THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 554/2019

In the matter between:

ASSOCIATED PORTFOLIO SOLUTIONS (PTY) LTD	**FIRST APPELLANT**
PENTAGON FINANCIAL SOLUTIONS (PRETORIA) (PTY) LTD	**SECOND APPELLANT**

and

PIETER WILLEM BASSON	**FIRST RESPONDENT**
REGISTRAR OF FINANCIAL SERVICE PROVIDERS	**SECOND RESPONDENT**
MOONSTONE COMPLIANCE (PTY) LTD	**THIRD RESPONDENT**

Neutral citation: *Associated Portfolio Solutions (Pty) Ltd & Another v Basson & Others* (554/2019) [2020] ZASCA 64 (12 June 2020)

Coram: PONNAN, DAMBUZA and PLASKET JJA and
GORVEN and MATOJANE AJJA

Heard: 07 May 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 12H00 on 12 June 2020

Summary: Administrative Law – debarment of a representative and key individual of a financial service provider under the Financial Advisory and Intermediary Services Act 37 of 2002 an administrative action – relevant facts established in a preceding disciplinary inquiry for misconduct may be taken into account in resolving to debar a representative – directors of financial service provider charged with the responsibility to debar representatives – some measure of institutional bias present and tolerated in this mode of regulation.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Sievers AJ, sitting as court of first instance)

1 The appeal as to the main application is upheld with costs, such costs, including those of two counsel, to be paid by the first respondent.

2 The appeal as to the counter-application is dismissed with costs, such costs to include those of two counsel.

3 The order of the high court is set aside and replaced with the following:

'The application and counter-application are dismissed with costs, such costs to include those of two counsel'.

JUDGMENT

Dambuza JA (Ponnan, and Plasket JJA and Gorven and Matojane AJJA concurring)

Introduction

[1] This appeal, with the leave of the court below, is against a judgment of the Western Cape High Court, Cape Town (Sievers AJ) which set aside the debarment of the first respondent, Mr Pieter Willem Basson (Mr Basson) by the appellants and dismissed a counter-application by them, which sought a range of declaratory orders against the second respondent, the Registrar of Financial Services Providers (the Registrar).

Background

[2] From the early 2000s Mr Basson, was one of the four founder-shareholders, directors and employees of the first appellant, Associated Portfolio Solutions (Pty) Ltd) (APS), a fund management business, and the second appellant, Pentagon Financial Solutions (Pretoria) (Pty) Ltd (Pentagon), a financial services provider. The two businesses operated as a quasi-partnership and Mr Basson was a 'registered representative' and a 'key individual' in both of them under the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS Act).[1] The other directors were Mr Cornelis Kruger (also a key individual), Mr Harold Nimmo and Mr Jacob Van Westhuizen Neethling.

[3] During 2016 there was a falling out between Mr Basson and his fellow directors. In September of that year Mr Basson stopped coming to work. Negotiations for his exit from APS and Pentagon were unsuccessful as no agreement could be reached as to the market value of his shares. Subsequent thereto, evidence of wrongdoing on his part was brought to the attention of Mr Kruger. On 7 November 2016 Mr Basson was suspended from his employment, pending an investigation into the allegations of misconduct that had been made against him. The investigations culminated in a disciplinary inquiry in which Mr Basson was charged with ten counts of misconduct.

[1] In terms of s1 of the FAIS Act a 'key individual' in relation to an authorised financial services provider means a natural person responsible for managing and overseeing the activities of the authorised financial services provider. A 'representative' means any person who renders a financial service to a client for or on behalf of the financial services provider, in terms of conditions of employment or any mandatory agreement, , but excludes a person rendering clerical, technical, administrative, legal accounting or other service in a subsidiary or subordinate capacity, which service –

(a) Does not require judgment on the part of the latter person; or
(b) Does not lead a client to any specific transaction in respect of a financial product in response to general inquiries.

[4] On 9 December 2016 Mr Basson instituted proceedings against Mr Kruger and the other directors in the high court, under s 163 of the Companies Act 71 of 2008, alleging oppressive and unfair conduct by them. He sought an order that they be directed to purchase his shares in the quasi-partnership at a fair value. He alleged that their conduct, in laying unfounded misconduct charges against him, was motivated by the desire to devalue his shares so as to acquire them for far less than their fair value. That application was referred to arbitration.

