

THE FINANCIAL SERVICES TRIBUNAL

CASE NO: A37/2021

In the matter between:

JOHN HENRY ELMSLIE MURRAY

Applicant

and

FINANCIAL SECTOR CONDUCT AUTHORITY

Respondent

Tribunal: LTC Harms (Chair), Adv Michelle le Roux SC and Adv Salmé Maritz

For the applicant: Mr Tendayi Kadungure

For the respondent: Mr XL Mthethwa

Date of Virtual Hearing: 10 March 2022

Date of Decision: 4 April 2022

Summary: Application for Reconsideration in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 ("FSR Act") to debar a representative in terms of section 153 of the FSR Act: Non-compliance with section 8A the FAIS Act read with the Fit and Proper requirements of honesty and integrity, determined under section 6A of the FAIS Act read with section 8(1) of Board Notice 194 of 2017.

DECISION

A. INTRODUCTION

1. The Applicant, Mr John Henry Elmslie Murray, applied for the reconsideration of a decision taken by the Financial Sector Conduct Authority ("the FSCA or Respondent"), dated 6 September 2021, to debar him in terms of section 153 of the FSR Act.

B. RELEVANT BACKGROUND FACTS AND CHRONOLOGY OF EVENTS

2. Mr Murray was employed at SA Brokers CC (FSP 44349) as a financial broker/advisor between June 2016 to April 2017..
3. Mr Murray worked under the direct supervision and direction of Mr Wilfred Hale ("Mr Hale"), the owner of SA Brokers CC, and he was a representative under his (Mr Hale's) licence. Ms Saadia Mohamed was the personal/administrative assistant of Mr Murray during this time and she acted on his instructions and not on those of SA Brokers CC.
4. In 2016 Mr Hale, Mr Murray, and a Ms Karen Helen Warren met several times and a transaction was concluded in terms of which SA Brokers CC would render certain financial services to Ms Warren. Ms Warren is the aunt of the girlfriend of Mr Murray.
5. On 12 September 2016 a blank client consent form ("initial client consent form") was emailed by Mr Murray to Ms Warren, requesting her to complete it and send it back to him which she did. The form confirmed the engagement of SA Brokers, Mr Wilfred Hale and Mr Murray of SA Brokers CC as her financial advisor. The appointment form provided for three options, the last being a consent to obtain information on her behalf. As sent and received, the form was only ticked in one block to indicate that Ms Warren consented to Mr Murray obtaining information on her behalf in respect of her personal investment portfolio and the consent would remain effective until cancelled in writing. Ms Warren inserted her full names and her ID number and placed an initial against the ticked block and dated and signed the form. She returned it to Mr Murray by return email.
6. Mr Hale stated that during late 2017, he convened a meeting with Ms Warren to discuss her general portfolio, when he came across a few documents that appeared to be altered versions of the initial client consent form. There were two. The one version contained ticks and initials against the remaining two blank boxes. These revoked all existing appointments of previous intermediaries and that "advice received [would] entitle the Financial Advisor to any future review fee/commissions that may be payable under our various investment/policies."
7. The second was one where Ms Warren's name was deleted and "Warplus" inserted. No additional ticks or initials were added, which means that it was limited to obtaining

information on her behalf in respect of her personal investment portfolio. Warplas [not Warplus] Share Trust is a trust of which Ms Warren was a co-trustee.

8. On 4 December 2017 Ms Warren deposed to an affidavit in which she *inter alia* stated as follows:

8.1 *"SA Broker's Manager, Mr Tyrin Hale presented her with copies of client consent forms in her name and allegedly signed by her although they had visibly been altered and amended.*

8.2 *It is to be noted from Annexure "A" [the Warplus form] that HENRY fraudulently altered the Client Consent Form signed by me in my personal capacity to provide him with additional authorities not expressly authorised by myself by forging my initials and placing ticks next to the additional authorities (sic). HENRY further fraudulently altered my personal authority by deleting my name and inserting "WARPLUS" in an endeavour to allow him consent and authority to obtain information pertaining to the WARPLAS SHARE TRUST (incorrectly cited by him as 'WARPLUS')."*

