



Clarifying the Effect of Debarment of Representatives by Financial Services Providers and Related Due Process Requirements: *Financial Services Board v Barthram* [2015] 3 All SA 665 (SCA)

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Abstract

This note focuses on the decision of the Supreme Court of Appeal (SCA) in *Financial Services Board v Barthram* [2015] 3 All SA 665 (SCA). The case dealt with the debarment of a person active professionally in the financial sector as a representative for a financial services provider (FSP) in terms of section 14 of the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS Act). Barthram, an FSP representative of Discovery, was found by Discovery to have ceased to comply with the extant requirements of the FAIS Act for a representative in good standing. He was consequently debarred by Discovery from rendering financial services on behalf of Discovery and removed from the register of representatives. Barthram was subsequently listed on the Financial Services Board (FSB) website as a debarred representative for failing to comply with the personal character qualities of honesty and integrity. The central question posed in the litigation that ensued was regarding the effect of Barthram's debarment. The High Court held that he was only debarred from providing financial services on behalf of Discovery and not industry wide. However, the SCA reversed the High Court's decision. It would appear that there is a misconception whether a representative banned from providing financial services on behalf of one FSP under section 14 will be prohibited from providing financial services industry-wide. This note intends to clarify this misconception by exploring the SCA's decision in *Financial Services Board v*

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Barthram. The decision is significant for the jurisprudence of debarment of FSP representatives and for the financial services industry at large. It clarified that a section 14 debarment has industry-wide application, and that procedural fairness is required in arriving at the decision to debar such a representative. Lastly, judicial affirmation of the use of industry-wide debarment as a tool for enforcing honesty and integrity, and thereby restoring investor confidence in financial services delivery is to be welcomed in South Africa, especially in the wake of increasing dishonesty and malpractices in the industry.

Keywords: Debarment; financial services; fit and proper; financial intermediaries; procedural fairness

1 INTRODUCTION

With the introduction of the Financial Advisory and Intermediary Services Act (FAIS Act),¹ financial services providers (FSPs) and their representatives² now operate in a significantly more regulated industry environment. The FAIS Act is intended to, *inter alia*, systematically regulate the provision of advice and rendering of financial services to the public and related matters. The objective of the FAIS Act is not solely investor protection but it also seeks to foster good business practices and uphold the integrity of the financial services industry.³ Thus, representatives of FSPs are required, when rendering financial services for or on behalf of an authorised/licensed financial services provider (FSP),⁴ to act “fairly, and with due skill, care, and diligence in the interests of clients and the integrity of the financial services industry.”⁵

One of the most pivotal elements of the regulatory framework established by the FAIS Act is the prescription for representatives of FSPs to comply with the “fit and proper requirements” codified in section 8(1) of the FAIS Act.⁶ From the perspective of practicing FSP representatives, the most drastic consequence for such a representative who no longer conforms to the “fit and proper requirements” is that she or he will be prohibited or banned from continuing to render financial services in South Africa. This action is technically known as *debarment*.⁷ Debarment

1 37 of 2002.

2 Section 1 of the FAIS Act defines a representative as a person “who renders a financial service to a client for or on behalf of a FSP in terms of conditions of employment or any other mandate, but excludes a person rendering clerical, technical, administrative, legal, accounting or other service in a subsidiary or subordinate capacity.”

3 See generally Phakeng “The Role of the Takeover Regulation Panel in Protecting Investors” 2015 *De Rebus* 15; and La Porta, Lopez-De-Silanes, Shleifer and Vishny “Investor Protection and Corporate Valuation” 2002 *The Journal of Finance* 1147.

4 Section 1 of the FAIS Act provides that an FSP is:
“any person, other than a representative, who as a regular feature of the business of such a person-
(a) furnishes advice; or
(b) furnishes advice and renders any intermediary services; or
(c) renders an intermediary service.”

5 Du Toit “The FAIS Specific Code of Conduct for Authorised Financial Services Providers and Representatives conducting Short-term Deposit Business and the Bank and Customer Relationship” 2004 *TSAR* 575. Apart from complying with any applicable code of conduct and other laws relating to conduct of business in the discharge of the duties and responsibilities imposed on them by the FAIS Act, representatives must also observe the pertinent ethical values or requirements including, *inter alia*, honesty, integrity, competence and operational ability. See ss 8 and 13(2) of the FAIS Act and s 2 of the General Code of Conduct for Authorised FSPs and Representatives, 2003. See also *Gary Le Vatte v Rosspen Financial Services* FOC 600/05 EC, 29 September 2005 and *Johan Adriaan Steenkamp v Old Mutual Life Assurance Company (South Africa) Ltd* FOC 1343/05 FS, 13 March 2006. For a detailed account of the legislative duties and responsibilities of representatives, see Moolman *et al* *Financial Advisory and Intermediary Services Guide* (2010) 66-75.

6 In terms of s 8 of the FAIS Act, fit and proper requirements include, but are not limited to, personal character qualities of honesty and integrity, competence as well as continuous professional development. For a detailed explanation on what constitutes fit and proper requirements, see Board Notice 106 of 2008 – Determination of Fit and Proper Requirements for Financial Services Providers read in conjunction with Board Notice 103 of 2008 – Determination of Continuous Professional Development, Board Notice 104 of 2008 – Exemption of Services under Supervision in terms of Requirements and Conditions and Board Notice 105 of 2008 – Determination of Qualifying Criteria and Qualifications for Financial Services Providers. The Board Notices are available at <https://www.fsb.co.za/Departments/fais/legislation/Pages/board.aspx>. Van Zyl, a leading commentator on financial services regulation in South Africa, has opined that the FAIS Act’s fit and proper requirements follow global regulatory standards in the financial services industry which mandate the administration of financial institutions to be conducted by “competent staff of integrity” and that those performing the duties of an FSP be “honest, competent and solvent”. See Van Zyl *Financial Services Advisory and Intermediary Services Manual* (2004) 1.

