<sup>st</sup> July 2020

Decision: 13th August 2020

Summary: Application for reconsideration of a decision in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 ("FSRA") – application to reconsider the debarment decision – procedure for debarment – respondent failure to provide an FSR with an opportunity to make representation prior to taking a decision to debar – debarment procedurally unfair and thus set-aside

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## DECISION

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### INTRODUCTION

1. In this matter the applicant applied for reconsideration of the debarment decision dated 17<sup>th</sup> December 2020<sup>1</sup>. Subsequent to the debarment decision the applicant filed an application for the reconsideration of a decision in terms of section 230(1) of the FSRA<sup>2</sup>.
2. The applicant in this matter is Ms. Monique Van der Berg (Ms. Van der Berg / the applicant) a former Financial Services Representative (FSR) of Eastvaal Financial Services (Jaco Taljaard) an authorized Financial Services Provider (FSP) and the Respondent in this matter.
3. The reconsideration application was filed with this Tribunal on the 17<sup>th</sup> January 2020. The application was opposed by the respondent. This matter is thus considered on the written and oral submissions presented by the parties.

### FACTUAL BACKGROUND AND COMPLAINT

4. The gist of the matter concerns an incident wherein it was alleged that the applicant acted in a dishonest manner and further brought the name of the company into disrepute. The actual charges preferred against the applicant were formulated as follows:

*“Dishonesty - Being an act or omission Which entails deceit in that, For the period of approximately March 2019 to September 2019, you made misrepresentations to Wesbank, being a stakeholder of the company by way of submitting declarations that you had visited customers places of residence whereas you had not.*

*Bringing the company's name into disrepute - in that by your conduct in (1) above you placed the company's facility with Wesbank at risk.”<sup>3</sup>*

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<sup>1</sup> See record of proceedings part A page 1

<sup>2</sup> See record of proceedings part A page 1 - 7

<sup>3</sup> See record of proceedings part B page 9

5. The applicant pleaded guilty to both the charges during the disciplinary hearing and was accordingly found guilty of both charges. She was issued with a written warning. Later she was then debarred.
6. It must be stated that the facts in this matter are not in dispute. The applicant acknowledges the misconduct and that she pleaded guilty. She however submits that this has always been the practice at the respondent and thus she should not have been disbarred or disciplined for same. On the other hand, the respondent stated that the applicant was not afforded an opportunity to make representations prior the decision to debar her being taken. These facts are clear, and no one is disputing this.

### **GROUND FOR THE RECONSIDERATION**

7. The applicant's main ground for the reconsideration is that other representatives also operate in the same fashion and thus it will be unfair that she is disciplined and debarred whereas the others are not. The respondent argued that it is strange that the applicant would bring this application as she pleaded guilty during the disciplinary hearing. According to the respondent they did everything to try and assist the applicant. Furthermore, because she had not been dismissed, she can work herself back into the position of a representative.
8. During the proceedings, the respondent's representative was specifically asked if the applicant was given any notice which clearly indicated that the respondent intent debarring her on the basis of the allegations and findings which were against her. The response from the respondent was that he does not recall if ever the applicant was provided with such a notice.

### **LEGAL FRAMEWORK**

9. In terms of section 14(1) of the FAIS Act, an FSP is obliged to debar a representative from rendering financial services if the FSP is satisfied on the

basis of available facts and information that that representative no longer complies with inter alia the fit and proper requirements.

10. Our law provides guidance to parties on the procedure that must be followed in the event of an FSP invoking a debarment process. The FAIS Act states in section 14(2) that before effecting debarment in terms of subsection (1), the FSP must ensure that the debarment process is lawful, reasonable and procedurally fair.

11. Further, the FAIS Act states the following in section 14(3) (a) and (b):

*“(3) A financial services provider **must** -*

*(a) before debarring a person-*

*(i) **give adequate notice in writing to the person stating its intention to debar the 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 interests of clients;***

*(ii) provide the person with a copy of the financial services provider’s written policy and procedure governing the debarment process; and*

*(iii) give the person a reasonable opportunity to make a submission in response;*

*(b) consider any response provided in terms of paragraph (a)(iii), and then take a decision in terms of subsection (1); and.....” (own emphasis)*

12. 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 reasons for the debarment.

13. This tribunal has on many occasions expressed its views regarding the procedure required when debarring representatives. FSP's that are found not to have followed proper procedure in debarring representatives, such debarments have been set aside by this tribunal.
14. It is without a doubt that the applicant in this matter was not provided with an opportunity to make her representations as to why she should not be debarred. This was also confirmed by the respondent's representative during the hearing. Solely on this ground the debarment of the applicant in this matter is procedurally unfair. It thus follows that the debarment decision and the noting thereof should be set aside and the matter be remitted back to the respondent to comply with proper procedures.
15. This Tribunal is of the view that the respondent has failed to show that it complied with proper procedures prior taking a decision to debar the applicant.
16. Accordingly, in terms of section 234(1)(b)(ii) of FSR Act, this Tribunal makes the following orders:
  - 16.2 The debarment of the applicant is hereby set-aside;
  - 16.3 The matter is remitted back to the respondent; and
  - 16.4 No order as to costs

Signed at PRETORIA on the 13<sup>th</sup> day of AUGUST 2020 on behalf of the Tribunal

  
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CHAIRPERSON  
JM DAMONS