[5] Whilst the arbitration was pending, the disciplinary enquiry against Mr Basson proceeded. The charges included: (a) establishing or taking steps to establish an asset management business in competition with and in breach of his fiduciary obligations to the quasi-partnership; (b) disclosing confidential information to third parties with whom he had private business interests, engaging in discussions with third parties regarding the sale of assets of the quasi-partnership managed by him (his client book); (c) negligently communicating false and unrealistic information about a '10M' investment program; (d) 'purporting' to conclude an agreement without authorisation and without conducting due diligence, for the provision of financial services to Germix Investments SA and Caleb Foundation; and (e) consistently using the quasi-partnership's resources for private and personal business interests in conflict with his fiduciary duties.

[6] The disciplinary hearing was presided over by Mr Graham Leslie, an advocate of the Cape Bar. At the end of the hearing Mr Basson was found guilty of five of the charges. The chairperson recommended his dismissal. He was of the view that each individual transgression that had been established

was, on its own, sufficiently serious to warrant Mr Basson's dismissal. The ruling was delivered on 28 April 2017.

[7] On 2 May 2017, the appellants' attorneys wrote to the third respondent, Moonstone Compliance (Pty) Ltd (Moonstone), being the appellants' compliance officer under the FAIS Act, seeking advice on how to proceed, now that Mr Basson had been found guilty in the disciplinary enquiry. On the same day Moonstone advised the appellants' attorneys that, as a result of Mr Leslie's ruling the appellants had 'very little choice other than to debar [Mr] Basson as a representative based thereon that he ha[d] contravened the FAIS Act in a material manner and [did] not exhibit the characteristics of honesty and integrity'.

[8] On 4 May 2017 the appellants' attorneys forwarded to Mr Basson notices of a directors' meeting of both appellants that was scheduled for 17 May 2017. The notices included proposed resolutions to be considered for the contemplated debarment of Mr Basson, consequent upon the findings made against him in the disciplinary process. Save in one respect that is not material for present purposes, the notices in respect of each of the appellants were identical.[2] In terms thereof, the board of each of the appellants was to consider resolutions to: (a) remove Mr Basson from each board (resolution 1); (b) dismiss him from his employment (resolution 2); (c) terminate a mandatory agreement dated 18 February 2008 between Mr Basson and APS (resolution 3 – this resolution was applicable only in respect of APS); (d) debar Mr Basson as a representative of each company in terms of s 14(1) of the FAIS

[2] Save for one resolution relation to termination of an agreement dated 18 March 2008 which was not applicable to Pentagon.

Act (resolutions 4 and 3 respectively); and (e) authorise directors to take all steps necessary to give effect to these resolutions (resolution 5 and 4 respectively). Mr Basson was, in each notice, informed that he could 'make a presentation, in person or through a representative, to the meeting before the resolutions [were] put to the vote, save that no further presentations [could] be made in respect of resolutions 2 and 5'.[3]

[9] In a letter dated 17 May 2017, entitled 'representations to board meetings held by APS and Pentagon', Mr Basson's attorneys made representations on his behalf in terms of s 71(2)(b) of the Companies Act 71 of 2008'.[4] They highlighted the fact that Mr Basson did not accept the results of the disciplinary proceedings and warned that acceptance thereof by the boards would lead to legal action. They pointed to what they considered to be 'material shortcomings' in the findings of the chairperson, which included disregarding the ulterior motives of the directors in pursuing the charges, chief of which was to acquire his shares cheaply. They insisted that the chairperson had erred in his consideration of the matter and urged the directors to consider very carefully the implications of accepting the recommendation to 'dismiss [their] client'. They alluded to the fact that '[Mr Basson's] income stream as a professional [was] likely to be destroyed by the adoption of the recommendation to dismiss him, and the likely accompanying decision to disbar him', and to the fact that 'the damaging consequences to both the company and himself may be irreversible once the decision to dismiss him [was] taken'.

[10] Neither Mr Basson nor his attorneys attended the meeting of 17 May 2017. The meeting proceeded and the proposed resolutions were all passed.

[3] The last resolution in respect of Pentagon was resolution 4.
[4] This section prescribes the procedure by which a board may remove a director.