7 Debarment is defined as “an action taken by the FSP in order to prevent a representative from rendering further financial services due to an adverse finding/ruling against that representative, which renders the FSP

is analogous to the legal profession's disciplinary action known as "striking-off"⁸ of individuals who are no longer fit and proper to practice as legal practitioners. The FAIS Act provides for debarment at the request of an FSP (under section 14) or by the Registrar of Financial Services Providers *mero motu* (under section 14A). Significantly, section 14(1) of the FAIS Act not only provides for the debarment of a representative by an FSP but it also enjoins and empowers the FSP to ensure that any representative who no longer complies with the "fit and proper requirements" is prohibited by such FSP through the withdrawal of any authority to act on behalf of the provider and removal of the representative's name from the register (of FSP representatives) referred to in section 13(3).⁹ Section 14(1) further mandates the authorised FSP to immediately take steps to ensure that the debarment does not prejudice the interests of the errant representative's clients and that any of the representative's unfinished business is properly concluded. It is important to stress that the provisions of section 14(1) of the FAIS Act are peremptory, hence it is mandatory for FSPs to take action in the event of anyone of their representatives failing to meet the fit and proper requirements.¹⁰

Not surprisingly, until quite recently, there have been misunderstandings as to the consequences of debarment of representatives by FSPs in terms of section 14 of the FAIS Act. The objective of this note is to provide clarity and related justifications on the narrow question of the legal effect flowing from debarment under section 14 of the FAIS Act. To this end, it examines the Supreme Court of Appeal (SCA) decision in *Financial Services Board v Barthram*.¹¹ The corpus of the note consists of seven parts. Immediately following this introduction is the second part which briefly describes the narrow legal and regulatory context within which the debarment decision is made and against which judicial review of the decision must be made. The third part presents the facts of *FSB v Barthram* succinctly after which the proceedings and decision in the court *a quo* are briefly discussed. Part five then critically explores the SCA's decision as well as the underlying reasons for the decision while part five critically evaluates that decision. The final part concludes the note by assessing the significance of the SCA's decision for the jurisprudence of debarment of representatives and for the financial services industry at large.

2 REGULATORY CONTEXTUAL BACKGROUND

In the realm of the FAIS Act, the term "fit and proper" encompasses the personal characteristics, academic qualifications and technical experience that all representatives ought to possess in order to render financial services as well as mandatory ongoing professional development to which they must periodically submit themselves in order to retain their licence or authorisation to do so.¹² Not surprisingly, failure by a representative to meet any of the said requirements implies that he or she is no longer "fit and proper" in terms of section 8(1) of the FAIS Act. Perhaps the most prominent of the "fit and proper" requirements are the personal character

non-compliant with the Fit and Proper Requirements." See FSB *FAIS Newsletter* (2007) 5.

- 8 Striking off is considered to be the legal profession's version of capital punishment. See Maloka "Protecting the Foundation and Magnificent Edifice of the Legal Profession: Reflection on *Thukwane v Law Society of the Northern Provinces* 2014 5 SA 513 (GP) and *Mtshabe v Law Society of the Cape of Good Hope* 2014 5 SA 376 (ECM)" 2015 *PER/PELJ* 2645.
- 9 Section 13(3) of the FAIS Act stipulates that an authorised FSP must maintain a register of its representatives, and key individuals of such representatives, which must be regularly updated and be available to the Registrar of Financial Services Providers for reference or inspection purposes.
- 10 Thulane "To Debar or Not Debar – The Perennial Headache for FSPs" *FAIS Newsletter* (6 March 2015) 6. In *Odendaal v ABSA Brokers (Pty) Ltd* (2243/2010) [2010] 61 (25 June 2010) para 8, Van der Merwe J explained the provisions of s 14(1) as follows: "The meaning of this ... is that if it is established by an authorised financial services provider that its representative has committed an act of dishonesty sufficiently serious to impugn the honesty and integrity of the representative, the authorised financial services provider must ensure that the representative is debarred."
- 11 [2015] 3 All SA 665 (SCA); (20207/2014) [2015] ZASCA 96 (1 June 2015) (hereinafter "*FSB v Barthram*").
- 12 See s 8 of the FAIS Act read with the Determination of Fit and Proper Requirements for Financial Services Providers and Representatives (as amended) <https://www.fsb.co.za/Departments/fais/communication/Documents/Determination%20of%20Fit%20and%20Proper%20Requirements%20For%20Financial%20Services%20Providers2008.pdf> (accessed 08-05-2016). In brief, the fit and proper requirements entail that a representative must: be a person who is honest and has integrity; comply with the applicable minimum experience requirements; have the relevant qualification as prescribed; have successfully passed the relevant first and second level regulatory examinations; and comply with the continuous professional development requirements as set out. Board Notice 91 of 2006 in both Government Gazette No. 25446 of 10 September 2003 and Government Gazette No. 29132 of 16 August 2006.

qualities of honesty and integrity in respect of which both the FSB and the courts have tended to be uncompromising.¹³ Interestingly, the same ethical standards of honesty and integrity are demanded of practitioners in the legal profession.¹⁴ Central to the determination of compliance with this conduct of business standard is that the representative must, in rendering financial services, act honestly and fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry.¹⁵

