THE FINANCIAL SERVICES TRIBUNAL

Case No. FSP32/2024

In the matter between:

NTOMBIFUTHI LEFAKANE Applicant

and

ASI FINANCIAL SERVICES (PTY) LIMITED Respondent

Tribunal Panel: Judge LTC Harms and Adv. KD Magano

Summary: *Application for reconsideration – Debarment is a serious sanction meant to protect the public from unfit representatives, and its use to resolve an employment contractual dispute suggests a potential misuse of this regulatory tool-- Application for reconsideration succeeds—Applicant's debarment set aside.*

DECISION

INTRODUCTION

1. This Tribunal is required to decide on this application for reconsideration of the respondent's decision to debar the applicant in terms of section 14(1) read with section 13(2) of the Financial Advisory and Intermediary Services Act 37 of 2002 (*"FAIS Act"*).

2. The applicant brings this application under section 230 of the Financial Sector Regulation Act 9 of 2017 ("the FSR Act").

3. The applicant, Ms Ntombifuthi Lefakane, is a former employee of ASI Financial Services (Pty) Limited (*"the respondent"*), an authorised Financial Services Provider as contemplated by the FAIS Act.

4. The parties waived their right to a formal hearing. Consequently, this is the decision of the Tribunal.

FACTUAL BACKGROUND

5. The applicant was employed by the respondent from 2 January 2023 until 30 August 2023, when she resigned with immediate effect.

6. It is common cause from the record before this Tribunal that on 30 August 2023, the applicant resigned immediately after being paid a retention bonus by the respondent.

7. On 19 September 2023, the respondent, through its attorneys of record, wrote to the applicant demanding repayment of the retention bonus, failing which it would institute legal proceedings against her. In the said letter, the respondent alleges that the payment of the retention bonus was premised on the applicant's continued employment with the respondent.

8. On 3 November 2023, the respondent notified the applicant of its intention to debar her in terms of section 14 (3) of the FAIS Act. The reasons for the intended debarment were that the applicant ceased to be a fit and proper person in terms of section 13 (2) (a) of the FAIS Act because resigning with immediate effect after being paid a retention bonus demonstrates a lack of honesty and integrity on the part of the applicant.

9. The respondent's rationale for the intended debarment centered around two key points:

9.1. The retention bonus was awarded with the expectation of the applicant's continued employment with the respondent.

9.2. The applicant's resignation, without providing the stipulated one-month notice as outlined in the employment contract, deviated from expected professional conduct.

10. In essence, the issues raised in the respondent's debarment notice appear to hinge on the applicant's potential breach of her employment contract with the respondent.

11. The applicant did not heed the respondent's demands, and following an exchange of correspondence, the parties met on 23 November 2023 to discuss this issue further.

12. Subsequently, the respondent sent an email dated 29 November 2023 to the respondent, reiterating its demand for the repayment of the retention bonus and indicated that management would be willing to "reconsider the debarment" upon receipt of an immediate partial payment of at least R7,000 towards the bonus.

13. The email of 29 November 2023 suggests an alternative course of action that could potentially lead to a reconsideration of the debarment if the applicant paid a partial payment of at least R7,000 towards the retention bonus.

14. On 5 and 18 December 2023, the respondent sent follow-up letters to the

applicant. Of importance, the respondent reiterated its demand for repayment of the retention bonus and further offered the applicant an opportunity to resolve the matter by agreeing to repay it.

15. On 29 February 2024, six months later, the respondent decided to debar the applicant for the same reasons set out in its notice of intention to debar her, which is that she lacked honesty and integrity.

16. On 5 March 2024, the respondent notified the applicant of its decision to debar her. The applicant applied for reconsideration of the respondent's decision on 10 May 2024. The applicant also applied for condonation of the late filing of her application for reconsideration.

17. The respondent opposes both the application for reconsideration and condonation.

THE RECONSIDERATION APPLICATION

a) *Issues in dispute*

18. Central to this matter is the critical inquiry of whether the applicant's conduct justifies debarment under Section 13(2)(a) of the FAIS Act. The Tribunal must determine if the debarment action aligns genuinely with the purpose of the debarment provisions in the FAIS Act or if the decision to debar the applicant pursues an ulterior motive. The determination of this core issue lies in interpreting the applicant's actions.

19. While the core issue revolves around whether the applicant's conduct justifies debarment under Section 13(2)(a) of the FAIS Act, another matter that

requires the Tribunal's consideration is whether the applicant's application for reconsideration adheres to the timeframes established by Section 230 of the FSR Act. If the Tribunal finds that the application is late, it must then determine if the applicant can demonstrate sufficient justification (good cause) for the delay, warranting condonation.

