

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2023-103509

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

12 DECEMBER 2025

Judge Dippenaar

In the matter between:

PAULINA BINFA AND ASSOCIATES
T/A PBA FINANCIAL SERVICES CC

APPLICANT

and

BEVERLEY DABROWA
FINANCIAL SERVICES TRIBUNAL
M G MASHABA

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploading it onto the electronic platform. The date and time for hand-down is deemed to be 10h00 on the 12th of DECEMBER 2025.

DIPPENAAR J:

[1] This application concerns the judicial review of a decision of the Financial Services Tribunal in terms of which the debarment of the first respondent was set aside. The application is brought under s 6(2) read with s 6(3) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

[2] The applicant, PBA Financial Services CC, conducts business as a registered financial service provider and is the former employer of the first respondent, Mrs Beverley Dabrowa, a registered representative licensed to sell life insurance, health insurance, pension benefit investments and short-term insurance. She was employed on 1 July 2017 as a registered representative of the applicant and key individual and was summarily dismissed by the applicant on 1 July 2022 on various counts of misconduct. She opposed the application, seeking its dismissal as an abuse of process, together with a punitive costs order.

[3] The second respondent is the Financial Services Tribunal ('the Tribunal'), an authority established in terms of s 219 of the Financial Sector Regulation Act 9 of 2017 (the 'FSR Act'). The third respondent, Mr Mashaba was the chairperson of the Tribunal panel that made the impugned decision under s 230 of the FSR Act. The second and third respondents did not participate in the proceedings and did not provide any record of the proceedings before the Tribunal.

[4] The background facts are not contentious. Pursuant to a complaint laid by the applicant following the first respondent's dismissal, debarment proceedings followed wherein the applicant and first respondent respectively presented evidence, including documentary evidence. The first respondent elected not to have legal representation and did not call any witnesses.

[5] The first respondent was debarred by recommendation of the decision maker in the debarment proceedings, Ms D Julyan; in terms of s 14 of Financial Advisory and Intermediary Sector Act 37 of 2002 (the 'FAIS Act'). In her ruling, Ms Julyan considered the standards of fit and proper in terms of s 13(2) of the FAIS Act, Board Notice 194 of 2017, the applicant's employment contract and the industry standards relating to honesty and integrity. Ms Julyan held that the first respondent exhibited dishonesty not only in her actions dating back to 2020 but also in her submissions and representations in respect of her proposed debarment. She held that the first respondent had acted unprofessionally and had abused her position of trust. It was concluded that the first respondent had been dishonest to the applicant and to its compliance officer. It was found that the contraventions of the first respondent had been done knowingly and over a long period of time with financial motivation.

[6] Dissatisfied with the result, the first respondent sought a reconsideration before the Tribunal in terms of s 230 of the FSR Act. A hearing took place on 15 March 2023. The Tribunal was comprised of three members and was chaired by the third respondent. On 21 April 2023, the Tribunal produced its decision. Its order provided:¹

(a) Applicant's application for the admission of further evidence is refused;

(b) Respondent's application for the admission of further evidence is refused;

¹ In terms of s 234(1)(a) of the FSR Act.

(c) The application for reconsideration is granted and the Respondent's debarment is set aside'.

[7] The present review is aimed at this order. The nub of the dispute centres around what constitutes fit and proper standards.

[8] The applicant sought orders:

(1) Reviewing and setting aside the second respondent's decision dated 21 [23] April 2023;

(2) a substitution of the decision with an order refusing the first respondent's application for a reconsideration and confirming the debarment of the first respondent;

(3) Alternatively a referral of the matter back to the second respondent for a determination de novo before a new panel'.

(4) An order directing the first respondent to pay the costs of the application.

[9] In terms of s 235 of the FSR Act: *'Any party to proceedings on an application for reconsideration of a decision who is dissatisfied with an order of the tribunal may institute proceedings for a judicial review of the order in terms of the Promotion of Administrative Justice Act or any applicable law'.*

[10] It was uncontested that all internal remedies were exhausted as the reconsideration application constituted an internal remedy as envisaged in s 7(2) of PAJA.

[11] The applicant relies on s 14 of the FAIS Act, in terms of which service providers such as the applicant have a peremptory obligation to take steps to debar a representative who does not comply with the fit and proper requirements.

