IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: 16224/2017

In the matter between:

PIETER WILLEM BASSON	Applicant
and	
ASSOCIATED PORTFOLIO SOLUTIONS (PTY) LTD	First Respondent
PENTAGON FINANCIAL SOLUTIONS (PRETORIA) (PTY) LTD	Second Respondent
MOONSTONE COMPLIANCE (PTY) LTD	Third Respondent
REGISTRAR OF FINANCIAL SERVICES PROVIDERS	Fourth Respondent

JUDGMENT DELIVERED ON 14 DECEMBER 2018

SIEVERS AJ

INTRODUCTION

[1] This is an application to review and set aside the decisions taken by the First and Second Respondents ("APS and Pentagon") to debar the Applicant ("Basson") as a representative and key individual of APS and Pentagon in terms of Section 14(1) of the Financial Advisory and Intermediary Services Act, 37 of 2002 ("FAIS Act").

[2] APS and Pentagon have brought a counter-application in which they seek declaratory relief.

THE REVIEW

[3] The elements of an administrative action for review purposes were summarised by the Constitutional Court in **Minister of Defence and Military Veterans v Motau and Others** 2014(5) SA 69 (CC), by Khampepe J as follows:

> "[33] The concept of 'administrative action', as defined in s 1(i) of PAJA, is the threshold for engaging in administrative-law review. The rather unwieldy definition can be distilled into seven elements: there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions."

[4] In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others** 2004 (4) SA 490 (CC), O'Regan J said:

> "[25] The provisions of s 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution. It is not necessary to consider here

causes of action for judicial review of administrative action that do not fall within the scope of PAJA. As PAJA gives effect to s 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters."

[5] The debarment decisions in the present matter fall within the ambit of the definition of "administrative action" in Section 1 of PAJA. They were made by the Respondents in their capacities as authorised financial service providers, they are decisions made in the exercise of a public power in terms of the FAIS Act that adversely affect Basson's rights and have a direct, external legal effect.

[6] The principles for evaluating the validity of administrative action were summarised in **Schoonbee & Others v MEC for Education, Mpumalanga & Another** 2002 (4) SA 877 (T) at 882F, by Moseneke J who said:

> "Now the litmus test for evaluating administrative actions is well settled in our law. It has been the subject of judicial pronouncements over several decades. More lately the Legislature saw fit to bring into being the Promotion of Administrative Justice Act 3 of 2000. The Act contains in great part what one may regard as partial codification of administrative law with specific reference to administrative actions, I do not propose to set out each of these tests to be found in the Act. Where appropriate, I will refer to specific test as I evaluate particular conduct on the part of the second respondent.
>
> Suffice to say that an administrative action should not be taken on account of bias or a reasonable suspicion of bias. The action has to

fall within the parameters of the law, in other words, where there is a material procedure or condition which the law prescribes, the wielder of power is obliged to have regard to that. Administrative action has to be procedurally fair and it should not be undermined by an error of law or, put otherwise, an error of understanding or application of the law. For this purpose, lastly, it is quite settled law that the official who takes the administrative action should not be persuaded by matters other than those which are relevant for purposes of the decision before it; he or she should not have regard to or be persuaded or moved by some ulterior purpose or motive or make considerations which are irrelevant. He or she must act honestly, he or she cannot act arbitrarily, or capriciously. He or she must act rationally."

[7] Basson contends that the debarment issue in this review can be decided on the basis of facts that are common cause or have not been denied or are subject to bald, uncreditworthy denials.

[8] The approach to the assessment of evidence in motion proceedings was described in **National Director of Public Prosecutions v Zuma** 2009 (1) SACR 361 (SCA), by Harms JA as follows:

> "[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common-cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if

the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.

[27] ... In motion proceedings the question of onus does not arise and the approach set out in the preceding paragraph governs irrespective of where the legal or evidential onus lies ..."

[9] The following facts are not in dispute.

9.1 Basson is a shareholder and founder member of both APS and Pentagon.

9.2 The companies are quasi-partnership companies and authorised financial services providers registered in terms of FAIS Act.

9.3 Third Respondent (Moonstone) provides compliance services as consulting and management services to financial advisors and is the compliance officer of APS and Pentagon.

9.4 During 2006 Basson had a fall out with a co-shareholder and director Kruger. This culminated in Basson applying for relief in

terms of Section 163 of the Companies Act, 71 of 2008 against the alleged oppressive and unfair conduct on the part of the majority shareholders of APS and Pentagon. The primary relief sought was an order directing the majority shareholders to purchase Basson's shares at a fair value. This dispute was referred to arbitration.

9.5 In the midst of these proceedings the majority shareholders proceeded with a disciplinary enquiry conducted in terms of Labour Law to dismiss Basson as an employee.

9.6 The notice of disciplinary enquiry and complaint sheet did not reflect any intention on the part of APS and Pentagon to debar Basson.