9. Since the second altered client consent form was not counter-initialled or signed by a second trustee where the deletion of Ms Warren's name and the insertion of "WARPLUS" was, despite it being a requirement in terms of the WARPLAS Deed of Trust gave Ms Warren an additional reason to deny that she authorised it, let alone misspelled the name of the trust. Ms Warren further stated that she received a call from Mr David Burke from Standard Bank on or about 11 October 2016 enquiring if she had authorised Mr Murray to obtain information in respect of the Warplas Share Trust. She told him that she had not.
10. It is not disputed that between 23 September 2016 and 3 October 2016 multiple e-mails were sent to Stanlib (who did not hold the trust account – Standard Bank did) from Mr Murray's laptop on his e-mail address namely henry.murray@sabrokers.biz, to which *inter alia* the altered client consent forms were attached and in which a copy of the policy schedule of the "Warplus" trust was requested.
11. Mr Murray resigned from SA Brokers CC on 4 of April 2017. Since 2017 he is employed with Proper Group Health and Wealth.

12. Pursuant to her affidavit of 4 December 2017, Ms Warren filed a complaint at the FSCA against Mr Murray based on the above allegations.
13. Mr Murray contended that the above e-mails could have been sent by anyone at SA Brokers CC as his laptop from which the above documents were sent could easily have been assessed by various individuals including Ms Mohamed, Mr Adrian Stander or by Mr Hale.
14. Mr Murray laid criminal charges and instituted civil claims (as well as a CCMA dispute) against SA Brokers CC (Mr Hale), which charges pertained to defamation, theft and salary disputes. The criminal charges have been withdrawn by the prosecuting authorities and a *Nolle Prosequi* was issued. The action against Ms Warren was presumably also for defamation.
15. Pursuant to the complaint filed by Ms Warren the following notices, letters and applications were exchanged between Mr Murray and the FSCA:
 - 15.1 On 7 March 2018 the precursor of the FSCA informed Mr Murray of its intention to debar him in terms of the provisions of section 14A of the FAIS Act. He was afforded an opportunity to respond by no later than 30 March 2018. However, no response was received.
 - 15.2 On 16 July 2018 the FSCA sent a Notice of Intention to issue a debarment order in terms of section 153 of the FSR Act (the FSR Act came into effect on 1 April 2018) to Mr Murray in terms of which the FSCA intended to prohibit him for a period of 2 (two) years from rendering financial services as defined in section 1 of the FAIS Act.
 - 15.3 On 16 August 2018 Mr Murray responded thereto (2 pages).
 - 15.4 On 31 October 2018 the FSCA informed Mr Murray that the Authority has decided not to proceed with the intended debarment due to a lack of evidence.
 - 15.5 On 7 April 2021 the FSCA sent a Notice to Issue a Debarment order in terms of section 153 of the FSR Act to Mr Murray and informed him that new information which was

not previously disclosed has now been brought to the Authority's attention and that it warrants that this matter be investigated afresh. The new information pertained to an email, dated 3 October 2016, which was sent to Stanlib and which indicated that the "Warplus" email was received at the address of instructions@stanlib.com on 3 October 2016 at 10:17 am. Furthermore, the sender of the e-mail referred to was likely Mr Murray as it was sent from the following email address: henry.murray@sabrokers.biz. The email address was the one used by Mr Murray during his employment at SA Brokers CC and the attachment was likely that which indicated that the name on the consent form was altered from Ms Warren's full name to "Warplus". In terms of the intended debarment order Mr Murray was informed that he will be prohibited from rendering financial services for a period of 7 (seven) years. Mr Murray was invited to respond thereto by no later than close of business on 15 May 2021.

- 15.6 Mr Murray filed his response to the abovementioned Notice (11 pages including annexures thereto).
- 15.7 On 6 September 2021 the FSCA sent its decision to debar and the debarment order in terms of section 153 of the FSR Act to Mr Murray. In terms of the Debarment Order Mr Murray is debarred for a period of 5 (five) years subject to specific conditions.
- 15.8 On 22 September 2021 Mr Murray launched this application for reconsideration of the decision of the FSCA, dated 6 September 2021, in terms of section 230 of the FSR Act (17 pages).
- 15.9 On 22 September 2021 Mr Murray launched an application for suspension of the above decision (7 pages). The FSCA filed its submissions in opposition to the application for the interim relief on 4 October 2021. On 11 October 2021 Mr Murray filed his reply to the opposition for suspension of decision and applied to introduce further evidence in terms of section 232(5) of the FRS Act which included a further affidavit ("the second affidavit") deposed to by Ms Warren, dated 6 October 2021 (11 pages including annexures thereto). We will address the content of this second affidavit hereinunder.

