

THE FINANCIAL SERVICES TRIBUNAL

Case No: FSP72/2023

In the matter between:

FANISWA NGESI

Applicant

and

**FIRST NATIONAL BANK a division of
FIRST RAND BANK LIMITED**

Respondent

Summary: Application for reconsideration in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 – debarment of representative in terms of section 14(1) of the Financial Advisory and Intermediary Services Act 37 of 2002 – section 13(2)(a)(i) of the FAIS Act – fit and proper requirements

DECISION

1. The applicant applies for reconsideration of the decision of the respondent to debar her in terms of section 14(1) of the Financial Advisory and Intermediary Services Act 37 of 2002 (“the FAIS Act”). The debarment decision is dated 30 October 2023.
2. The present application is made under section 230 of the Financial Sector Regulation Act, 9 of 2017 (“the FSR Act”).
3. The parties waived their rights to a formal hearing and the matter will be decided on the record filed.
4. The applicant was in the employ of the respondent and was appointed in

her role as a FAIS representative on 1 November 2016. The applicant had been in that role for 8 years. The certificate of service issued by the respondent states that her services were terminated on 1 February 2023.

5. She was a Branch Consultant at the branch of the respondent at Junxion Mall Branch. The role of the applicant was, amongst other things, to represent products offered by the respondent to the public, provide information to potential customers regarding those products, attempt to sell same products to such customers, and assist current respondent's clients with their banking needs.
6. During October 2022 the respondent commenced an investigation when the respondent's automated internal reporting systems picked up various irregularities in the accounts opened by the applicant.
7. According to the respondent, the investigation revealed that the applicant had activated numerous bank accounts with her own money and the same accounts were not activated by the customers. The respondent submitted that most of the accounts remained and continue to remain dormant.
8. The record shows that on 11 October 2022, 9 accounts were activated by the applicant personally. These same accounts were opened in August 2022. The applicant transferred various amounts from her personal account to credit the dormant accounts, thereby activating them.

9. On 11 October 2022, 3 accounts were activated and on 17 October 2022 1 account was activated. The applicant transferred money from her daughter's account to the said accounts to activate them. Further, on 11 October 2022 the applicant transferred money from her son's account to activate a dormant account.
10. It is the version of the respondent that the applicant benefitted in respect of the Point of Presence Sales rewards Embedded Value (EV) for the sampled accounts.
11. The applicant provided a written statement dated 12 December 2022 and, in that statement, she admitted that she activated accounts when it is busy.
12. Although the applicant did not deny the conduct of activation of dormant account, she provided a response to the allegations. The applicant submitted that the branch has one Automated Deposit Machine (ADT) and it was difficult for clients to stand in queues twice, the first queuing being opening an account and the second queueing being the ATM branch to activate account. Further, it is the applicant's version that she was preventing a service failure.
13. The respondent's investigation process culminated in charges being preferred against the applicant. The applicant pleaded not guilty but did not dispute that she activated the accounts by transferring her own funds and funds in the account of her children.

14. The applicant was found guilty by the chairperson in the disciplinary hearing and consequently she was summarily dismissed. The applicant approached the Commission for Conciliation, Mediation and Arbitration (“CCMA”) and this process resulted into a settlement agreement.
15. This Tribunal is not concerned with processes falling within the ambit of labour law and its processes. The FAIS Act read together with the FSR Act provides the legal framework for the Tribunal to consider this matter.
16. The debarment process in terms of section 14 of the FAIS Act starts with a notice of intention to debar. More specifically section 14(3)(a) states, amongst other things, that 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;” (own emphasis)*

17. On 13 April 2023 the respondent issued a notice of intention to debar the applicant ("the Notice of Intention"). The Notice of Intention provides grounds and reasons for debarment as required by the FAIS Act.
18. In respect of the grounds, the Notice of Intention states, amongst other things, that the applicant does not meet and/or no longer or comply with the requirements of section 13(2)(a) of the FAIS Act, specifically fit and proper requirement of honesty, integrity and good standing, as provided in Board Notice 194 of 2017.
19. In respect of reasons for debarment, the Notice of Intention provides the factual basis for the intended debarment. In summary, the Notice of Intention provides that the applicant activated not less than 17 dormant accounts by transferring various amounts. The applicant transferred R10.00 in each of the 16 accounts and in one account only R5.00 was transferred.
20. Further, the Notice of Intention states that applicant acted dishonestly when she activated the accounts. Furthermore, the Notice of Intention stated that her action triggered the activation of the accounts, which resulted in the applicant deriving Embedded Value (EV).
21. It is worth noting that the applicant admitted transferring the amounts into the various accounts and therefore activating those accounts.
22. According to the Notice of Intention, the applicant was informed that she is entitled to make submissions within 14 days from the date of the

notice. It is the version of the respondent that on 24 April 2023 the applicant indicated to the respondent that the latter may proceed with the debarment process. This version is not disputed.

23. The applicant raised a number of concerns as part of her grounds for reconsideration in this matter. We have carefully considered same. We found no sound basis in the grounds raised justifying reconsideration of the matter. What is obvious from the submissions of the applicant is, amongst other things, that she does not dispute that she benefitted from the conduct of transferring money in the dormant accounts.
24. The explanations of the applicant that she transferred the money to the various accounts to avoid long queues and poor ratings, do not assist her for the reason that the accounts in question were activated two months later after they have been opened.
25. The applicant was an employee with 8 years of experience in her role and it is not plausible, in our view, that she did not understand the Embedded Value earned process for account activation.
26. The conclusion of the respondent that the applicant's actions were dishonest in that she benefitted financially when she activated the accounts using her own funds to earn commission, is sound.
27. Therefore, we find no sound grounds to interfere with the decision of the respondent to debar the applicant

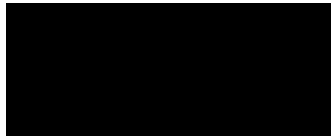
ORDER:

- (a) The application for reconsideration is dismissed.

Signed on the 11th of March 2024



Adv W Ndinisa (Member) and



p.p. _____
LTC Harms (Deputy Chair)