THE FINANCIAL SERVICES TRIBUNAL

Case No: A20/2019

In the matter of:

BRENDON MARVYN MCKENZIE **Appellant**

and

FINANCIAL SECTOR CONDUCT AUTHORITY **Respondent**

DECISION

Coram: A.T. Ncongwane SC (Chairperson),
L. Makhubela, and
A. Jaffer (members)

Date: 12 June 2020

Summary: Application for reconsideration in terms of s. 230 of Act 9 of 2017 of the decision to debar the appellant. The notice in terms of s. 153 (1) (a) of the FSR Act - informed appellant, debarment was contemplated. Notice adequate and appellant made representations.

INTRODUCTION

[1] The appellant was a representative of First Serve Insurance Brokers ("an erstwhile employer" or "a Financial Service Provider" (FSP) or "a complainant"), as the case may be. Appellant was registered as a

representative to render financial services and was subject to the fit and proper requirements as required in the Financial Advisory and Intermediary Services Act No. 37 of 2002 ("FAIS Act").

[2] The respondent ("the Conduct Authority") issued a debarment order, on the 15th October 2019 in terms of s. 153 (1) (a) of the Financial Sector Regulation Act 9 of 2017 ("the FSR Act").

[3] In the debarment order, the respondent notified the appellant that he no longer complied with the requirements of s. 8A of the FAIS Act, read with the fit and proper requirements, particularly his character qualities of honesty and integrity, as determined under s. 6A of the FAIS Act read with s. 81 of Board Notice No. 194 of 2017.

[4] The Conduct Authority made a finding that it was satisfied that the appellant contravened the sections of the FAIS Act referred to above and its subordinate legislation[1] in a *"material manner"* and proceeded to issue a debar order against him. The duration of the appellant's debarment is for a one (1) year, during which period the appellant was prohibited from furnishing any financial advice or rendering any intermediary services as defined in s.1 of the FAIS Act to any financial customers. The debarment

1 S. 8A provides as follows: *"an authorised financial services provider, key individual, representative of the provider and the key individual of the representative must (a) continue to comply with the fit and proper requirements, and (b) comply with the fit and proper requirements relating to continuous professional development"*
S. 8 (1) provides: "a person referred to in s. 7 (1) must be a person who is (a) honest and has integrity; (b) of good standing."

also had an effect of removing the appellant's name from register with effect from the date of debar (i.e. 15th October 2019).

[5] The grounds for the decision are premised on the findings made by the respondent in that the appellant made a false statement to Telkom that Mr Bartleson from the FSP wanted to have a cell phone number 0720222087 from a contract plan to a prepaid. Appellant was also said to have made a false statement to the FSP that he had an agreement with Bartleson to port the cell phone number back to a contract plan and that the copy of the identity document of Mr Bartleson was provided to him by Mr Bartleson's personal assistant.

[6] The parties waived their right to a formal hearing and agreed that the matter be decided on the papers filed and the record.

Grounds for reconsideration of the debarment

[7] The appellant's grounds for reconsideration are mainly that there has been procedural defects that have been occasioned by the time lapse of one year and five months before the debarment notice was issued. That the conduct authority erred in not objectively looking into the allegations and erred in considering on the balance of probabilities how the appellant's conduct amounted to a material breach warranting a one year long debarment. That the debarment order for a period of one year is grossly unjust and goes

against retributive justice and affects the appellant's constitutionally protected rights.

[8] We deal further hereafter with the appellant's grounds for reconsideration by applying the relevant legislative provisions and applicable subordinate legislation. Prior to doing that. It is apposite to evaluate the relevant facts that culminated to the debarment.