- 15.10 On 22 October 2021 the FSCA replied to Mr Murray's application to introduce further evidence and requested that the application be dismissed.
- 15.11 On 2 November 2021 Mr Murray filed his reply to the Respondent's opposition to lead further evidence (10 pages). On 3 November 2021 Mr Murray filed his Notice to Augment the grounds for reconsideration (7 pages).
- 15.12 On 8 November 2021 the Deputy Chairperson, LTC Harms J, dismissed the Applicant's Application for Suspension in terms of section 231 of the FSR Act.
- 15.13 On 22 September 2021 the Applicant filed his Application for Reconsideration (17 pages) of the decision of the FSCA and on 23 February 2022 he filed his Notice to Augment the Record regarding this application (26 pages).

C. FINANCIAL SECTOR CONDUCT AUTHORITY'S DECISION

We do not intend to repeat the full decision therein, but only the relevant part thereof:

16. It is contended by the Respondent that the Applicant no longer complied with the requirements of section 8A of the Financial Advisory and Intermediary Services Act, 37 of 2002 ("the FAIS Act") read together with the Fit and Proper requirements, particularly the character qualities of honesty and integrity, determined under section 6A of the FAIS Act read with section 8(1) of the Board Notice 194 of 2017.
17. The Respondent's decision is based on the fact that between 26 September 2016 and 3 October 2016 Mr Murray altered the initial client consent form of Ms Warren by forging her initials and applying it next to additional blocks provided for therein without her knowledge and consent and by deleting Ms Warren's full names and replacing it with WARPLUS to fraudulently obtain information on the Warplas Share Trust of which Ms Warren is a trustee. Based on the above the FSCA found that Mr Murray's conduct amounted to dishonesty, and he lacked integrity.

18. The FSCA then imposed a debarment order in terms of which Mr Murray is prohibited for a period of 5 (five) years to furnish any financial advice or rendering financial services to customers subject to specific conditions.

D. APPLICANT'S GROUNDS FOR RECONSIDERATION

19. The main grounds relied on by the Applicant in his reconsideration application (including his point *in limine*) are as follow:

19.1 POINT *IN LIMINE*¹

19.1.1 The Applicant contended that the FSCA committed a litany of administrative/procedural irregularities. At the nub of this criticism is the fact that no formal hearing was held (Applicant alleges a factual dispute), that the principles of the *audi alterem partem* rule and natural justice were not adhere to, that the Applicant was denied his basic rights in terms of sections 32, 33, 36 and 39 of the Constitution, Act 108 of 1996, as amended, that the FSCA failed to convene and conduct a proper enquiry, that he was not provided with all the documentation, that expert evidence was not obtained by the FSCA and that the FSCA was impartial, unfair and arbitrary.

19.2 MERITS²

19.2.1 Mr Murray vehemently denied committing any fraud, forgery, misconduct or being a co-conspirator or accomplice to any such illegal activity or other illegal and unlawful activity, which included altering the client consent form as alleged.

19.2.2 He stated that he has never been shown the original client consent form and therefore could not appoint a handwriting expert to analyse it.

19.2.3 His laptop was always in an open space and could easily been accessed by Ms Mohamed, Mr Stander and Mr Hale.

¹ Application for Reconsideration, para 1 – 20.2

² Application for Reconsideration: Application on Merits, para 1 - 24

- 19.2.4 He alleged that Mr Hale committed perjury by stating in his affidavit (par 7) that Mr Murray consulted with Ms Warren on 16 October 2017 as he has left the employment of SA Brokers CC on 4 April 2017.
- 19.2.5 That the FSCA ignored the fact that no prejudice was suffered by any party.
- 19.2.6 That the findings of the Respondent constituted an administrative action and that the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") is applicable.
- 19.2.7 That Mr Murray has the constitutional right to a fair trial.
- 19.2.8 That the evidence of Ms Warren as set out in her second affidavit, dated 6 October 2021, should be admitted, and considered.
- 19.2.9 It was further submitted in the Applicant's heads of argument that the matter is *res judicata*.