On the same day the appellants (through Mr Kruger) wrote to Mr Basson, informing him of the outcome of the board meetings. In relation to Resolution 4 (and 3) the letter read:

'In light of the findings of the disciplinary inquiry, and especially the Chairman's findings contained in [certain specified paragraphs] Basson no longer complies with the requirements referred to in section 13(2)(a) of the FAIS Act and/or has contravened or failed to comply with the FAIS Act in a material manner, and accordingly the Board resolves that Pieter Willem Basson be and is hereby prohibited from rendering any new financial service on behalf of the Company, and his authority to act on behalf of the Company either as a registered representative or key individual is withdrawn; that his name be and is hereby removed from the Company's register of representatives as contemplated in section 14(1) of the FAIS Act, and further that the Company shall inform the registrar in writing thereof and provide written reasons for the implementation of Basson's debarment as contemplated in terms of section 14(3)(a) of the FAIS Act.' [5]

[11] On the same day (17 May 2017), Mr Kruger also wrote to the registrar of the Financial Services Board (the FSB) requesting that Mr Basson be debarred as a representative for material contravention or non-compliance with provisions of the FAIS Act as well as non-compliance with 'Fit and Proper Requirements'. The letter set out details of Mr Basson's transgressions and a copy of the judgment in the disciplinary enquiry was attached. In a form

[5] The specified paragraphs related to the findings made by Mr Leslie on the complaints in respect of which Mr Basson was found guilty. In complaint 4, Mr Basson was found to have sent an email dated 22 September 2016 from his work email address to a Mr Richard Turner advising him that the returns on a '10M' investment program were ". . . 300% in 30 days, and then about 50% per week from 40 weeks", and that it was a very good program". The chairperson found that, as an experienced financial services representative he should have been extremely careful before accepting the legitimacy of the 10M programme. His unqualified endorsement of it amounted to gross negligence which posed a risk to his employer's reputation and business.
In relation to complaint 5, Mr Basson was found to have concluded an agreement between himself, APS, Germix Investments SA and C.A. L.E.B Foundation without the necessary authority.
In relation to complaint 8, he was found to have repeatedly failed to comply with internal compliance procedures and statutory obligations relating to the completion of client documents.
In relation to complaint 9, he was found to have caused the appellants' names to be used in what may well have been illicit diamond trade dealings with Congolese nationals, which dealings had nothing to do with the appellants.

entitled ‘Notification of Debarment in terms of Section 14 of the FAIS Act’ completed in respect of Mr Basson, the appellants were described as ‘the debarring FSP’. On 2 June 2017, the FSB notified the appellants’ attorneys that its register had been updated on the previous day and that Mr Basson’s name appeared on it as a person who had been debarred.

[12] On 6 September 2017 Mr Basson launched review proceedings in the high court seeking that the decision taken by the appellants to debar him be set aside. The grounds for the review were that, firstly, he had not been afforded a reasonable opportunity to make representations and to call witnesses before the debarment decision was taken. Aligned to that was a contention that the compliance authority, Moonstone, recommended his debarment without having been involved in the investigations and the disciplinary proceedings, and that it made its recommendations to the appellants based purely on the results of the disciplinary proceedings. Therefore the debarment recommendation was tainted by procedural unfairness. Secondly, the majority directors who passed the resolutions had pre-judged the issues; the decision was tainted by ulterior motive; and they had acted as judges in their own case, because they had given evidence at the disciplinary hearing.

[13] In the meantime, Mr Basson had, on 23 August 2017, prior to consideration of his review application by the high court, been reappointed as a representative by Rebalance Fund Managers (Pty) Ltd (Rebalance). In addition to opposing the review application, the appellants brought a counter-application, in which they sought the joinder of Rebalance and the review of the decision by Rebalance to appoint Mr Basson as its representative. As

against the Registrar, the appellants sought a range of declaratory orders to the effect that Mr Basson's debarment ought not to have been lifted without the Registrar first satisfying herself that he complied with the necessary fit and proper requirements of FAIS and was honest and had integrity.

[14] The appellants also sought a declarator that Mr Basson would only be eligible for re-appointment after the lapse of 12 months from the date of his debarment. It was contended that his re-appointment was in contravention of the regulatory framework which governed re-appointments.[6] In response, the Registrar explained that Mr Basson '[was] currently not a representative of Rebalance or any FSP'. Rebalance had since removed Mr Basson as its representative. In a further affidavit the appellants alleged that Mr Basson had once more been appointed by another FSP (financial service provider) - Vision Risk and Investment Consultants (Pty) Ltd. The high court dismissed the counter-application on the basis that the issues raised therein had become moot.