In terms of this regulatory scheme, the FSP takes responsibility for the actions and/or omissions of its representatives insofar as they provide financial services on its behalf. For this reason, it is in the self-interest of the FSP to ensure that its representatives comply with all applicable regulatory requirements. Accordingly, section 13(2) of the FAIS Act should be seen as an enabling provision in that it gives every FSP the power and duty to ensure and be satisfied that at all times its representatives are, when providing financial services on behalf of the FSP, competent to act and comply with the fit and proper requirements.¹⁶

The Registrar of FSPs can, in terms of section 14A of the FAIS Act,¹⁷ debar a person from rendering financial services for a specific period if the person no longer meets the fit and proper requirements; or the person has contravened or did not comply with a provision of the FAIS Act.¹⁸

The decision of an FSP to debar a representative pursuant to section 14 of the FAIS Act qualifies as an "administrative action" in terms of section 1 of the Promotion of Administrative Justice Act (PAJA)¹⁹ and, accordingly, the debarring FSP must follow a procedurally fair process.²⁰ Accordingly, a representative facing debarment may approach the courts for a

13 Section 2(1) of the Board Notice 106 of 2008. See also s 8(1)(a) of the FAIS Act and Wessels "Honesty and Integrity - How are these Qualities Assessed in terms of FAIS Act?" 2003 *FSB Bulletin* <https://www.fsb.co.za/Departments/fais/communication/Documents/Honesty%20and%20integrity.pdf> (accessed 27-05-2016).

14 Section 3(1)(c) of the Advocates Act 74 of 1964. See also *General Council of the Bar of SA v Matthys* 2002 5 SA 1 (E) paras 34-35; Maloka 2015 *PER/PELJ* 2646; and Slabbert "The Requirement of being a 'Fit and Proper' Person for the Legal Profession" 2011 *PER/PELJ* 215.

15 Du Toit 2004 *TSAR* 575.

16 Section 13(2) stipulates that a licensed FSP must:

"(a) at all times be satisfied that the provider's representatives, and the key individuals of such representatives, are, when rendering a financial service on behalf of the provider, competent to act, and comply with:

(i) the fit and proper requirements; and

(ii) any other requirements contemplated in subsection (1) (b) (ii);

(b) take such steps as may be reasonable in the circumstances to ensure that representatives comply with any applicable code of conduct as well as with other applicable laws on conduct of business."

See also Kloppers "The Regulation of Advice within the Financial Services Sector" 2007 *Obiter* 133; and *Pienaar v The Registrar of Financial Services* (629/2013) [2013] ZACPEHC 37 (16 July 2013) para 10.

17 Section 14A of the FAIS Act states:

"The Registrar may, subject to subsection (2), at any time debar a person including a representative, for a specific period from rendering financial services if satisfied on the basis of available facts and information that the person:

does not meet, or no longer meets, the requirements contemplated in section 8 (1) (a); or

has contravened or failed to comply with any provision of this Act."

18 It should be carefully noted that the nature and effect of debarment by the Registrar pursuant to s 14A of the FAIS Act is beyond the scope of this note.

19 Section 1 (i) of PAJA defines an administrative action as:

"any decision taken, or any failure to take a decision, by

(a) ...

(b) 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 any person and which has a direct, external legal effect."

See the two leading decisions in this regard, namely *President of the Republic of South Africa v South African Rugby Football Union (SARFU)* 2000 1 SA 1 (CC) and *Pharmaceutical Manufacturers Association of South Africa: In re: ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC). See also Nugent J's description of administrative action in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA) para 24. However, in this case the SCA held that "the cumbersome definition in PAJA serves not so much as to attribute meaning to the term as to limit its meaning by surrounding it within a palisade of qualifications" para 21. In *Odendaal v ABSA Brokers (Pty) Ltd* para 19, the court held that a decision to debar a representative by an FSP constitutes an action taken by a natural or juristic person other than an organ of state in exercising a public power or performing a public function in terms of the FAIS Act which adversely affects the rights of the representative and has a direct, external legal effect.

20 Thulane *FAIS Newsletter* 6. See also "Don't Misuse Debarment Tool: FSB" *MoneyMarketing* (August 2015) <http://www.nmpb2b.co.za/mm/digimags/2015/aug/files/assets/common/downloads/page0001.pdf> (accessed 31-08-2015).

review of the FSP's decision under PAJA.²¹ This right of recourse is in accordance with section 6(1) of PAJA which provides that any person may institute proceedings in a court for judicial review of an administrative action where such act was, in terms of section 6(2)(c) of PAJA, procedurally unfair; or the action was taken in bad faith, arbitrarily or capriciously.²² Section 3(1) of PAJA demands procedural fairness for any administrative action that materially and adversely affects the rights or legitimate expectations of a person. Procedural fairness is not a question pertaining to the merits of the impugned administrative action but of whether the administrator acted in a manner that qualifies as procedurally fair. In other words, it does not relate to whether the decision was right or wrong but whether the administrator followed a fair procedure in reaching a decision.