9.7 The disciplinary enquiry proceeded for a period of thirteen days and in the written outcome the independent chairperson, Advocate Lesley ("Lesley"), recorded: 'My mandate as chairperson is to make findings regarding the alleged misconduct and, if appropriate, to make a sanction recommendation to the employer. I accordingly recommend summary dismissal.'

9.8 On 4 May 2017 Basson was informed that a directors' meeting of the two companies was scheduled to be held on 17 May 2017 and that he may make presentations to the boards of directors before dismissal and debarment resolutions were put to a vote.

9.9 Basson's attorneys in the labour matter wrote to the directors of APS and Pentagon on 17 May 2017 advising that Basson disputed the validity of the outcome of the dismissal hearing and that he would approach the CCMA to have the matter reheard.

9.10 In an exchange of emails dated 2 May 2017 Moonstone was requested by APS and Pentagon to evaluate the findings made by the chairperson of the disciplinary hearing and to make a recommendation. Moonstone did so within hours and recommended to APS and Pentagon that Basson be debarred. This recommendation was made without notice to Basson and without affording Basson any opportunity to make representations to Moonstone.

[10] Section 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Basson contends that he was deprived of his constitutional rights to procedural fairness and an impartial hearing. He submits that the decisions by APS and Pentagon to debar him are reviewable *inter alia* on the following grounds:

10.1 He was afforded no reasonable opportunity to make representations;

10.2 There was pre-judgment of the debarment decisions;

10.3 Bias and perception of bias;

10.4 The majority directors acted as judges in their own cause.

[11] In **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others** 2014 (1) SA 604 (CC); Froneman J said:

> "[42] It is apparent from section 6 that unfairness in the outcome or result of an administrative decision is not, apart from the unreasonableness ground (Section 6(2)(h) of PAJA), a ground for judicial review of administrative action. That is nothing new. The section gives legislative expression to the fundamental right to administrative action 'that is lawful, reasonable and procedurally fair' under section 33 of the Constitution. It is a long-held principle of our administrative law that the primary focus in scrutinising administrative action is on the fairness of the process, not the substantive correctness of the outcome."

[12] Sections 3(1) and (3)(2)(b) of PAJA provide that:

> "(3)(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.
>
> (3)(2)(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-
>
> (i) adequate notice of the nature and purpose of the proposed administrative action;
>
> (ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right to review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5."

[13] It is important to distinguish between the disciplinary enquiry conducted for the purpose of dismissing Basson, which was convened in terms of the Labour Relations Act, 66 of 1995 ("LRA"), and a hearing to determine whether or not Basson should be debarred as an authorised representative, which is to be conducted in terms of section 14(1) of the FAIS Act and Section 3 of PAJA.

[14] Advocate Thulare in an article in the FSB Bulletin wrote as follows:

> "For purposes of a debarment under section 14(1) of the FAIS Act and the Promotion of Administrative Justice Act (PAJA), the FSP must afford the representative the opportunity to be heard before an adverse decision is taken. In my view, the fact that the representative was subject to an earlier disciplinary hearing would not constitute adequate compliance under PAJA."

[15] A disciplinary enquiry is convened in terms of the LRA to determine whether or not an employee should be dismissed on recognised Labour Law grounds. In this matter this is apparent from the "charge sheet" brought to bear against Basson. Basson was charged with "gross misconduct" and that is what he was found guilty of by the chairman of the Disciplinary Enquiry. That finding is currently being challenged before the CCMA.

[16] A disciplinary enquiry differs in material respects from an enquiry to determine whether an authorised representative should be debarred. A debarment enquiry must be convened in terms of section 14(1) of the FAIS Act to determine if the representative complies with the "fit and proper" requirements contemplated in section 13 of the FAIS Act and published in regulations under section 6A; or has contravened or failed to comply with any provision of the FIAS Act in a material manner, as contemplated in section 14(1) thereof. A debarment enquiry must be conducted in a manner that meets the procedural fairness requirements contemplated in section 3 of PAJA.

[17] There was no reference to section 13(2)(a) or section 14(1) of the FAIS Act in the Respondents' notice of the disciplinary enquiry and complaint sheet.

[18] The finding of "gross misconduct" made by Leslie at the disciplinary enquiry is insufficient for a finding that Basson should be debarred in terms of Section 14(1) of the FAIS Act. The statutory "fit and proper" requirements were not raised or placed in issue and no finding was made in relation to such requirements by Leslie.

[19] The resolutions in terms of which Basson was debarred recorded that "In light of the findings of the disciplinary inquiry . . . Basson no longer complies with the requirements referred to in section 13(2)(a) of FAIS". This charge did not form part of the complaints dealt with at the disciplinary enquiry and Basson was not given a reasonable opportunity at the disciplinary enquiry to make representations in this regard. In his written outcome in the disciplinary enquiry, Leslie did not make any finding that Basson no longer complied with the requirements referred to in section 13(2)(a) of the FAIS Act.