E. TRIBUNAL'S DECISION

- 20. Against this background, before us is Mr Murray's application for the reconsideration of the decision by the Respondent, dated 6 September 2021, to debar him in terms of section 153 of the FSR Act.
- 21. Section 6A(2)(a) of the FAIS Act gives a definition, by way of a list, of what "*fit and proper*" includes:
 - "(2) *Fit and proper requirements may include, but are not limited to, appropriate standards relating to –*
 - (a) *personal character qualities of honesty and integrity.*
- 22. In terms of section 7(1) of Board Notice 194 of 2017 ("the Board Notice") the fit and proper requirements relating to honesty, integrity and good standing apply to all FSPs, key individuals and representatives. At all relevant times Mr Murray was a representative of the FSP and as such these requirements applied to him.
- 23. Section 8(1)(a) of the Board Notice states that a person referred to in section 7(1) must be a person who is –
 - (a) honest and has integrity.
- 24. *In casu*, the Applicant was debarred on the grounds of dishonesty and lack of integrity due to forgery and fraud.

25. Before addressing the merits of this application it is necessary to deal with the evidence of Ms Warren. On 15 February 2021 the Chairperson of the panel, LTC Harms J, made an order in terms of section 232(5)(a) of the FSR Act directing Ms Warren to appear before this panel on 10 March 2022 via MS Teams.
26. The main reason for the above order was that Ms Warren deposed to 2 (two) contradictory affidavits. The first affidavit was deposed to on 4 December 2017 and the second affidavit was deposed to on 6 October 2021, which is 4 years since Ms Warren's first affidavit.
27. In her first affidavit, dated 4 December 2017 she has stated under oath, *inter alia*, the following:
 - 27.1 That on 16 October 2017 she met with Mr Hale who presented her with copies of client consent forms allegedly signed by her which had been visibly altered. She stated that she was not aware of these alterations.
 - 27.2 That on 12 September 2016 when Mr Murray emailed her the client consent form regarding her personal investment portfolio only the last acknowledgement was ticked, indicating that she acknowledged that the consent to obtain information on her behalf will remain effective until cancelled by her in writing, which client consent was sent back to Mr Murray on the same day.
 - 27.3 That she noted from the altered client consent form that Mr Murray fraudulently altered the client consent form signed by her in her personal capacity to provide him with additional authorities not expressly authorised by her by forging her initials and placing ticks next to the additional authorities and that Mr Murray further fraudulently altered her personal authority by deleting her name and inserting "WARPLUS" in an endeavour to allow him consent and authority to obtain information pertaining to the WARPLAS SHARE TRUST (incorrectly cited by him as 'WARPLUS'). Further that such amendment has been affected in a completely different handwriting to hers and has not been counter-initialled by her, nor signed by a second Trustee, as required.
 - 27.4 That she did not give Mr Murray authority to obtain any information pertaining to the WARPLAS SHARE TRUST.
 - 27.5 That she recalled that Mr David Burke from Standard Bank contacted her on 11 October 2016 to enquire as to whether she had authorised Mr Murray to obtain

information in respect of the WARPLAS SHARE TRUST, which she denied. She confirmed that Standard Bank refused to supply Mr Murray with the policy schedule.