[9] The appellant became an employee of the FSP on the 7th February 2014 until he was dismissed from that employment on the 7th of May 2018, after being found guilty of gross insubordination and poor work performance amongst others.[2]

[10] On the 7th of August 2018 the CCMA upheld the appellant's dismissal. The adumbrate of the applicable facts for the debarment are that a phone number 0720222087 that was previously registered in the name of the appellant was ported from the appellant to FSP, from Vodacom to Telkom.[3] The phone number was, *ipso facto* the porting, registered in the FSP's name and on the appellant's permission. On the 11th April 2018, it is alleged that the appellant presented a letter to Telkom stating that his senior and manager Mr G. Bartelson, the owner of the FSP had given permission for the number to be ported back to prepay and in the name of the appellant and the letter was not signed by Mr Bartelson. From the facts it seems he had no knowledge of the letter. It also turned out that on the same day the

[2] See page 8, notice of dismissal, item 3.2.

[3] Porting a number means taking an existing phone number from one service provider and transferring it to another service provider.

appellant was informed by Mr Bartelson via watt Sapp messages that he should not return to work that day and had been suspended and the suspension letter was also sent to him on the same day, confirming that he should return all company keys and other equipment that belonged to the employer. In the watt Sapp messages of the 11th April 2018, the record shows that Mr Bartelson did not mention anything in relation to the porting of the number but it only insisted on the appellant's returning the employer's property which amongst others was the employer's cell phone.

[11] During October 2018, FSP issued a notice of intention to debar the appellant in terms of s. 14 (1) of the FAIS Act on issues that came to light from the CCMA hearing. The FSP did not proceed with its debarment process until another notice dated the 15th August 2019 was issued by the Conduct Authority to the appellant. The Conduct Authority relies on s. 153 of the FSR Act for notifying the appellant of the intention of the Conduct Authority to issue a debarment order against the appellant.

[12] It is apparent from the record that after the FSP did not pursue the debarment but on the 6th November 2018 lodged a complaint with the Conduct Authority about matters suggesting misconduct flowing from the DC hearing, including the evidence that the appellant attempted to port the employer's phone number and this evidence was contained in the affidavits that were obtained during the investigations conducted by the FSP.

[13] The appellant's aggrievement about the unfairness of the process is that he was not timeously notified of the decision to debar him after the process was initiated firstly by the FSP in October 2018 and that he was not provided with a written policy of the FSR's debarment policy. The notice of debarment of the 15th August 2019 by the Conduct Authority initiated another debarment process that produced the debarment order on 15th October 2019. It is contended by the appellant that he was dismissed on the 7th May 2018 and has not been acting as a representative since then. It has taken a period of seventeen (17) months to debar him. He submits that this consists a joint period of almost three (3) years of debarment and this is *"grossly unjust"* and *"severely prejudiced"* the appellant's right to earn a living.

FAIRNESS OF THE PROCESS

[14] In terms of s. 14 (2) (a) of FAIS, the debarment process must be lawful, reasonable and procedurally fair. It is incumbent upon an authorised FSP to debar a representative who no longer complies with the requirement of fit and properness referred to in s. 13 (2)(a) of FAIS. In *casu*, as stated above, the FSP initiated the process to debar the appellant but this was discontinued before it reached finality. The Conduct Authority recommenced the debarment process ten (10) months later (the first notice of intention to debar having been issued by the FSP in October 2018 and the second notice to debar issued by the Conduct Authority on the 15th August 2019).

[15] The provisions of s. 14 (1)(b) and 14 (5) of FAIS Act, deal with the debarment where the reasons for such debarment occurred and become known to the FSP while the representative was still a representative of the FSP, and that it must commence no longer than six (6) months from the date that the representative ceased to be a representative of the FSP. The same provision is restated in the Guidance Notice 1 of 2019 (FAIS) clause 3.1.3.[4]

[16] The appellant ceased to be a representative of the FSP upon his dismissal on the 7th of May 2018. The notification by the FSP of the intention to debar the appellant in October 2018, fell within the six (6) months period stipulated in s.14 and in clause 3.1.3 of the Guidance Notice, to commence the debarment process but this notice had no legal effect as it was not acted upon. If it was acted upon it would have resulted to a proper lawful notice. The appellant contends that since this notice was not acted upon, it can only be assumed that the FSP abandoned its intention to debar the appellant. It is not clear whether this is the reasonable conclusive inference that could be made from the FSP's decision not to act upon the notice in the light of its subsequent complaint to the conduct authority. The Guidance Notice provides for further obligations on the part of the FSP if it is to comply with the requirement of the fairness of the process.