[15] At the time of Mr Basson's re-appointment by Rebalance the guidelines issued by the FSB for re-appointment of representatives provided that:

'the onus rests on the reappointing provider . . . as a first step to convince the [FSB] on a balance of probabilities that there has been a genuine, complete and permanent reformation on the part of the representative and that the defects and character, attitude or other aspects that led to the representative being considered not fit and proper, no longer exist . . . it must be clear when the registrar peruses the documents supplied by the provider, that the latter is aware of the details of the applicant's transgression and the provider is satisfied that the representative will not commit the offence again'.

[6] Titled 'Determination of Requirements for Reappointment of Debarred Representatives, 2003', published in Board Notice 82 of Government Gazette 25299.

[16] Subsequent to the removal of Mr Basson as a representative for Vision Risk, the Registrar withdrew the reappointment guidance notice, which was in force at the time of Mr Basson's re-appointment and on which the appellants had largely relied in their counter-application. A fresh guidance notice was issued in which the Registrar advised that it played a 'relatively minor role' in supervising entry into and debarment from the profession, 'mainly relating to the updating of the central register of representatives'.

[17] In setting aside Mr Basson's debarment and dismissing the appellants' counter-application, the high court found that because the disciplinary proceedings were regulated by provisions of the Labour Relations Act 66 of 1995, the results thereof could not inform the debarment proceedings as the latter fell under the FAIS Act. The court was of the view that a separate 'debarment inquiry' should have been held under s14(1) of the FAIS Act 'to determine whether Mr Basson complied with the "fit and proper" requirements contemplated in s 13 of [that] Act and published in regulations under section 6A'. It also found that the responsibility lay exclusively with the appointing FSP (Rebalance) to ensure that the pre-requisites were met for Mr Basson's re-appointment and upheld the argument by the Registrar that the relief claimed in the counter-application was moot.

[18] On appeal, the appellants took issue with the key finding of the high court – that the disciplinary and debarment processes were separate and distinct and that the earlier process could not inform the later one. It was submitted on their behalf that on a finding that Mr Basson lacked integrity and honesty, the appellants had a duty to debar him. The appellants also persisted

in their appeal against the dismissal of their counter-application because of Mr Basson's further appointment by Vision Risk.

[19] Mr Basson also persisted in his procedural unfairness contention, re-asserting that he was not afforded the opportunity to make representations and to call witnesses prior to his debarment. He also insisted that his debarment was fatally flawed as a result of bias on the part of his co-directors.

Debarment and administrative decision

[20] An overview of the relevant sections of the FAIS Act is helpful for an understanding of the context and the relationship between the parties. The purpose of the Act is, according to its long title, to 'regulate the rendering of certain financial advisory and intermediary services to clients'. It does so by means of an administrative system of licencing, controlled by the FSB under the management of its Registrar, and largely thereafter, by a system of self-regulation in which licenced FSPs ensure that their representatives and key individuals are fit and proper persons to be entrusted with providing financial advice to the investing public. [7]

[21] In terms of s 7, the FSP may not provide financial services unless it is licenced in terms of s 8. Neither may a representative of a FSP do so unless he or she has been appointed as such by an 'authorised' or licenced FSP in terms of s 13. FSPs are required to keep registers of their representatives and key individuals.[8]

[7] See the FAIS Act, ss7, 8 and 13.
[8] In terms of s 1 'an 'authorised service provider', or provider means a person who has been granted an authorisation as a financial service provider by the issue to that person of a licence in terms of section 8'.

[22] The Act decrees a close supervisory responsibility by FSPs over their representatives. In terms of s 13(1)*(b)*(i), no person may act as a representative of an authorised FSP unless, prior to the rendering of a financial service, he or she provides to clients confirmation certified by the FSP, that the FSP accepts responsibility for the activities of the representative performed within the scope of or within the course of implementing a service contract with the FSP. Section 13(iA) prescribes that a representative must meet the 'fit and proper' requirement. In terms of s 13(2)*(a)* an authorised FSP must, at all times, be satisfied that its representatives and key individuals are competent to act and that they comply with the fit and proper requirement. FSPs are charged with the duty to take reasonable steps to ensure that representatives comply with any applicable code of conduct and applicable laws in the conduct of business.

[23] Under s 14 of the FAIS, the FSPs bear the duty to debar representatives, who do not meet the fit and proper requirement. Section 14(1)*(a)* provides that an FSP must debar its representative and key individual if satisfied that he or she (the representative and key individual) does not meet, or no longer complies with the requirements set in s 13(2)*(a)*, or has contravened any provision of the Act in a material way. Mr Basson's debarment was effected in terms of s 14(1) of the Act.