[20] In his article in the FSB bulletin Advocate Thulare further wrote the following:

> "The outcome of the disciplinary enquiry may provide the basis to consider the application of the FAIS legislation. In my view, it does not necessarily follow that a guilty finding made under the LRA would also trigger a debarment process under the FAIS Act. An independent assessment would be necessary to determine whether the misconduct is sufficiently serious to impugn the honesty and integrity of the Representative."

[21] The case that Basson had to meet at the disciplinary enquiry did not include any complaint based on section 13(2)(a), namely that the Respondents were satisfied that when Basson rendered financial services on their behalf he was not competent to act; or he did not comply with the fit and proper requirements that were published in regulations published under section 6A.

[22] At the disciplinary enquiry the Respondents acted purely in their capacity as employers (and not as authorised financial services providers) when they sought a recommendation for Basson's summary dismissal.

[23] The only opportunity given to Basson to make representations regarding his proposed debarment was at the meetings of the boards of directors of the Respondents that was held on 17 May 2017 and at which the majority directors passed the resolutions to debar Basson.

[24] The debarment procedure adopted by the Respondents thus failed to afford Basson a reasonable opportunity to make representations in respect of his proposed debarment, for the reasons below.

[25] The notice of board meetings did not relate to the convening of a debarment enquiry but, rather, to meetings of the board of directors of APS and Pentagon, where the directors would be called upon to vote for the motions in question. Basson was thus not advised that there would be an enquiry, at which he could state his case, after which an unbiased decision would be made by an independent and impartial forum. There would be a vote on the motion and it was, in the circumstances, unquestionable that the majority directors would vote in favour of the motion.

[26] Basson was not advised to answer to any specific allegations impeaching his "honesty and integrity", but rather, the finding of gross misconduct which had justified his dismissal at the disciplinary enquiry. As debarment involves a higher threshold than dismissal, representations in respect of debarment would be different to those relating to dismissal.

[27] The SCA has held that principles of procedural fairness are applicable in instances where an authorised FSP takes steps to debar a representative. In **Financial Services Board v Barthram** (20207/2014) [2015] ZASCA 96 (1 June 2015), Ponnan JA said:

> "[21] There was some debate on the papers as to whether the power that Discovery exercised when debarring Mr Barthram was reviewable under PAJA. It seems to me that it is unnecessary to enter into that debate for the purposes of this case because even in our pre-

constitutional era, our courts generally accepted that certain principles of procedural fairness would find application in an instance such as this. In **Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture** 1980 (3) SA 476 (T) at 486 D, Colman J stated:

> "It is clear on the authorities that a person who is entitled to the audi alteram partem rule need not be afforded all the facilities which are allowed to a litigant in a judicial trail. He need not be given an oral hearing, or allowed representation by an attorney or counsel; he need not be given an opportunity to cross-examine; and he is not entitled to discovery of documents. But on the other hand (and for this no authority is needed) a mere pretence of giving the person concerned a hearing would clearly not be a compliance with the Rule. For in my view will it suffice if he is given such a right to make representations as in the circumstances does not constitute a fair and adequate opportunity of meeting the case against him. What would follow from the last-mentioned proposition is, firstly, that the person concerned must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations; secondly he must be put in possession of such information as will render his right to make representations a real, and not an illusory one."

[28] The opportunity that the Respondents gave Basson to make representations at the board meetings held on 17 May 2017 at which his debarment had been proposed by one of the decisions-makers was (in the

words of Colman J) a mere pretence of giving Basson a hearing and thus not in compliance with the audi alteram partem rule and it rendered his right to make representations an illusory one.

[29] Section 6(2)(c) of PAJA provides that:

> "6(2) A court or tribunal has the power to judicially review an administrative action if-
>
> (c) the action was procedurally unfair;"

[30] The Respondents' debarment decisions accordingly fall to be reviewed under PAJA and set aside on this ground as they did not meet the constitutional requirements for procedural fairness.

[31] Section 34 of the Constitution provides that:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[32] In **Hamata & Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others** 2000 (4) SA 621 (C), Hlophe JP et Brand J said:

> "[67] It is our view that it is not bias per se to hold certain tentative views about a matter. It is human nature to have certain prima facie views on any subject. A line must be drawn, however, between mere predispositions or attitudes, on the one hand, and pre-judgment of the issues to be decided, on the other. Bias or partiality occurs when the tribunal approaches a case not with its mind open to persuasion nor

conceding that exceptions could be made to its attitudes or opinions, but when it shuts its mind to any submissions made or evidence tendered in support of the case it has to decide. No one can fairly decide a case before him if he has already prejudged it. Thus, pre-judgment of the issues to be decided (which is in a sense prejudiced) constitutes bias. The entire proceedings become tainted with bias. (See De Lille and Another v Speaker of the National Assembly 1998 (3) SA 430 (C) at 444-5 and the authorities there cited; Loggenberg and Others v Robberts and Others 1992 (1) SA 393 (C) at 405 – 6; Anglo American Farms t/a Boschendal Restaurant v Konjwayo (1992) 13 ILJ 573 (LAC) at 587; Council of Review, South African Defence Force, and Others v Monnig and Others 1992 (3) SA 482 (A) at 490.)"