There is no hard and fast rule regarding what constitutes fair administrative procedure, but rather it depends on the circumstances of each case.²³ However, to give effect to a fair administrative procedure, the administrator must generally ensure that the affected person is given: "adequate notice of the nature and purpose of the proposed administrative action; a reasonable opportunity to make representations; a clear statement of the administrative action; adequate notice of any right of review or internal appeal, where applicable; and adequate notice of the right to request reasons".²⁴ In other words, the affected person must be clearly informed of the count against him and given enough time to respond to such. However, it should be noted that these requirements are not peremptory and an administrator may depart from such requirements if it is reasonable and justifiable to do so²⁵ taking into account all relevant factors such as, *inter alia*: "the objects of the empowering provision; the nature and purpose of, and the need to take, the administrative action; the likely effect of the administrative action; the urgency of taking the administrative action or the urgency of the matter; and the need to promote an efficient administration and good governance."²⁶

3 THE FACTS

The relatively simple set of facts in the case of *FSB v Barthram* was as follows. Percy Barthram (Barthram) entered a contract of employment with Discovery Life Limited (Discovery) in which the former was employed by the latter as a representative. Three years later, Barthram decided to terminate his contract with Discovery on 24 hours' notice and immediately thereafter took up employment with Old Mutual Life Insurance Limited (Old Mutual). After doing an audit of Barthram's client files, Discovery found that he no longer satisfied the "fit and proper" requirements, especially pertaining to the personal character qualities of honesty and integrity. Thus, immediately following that audit, Discovery's forensic investigator, who was also the company's chief compliance officer, convened a meeting with Barthram to address certain concerns relating to irregularities found in his client files.²⁷ Subsequent to that meeting, Discovery made a decision to notify the Financial Services Board (FSB)²⁸ that Barthram was no longer in compliance with the requirements of the FAIS Act for continued appointment as its representative. More importantly, Discovery then debarred Barthram from rendering financial services on its behalf and removed his name from its register of representatives. Consequently, the FSB listed Barthram on its website as a debarred representative indicating that he did not comply with the personal character qualities of honesty and integrity.²⁹ After trying without

21 *Pienaar v The Registrar of Financial Services* paras 5 and 21.

22 See s 6(2)(e), (v) and (vii) of PAJA.

23 Section 3(2)(a) of PAJA.

24 Section 3(2)(b) of PAJA. See also s 33 (2) of the Constitution.

25 Section 3(4)(a) of PAJA.

26 Section 3(4)(b) of PAJA.

27 For the details of the meeting, see *FSB v Barthram* para 20.

28 The FSB was a South African regulatory agency established in terms of s 2 of the Financial Services Board Act 97 of 1990. It was responsible for overseeing the South African non-banking financial services industry in the interests of the public. Section 3 of the Financial Services Board Act. See also Moolman et al 155. The FSB has been recently renamed and replaced by the Financial Sector Conduct Authority (FSCA) under South Africa's new "twin-peaks" legislation, the Financial Sector Regulation Act No 9 of 2017. The FSCA performs a role similar to that of the Financial Services Authority (FSA) of the United Kingdom (UK). More information on the FSA of the UK is available at <http://www.fsa.gov.uk/>. For the purposes of this note's subject matter, there is no significant difference between the FSB and the FSCA. For more information, see www.fsca.co.za

29 FSB maintains a register of representatives of FSPs on its website, which includes the names of representatives who have been debarred. See International Monetary Fund *South Africa: Financial Sector Assessment Program - Detailed Assessment of Implementation on the IOSCO Objectives and Principles of Securities Regulation*

success to have his debarment lifted, Barthram launched an urgent application in the North Gauteng High Court seeking the review and setting aside of the decisions of both Discovery and the FSB. Hiemstra AJ granted him an interim order directing the FSB to, *inter alia*, reinstate Barthram as representative of an FSP; enter his name in the register referred to in section 13(3) of the FAIS Act; and remove any mention of his debarment by any means necessary.³⁰ This interim order was granted pending the final order in the review proceedings.

4 THE HIGH COURT PROCEEDINGS AND DECISION

Clearly distressed by the potential consequences of the debarment, Barthram prayed the High Court to, *inter alia*, review and set aside both the decision of Discovery to debar him and to publish such fact, and that of the FSB to include his name in the register of debarred persons. In support of the application, Barthram contended, among others, that Discovery did not follow the correct procedure when it decided to debar him in terms of the FAIS Act, common law, PAJA and the rules of natural justice; that Discovery did not have the required authority to debar him in terms of section 14 of the FAIS Act;³¹ and that there was no evidence to prove that he was not fit and proper to provide financial services on behalf of any FSP. Discovery opposed the application, arguing that Barthram failed to clearly distinguish between the provisions of sections 14 and 14A of the FAIS Act. According to Discovery, section 14 deals specifically with the “debarment of representatives” and authorises the removal of a representative by an FSP from the register referred to by section 13(3). It argued that the consequence thereof is that a debarred representative can no longer act on behalf of that specific FSP in the provision of any financial services.³² In other words, the effect of the debarment in terms of section 14 is, according to Discovery, applicable in respect of a specific FSP. It further argued that section 14A provides for the “debarment of a person” by the Registrar and allows for the preclusion of that person from rendering financial services for any FSP.³³ Thus, such a debarment operates on an industry-wide basis. More specifically, Discovery stated:

In effect, the debarment by the Registrar of a person in terms of section 14A of the FAIS Act precludes such a person from rendering financial services on behalf of any service provider whereas a debarment in terms of section 14(1) of the FAIS Act precludes the debarred representative only from representing the particular service provider who effects the debarment.³⁴

Discovery accordingly argued that it acted well within its rights and powers under section 14(1) of the FAIS Act in deciding to debar Barthram as its representative and remove his name from its register. This was consistent with the fact that Discovery, as an authorised FSP, assumed the responsibility prescribed by the FAIS Act to ensure that its representatives were competent to act and comply with the “fit and proper” requirements. Discovery further maintained that the consequence of such a debarment did not and would not preclude the applicant from acting on behalf of Old Mutual in rendering financial services. The High Court held in favour of Discovery and thus dismissed the applicant’s review application. However, the interim order against the FSB was upheld and made a final order of the High Court. This was based primarily on critical findings of fact: that the applicant was debarred in terms of section 14(1) of the FAIS Act which prevents him from rendering financial services only on behalf of Discovery and was, therefore, still at liberty to offer financial services on behalf of other FSPs; that the review and setting aside of the respondents’ decisions in terms of the requirements of the PAJA and the common law were unnecessary in light of the legal and fact-based arguments of Discovery with which the court agreed. Accordingly, the court concluded that the consequence of the

(2007) 90.