[24] Once debarment has been effected, the FSP must immediately withdraw any authority that may still exist for the person to act on its behalf, remove the name of the debarred person from the its register of representatives, immediately take steps to ensure that the debarment does not prejudice the interests of clients, notify the FSB of the debarment within five

days, and provide the authority with the reasons for the disbarment. A (previously) debarred person may only carry on business or render financial services to clients or act as a representative or a key individual of an authorised provider if he or she complies with the requirement set in s 13(1)*(b)(*ii) of the FAIS Act.

[25] The appellants, being private juristic entities, exercised their authority under s 14(1) of the FAIS Act to debar Mr Basson. In doing so they acted in furtherance of the objects of the FAIS Act – and in the public interest. They exercised public power in terms of that Act. The debarment had an adverse impact and direct, external legal effect on his rights.[9] It was not in dispute that the debarment of Mr Basson was an administrative action and that it was therefore reviewable under s 6(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Section 6(2) of the PAJA enumerates the grounds for review of administrative action. In terms of s 6(2)*(c)* a court may set aside administrative action if it 'was procedurally unfair', whilst s 6(2)*(a)*(iii) provides that administrative action may be set aside if the administrator who took it 'was biased or reasonably suspected of bias'.

Procedural fairness

[26] Section 33 of the Constitution provides that everyone has a right to administrative action that is lawful, reasonable and procedurally fair. Section 3(1)*(a)* of PAJA incorporates the procedural fairness requirement by

[9] In terms of s 1 of PAJA administrative action as any decision taken or any failure to take a decision by:
an organ of state when:
exercising a power in terms of the Constitution or a provincial constitution; or
exercising a public power or performing a public function in terms of any legislation; or
a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of a person and which has a direct, external legal effect.

providing that 'administrative action which materially and adversely affects the rights and legitimate expectations of any person must be procedurally fair'. What is fair in the particular circumstances, will depend on the context of each case.[10] But the core of the right comprises the giving to the affected person of 'adequate notice of the nature and purpose of the proposed administrative action'; a 'reasonable opportunity to make representations'; and a 'clear statement of the administrative action' (section 3(2)*(b)* of PAJA).

[27] The procedural fairness requirement is, again, ordained in ss 14(2) and (3) of the FAIS Act wherein the procedure for debarment is prescribed as follows:

'(2) *(a)* Before effecting a debarment in terms of subsection (1), the provider must ensure that the debarment process is lawful, reasonable and procedurally fair.

(b) If a provider is unable to locate a person in order to deliver a document or information under subsection (3), after taking all reasonable steps to do so, including dissemination through electronic means where possible, delivering the document or information to the person's last known e-mail or physical business or residential address will be sufficient.

(3) 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;

[10] Section 3(2)*(a)* of PAJA. See also *Chairman, Board on Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 (SCA) at para 19.

(b) consider any response provided in terms of paragraph *(a)*(iii), and then take a decision in terms of subsection (1); and

(c) immediately notify the person in writing of-

(i) the financial services provider's decision;

(ii) the persons' rights in terms of Chapter 15 of the Financial Sector Regulation Act; and

(iii) any formal requirements in respect of proceedings for the reconsideration of the decision by the Tribunal.'

[28] Against the factual background and legislative framework, it becomes readily apparent that the contention that Mr Basson was not given a fair opportunity to make representations cannot be supported. The letter addressed by the appellants' attorneys to Mr Basson (dated 4 May 2017 - almost two weeks prior to the date of the meeting) and the notices attached thereto were an express invitation to Mr Basson to attend the meeting of the appellants' boards on 17 May 2014. He was expressly invited to make representations in relation to the proposed resolutions.[11] Mr Basson's attention (and that of his attorneys) was drawn pertinently to the findings of the chairperson in the disciplinary process and the effect those had on his position as a financial service provider. More particularly in relation to proposed resolutions 4 and 3 respectively the notice referred to specific portions of the chairperson's findings in his judgment[12] and warned that:

'Basson no longer complies with the requirements referred to in section 13(2)*(a)* of the FAIS Act and/or has contravened or failed to comply with the FAIS Act in a material manner, and accordingly the Board resolves as follows:

" *that Basson be and is hereby prohibited from rendering any new financial service on behalf of APS, and his authority to act on behalf of APS either as a registered*

[11] Except Resolutions 2 and 5 (and 4 respectively) in terms of which the directors would be authorised to execute the directives of the resolutions.