[33] The majority directors pre-judged the issue of whether Basson should be debarred before the board meetings were held on 17 May 2017. They based their decision to debar Basson on the findings made by Leslie at the disciplinary enquiry and Moonstone's advice relating thereto.

[34] In **President of the Republic of South Africa and Others v South African Rugby Football Union and Others** 1999 (4) SA 147 (CC), the court held that:

"[35] A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the

appearance of bias in the official or officials who have the power to adjudicate on disputes."

[35] In **Basson v Hugo and Others** 2018 (3) SA 46 (SCA), Shongwe AJ held that:

"[26] The rule against bias is thus firmly anchored to public confidence in the legal system, and extends to non-judicial decision-makers such as tribunals. And the rule reflects the fundamental principle of our Constitution that courts and tribunals must not only be independent and impartial, but must be seen to be such; and the requirement of impartiality is also implicit, if not explicit in s 34 of the Constitution (**Bernert v ABSA Bank Ltd** 2011 (3) SA 92 (CC) paras 28 and 31)."

[36] In **Basson v Hugo** Swain JA said:

"[41] The rule against bias is foundational to the fundamental principle of the Constitution that courts, as well as tribunals and forums, must not only be independent and impartial, but must be seen to be so. The constitutional imperative of a fair public hearing is negated by the presence of bias, or a reasonable apprehension of bias, on the part of a judicial or presiding officer."

[37] In **Turnbull-Jackson v Hibiscus Coast Municipality and Others** 2014(6) SA 592 (CC), Madlanga J said:

"[30] The Constitution guarantees everyone the right to administrative action that is procedurally fair. Section 6(2)(a)(iii) of PAJA, which is legislation enacted in terms of section 33(3) of the Constitution to give

effect to, inter alia, the right contained in section 33(1) of the Constitution, makes administrative action taken by an administrator who was 'biased or reasonably suspected of bias' susceptible to review. Whether an administrator was biased is a question of fact. On the other hand, a reasonable suspicion of bias is tested against the perception of a reasonable, objective and informed person.

To substantiate, borrowing from S v Roberts:

a) There must be a suspicion that the administrator might – not would

   - be biased.

b) The suspicion must be that of a reasonable person in the position of the person affected.

c) The suspicion must be based on reasonable grounds.

d) The suspicion must be one which the reasonable person would – not might – have."

[38] In **South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd** 2000 (3) SA 705 (CC), in para [13], Cameron AJ said:

"Impartiality is that quality of open-minded readiness to persuasion – without unfitting adherence to either party, or to the Judge's own predilections, preconceptions and personal views – that is the keystone of a civilized system of adjudication. Impartiality requires, in short, 'a mind open to persuasion by the evidence and the submissions of counsel'; and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding. The reason is that:

'A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before courts and other tribunals ... Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes.' "

[39] The FSB Guidelines On The Debarment Process In Terms Of Sec 14(1), dated 5 November 2013, provides the following with regard to the debarment of representatives in paragraph 3 thereof:

"**ii. Bias – Section 14(2)**

Providers must use their power without bias. "Bias" means that the person making the decision is unfairly slanted towards or in favour of a particular decision. It means too that the person making the decision is not independent and impartial.

The provider must develop systems and procedures to ensure that due process is complied with as soon as possible. Before effecting a debarment, the provider must inform the representative of the intention to debar and grounds therefor and must give the representative a reasonable opportunity to make a submission in response thereto. This process may form part of disciplinary proceedings which may be embarked upon by the employer against a representative.

If the provider might be perceived as biased, it is recommended that an independent person be delegated to chair the enquiry to determine whether there are grounds for debarment. It is important that when

effecting a debarment in terms of S 14(1) the provider is exonerated of actual or real bias."

[40] The majority directors of APS and Pentagon were not independent or impartial as when they took the decision to debar Basson on 17 May 2017. The companies and Basson were embroiled as opposing parties in the section 163 litigation, in which the value of Basson's shareholding in the companies was the main point of dispute. At the time when the majority directors took the decision to debar Basson they believed that the debarment would have the effect of rendering Basson's shares valueless, as he would be precluded from acting as a financial intermediary and would accordingly not have the ability to earn an income.

[41] On the day following the debarment decisions the majority directors sent a letter to Basson's existing clients advising them of his debarment and his inability to further service them. A director testified at an arbitration that Basson's clients "accrued" to the companies. It was further conceded in the CCMA proceedings that the value of the investments of those clients amounted to approximately R200 million with the annual income generated therefrom approximately R2,4 million.

[42] In these circumstances, the majority directors should have declined to exercise their debarment powers in terms of the FAIS Act and should have referred the matter to the FSB for the latter's decision as to Basson's debarment in terms of section 14A of the Act. Alternatively, the majority ought to have appointed an impartial person as the chairperson of an enquiry to determine whether or not Basson should be debarred.