[12] In its application papers, the applicant relies on four grounds of review. First, that the Tribunal's decision was influenced by a material error of law in terms of s 6(2)(d) of

PAJA in failing to properly interpret the jurisdictional elements which justify the debarment of a financial services representative and in so doing failed to make a decision in terms of s 6(2)(g) read with s 6(3) of PAJA. Second, irrelevant considerations were taken into account and relevant considerations were not taken into account in the taking of the decision in terms of s 6(2)(e)(iii) of PAJA. Third, that the Tribunal's decision was unreasonable, was not rationally connected to the information before it in terms of ss 6(2)(f)(ii)(cc) and (dd) of PAJA. Fourth, that the Tribunal was biased against the applicant. That ground was, wisely in my view, not advanced at the hearing, given that no objective facts supporting such ground was presented by the applicant. A reasonable suspicion of bias is tested against the perception of a reasonable, objective and informed person.² It is thus not necessary to consider the fourth ground further.

[13] The first respondent opposed the application on various grounds. In sum she disputed that any of the review grounds had merit and contended that the application constitutes an abuse of process as the applicant is attempting to utilise the debarment process as a mechanism to satisfy its contractual and other grievances against the first respondent and as a retaliation against her, which is entirely unrelated to the fitness and competency requirements of a financial services representative. According to the first respondent, the applicant's Mrs Alcock is embarking on a personal vendetta and courts should guard against such kind of oppressive and abusive conduct. On this basis, dismissal of the application was sought with a punitive costs order on the scale as between attorney and own client. It was further argued that the application was launched *mala fide* and with ulterior motive and was frivolous and vexatious. During argument, the first respondent supported the findings and reasoning of the Tribunal.

[14] It was undisputed that the evidence placed before the Tribunal consisted of the applicant's affidavit, the first respondent's affidavit, correspondence between the first respondent and a Mr Mike Wilson of Bannockburn Financial Services (Pty) Ltd, invoices

² *Electoral Commission of South Africa v Umkhonto Wesizwe Political Party and Others* [2024] ZACC 6 para 97.

from the first respondent to Mr Wilson for referral commission and proof of payments from Mr Wilson to the first respondent is pertaining to the said invoices.

[15] A copy of the reconsideration application was attached to the first respondent's answering papers. It is unclear whether all the relevant documents were placed before the court. Although the applicant's attention was drawn to the need to place a full record before the court in the answering papers, the applicant did not do so, instead contending in reply that the first respondent was not prejudiced as it was in her possession. That contention disregards the importance of placing the full record before the court in the review proceedings, especially where a substitution order is sought, as was the primary relief sought by the applicant. The applicant did not at the hearing seek a postponement or an opportunity to supplement her papers by the provision of the full record. The application was argued on the basis of the papers as they stood and the applicant must be held to that election.

[16] According to the applicant, the Tribunal's interpretation of the requirements for debarment resulted in a material influence on the outcome of the application, which interpretation prevented it from the proper exercise of its discretion and ultimately failing to make a decision on the pertinent aspect of the dispute. The Tribunal failed to take into consideration the requirements of a fit and proper person of which various pieces of legislation set out the requirements. Put differently, the applicant submitted that the Tribunal failed to take into consideration the requirements of a fit and proper person, which underpins a debarment enquiry and applied the wrong test by finding the issue was a contractual one and dealing with the reconsideration application on that basis.

[17] Reliance was placed on *Hamilton Smith*,³ wherein the Appeal Board analysed the relevant fit and proper requirements. They are well known and do not require restatement.

³ *Hamilton Smith and Company v the Registrar of Financial Markets*, an Appeal Board decision of 6 September 2003.

The same approach was adopted in *Picard*⁴ and *Davis*.⁵ In each of these matters, the fit and proper requirements were extensively dealt with and applied to the facts.

[18] In reaching its conclusion, the Tribunal reasoned:

[23] During the hearing a lengthy debate ensued with Ms N Gxilishe (the applicant's representative) concerning the manner in which the grounds for debarment were formulated by the respondent.

[24] Furthermore it appeared to us that most of the charges, if not all, preferred against the Applicant's breach of her employment contract, save for alleging [that the Applicant] potentially materially contravening the FAIS Act in representing another FSP by visiting a Client with them in lieu of setting up business.

[25] However, in the ruling by the decision maker, reliance is placed on sections 14(1) and 13(2) of the FAIS Act, read with Board Notice 194 of 2017, in particular sections 9(1)(a)(ii), 9(3) and 10 thereof. The Applicant's debarment was, as per the ruling, premised on the fit and proper requirements as stipulated in section 13(2) of the FAIS Act read with section 14(1)(iii) thereof. This is however not apparent from the grounds of debarment as communicated to the Applicant.

[26] In any event it was the Respondent's case during the debarment proceedings and before the Tribunal, that the conduct of the Applicant in being party to the aforesaid 'arrangement' i.e. referring clients of the Respondent to Mr Wilson (another FSP), receiving a commission for doing so and by failing to disclose it to the Respondent, was dishonest.