30 *FSB v Barthram* para 4.

31 Debarment ought to be done before terminating the services or other agreements between the FSP and the representative. This is in accordance with the FSB’s contention that if an FSP has no mandate or contractual relationship with a representative at the time when the reason for the debarment occurred, it cannot impose a valid debarment. However, a crucial difference is that if the reason for debarment existed, but only came to the notice of the FSP later, the process of debarment may still be undertaken. FSB “Guideline on the Debarment Process in terms of Section 14(1)” 2013 <https://www.fsb.co.za/Departments/fais/legislation/Documents/Sec%2014%281%29%20Guideline.pdf> (accessed 21-08-2015).

32 *FSB v Barthram* para 6.

33 *Ibid.*

34 *Ibid.*

debarment by Discovery did not and could not debar the applicant from rendering financial services for other FSPs, including Old Mutual.³⁵ Barthram, according to the High Court, had only been excluded from providing financial services on behalf of Discovery and not industry-wide. Fearing that the decision of the High Court could have adverse consequences for the efficacy of financial services industry regulation, the FSB appealed against the court's decision. The FSB was clearly concerned that, as a result of the High Court's decision, representatives who had been subjects of industry-wide debarment as a result of having been debarred by one FSP could approach the Registrar and demand reinstatement to enable them render financial services for or on behalf of other FSPs.³⁶ For his part, Barthram sought and was granted leave to appeal against the dismissal of his review application in respect of Discovery.

5 THE SCA DECISION

The SCA effectively upheld the appeal of the FSB and reversed the decision of the court *a quo* concerning the debarment of representatives in terms of section 14 of the FAIS Act. However, it also upheld Barthram's appeal and overturned Discovery's decision to debar him pursuant to section 14 of the FAIS Act.

Essentially, two key legal issues came up for determination in the appeal before the SCA. First, the SCA had to determine whether the debarment of Barthram in terms of section 14 of the FAIS Act operated on an industry-wide basis or only in relation to a particular FSP, in this case Discovery. Second, the court had to decide whether the decision of Discovery to debar Barthram in terms of that section should be set aside on the grounds of non-compliance with procedural fairness.

With regard to the first issue, the SCA held that any representative debarred in terms of section 14(1) is prohibited on an industry-wide basis from providing financial services to the investing public. It largely accepted the contention of the FSB that the court *a quo* "erred in its finding that the effect of the debarment of Mr Barthram by Discovery was that he was only precluded from rendering financial services to the public on behalf of the latter."³⁷ In the SCA's view:

The court below appears to have misinterpreted the legal effect of a debarment in terms of section 14(1) in holding that it precludes the representative from acting as such only in respect of the debarring FSP. The absurdity of such an approach is patent. The debarment of the representative by a FSP is evidence that it no longer regards the representative as having either the fitness and propriety or competency requirements. A representative who does not meet those requirements lacks competence and thereby poses a risk to the investing public generally. Such a person ought not to be unleashed on an unsuspecting public and it must therefore follow that any representative debarred in terms of section 14(1) must perforce be debarred on an industry-wide basis from rendering financial services to the investing public.³⁸

In light of the above pronouncement of the SCA, it may be safe to conclude that once a representative is found to be lacking the "fit and proper" requirements referred to by the Act, such a person can and should be prohibited from carrying on with their business of providing financial services for or on behalf of any FSP. In other words, with respect to operational scope, debarment of a representative in terms of section 14(1) of the FAIS Act has industry-wide consequences.

With respect to the second key issue – whether the decision taken by Discovery to debar Barthram in terms of section 14 of the FAIS Act should be set aside on the grounds of procedural unfairness – the SCA held that the process followed by Discovery when making its decision was procedurally unfair and should have been set aside on that basis.³⁹ It held that before a decision is taken to debar a representative: (i) that representative must be given reasonable time in which to assemble the relevant information and to prepare and put forward his or her representations; and (ii) he must be provided with such information in addition to being allowed to exercise his or her right to make those representations.⁴⁰ Thus, debarment must be

³⁵ *Ibid* para 8.

³⁶ *Ibid* para 11.

³⁷ *Ibid*.

³⁸ *Ibid* para 16.

³⁹ *Ibid* para 18.

⁴⁰ *Ibid* para 21. It is important to point out that the SCA, in this respect, adopted the reasoning and finding of Colman J, in *Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture* 1980 (3) SA 476 (T) para 486E-G.

preceded by due process.⁴¹

6 EVALUATION

It is submitted that the SCA decision in *FSB v Barthram* has clarified the pre-existing misunderstandings around the implications and legal consequences of the debarment of representatives by an FSP under section 14 of the FAIS Act. As such, the decision is worthy of applause for the court's definitive pronouncement on the legal effect of a section 14 debarment, something which is not expressly stated in the FAIS Act or any related legislation. As a matter of fact, a credible assessment of the SCA decision in *FSB v Barthram* must address two critical questions – first, whether the SCA was correct in holding that a section 14 debarment has industry-wide application; and, second, whether the SCA's ruling that, under the particular circumstances, procedural fairness was not observed by Discovery in arriving at its decision to debar Barthram was sound.