[43] Section 6(2)(a)(iii) of PAJA provides that:

"6(2) A court or tribunal has the power to judicially review an administrative action if-

a) the administrator who took it-

(iii) was biased or reasonably suspected of bias;"

[44] In the premises, the Respondents' debarment decisions fall to be reviewed and set aside as the majority directors who passed the debarment resolutions were biased or reasonably suspected of bias.

[45] In **Tshwane City v Link Africa (Pty) Ltd and Others** 2015 (6) SA 440 (CC) Jafta J and Tshiqi AJ said:

"[71] In our law, administrative justice has always forbidden decision-makers from taking decisions in matters where they have an interest. For decision-makers cannot be impartial if they stand to gain from the very decision taken by them. In essence, the presence of bias is excluded in the process of administrative decision-making as it is in judicial decisions. But it is not actual bias only that renders an administrative decision invalid; a reasonable suspicion of bias also vitiates the decision.

[73] Administrative action that is tainted with bias is void and falls to be set aside on review. The common law rule against bias is part of the principles of natural justice ..."

[46] In **De Lange v Smuts NO and Others** 1998 (3) SA 785 (CC), Ackermann J said:

"[131] When contemplating the essential purpose of the protection afforded through the notion of procedural fairness, my sight is arrested by this fact: at heart, fair procedure is designed to prevent arbitrariness in the outcome of the decision. The time-honoured principles that no-one shall be the judge in his or her own matter (nemo iudex in sua causa) and that the other side should be heard (audi alteram partem) aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law...."

[47] The directors who had given evidence against Basson at the disciplinary hearing were judges in their own matter when they decided to debar Basson.

[48] The chairperson of the disciplinary enquiry (Leslie) had, to a considerable extent, predicated his findings on his determination of credibility in favour of two of the directors and at Basson's expense. Therefore, and in relying on Leslie's findings as grounds for Basson's debarment, the directors, in effect not only relied upon their own veracity as witnesses (being the judges in a matter in which they had given evidence); but did so knowing that they would rely upon the fact of Basson's debarment in the section 163 proceedings. In the debarment proceedings they were thus variously complainant, prosecutor, witness and judge.

[49] The Respondents' debarment decisions fall to be reviewed and set aside as the majority directors who passed the debarment resolutions were judges in their own cause.

[50] **In Council of Review, South African Defence Force and Others v Mönnig and Others** 1992 (3) SA 482 (A) at 491, Corbett CJ in a case involving the institutional bias of a court martial, held that a military court should recuse itself if there are reasonable grounds for believing or perceiving it to be biased, in which event a civil court with concurrent jurisdiction should hear the matter:

> "Although a court martial is composed of military officers, it is in substance a court of law and its proceedings should conform to the principles, including the rules of natural justice, which pertain to courts of law. One such rule is that which postulates that a person should not be tried by a court concerning which there are reasonable grounds for believing that there is a likelihood of bias or there is a reasonable suspicion of bias (whichever test be the correct one); and that, where there are such grounds or such a suspicion, the person concerned is entitled to have the court recuse itself . . . To the extent that this may, on the facts of the present case, curtail the jurisdiction of a court martial, it is a necessary consequence of applying one of the rules of natural justice designed to produce a fair trial ...
>
> It is not clear why the Legislature decided to confer such concurrent jurisdiction; but what it does mean is that, in the event of a military court being disqualified by reason of institutional bias, the accused may be brought to trial before a civil court. To my mind, this meets completely the argument raised by appellants' counsel to the effect that it could not have been intended that a ground of recusal based on institutional bias could be raised since it would disqualify all military

courts. This argument smacks of the so-called 'doctrine of necessity' described by De Smith Judicial Review of Administrative Action 4th ed at 276 as follows:

> 'An adjudicator who is subject to disqualification at common law may be required to sit if there is no other competent tribunal or if a quorum cannot be formed without him. Here the doctrine of necessity is applied to prevent a failure of justice.'

In this case, because of the concurrent jurisdiction of the civil courts, no such necessity arises."

[51] The FSB has concurrent jurisdiction with the Respondents in terms of section 14A of the FAIS Act to decide whether Basson should be debarred. It follows that the doctrine of necessity does not apply. Alternatively, a debarment enquiry under the chairmanship of an independent person could have been convened. The boards of directors of APS and Pentagon were disqualified and should have recused themselves. The curtailment of the Respondents' debarment jurisdiction in the specific circumstances of this case is a natural consequence of applying the rules of natural justice.

[52] The decisions to debar Basson thus fall to be set aside on each of the grounds set out above.