[12] See para 10 supra.

representative or key individual is withdrawn; that his name be and is hereby removed from APS's register of representatives as contemplated in section 14(1) of the FAIS Act, and further that APS shall inform the registrar in writing thereof and provide written reasons for the implementation of Basson's debarment as contemplated of section 14(3)(a) of the FAIS Act".

[29] Not only was Mr Basson apprised, through the notices, of the implications of the findings made against him in the disciplinary process, but it is clear from the record that he was independently aware of the significance thereof. In his representations (dated 17 May 2017), his attorneys wrote that 'his income as a professional is likely to be destroyed by the adoption of the recommendation to dismiss him and the likely accompanying decision to disbar him'. Significantly, Mr Basson responded pertinently to the invitation to make representations but did not address the core question of debarment – except in passing. He can hardly complain of procedural unfairness when the resolutions were passed after he had chosen not to address that core issue.

[30] The fact that in the disciplinary hearing Mr Basson was not required to address issues of his honesty and integrity or whether he was a fit and proper person, weighed heavily with the high court, leading to the finding that there was a failure to afford him an opportunity to make representations. Whilst it is correct that the disciplinary enquiry was not directly concerned with whether Mr Basson was a fit and proper person to represent APS and Pentagon, the disciplinary inquiry afforded him the opportunity to respond to the transgressions under consideration, the nature of which pertinently implicated his honesty and integrity.[13]

[13] In terms of s 6A(2) of the FAIS Act 'Fit and proper requirement may include, but are not limited to, appropriate standards relating to –

(a) personal character qualities of honesty and integrity;

[31] The argument that a 'debarment factual inquiry' should have been held in compliance with procedural fairness prescripts is unsustainable. It was clear in the notices of 4 July 2017 that the outcome of disciplinary hearing was the factual basis for the meetings and the proposed resolutions. The facts established in the disciplinary proceedings impacted directly on Mr Basson's honesty and integrity, raising the issue squarely whether he met the crucial requirement of a fit and proper person to be a representative and key individual under s 8(1) of the FAIS Act.[14] Any further inquiry would have been absurd and unnecessary, particularly as it could hardly be accepted that whilst not a fit and proper person qua employee, he could nonetheless be a fit and proper person qua representative. To insist on a further inquiry in these circumstances would be to place form above substance.

[32] At the hearing of the appeal, Counsel for Mr Basson accepted that the disciplinary hearing could indeed have unearthed facts that enjoined the appellants to exercise their authority under the FAIS Act. But even then, it was submitted (without reference to any authority), they could only take into account common cause facts. Allegations that were in dispute at the disciplinary hearing had to be adjudicated afresh, so it was submitted. The argument rested on an untenable distinction between the appellants qua employers and qua FSPs. And, contrary to the submission, the facts on which the debarment was founded had already been established in the disciplinary

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(b) competence, including-
(i) experience;
(ii) qualifications; and
(iii) knowledge tested through examinations determined by the registrar;
(iv) operational ability
(v) financial soundness; and
(vi) continuous professional development'.

[14] In the representations Mr Basson threatened to challenge any decision taken on the basis of the chairman's finding. However no challenge was pending at the time of the hearing of the appeal.

proceedings. Those facts had been established after a full enquiry. Mr Basson had participated fully in the enquiry. He had every opportunity to test the allegations levelled against him. By the conclusion of the enquiry many serious allegations that impacted substantially on Mr Basson's honesty and integrity were either common cause or undisputed. None of that could subsequently have changed.

Was the debarment decision free of bias?

[33] In this regard the argument on behalf of Mr Basson was threefold – a) that the decision was motivated by an ulterior motive, b) that the majority shareholders had pre-judged the matter, and c) that they had acted as judges in their own case. The high court held that the majority of the directors of APS and Pentagon pre-judged Mr Basson's debarment because that decision was based on the findings made by the chairperson and Moonstone's advice. That court also found that the directors were biased because they testified in the litigation initiated by Mr Basson regarding his exit from the companies and the fair value of his shares.