[17] The decision to issue a notice to debar was made by the Conduct Authority ten (10) months after the lapse of the six (6) months referred to in s. 14 (5)

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4 Guidance Notice 1 of 2019 (FAIS): Guidance Notice on debarment process in terms of s. 14 of the Financial Advisory and Intermediary Services Act, 2002.

of FAIS. In terms of s. 218 (g) of the FSR Act, it provides that a decision includes an omission to take a decision within a reasonable period, if the applicable financial sector law, or rules of, or other requirement pertaining to, the decision-maker require the decision to be taken but without prescribing or specifying a period.

[18] The complaint with the Conduct Authority was lodged with the FSP in the email dated the 6th of November 2018, accompanied by the documents compiled from the investigation conducted by the FSP, documents that served at the DC hearing as well as the disciplinary finding. The record does not show as to why the notice of intention to debar was only issued in August 2019.

[19] The notice issued by the Conduct Authority in terms of s. 154 read with s. 153 (1)(a) of the FSR Act, informed the appellant that the Conduct Authority contemplated making a debarment order as the appellant contravened a financial sector law in material way.[5] The notice is an adequate notice and it afforded the appellant sufficient opportunity to make representations. There is no statutory period stipulated by the FSR Act or the FAIS Act that require the Conduct Authority to commence with the debarment process within a specific period. Under these circumstances, it follows that a debarment order could be made by the Conduct Authority where there is a contravention of *"a financial sector law"* and in a *"material way"*. The

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[5] "153 –Debarment

(1) The responsible authority for a financial sector law may make a debarment order in respect of a natural person if the person has – (a) contravened a financial sector law in a material way (b) … (c) … (d) …

reasonableness of the time within which the notice was issued was not an issue before the Conduct Authority. The appellant duly made his representations on the merits. We also have no material facts upon which we can decide this issue in these proceedings.

THE MERITS

[20] The main ground to debar the appellant is that he no longer met the requirements contemplated in s. 8 of the FAIS Act relating to qualities of honesty and integrity. As pointed out above, the FSP submitted to the Conduct Authority affidavits obtained from the FSP's managing director and his professional assistant and other documents on the investigation and conclusions made. The annexures included documents that are set to have been fraudulently produced, used and submitted by the appellant to Telkom.

[21] It is significant to state that the appellant's main version is that the cell phone number in issue was his personal cellphone number prior to his partnership with Mr Bartelson and he does not deny that it became the FSP's business number after it was ported to the FSP and on a contract basis between the FSP and Telkom.

[22] His main case is further that he explained to Mr Bartelson that he needed to have access to his mobile number as creditors had the number and he would need to be in contact with them. He contends that Mr Bartelson's PA

is the one who sent him the copy of Mr Bartelson's identity document so that he could liaise with Telkom. The appellant admits that the contract in respect of the telephone number relevant to the matter was in Mr Bartelson's name. He further states that at that point, the *"trust relationship had broken down... I then went to Telkom to port my number back as agreed with Mr Bartelson"*. This statement is in direct contrast to the appellant's earlier admission that after the number was ported in the first instance, and with his consent, it was legally taken over by the FSP as he lost its use. His subsequent version is denied by the FSP.

[23] The appellant had the opportunity to challenge the finding that Mr Bartelson has not consented to the porting of the number back to his name and also that Ms Phalatsi who submitted an affidavit during the investigations, deposed to the fact that she did not give the appellant Mr Bartelson's ID copy as is alleged by the appellant. In these proceedings, the appellant also failed to mount any challenge to furnish any cogent evidence as to the manner in which the defence of consent by Mr Bartelson was obtained and given to him. Mr Bartelson refutes the appellant's version that he consented for him to have the number changed to prepay. The appellant also does not dispute Mr Bartelson's PA that she did not forward to him a copy of Mr Bartelson's identity document so that he could liaise with Telkom.