THE COUNTER APPLICATION

[53] APS and Pentagon filed a counter application in which they seek an order in the following terms:

53.1 Exempting APS and Pentagon in terms of section 7 (2)(c) of PAJA from the obligation to exhaust any internal remedies that may be provided in the FAIS Act or otherwise, insofar as may be necessary:

53.2 Declaring:

53.2.1 That twelve months must elapse from the period of Basson's debarment before he is eligible for upliftment of debarment;

53.2.2 Basson and Rebalance to have been obliged to provide original substantiating documents for his debarment to be uplifted:

53.2.2.1 To APS and Pentagon; and

53.2.2.2 To the Registrar;

53.2.3 Rebalance to have been obliged – prior to reappointing Basson – to have satisfied itself on rational grounds that Basson:

53.2.3.1 Is honest and has integrity;

53.2.3.2 Complied with the fit and proper requirements of FAIS;

53.2.3.3 Has genuinely, completely and permanently reformed; including (but not limited to) taking steps to obtain input from Basson's previous employing service provider;

53.3 The Registrar – prior to the upliftment of Basson's debarment – to have been obliged:

53.3.1 To obtain the input of APS and Pentagon in regard to the proposed upliftment of Basson's debarment;

53.3.2 To apply his mind as to whether Basson was (or was not) a fit and proper person to be representative as contemplated in the FAIS Act;

53.3.3 To have concluded upon rational grounds that Basson was a fit and proper person to be a representative as contemplated in the FAIS Act;

53.4 That the act of upliftment of debarment by the Registrar, and his reappointment as a representative:

53.4.1 Comprises administrative action within the purview of PAJA;

53.4.2 Requires fair procedure as contemplated by section 3 of PAJA, including (but not be limited to) the obligation of audi in regard to input from APS and Rebalance.

53.5 The costs of the counter-application be borne by the Registrar jointly and severally with Basson.

[54] The requirements for the grant of a declaratory order are set out in section 21(1)(c) of the Superior Courts Act 10 of 2013:

(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its

area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power –

(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

[55] Two requisites that must be fulfilled before a declaratory order can be granted. In **Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd** 2005 (6) SA 205 (SCA), Jaftha JA held:

> [18] Put differently, the two-stage approach under the subsection consists of the following. During the first leg of the enquiry the Court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation'. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the Court's discretion exist.
>
> If the Court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry.

[56] In **Van Deventer v Ivory Sun Trading 77 (Pty) Ltd** 2015 (3) SA 532 (SCA), Schoeman AJA said:

> "[31] Although an existing dispute is not a prerequisite for the granting of a declaratory order, there are two steps that must be investigated before a declaratory order can be granted. These are: firstly, that the

applicant has an interest in any existing, future or contingent right or obligation; and secondly, if such interest exists, whether an order would be appropriate. (Ex parte Nell 1963 (1) SA 754 (A) at 759A-B) However, if no dispute exists, a court might refuse to exercise its discretion in favour of an applicant. (Nell at 760 A-B)"

[57] During the first stage of the enquiry APS and Pentagon must be found to have an interest in an 'existing, future or contingent right or obligation'.

[58] In **Letseng Diamonds Ltd v JCI Ltd and Others**, **Trinity Asset Management (Pty) Ltd and Others** 2007 (5) SA 564 (W), Blieden J said:

"[25] The first question to be determined therefore is who is a person interested in an 'existing, future or contingent right or obligation'. This party must have a direct right concerning the subject-matter of the litigation 'not merely a financial interest which is only an indirect interest in such litigation', per Horwitz AJP in **Henri Viljoen (Pty) Ltd v Awerbuch Brothers** 1953 (2) SA 151 (O) at 169H ..."

[59] In **Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd and Others** 2009 (4) SA 89 (SCA), Jafta JA (in a minority judgment) said:

"[49] The sort of locus standi we are concerned with here does not relate to the appellants' capacity to institute proceedings but to their competence to claim particular relief. In other words the question is whether the appellants have a direct and substantial interest in the agreements which they seek to be declared invalid. The direct and substantial interest dos not include mere financial interest which is taken to be indirect interest."

[60] In the event that it is established that APS and Pentagon have an interest in an existing, future or contingent right, in the second stage of the enquiry, a discretion is to be exercised by deciding whether or not to grant the declaratory orders sought.

[61] In **JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others** 1997 (3) SA 514 (CC), para [15], Didcott J said:

> "... a declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones."

[62] The reason for launching the counter-application is set out in the founding affidavit of the counter application:

> "This counter-application is instituted arising from the fact that Basson has been re-appointed as an authorised representative in terms of the FAIS Act."

[63] It is common cause that at the time of the hearing of this matter:

63.1 Rebalance had long-since terminated Basson's appointment as a representative;

63.2 The Registrar had reversed Basson's status on the FSB website.

[64] In **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others** 2000 (2) SA 1 (CC) in note 18, Ackermann J wrote:

> "A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."

[65] APS and Pentagon do not have a valid direct and substantial interest in an existing, future or contingent right or obligation; and the relief sought in respect of Basson and Rebalance is moot.