20. Before delving into the core issues, the Tribunal will first deal with the application for condonation. Our evaluation of the application for reconsideration hinges on the outcome of the condonation application. If the Tribunal finds that the application for reconsideration was filed within the prescribed time periods or condonation is granted, it will then proceed to assess the merits of the reconsideration application.

b) *Application for Condonation*

21. Section 230(2)(b) of the FSR Act regulates the position relating to the condonation for the late filing of reconsideration applications. In terms of section 230(2) of the FSR Act, an application for reconsideration must be made: *. . . within 60 days after the applicant was notified of the decision, or such longer period as may on good cause be allowed."* (Emphasis added)

22. The first question this Tribunal must answer before considering the merits of the condonation application is whether the application for reconsideration is late, as both parties alleged. We turn to answer this question.

23. The respondent notified the applicant of its decision to debar her on 5 March 2024. Therefore, the applicant had until 31 May 2024 to submit her reconsideration application. In light of the evidence presented, it is clear that

the applicant submitted the reconsideration application on 10 May 2024. This falls well within the designated 60-day period mentioned above. Therefore, the reconsideration application was made within the prescribed timeframes. Therefore, there is no need to consider arguments for condonation of a late filing.

24. Even if we consider the applicant's alleged late awareness of her debarment, she still submitted the application within the prescribed time frame because her argument is that she became aware that she was debarred on 18 April 2024 after going through the FSCA website. Based on her version, she had until 16 July 2024 to submit her application for reconsideration. There was no need for her to bring a condonation application.

25. Having established that the reconsideration application was submitted within the relevant timeframe on both versions, the issue of condonation becomes moot. We now proceed to assess the merits of the reconsideration application itself.

c) *Legal principles regarding Debarment of Representatives*

26. Section 14(1)(a) of the FAIS Act reads as follows:

> *"An authorised financial services provider must debar a person from rendering financial services which 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."

27. As previously established by the SCA in the matter of the **Financial Services Board v Barthram and Another,**[1] the rationale for debarring representatives and key individuals who no longer satisfy fit and proper requirements is as follows:

> *"[16] ... A representative who does not meet those requirements lacks the character qualities of honesty and integrity or lacks competence and thereby poses a risk to the investing public generally. Such a person ought not to be unleashed on an unsuspecting public, and it must therefore follow that any representative debarred in terms of section 14(1) must perforce be debarred on an industrywide basis from rendering financial services to the investing public."*

28. The FAIS Act does not provide a specific definition for "fit and proper person." However, the Act and its guidelines establish expectations for financial services providers and their representatives. These expectations revolve around honesty, integrity, good standing, competence, and financial soundness.

29. Section 13(2)(a) stipulates that an authorised financial services provider must:

> *"At all relevant times, be satisfied that the provider's representatives and the key individuals of such representatives are, when rendering a*

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1 Financial Services Board v Barthram and Another (20207/2014) [2015] ZASCA 96; [2015] 3 All SA 665 (SCA); 2018 (1) SA 139 (SCA) (1 June 2015)

financial service on behalf of the provider, competent to act and comply with:

(i) The fit and proper requirements …"[2]

30. That leads to sec 6A(2), which states that the fit and proper requirements relate *inter alia* to the "personal character qualities of honesty and integrity".

31. Representatives must meet certain criteria to be considered qualified to render financial services. These criteria encompass personal characteristics, academic qualifications, and technical knowledge. Failure to meet any of these requirements would render a representative unqualified under the FAIS Act.

32. The FAIS Act and its guidelines emphasise that a debarment is a regulatory tool aimed at protecting the public by removing unfit individuals from the financial services industry. The debarment must be demonstrably linked to actions impacting the applicant's ability to perform financial services with honesty and integrity. A representative must be debarred for reasons related to the rendering of financial services.

33. In **Law Society, Northern Provinces v Mogami and Others**[3], the court stated the following when dealing with the requirement of a fit and proper person:

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2 The fit and proper requirements are set out in the publication under 6A of the FAIS Act.

3 Law Society of the Northern Provinces v Mogami and Others (588/08) [2009] ZASCA 107; 2010 (1) SA 186 (SCA) ; [2010] 1 All SA 315 (SCA) (22 September 2009)

"[4] ...[f]irst, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual inquiry. Second, it must consider whether the person concerned is 'in the discretion of the court' not a fit and proper person to continue to practice. This involves a weighing-up of the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgment. And third, the court must enquire whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice"

34. While the **Mogami** case dealt with the "fit and proper" person within the context of the legal profession, its principles regarding a "fit and proper" person can be applied by analogy to the FAIS context. The case outlines a three-stage inquiry for assessing whether a person is fit and proper:

34.1. The initial step involves determining, based on a preponderance of evidence, whether the actions attributed to the applicant actually occurred. In this case, the alleged misconduct occurred and it centers on the applicant's immediate resignation and her failure to repay the retention bonus.