[27] The issue for determination by the Tribunal is whether the Applicant's failure to disclose the referrals to the Respondent's compliance officer as required by her employment contract and the fact that she earned a referral commission for doing so, is dishonest for purposes of the FAIS Act. This very same question was posed to the Respondent during the hearing. The Respondent could not point to a single provision in the FAIS Act, or other legislation, that prohibits the Applicant from referring clients to another FSP and earning a referral commission for doing so. Reference was only made to the prohibitions as contained in the Applicant's employment contract....

⁴ *RJ Picard v Registrar of Financial Services* Appeal Board Decision under case no 196153.

⁵ *Davis v AC& E Engineering Managers (Pty) Ltd FSP4/2018*, an Appeal Board decision of the Financial Services Board.

[29]...Outside the scope of the Applicant's employment contract, the Respondent has not been able to point to a single regulatory provision that requires the Applicant to disclose the referral arrangement.

[30]...The evidence proves that the Respondent[sic] acted in breach of her employment contract with the respondent...However a dismissal cannot lead to an automatic debarment of a representative.

[31] In the result, we are not satisfied that debarment was justified. The guidelines on debarments clearly stipulate that debarment should not be used by FSP's to satisfy contractual or other grievances against a representative, unrelated to fitness or competency requirements. Debarment proceedings should not be abused for ulterior purposes.'

[19] It is well established that an error of law arises if the repository of public power misconstrues the enabling provisions or misapplies it. An error of law must be material and causally related to the decision reached and must affect the decision reached, otherwise it is immaterial and incapable of tainting the decision.⁶

[20] Although raising the issue of dishonesty in one context,⁷ the Tribunal did not deal in any detail with the relevant fit and proper requirements. The fit and proper requirements were dealt with in some detail in the initial ruling of Ms Julyian in considering the first respondent's conduct. However, the Tribunal did not engage in detail with the conduct of the first respondent as measured against such criteria. Instead, the Tribunal focused on the source of the applicant's complaint. In doing so, it incorrectly limited the scope of the enquiry and ignored both the test pertaining to fit and proper requirements and the relevant facts in concluding that the applicant's complaint pertained to a contractual grievance. The Tribunal did not engage with the principles in *Hamilton Smith* at all, nor was the conduct of the first respondent measured against the relevant principles.

⁶ *S Sayed obo OM v HPSCA and Others* (21310/2024) [2024] ZAGPPHC 905.

⁷ Tribunal decision, paras 26-27.

[21] In so doing, the Tribunal materially erred in applying the necessary criteria, which directly affected its decision. I conclude that the applicant has established a material error of law and that this ground of review must succeed.

[22] In any event, even if the Tribunal's approach is not to be elevated to a material error of law it suffices for purposes of the second ground of review raised. The applicant contended that the Tribunal failed to take relevant considerations into account and took irrelevant considerations into account, thus not considering all the evidence before it. It must be shown that the Tribunal failed to apply its mind to the relevant issues. The relevant principles are set out in *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Limited and Another*⁸ and it is not necessary to repeat them.

[23] The Tribunal identified the issue for determination as: '*whether the Applicant's failure to disclose the referrals to the Respondent's compliance officer as required by her employment contract and the fact that she earned a referral commission for doing so, is dishonest for purposes of the FAIS Act*'. I agree with the applicant that this is not the issue for determination. Rather it was but one of the applicant's complaints regarding the events which occurred that the Tribunal had to consider in order to come to a decision as to whether the first respondent was a fit and proper person and whether her debarment was appropriate.

[24] The Tribunal impermissibly narrowed the scope of the dispute to non-disclosure aspects which if determined in isolation lead to the conclusion that the case made out by the applicant was one relating to a mere breach of contract which could be sanctioned by dismissal as opposed to debarment. The Tribunal found that the reason for debarment mostly related to her breach of contract, working contrary to company policy or breaching

⁸ *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Limited and Another* 1988 (3) SA 132 (A)

clauses of her employment, without taking the circumstances and the conduct of the first respondent in the context of her honesty into account.

[25] The application cannot be characterised as constituting an abuse of process as contended by the first respondent. The first respondent has a case to answer. The approach adopted by the Tribunal was superficial and ignored the substance and underpinning implications of the applicant's complaints.

[26] I am satisfied that on the facts presented, the Tribunal did not take all relevant facts and considerations into account and did not properly consider or interpret the requirements of 'fit and proper' for purposes of debarment. In doing so, it ignored the necessary jurisdictional requirements for debarment and did not properly interpret them. Seen cumulatively these constitutes sufficient grounds to set aside the decision of the Tribunal.