[66] APS and Pentagon allege that in reappointing Basson, the regulatory framework governing such reappointment was not complied with, more particularly:

66.1 The regulations titled, "Determination of Requirements for Reappointment of Debarred Representatives, 2003" published in Board Notice 82 and Government Gazette 25299 ("**Board Notice 82**").

66.2 The Guidelines published under Board Notice dated 13 July 2011 ("**the Guidelines**")

[67] On receipt of the counter application Rebalance immediately removed Basson as a representative on its licence. The relief sought in the counter application is accordingly academic insofar as it relates to the appointment of Basson by Rebalance.

[68] APS and Pentagon sought an order declaring that twelve months must elapse from the period of Basson's debarment before he is eligible for

upliftment of debarment. This similarly became moot as the 12-month period has passed.

[69] Basson was not re-appointed by Rebalance. Rebalance's compliance officer had checked the FSB database which had indicated that Basson was not debarred. Basson was appointed as representative by Rebalance without regard to the requirements of Board Notice 82 which do not find application with regard to the appointment of representatives.

[70] The reappointment of debarred representatives is governed by the provisions of section 13(1)(b)(ii) of the FAIS Act read with Board Notice 82.

[71] In terms of section 13(1)(b)(ii) of the FAIS Act, a person may not act as a representative of an authorised financial services provider, unless such person, if debarred as contemplated in section 14, complies with the requirements determined by the registrar by notice in the Gazette, for the re-appointment of a debarred person as a representative.

[72] Board Notice 82 constitutes the "notice in the Gazette". It provides as follows:

> "2 Requirements for reappointment of debarred representatives
>
> The requirements for the reappointment of a debarred representative shall be as follows, namely, that the applicant must be a person who, on the date of reappointment, complies with the following, which compliance must, where necessary, be proved by the submission to the appointing provider by the applicant and, where appropriate, the debarring provider or any other person, of relevant original

substantiating documentation or certified copies thereof, including affidavits (if any):

(a) At least 12 (twelve) months since the debarment date must have elapsed, unless the debarment was consequent on the applicant not having qualified as contemplated in section 13(2)(a) of the Act, and the applicant has within that period qualified as so contemplated;

(b) All un-concluded business of the applicant as former representative, referred to in the proviso to section 14(1) of the Act, has been properly concluded;

(c) All-

i. Complaints or legal proceedings (if any) submitted by clients to the applicant or the debarring provider, or the Ombud or nay court of law; or

ii. Other administrative or legal procedures or proceedings in terms of the Act or any other law,

Arising out of any acts or omissions in which the applicant was directly or indirectly involved prior to the debarment date, have been properly and lawfully resolved or concluded, as the case may be, and that the applicant has fully complied with any decision, determination or court order in connection therewith, given or issued in respect of the applicant;

(d) All fit and proper requirements as contemplated in section 8(1)(a) and (b), read with section 13(2), of the Act are complied with."

[73] The FSB submitted that the Counter Applicants misinterpret the contents of Board Notice 82 in that:

73.1 While the Board Notice provides that at least 12 months should have elapsed since the time of debarment, this requirement is subject to the following proviso: "unless the debarment was consequent on the applicant not having qualified as contemplated in section 13(2)(a) of the Act, and the Applicant has within that period qualified as so contemplated".

73.2 The qualification referred to in the proviso does not only refer to the competency requirements but also includes the fit and proper requirements of honesty and integrity. This, the FSB explained, is because section 13(2)(a) requires FSP's to be satisfied that their representatives are competent to act and that they comply with the fit and proper requirements contemplated in paragraphs (a) and (b) of section 8(1).

[74] The proviso allows for the re-appointment of a debarred representative within a period of less than 12 months. Where the debarment was effected due to dishonesty or lack of integrity, the appointing FSP will have to be satisfied that the representative has been rehabilitated or reformed (i.e. that the representative has qualified within regard to the personal character qualities of honesty and integrity).

[75] The re-appointment of a representative is the prerogative of a FSP and the Registrar is not empowered to interfere in the process of reappointment. The Registrar will merely satisfy himself that the process of re-appointment was correct. Should the Registrar be of the view that a FSP has re-appointed a representative who is not reformed, the Registrar may take action under section 9 or in terms of section 14A.

[76] The above interpretation is consistent with the well-established principles of statutory interpretation. In **Cool Ideas 1186 CC v Hubbard and Another** 2014 (4) SA 474 (CC) Majiedt AJ stated as follows:

> "[28] A fundamental tenet of statutory interpretation is that the words in a statue must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
>
> (a) that statutory provisions should always be interpreted purposively;
>
> (b) the relevant statutory provisions must be properly contextualised; and
>
> (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."