In determining whether the SCA was correct in deciding that a section 14 debarment has the effect of an industry-wide ban, it is important to consider a statement made by the FSB in one of its newsletters wherein it distinguished between the legal effects of removal and debarment of representatives.⁴² The FSB clearly stated that in circumstances of removal, a representative no longer acts on behalf of a particular FSP but may still be appointed or act as a representative for another FSP, while in cases of debarment this would mean that such a representative shall no longer be allowed to participate in the rendering of financial services on an industry-wide basis.⁴³ In addition, it should be borne in mind that debarment under section 14 of the FAIS Act is not used as a form of punishment. Rather, it is employed as a regulatory instrument aimed at protecting the public and ridding the financial services industry of dishonest and incompetent financial intermediaries.⁴⁴ Debarment is therefore a serious censure of an individual and its purpose is to protect the investing public, the individual's employer and the industry.⁴⁵ It is therefore consistent with good sense and logic that the seriousness of a representative's acts or omissions and any mitigating factors should be taken into account by a FSP when considering debarment.

In light of the foregoing, debarment of representatives should be regarded as a shield, not a sword. In principle, the debarment process has the potential to enable the creation of lists of dishonest and incompetent financial intermediaries, on the basis of which it would then be possible to protect the investing public, prospective employers and the industry from such unfit and improper representatives. From an investor protection perspective, it is desirable that "when someone contravenes the laws designed to protect investors, they should be dealt with decisively and swiftly – or they are likely to create more financial victims."⁴⁶ As already alluded

41 It is noteworthy that because there was debate on the papers as to whether Barthram was still in the employ of Discovery at the time of his debarment, the SCA reached its decision on the factual assumption that he was still in Discovery's employ at the time the decision to debar him was taken.

42 The FSB explained that removal of a representative occurs when a representative terminates his or her contract with an FSP under normal circumstances such as resignation or retirement, whereas debarment happens when a representative no longer complies with fit and proper requirements. FSB *FAIS Newsletter* (2007) 5. See also Life Industry "New Debarment Procedure Introduced" *South Africa's Insurance Times*, July 2009 <http://www.insurance-times.net/article/new-debarment-procedure-introduced> (accessed 20-08-2015).

43 This means that from the date of exclusion, a representative shall cease to carry on with the provision of financial services as a representative during the period of such debarment. *Ibid.*

44 FSB "Guidelines on the Debarment Process in terms of Sec 14(1)" 2013 [https://www.fsb.co.za/Departments/fais/legislation/Documents/Sec%2014\(1\)%20Guideline.pdf](https://www.fsb.co.za/Departments/fais/legislation/Documents/Sec%2014(1)%20Guideline.pdf) (accessed 20-08-2015). Debarment of financial intermediaries is intended to encourage them to raise their standards of conduct to a level where they can demonstrate their commitment to honesty and integrity during the provision of financial services. Thulane "Financial Services Sector must follow Correct Procedures in the Debarment of FSP Representatives" *FA News* (June 2015) <http://www.fanews.co.za/article/compliance-regulatory/2/fsb-financial-services-board/1059/financial-services-sector-must-follow-correct-procedures-in-the-debarment-of-fsp-representatives/18174> (accessed 13-08-2015). Thulane explains that "debarment in terms of section 14(1) of the FAIS Act is intended to rid the industry of incompetent and dishonest representatives". See also "Don't Misuse Debarment Tool: FSB" *MoneyMarketing*, August 2015 and FSB "Guideline on the Debarment Process in terms of Section 14(1)" 2013.

45 Kilbride "Ian Kilbride on Fairness of FAIS Act: Debar, or not to Debar? That is the Question" *BizNews* (November 2014) <http://www.biznews.com/ian-kilbride/2014/11/28/ian-kilbride-fairness-fais-debar-not-debar-question/> (accessed 20-08-2015). See also Bracher "FAIS Act Debarment is Industry-wide" <http://www.insurancegateway.co.za/LifeProfessionals/PressRoom/ViewPress/ln=10931&URL=FAIS+Act+debarment+is+industrywide#.Vjspa-afeGs> (accessed 20-10-2015).

46 Kilbride *BizNews* (November 2014).

to, this punitive mechanism is similar to the order of striking-off imposed from time to time upon practicing attorneys and advocates for serious professional misconduct which is intended to be permanent.⁴⁷ A prominent financial services industry commentator, Kilbride, has asserted that he has personally witnessed in South Africa many cases where debarment was not utilised and the persons involved subsequently went on to harm their new employers as well as other members of the public.⁴⁸ In order to avoid the recurrence of such situations, debarment on an industry-wide basis would be preferable in that it shuts such offending representatives out of the industry and places them in a position where they could do no more harm to investors as consumers of financial services.⁴⁹ Obviously, if deviations from the pertinent conduct of business rules and related ethical standards are to be treated with less severity, there would be a greater likelihood that financial intermediaries will continue engaging in malpractices. This corresponds with the FSB's contention that the grave consequences of interpreting section 14 as debarment only in respect of a specific FSP is that it could possibly create space for the previously excluded representatives to return and render services for another FSP.⁵⁰ In that regard, the decision of the SCA in *FSB v Barthram* sends out a clear message to all financial intermediaries to consistently act honestly and fairly when providing financial services to the investing public, or else they will be shut out from the financial services industry all together. However, in other jurisdictions with comparable statutory requirements, a problematic scenario occasionally arises whereby an FSP would allow a representative to be dismissed rather than be debarred, making it possible for that representative to subsequently render financial services through another FSP.⁵¹