34.2. Seeing that the alleged conduct has been established, the Tribunal must then assess whether it renders the applicant unfit and proper to continue providing financial services. This necessitates a value judgment, weighing her actions against the expected conduct of a financial services representative.

34.3. Assuming that the applicant's resignation may have violated the terms of her employment contract, the core issue is whether her conduct

directly translates to a lack of honesty or integrity when rendering financial services to clients.

34.4. The last stage of this inquiry deals with the proportionality of the respondent's sanction, i.e., debarment of the applicant. The Tribunal must consider whether debarment, the most severe sanction, is, under these circumstances, truly warranted.

35. With the legal principles laid out, the Tribunal will now turn its attention to applying a rigorous analysis to the specific details surrounding this case.

36. We have applied the three-stage **Mogami** test to ensure a comprehensive and balanced evaluation, considering the specific details of this case. Furthermore, the principles established in the **Barthram** case have also guided our assessment. Barthram emphasises that debarment should target individuals who lack the character qualities or competence necessary to protect the public.

d) *Application of the above legal principles to the facts of this case*

37. The Tribunal's analysis focused on whether the applicant's actions, particularly her immediate resignation and her failure to repay the retention bonus, demonstrate a general unfitness to provide financial services with honesty and integrity. The Tribunal also carefully distinguished between contractual concerns and legitimate regulatory issues under the FAIS Act.

38. The debarment appears to be partially premised on the terms surrounding a financial incentive offered by the respondent upon continued employment and the applicant's failure to repay the financial incentive. This approach is wrong

because the focus should be on whether the applicant's actions demonstrate a general unfitness to provide financial services due to dishonesty or ethical lapses.

39. It appears from the record that the applicant's sudden and immediate departure from employment and failure to repay the incentive bonus while raising concerns for the respondent does not directly constitute "rendering financial services."

40. Additionally, the respondent's emails suggesting debarment might be reconsidered upon repayment of the bonus imply the debarment was used for purposes beyond a legitimate concern about fitness and properness under FAIS.

41. The respondent's policy on debarment defines financial services as follows:

*"**Financial Service(s)** means services rendered by an FSP as defined in Section 1 of the FAIS Act specifically:*

a) Furnishing advice; or

b) Furnishing Advice and rendering intermediary service; or

c) Rendering intermediary service."

42. The conduct complained of does not fall within the above definition. Therefore, the respondent did not comply with its own policy on debarment.

43. The respondent's concerns regarding the retention bonus and the applicant's departure, while relevant to their contractual relationship, do not necessarily translate to a lack of fitness and properness under FAIS.

44. Furthermore, the Tribunal has examined Clause 5 of the respondent's Remuneration Policy, which specifically addresses retention bonus clawback. The existence of this policy highlights that the respondent possessed contractual remedies to address its dispute with the applicant. However, by pursuing debarment proceedings in addition to these contractual remedies, the respondent's actions raise concerns about using the FAIS Act's debarment process for purposes beyond safeguarding the integrity of the financial sector. In other words, the debarment seems to be used as a tactic to exert pressure in resolving a contractual dispute rather than a genuine reflection of the applicant's fitness to act as a financial services representative.

45. Lastly, the FAIS Act mandates that debarment should occur promptly upon the discovery of a representative no longer meeting the "fit and proper" criteria. Here, however, the respondent's decision to debar the applicant came six months after the alleged misconduct. This extended delay raises questions about the respondent's true motivations for debarment, potentially suggesting its use as leverage in resolving the employment dispute rather than a genuine concern about adherence to the FAIS Act.

CONCLUSION

46. Based on the analysis above, the Tribunal finds that the debarment order issued against the applicant is not justified under the FAIS Act. The grounds

for debarment appear to be primarily related to issues arising from an employment contractual dispute. Thus, the respondent used the debarment proceedings to resolve an employment contractual dispute.

47. The reasons for the applicant's debarment do not relate to the rendering of financial services, and as such, they do not directly impact the applicant's ability to render financial services with honesty and integrity.

48. For the reasons stated above, the reconsideration application must succeed, and the debarment ought to be set aside.

ORDER

49. Accordingly, the Tribunal makes the following order:

49.1. The application for reconsideration succeeds.

49.2. The debarment of the applicant is set aside.

SIGNED at PRETORIA on this the 19th day of JULY 2024

Signed on behalf of the Tribunal panel.

KD Magano