[77] APS and Pentagon complain that a New Guidance Note "effectively reduces the requirements contained in the prescribed B82 from to a mere formality devoid of any substance". The New Guidance Note states expressly that Board Notice 82 finds application:

> "21 A debarred representative may be reappointed as a representative of an FSP if the requirements of BN82 have been met. BN82 does not require of the Registrar to make enquiries with the debarring FSP regarding the matter referred to in paragraph 2 of BN82 or empower the Registrar to consider or confirm a reappointment in order for it to have to take effect. Any failure by the Registrar to make such enquiries or to reconsider a reappointment has no effect on the validity of a reappointment because they are not prerequisite requirements for a reappointment. The purpose of the notification of the reappointment of a debarred representative to the Registrar and the consideration by the Registrar of the information supporting a reappointment is set out in paragraphs 12 to 14 above."

[78] Both the New Guidance Note and Board Notice 82 remain in place. APS and Pentagon seek no relief aimed at challenging the validity or lawfulness thereof.

[79] APS and Pentagon did not identify any legislative provision in support of their proposition that the FSB was obliged to apply its mind as to whether Basson was (or was not) a fit and proper person to be a representative as contemplated in the FAIS Act. The FAIS Act provides, in section 13(1)(b)(ii) that the Registrar determines the requirements by notice in the Gazette for the reappointment of a debarred person as a representative; there is no injunction

that these requirements entail the FSB considering and determining such an application. Had the legislature so intended, section 13(1)(b)(ii) would have said so in terms.

[80] The act of upliftment of debarment does not occur by the FSB. On the evidence in this matter as a matter of fact the FSB did not decide on the upliftment of debarment and did not effect such upliftment.

[81] The re-appointment of a representative is the prerogative of a FSP. As in the case the appointment of a representative, the Registrar is not empowered to interfere in the process of reappointment. He will at most satisfy himself that the process of reappointment was correct.

[82] The function of the FSB is (inter alia) to make known a decision already taken of the representative's debarment; this is not administrative action.

[83] The Registrar did not and need not take any decision in this respect.

[84] It is clear that the review relief sought in this application is in terms of the Promotion of Administrative Justice Act No 3 of 2000 ("PAJA"); hence the declarator sought in paragraph 53.1 above.

[85] In terms of PAJA, a key element to the definition of "administrative action" is "any decision taken, or any failure to take a decision".

[86] "Decision" is in turn defined as:

> "decision means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-

(a) making, suspending, revoking or refusing to make an order, award or determination;

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

(d) imposing a condition or restriction;

(e) making a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing of an administrative nature,

and a reference to a failure to take a decision must be construed accordingly."

[87] In light of the evidence in this matter that the FSB did not uplift Basson's debarment and as there is no "empowering provision" in respect of such an upliftment by the FSB the declarator sought cannot be granted.

[88] In this regard it is significant that the FAIS Act contemplates a debarment of representative occurring in two ways, one of which is by the Registrar.

[89] By contrast, the reappointment of a debarred representative is not regulated by the FAIS Act at all, save for section 13(1)(b)(ii), which vests in the Registrar the power to determine the requirements for re-appointment. This has been done through Board Notice 82, the content of which speaks for

itself. The reappointment of a debarred representative does not "uplift" the debarment; it merely signals the fact that the person has qualified again to work in the industry.

[90] The decision to debar constitutes administrative action and as such it cannot be revisited by an administrative body in the absence of a legislative power to do so.

[91] Board Notice 82, has a status in law that is akin to that of regulations. In **Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)** 2006 (2) SA 311 (CC) at par 121, the Constitutional Court held that the regulations that were the subject of challenge therein, will be 'administrative action' within the meaning of PAJA, if the making of the regulations constituted a 'decision', and if they are not excluded by subparas (aa) – (ii) of the definition of ' administrative action'.

[92] The consequence of this is that Board Notice 82 remains valid and binding unless and until set aside by a Court of law.

[93] On the plain wording of the Notice, the FSB bears no obligation to determine the removal of debarment.

[94] The counter application thus falls to be dismissed with costs.

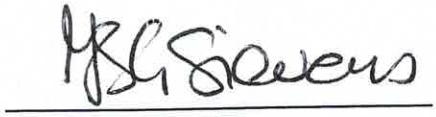
[95] It is therefore ordered that:

95.1 The decision taken by First Respondent (APS) on 17 May 2017, to debar the Applicant (Basson) in terms of Section 14(1) of the FAIS Act, is reviewed and set aside;

95.2 The decision taken by the Second Respondent (Pentagon) on 17 May 2017 to debar the Applicant (Basson) in terms of Section 14(1) of the FAIS Act, is reviewed and set aside;

95.3 The First (APS) and Second Respondents (Pentagon), jointly and severally, shall pay the Applicant's (Basson's) costs in the review application (which costs include the costs of the interlocutory application which stood over for later determination in terms of the court order dated 1 June 2018), such costs include the costs of two counsel, where briefed.

95.4 The counter application is dismissed and the First (APS) and Second (Pentagon) Applicants therein shall pay the First Respondent's (Basson's) costs therein, such costs include the costs of two counsel, where briefed.



SIEVERS, AJ
Acting Judge of the High Court