- 27.6 That she regarded Mr Murray's conduct in a very serious light and as a complete breach of fiduciary trust and that SA Brokers CC should take all necessary steps to prosecute Mr Murray for the forgery and fraudulent conduct perpetrated by him.
28. Then in Ms Warren's second affidavit, dated 6 October 2021 she stated, *inter alia*, as follows:
- 28.1 When she was presented with the altered consent form, she did not consider the correctness or validity of the allegations in that it was Mr Murray who altered the document. Instead, she accepted the version that was put forth by Mr Hale.
- 28.2 That in hindsight, she believed that the representation made by both Mr Wilfred Hale and Mr Tyrin Hale were misrepresentations meant to mislead her and that she acted on impulse in not questioning these wrongful allegations.
- 28.3 That she viewed a sample of Mr Murray's handwriting, by way of a letter that he wrote to her niece, Kate Peniston on 15 January 2021 and whilst she is not a handwriting expert, it appears that the writing on the altered document differs from that of Mr Murray's handwriting.
- 28.4 That she never discussed the WARPLAS TRUST with Mr Murray. She only discussed it with Mr Hale.
- 28.5 That Mr Murray did not meet with her on the 16th of October 2017, but that she met with Mr Tyrin Hale.
29. From the above affidavits Ms Warren has made contradictory statements which are incompatible and in clear opposition to one another, which *prima facie* renders her evidence unreliable. In her first affidavit she accused Mr Murray of wrongful conduct and in her second affidavit she retracted from her previous statements.
30. At all relevant times the information now tendered in her second affidavit was within her knowledge at the time when she deposed to her first affidavit and should have been disclosed to the FSCA when she filed her complaint.
31. During the hearing it became apparently clear that the crux of Mr Warren's evidence was that she changed her story in exchange for Mr Murray withdrawing an action against her. This

“deal” between them weighs heavily against Mr Murray as it reflects negatively on his honesty and integrity and thus the debarment should stand.

32. Furthermore, Ms Warren’s opinion based on her analysis and comparison of Mr Murray’s handwriting on the altered client consent form with that on the said letter from her niece is unqualified. She is not a handwriting expert and as such this evidence is rejected.
33. Having considered the evidence of Ms Warren this tribunal finds that Ms Warren was an unreliable and evasive witness who had no compunction in lying and her evidence had no probative value. Counsel did not even refer to her any further during argument. Eventually, her conclusion in both affidavits as to who committed the fraud was based on deduction or opinion. We do not rely on either statements for our decision.
34. In respect of the merits of this application this tribunal considered the following:
 - 34.1 A blank client consent form emailed to Ms Warren on 12 September 2016, requesting that she complete it and send it back to Mr Murray. That form was only ticked/marked where Ms Warren had to consent to Mr Murray obtaining information on her behalf and the said client consent form would remain effective until cancelled in writing.
 - 34.2 An authorised client consent form duly completed by Ms Warren by inserting/writing her full names, namely KAREN HELEN WARREN and signed by her on 12 September 2016, which she initialled only next to the tick referred to above.
 - 34.3 An altered client consent form with Ms Warren’s full names substituted (scratched out) and replaced with “WARPLUS” and
 - 34.4 An altered client consent form which was ticked and initialled next to all provisions of the consent (all 3 blocks provided for therein). Ms Warren’s initials were forged.
 - 34.5 It is important to note that the second block/consent provided for in the above client consent form would entitle the financial advisor to any future review fees/commissions that would be payable under various investments/policies.

34.6 In is not in dispute that an email, dated 3 October 2016 was sent to Stanlib, which indicated that the email was received at the following address: instructions@stanlib.com on 3 October 2016 at 10:17 am. Furthermore, the sender of the e-mail referred to Mr Murray and was sent from the following email address: henry.murray@sabrokers.biz. The email address was the one used by Mr Murray during his employment at SA Brokers CC.

34.7 On a closer inspection of the email sent on 3 October 2016 the following appears:

6202260029983 – WARPLUS

Mon, Oct 3, 2016, at 10:16 AM

From: HENRY MURRY <henry.murray@sabrokers.biz>
To: Contact@stanlib.com, brokersupport@stanlib.com, instructions@stanlib.com

Good day,

Please find attached Consent Form.

Client, Karen Warren has a share in this trust.

WARPLUS – Quantum Plus – please send me the policy schedule soonest.

Regards,
Saadia Mohamed
Personal Assistant to:
HENRY MURRAY

34.8 From this email it is clear that the altered client consent form was attached. In the message it is mentioned that Ms Warren has a share in the trust. The heading (subject) of the email referred to WARPLUS and it was requested from Stanlib to provide the sender with the policy schedule of WARPLUS.

34.9 On the same day, and at 10:17 am, Stanlib replied on email address: instructions.stanlib@noreply@stanlib.com by sending an automated Acknowledgement of Receipt Notification to the sender's email address, namely henry.murray@sabrokers.biz.