[34] Mr Kruger denied that the resolutions were passed for the ulterior purpose of rendering Mr Basson's shares worthless. His denial was a detailed explanation of precisely how the resolutions came to be proposed and why they were passed. There can be no doubt that there was a strong rational connection between the facts that were found to have been established in the disciplinary enquiry and the decision to debar Mr Basson. The fact that a resolution for debarment was proposed prior to the meeting of the 17 May 2017 was consistent and in compliance with the provisions of s 14(1) of the FAIS Act. Once the findings impacting on Mr Basson's honesty and integrity

were made by the chairperson the appellants were obliged to inquire into whether or why he should not be debarred. The duty fell on the appellants and no one else. Section 14(1)*(a)* compels a provider to debar a representative or a key individual who has misconducted him or herself, if he or she is no longer a fit and proper person to be trusted to give financial advice to members of the public. Mr Basson's argument that the decision should have been referred or left for the Registrar to make is untenable: the Registrar had no power to decide on Mr Basson's debarment. So too was the submission that it was improper for the appellants to sit in judgment of Mr Basson in the middle of a pending dispute about the valuation of his shares. The appellants were the only persons empowered by the FAIS Act to decide whether Mr Basson should be debarred.

[35] Curiously the objection based on bias was never raised prior to the debarment. In any event, nothing on the record supports the argument that the debarment was made for reasons other than those prescribed in the FAIS Act. The very purpose of giving Mr Basson notice of the contemplated resolutions was to afford him the opportunity to make representations. To suggest that this amounted to pre-judgment is unsustainable, otherwise every administrative decision requiring prior hearing would be susceptible to being set aside on account of pre-judgment. Moreover, the FAIS Act vests the power to debar in persons who inevitably would have a history to speak of – and be aware of the misdeeds of – what may be described as an errant representative. This method of regulation thus accepts that some institutional bias may be present and will be tolerated in respect of debarment proceedings in terms of the FAIS Act.

The counter-application

[36] The appellants persisted in their appeal against the dismissal of their counter-application on the basis that although Rebalance had revoked Mr Basson's registration as its representative he was, once more, registered as a representative for Vision Risk. It was also submitted that there was evidence of laxity in the supervision, by the Registrar, of reappointment of formerly debarred representatives. Much reliance was placed on *Financial Services Board v Barthram and Another*[15] in which this court held that debarment of a representative in terms of s 14(1) of the FAIS Act becomes effective on an industry-wide scale because of the risk posed to the public by a debarred person who does not meet the requirements of honesty and integrity.

[37] However, as far back as December 2017, it was stated on behalf of the FSB that Mr Basson was not registered as a representative of any FSP. There was also an explanation that Mr Basson's online appointment by Rebalance resulted from compliance with a court order in terms of which the FSB was ordered to remove publication of his debarment from its website. This resulted in an inadvertent disabling of a search function for debarred representatives on the website, allowing the uploading of Mr Basson's appointment by Rebalance. In this sense his appointment by Rebalance was never a 'reappointment', but no more than an administrative error.

[38] In this context the counter-application had indeed become academic. There had been no reviewable decision by the FSB. Neither could the FSB

[15] *Financial Services Board v Barthram and Another* [2015] 3 All SA 665 (SCA)

'take any steps as may be required in terms of s 14A (now s 153) of the FAIS Act in regard to [Mr Basson]'.[16]

The order

[39] Consequently, it is ordered that:

1 The appeal as to the main application is upheld with costs, such costs, including those of two counsel, to be paid by the first respondent.

2 The appeal as to the counter-application is dismissed with costs, such costs to include those of two counsel.

3 The order of the high court is set aside and replaced with the following:

'The application and counter-application are dismissed with costs, such costs to include those of two counsel'.

N DAMBUZA

JUDGE OF APPEAL

[16] This was the alternative order sought by the appellants in the alternative to remittal of the reappointment for reconsideration. Section 153 of The Financial Sector Regulation Act No 9 of 1017 also regulates debarment under the authority of the Reserve Bank.

Appearances

For appellants:	Adv Kirk-Cohen SC with him Adv Mark Greig
Instructed by:	Webber Wentzel Attorneys, Cape Town
	Symington & De Kok Attorneys, Bloemfontein
For 1st Respondent:	Adv Van Riet SC with him Adv Dorsten
Instructed by:	De Waal Grobbelaar Fischer Attorneys, Cape Town
	JL Jordaan Attorneys, Bloemfontein.
For 2nd Respondent:	Adv Pillay SC
Instructed by :	Bisset Boehmcke Mcblain, Cape Town
	Webbers, Bloemfontein