Against the above background, it is submitted that the use of industry-wide debarment as a tool for enforcing honesty and integrity, and thereby restoring investor confidence in financial services delivery is to be welcomed in South Africa, especially in the wake of increasing dishonesty and malpractices in the industry.⁵² Given this reality, it is necessary to adopt strict rules aimed at regulating the conduct of financial services intermediaries and combating financial crimes.⁵³ If there is no effective prosecution as part of a regime of proactive regulation and enforcement, financial services malpractices will increase to the detriment of a stable financial system.⁵⁴ The mandatory obligations and underlying values of professional conduct in the financial services industry, such as the duty to act with honour and integrity, stem from the desire of the regulators to maximise protection of investors and ensure the emergence of a fair and transparent financial services industry, among other regulatory goals.⁵⁵

47 *Malan v Law Society of the Northern Provinces* 2009 1 SA 216 (SCA) para 8. See also Slabbert 2011 *PER/PELJ* 209.

48 Kilbride *BizNews* (November 2014).

49 Investors are particularly vulnerable to harm because of: *inter alia*, information asymmetry between financial services providers or intermediaries and investors; investors are perceived to be ignorant, credulous, illiterate and uneducated with regard to the nature of financial services; and that they lack capacity to look after their own interests. Therefore, it is of paramount importance that these investors should be protected from misleading, manipulative and fraudulent practices within the financial services industry. Cartwright "The Vulnerable Consumer of Financial Services: Law, Policy and Regulation" <http://www.nottingham.ac.uk/business/businesscentres/crbfs/documents/researchreports/paper78.pdf> (accessed 21-10-2015).

50 *FSB v Barthram* para 11.

51 For example, the UK. See International Monetary Fund *South Africa: Detailed Assessment of Implementation on IOSCO Principles – Securities Markets* (2010) <https://www.imf.org/external/pubs/ft/scr/2010/cr10355.pdf> (accessed 07-09-2015).

52 Moolman *et al* 291. See also Department of Trade and Industry (DTI) "A Safer Financial Sector to Serve South Africa Better" 2011 *National Treasury Policy Document* <http://www.treasury.gov.za/documents/national%20budget/2011/A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf> (accessed 08-09-2015) states that "with the worst of the financial crisis behind us, government will have a renewed focus on maintaining financial stability, strengthening consumer protection and ensuring that financial services are appropriate, accessible and affordable." See also Bamber *et al* *Financial Regulation in South Africa* 2 ed (2001) 3.

53 National Treasury 2011 *National Treasury Policy Document*. See also Karmel "Should Securities Industry Self-Regulatory Organizations be Considered Government Agencies?" 2008 *Stanford Journal of Law, Business & Finance* 151.

54 Moolman *et al* 292.

55 Gullifer and Payne *Corporate Finance Law: Principles and Policy* (2011) 416 (arguing that the paramount consideration of the regulators in the exercise of their discretion as to whether to debar a representative is the protection of the public).

Since the relationship between the investing public and representatives of FSPs is a fiduciary one,⁵⁶ representatives must consistently show the highest levels of honesty, integrity and competence when they provide financial services.⁵⁷ The courts and financial services regulators act as “upper custodians of the integrity of the financial services industry and are particularly astute in condemning any deviation from professional standards.”⁵⁸

In light of the rights and values ushered in by South Africa’s post-apartheid constitutional dispensation, there can hardly be any doubt that the “fit and proper” requirement as a gatekeeping standard in any profession raises a constitutional issue.⁵⁹ Accordingly, it is generally accepted that debarment of financial intermediaries must be preceded by a procedurally fair process.⁶⁰ Indeed, before effecting a debarment, an FSP must inform the representative of the intention to debar him or her, the grounds thereof and it must give such representative a reasonable opportunity to make a submission in response.⁶¹ Thulane argues that “while there is no prescribed procedure set out in the legislation, there is a statutory duty on financial institutions to comply with procedural fairness.”⁶² This statutory duty is mandated by section 33(1) of the Constitution,⁶³ section 3 of PAJA⁶⁴ and section 14(3)(a) and (b) of the FAIS Act. Section 33(1) of the Constitution guarantees every citizen the right to a lawful, reasonable and procedurally fair administrative action. And section 14(3)(a) of the FAIS Act provides that an FSP must, within 15 days after taking a decision to debar a representative who has failed or ceased to meet the fit and proper requirements, inform the Registrar in writing and provide reasons for such a debarment. The Registrar will then, in terms of section 14(3)(b), notify the representative in writing of the debarment together with reasons thereof.⁶⁵ In fact, only thereafter will the debarment be made public by notice in the Government Gazette or by means of any other media. Also, significantly, debarment must only be done after all internal disciplinary procedures have been followed.⁶⁶

Section 3(2) of PAJA prescribes peremptory requirements of fairness which the administrator and by implication Discovery, as the FSP, ought to follow when making a decision that affects a representative’s rights. Thus, in accordance with this section, in order to give effect to procedurally fair administrative action, Discovery should have given Barthram adequate notice of the nature and purpose of the proposed administrative action; a reasonable opportunity to make representations; a clear statement of the administrative action; adequate notice of any right to review or internal appeal, where applicable; and adequate notice of the right to

56 Palmay and Di Lorenzo “Canada: Fraud and Misconduct by Financial Intermediary” 2012 <http://www.mondaq.com/canada/x/178294/White+Collar+Crime+Fraud/Fraud+And+Misconduct+By+Financial+Intermediaries> (accessed 07-09-2015), submit that although this relationship is not *per se* a fiduciary relationship such a relationship must be found. The Australian courts have, in many occasions, identified the relationship between financial advisers and customers/clients as fiduciary in nature. See *Hadid v Lenfest Communications Inc.* (1999) FCA 1798 para 817; *Daly v The Sydney Stock Exchange Limited* (1986) 160 CLR 371 para 377; *Aequitas v Sparad No. 100 Limited (formerly Australian European Finance Corporation Limited)* (2001) ACLC 1006 para 307; *ASIC v Citigroup* (No.4) (2007) FCA 963 para 272 and Hanrahan “The Fiduciary Idea in Financial Services Law” in O’Brien and Gilligan (eds) *Integrity, Risk and Accountability in Capital Markets* (2014) 204-208 .