34.10 The above is *prima facie* proof that the altered client consent form was sent from Mr Murray's laptop using his email address. The said email was sent either by Mr Murray or by his assistant Ms Mohamed on Mr Murray's instructions. Ms Mohamed deposed

to an affidavit, on which Mr Murray relied, in which she denied that she has ever sent a client consent form for "Warplus" or that it is her handwriting on the altered client consent form. It is highly improbable that Ms Mohamed has sent the above email as she would not have received any gain, financial or otherwise from doing so. On the other hand, Mr Murray was the financial advisor of Ms Warren and would have received a financial gain (review fees/commissions).

- 34.11 There is no evidence that Mr Hale or Mr Stander sent the above email, as alleged by Mr Murray. Mr Hale has stated that Mr Murray's password on his computer was at all relevant times protected and that only Mr Murray and Ms Mohammed had access to it, something not in dispute and on which the FSCA relied. He further stated that SA Broker's CC Google server metadata screenshot indicated that the above email was sent by Microsoft Outlook 12, which corresponds with the other emails sent from Mr Murray's computer at SA Brokers CC.
- 34.12 Furthermore, Ms Warren has stated in her affidavit, dated 4 December 2017 that she was contacted by Mr David Burke from Standard Bank on 11 October 2016 who enquired whether she had authorised Mr Murray to obtain information in respect of the WARPLAS SHARE TRUST. She denied it.
- 34.13 The WhatsApp chats between Mr Murray and Mr Hale on 6 October 2016 confirmed that Mr Murray was under the impression that the funds of the Warplas Share Trust were with Stanlib, whilst they were with Standard Bank. That is the reason why Mr Murray sent the email in respect of the "Warplus" Trust to Stanlib. The content of these WhatsApp chats is not denied by Mr Murray.
- 34.14 On a balance of probabilities Mr Murray was the only person who could have sent the email dated 3 October 2016 to Stanlib and who forged the initials of Ms Warren and altered the initial client consent form to fraudulently obtain information pertaining to the Warplas Share Trust. His conduct was dishonest and lacked integrity and thus the debarment imposed by the FSCA should stand.
- 34.15 If Mr Hale had forged the documents, he would hardly have raised the issue with Ms Warren and escalated the matter to the FSCA.

35. It is contended by the Applicant that the FSCA committed a litany of administrative/procedural irregularities which amongst others include the right to a formal hearing. See paragraph 19.1.1 where reference is made to the Applicant's contentions in this regard.
36. There is nothing in the terms of the legislative framework, namely the FSR Act and/or PAJA, that requires the FSCA to have a formal trial hearing before making any administrative decision.
37. Section 154 of the FSR Act lays out the consultation process that needs to be adhered to by the FSCA before it decides to debar. The Respondent adhered to the provisions of section 154 of the FSR Act by providing the Applicant with reasons for every decision taken and by inviting the Applicant to make submissions within a reasonable period. In this regard see paragraphs 15.1 to 15.13 above. Thus, the Applicant's contentions that the FSCA did not adhere to the principles of the *audi alteram partem* rule and natural justice are rejected.
38. All issues raised by the Applicant in respect of procedural irregularities and lack of documents are dismissed as these issues are frivolous, trivial and unsubstantiated (See: *Met Collective Investments (Pty) Ltd v Financial Sector Conduct Authority at para 23-26, A23/2019*).
39. The Applicant's contentions that the FSCA breached his rights as contained in section 32, 33, 36 and 39 of the Constitution of South Africa are dismissed as unsubstantiated.
40. The Applicant's contention that the evidence of a handwriting expert was necessary since a factual dispute existed between the parties has no merit. The Applicant's alleged factual dispute was a bare denial.
41. The Applicant's contention that the matter is *res judicata* in that the Applicant was previously subjected to the same inquiry, on the same evidence and found not to have committed any wrongful conduct is misplaced. The complaint is probably one of *functus officio*. But the answer is that by not making a decision at the first round, the doctrine does not arise. The position is comparable to a criminal complaint where the prosecutor does not proceed because of lack of evidence. If relevant evidence comes to light, the prosecution may proceed.
42. For reasons stated above the application is dismissed.

F. ORDER

The following order is granted:

1. The Applicant's application for reconsideration is dismissed.

SIGNED on this 4th day of APRIL 2022.



ADV SALMÉ MARITZ

With the Panel also consisting of:

LTC Harms J (Chair)

Adv Michelle le Roux SC