[27] Lastly, the applicant contended that the Tribunal's decision was not reasonable nor rational. I am not satisfied that the applicant has made out a proper case for review on this basis. Given that the first two grounds advanced are dispositive of the application, it is not necessary to delve into this issue further.

[28] I conclude that the application must succeed and that the Tribunal's decision of 21 April 2023 falls to be reviewed and set aside.

[29] The applicant submitted that this court should substitute its decision for that of the Tribunal and dismiss the reconsideration application. I am not satisfied that the full record was presented to court or that all the relevant facts are before the court. The Tribunal dismissed the respective parties' applications for leave to introduce further evidence after the debarment hearing. That evidence pertained to corroboration of the first respondent's version and additional emails evidencing transgressions by the first respondent, sought to be introduced by the applicant.

[30] In terms of s 232(5) of the Financial Sector Regulation Act 9 of 2017, which deals with reconsideration proceedings: *'The person presiding over a panel – (a) may, on good cause shown, by order, direct a specified person to appear before the panel at a time and place specified in the order to give evidence, to be questioned or to produce any document'*. It was thus open to the chairperson of the Tribunal panel to utilise this provision and call for oral evidence. In terms of the Rules of the Tribunal it has the power to call for oral evidence, albeit in exceptional circumstances.

[31] In this case, evidence was thus far produced on paper. There are contradictory and/or conflicting versions which can only be clarified with the hearing of oral evidence. There are also inconsistencies in the version of the first respondent and the documentary evidence. Debarment is a serious matter, both from the perspective of the first respondent and from the perspective of public interest. I am not satisfied that this court has sufficient evidence before it to substitute the Tribunal's decision with one that does justice to the parties concerned. I am further not satisfied that all the relevant facts have been fully interrogated.

[32] Various considerations must be taken into account in relation to the granting of a substitution order. They are: (i) Is the court in as good a position and accordingly as well qualified as the original authority to make the decision? (ii) Is the result a foregone conclusion, and it would merely be a waste of time to order the Tribunal to reconsider the matter? (iii) Will the additional delay cause unjustifiable prejudice? (iv) Has the Tribunal exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again? In my view the answers to these questions all point to a conclusion that a substitution order would not be appropriate.

[33] Substitution relief should only be granted in a clear case and if exceptional circumstances are shown.⁹ No case was made out by the applicant for the existence of

⁹ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (10) BCLR 1199 (CC).

special circumstances. As held by Plasket J in *Intertrade*,¹⁰ *‘the availability of proper and adequate information and institutional compliance of a court to take the decision for the decision maker are necessary prerequisites that must be present apart from exceptional circumstances’*.

[34] It is trite that remittal is almost always the prudent and proper course.¹¹ In this case, remittal is the most appropriate and fair remedy. Although unusual, the Tribunal has the power to hear oral evidence. Its dismissal of both parties’ applications to introduce additional evidence indicates that there is additional evidence which may well impact on arriving at a proper outcome. The ultimate consequences may be dire, especially seen from the perspective of the first respondent. Given the factual disputes on the parties’ respective versions, the hearing of oral evidence would clarify them. The Tribunal constituted by a different panel, can and should use the powers afforded to them to consider the full and true facts in order to make a proper decision. Such relief will be granted.

[35] Costs follow the result. The parties agreed that scale B would be appropriate, given the complexities which arose in the application. I agree.

[36] I grant the following order:

[1] The order of the Financial Services Tribunal (Tribunal) of 21 April 2023 is reviewed and set aside;

¹⁰ *Intertrade Two (Pty) Ltd v MEC, Roads and Public Works, Eastern Cape* [2007] ZAECHC 149 at para 43

¹¹ *City of Johannesburg Metropolitan Municipality and Others v San Ridge Heights Rental Property (Pty) Ltd* [2023] ZASCA 109; *Trencon* para 42.

[2] The matter is remitted to the Tribunal, constituted by a different panel, for reconsideration and a determination *de novo*, which may include the hearing of oral or other evidence insofar as there are irresolvable factual disputes on the papers;

[3] The first respondent is directed to pay the costs of the application on scale B.



EF DIPPENAAR
JUDGE OF THE HIGH COURT
GAUTENG JOHANNESBURG

HEARING

DATE OF HEARING : 03 NOVEMBER 2025

DATE OF JUDGMENT : 12 DECEMBER 2025

APPEARANCES

APPLICANT'S COUNSEL : MS K HOWARD

APPLICANT'S ATTORNEYS : VERMEULEN ATTORNEYS

RESPONDENT'S COUNSEL : MR S VILJOEN

RESPONDENT'S ATTORNEYS : MAYBERRY ATTORNEYS INC