[24] The appellant raises an issue of motive for the debar. He attacks Mr Bartelson to have abused the process as he contends that it was only when he was requested to issue a letter of recommendation for appellant to apply

for the FSP licence that he engaged the "FSCA" and asked for the debarment. It is indeed so that debarment should not be abused for ulterior purposes. In a letter that the FSP submitted to the Conduct Authority on the 6th of November 2018, Mr Bartelson stated that the appellant *"seems to want to go against his restraint of trade as during the investigations we also discovered as the attached, that on the 18th August 2017, he had registered an insurance brokerage called Mckenzie Insurance Brokers… and it is believed that he had intentions if not already has intentions to apply for an FSP licence with the FSCA if he has not already done so. Based on the information that we have provided we feel that it is in the interest of the FSCA to be notified of his actions as we have previously explained …"*

[25] At that stage, the FSP only had one day remaining, from the six (6) months period within which it could commence the debar process. The record does not show the reasons for the FSP not to have proceeded with their debar process even at that stage. The debarment notice that was issued in October 2018 had not been withdrawn. We are unable to find a connection from the issuing of the letter by Mr Bartelson to the Conduct Authority on the 6th of November 2018 and the alleged abuse of process and there is no evidence of any written request to have been made to Mr Bartelson by the appellant to issue a letter of recommendation for a licence and also at what stage that such a request was made. In the light of the absence of this objective evidence, we find the attack by the appellant based on the abuse of process to have no merit.

[26] Another critical aspect of the ground of appeal in the case is that the debarment for a one (1) year is unfair. It is submitted by the appellant that the term of the debarment amounts to a harsh sanction and cannot be justified due to one complaint from the disgruntled employer. We are requested, should we uphold the decision, to '*suit*' (sic) or impose a less harsh decision.

[27] The Conduct Authority has referred us to the decision of the tribunal in the matter of **Aletta Johanna Davis and AC& E Engineering Underwriting Managers (Pty) Ltd**[6]. This matter highlights the key issues to be taken into account to determine if a person lacks integrity and honesty requirements:

[27.1] The tribunal at paragraph 47 said the following: "*we take cognizance 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 complaint against her as a representative.*"

[27.2] In this matter, as against the issue of possession of a list in the Aletta case, the Conduct Authority found the appellant to have engaged in a dishonest conduct when he purported to have the authority from Mr Bartelson and drafted a letter to induce Telkom to change the contract phone to a prepaid. That the appellant lied to the FSP that he received a copy of the identity document from Mr Bartelson's assistant and had

[6] Case Number FSP 4/2018.

no basis to contest the factual evidence tendered by both Mr Bartelson and Mr Phalatsi in that he was never given any permission or authority by Mr Phalatsi to port the cell phone number from a contract plan to a prepaid plan and that Ms Phalatsi denied providing him with the copy of Bartelson's identity document.

[28] We are satisfied that in the light of the finding that was made by the Conduct Authority, from the facts of this case, left the Conduct Authority with no choice but to debar the appellant. From the evidence placed before us it is evident that the appellant no longer meets the required qualities of honesty and integrity and the decision by the Conduct Authority was made after a careful consideration of the issues, following a fair process. We do not find any merits in the appellant's grounds for reconsideration and the Conduct Authority was justified in making a finding that the appellant lacks the requisite character qualities of honesty and integrity.

[29] The term of the debarment is also not very long that it can be said to have been inappropriate. In this regard, the Conduct Authority did not misdirect itself to debar the appellant for a period of a one (1) year.

[30] In the result, the application for reconsideration is dismissed and no order is made as to costs.

AT NCONGWANE SC, CHAIRPERSON

With the panel consisting of:

L. Makhubela, and

A. Jaffer

Date: 12 June 2020