57 See Pearson *Financial Services Law and Compliance in Australia* (2008) 205; and *Marvin Manufacturers (Aust) Pty Ltd v Chamber of Manufacturers Insurance Ltd* (1992) 7 ANZ Insurance Cases 61-122 (VSC) para 77.

58 See Fernando *Business Ethics: An Indian Perspective* (2009) 203.

59 *Democratic Alliance v President of the RSA* 2013 1 248 (CC) paras 14-49.

60 Thulane *FAIS Newsletter* 6.

61 See Asterio Medical “Debarment Policy Manual” <http://www.asterio.co.za/image.ashx?i=57136.pdf&fn=Debarment%20Policy%20Manual%20Asterio.pdf> (accessed 21-08-2015) and Moonstone “The Debarment Process” <http://www.moonstone.co.za/the-debarment-process/> (accessed 21-08-2015). See also “Don’t Misuse Debarment Tool: FSB” *MoneyMarketing* (August 2015).

62 Thulane *FA News* (2015). See also “Don’t Misuse Debarment Tool: FSB” *MoneyMarketing* (August 2015).

63 Constitution of the Republic of South Africa, 1996.

64 The provisions of procedural fairness in PAJA are applicable in this instance by the virtue that, as articulated above, the decision is an administrative action. The rules of fair procedure are further detailed in regulations promulgated under PAJA: Regulations on Fair Administrative Procedures (GN 1022 in Government Gazette 23674 of 31 July 2002).

65 Within 15 days after a representative has been removed from the register, the FSP must submit to the Registrar all documentation relating to the debarment, including evidence and information supporting reasons for the debarment, copy of the service contract or mandate between the FSP and excluded representative, and the transcript of a disciplinary hearing and forensic investigation report (if any). See *Oasis Group Holdings (Pty) Ltd v Bardien* (2011) 3 ILJ 965 (LC) para 17.

66 Internal disciplinary proceedings are conducted in terms of the Labour Relations Act 66 of 1995 (LRA). In accordance with the LRA, the FSP must convene a disciplinary hearing in order to determine the guilt or innocence of the representative – as an employee under the LRA.

request reasons. Additionally, section 3(3) of PAJA provides for the directory or discretionary powers of the administrator allowing him or her to exercise some discretion in giving effect to the right to procedurally fair administrative action. In terms of this section, Discovery could have, in its discretion, given Barthram an opportunity to obtain assistance and, in serious or complex cases, legal representation.⁶⁷ To make matters worse, it appears that Barthram was positively misled as to the true nature and purpose of a meeting he had with Discovery's Chief Compliance Officer and Forensic Investigator.⁶⁸ It was therefore inevitable that the SCA, relying on the proposition of Colman J in *Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture*,⁶⁹ concluded that this meeting was just a mere pretence of giving Barthram a hearing and did not comply with the rules of procedural fairness. It is therefore plausible to submit that the SCA was correct in ruling that Discovery, in taking its decision to debar Barthram, did not follow a fair procedure because he was not given a reasonable time or opportunity in which to assemble the relevant information as well as to prepare and present his representations.

7 CONCLUSION

The case of *FSB v Barthram* has highlighted the apparent misconception surrounding the legal effect and process requirements pertaining to the debarment of financial services representatives under section 14 of the FAIS Act. And it is in those two respects that the SCA decision in this case is jurisprudentially significant. First, the decision settles the critical point, which was hitherto unclear, that if a representative no longer complies with the applicable standards of integrity and honesty, such a representative will not only be banned from providing financial services on behalf of the FSP who effected a section 14 debarment but will be prohibited from providing financial services industry-wide. To that extent the debarment effectively terminates the representative's career in that industry. In this respect, the SCA decision in *FSB v Barthram* has significantly enhanced the protection of the investing public by shielding them from possibly dealing with unfit and therefore dangerous financial services representatives.

Second, the SCA in *FSB v Barthram* also unequivocally declared the due-process obligations of a FSP wishing to exercise disciplinary powers over its representatives pursuant to section 14 of the FAIS Act. Clearly, given the potentially drastic consequences of the debarment for the said representatives, especially the irreparable damage to their professional career and reputation, it is inconceivable that such a decision would survive judicial scrutiny in post-apartheid South Africa where the process followed by the FSP does not comply with the requirements of administrative justice. Aside from being a constitutional imperative in this context, the due process requirements are an appropriate means of imposing effective discipline on the FSPs' exercise of the (public) power to discipline their representatives pursuant to section 14 of the FAIS Act.

⁶⁷ This is in accordance with the common law. See *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 (5) SA 449 (SCA) paras 5 and 23.

⁶⁸ *Ibid* para 22.

⁶⁹ In particular, para 486E-G where Colman J declared: "it is clear on the authorities that person who is entitled to the benefit of the *audi alteram partem* rule need not be afforded all the facilities which are allowed to a litigant in judicial trial ... But ... 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 in the circumstances does not constitute a fair and adequate opportunity of meeting the case against him."