IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case number: 13530/2017

Date:1/12/2017

(1) NOT REPORTABLE.
(2) NOT OF INTEREST TO OTHER JUDGES.
(3) REVISED.

In the matter between:

JOSIAS RENIER COETZEE **FIRST APPLICANT**
DIRK JOHANNES COETZEE **SECOND APPLICANT**

And

4D GROUP SOLUTIONS (PTY) LTD

FIRST RESPONDENT

FINANCIAL SERVICES BOARD

SECOND RESPONDENT

JUDGMENT

PRETORIUS J,

(1) This is a review application in terms of section 6 of the **Promotion of Administrative Justice Act [1] ("PAJA")** of a decision to debar the applicants by the first respondent in terms of section 14(1) of the **Financial Advisory and Intermediary Service Act[2] ("FAIS")** on 17 January 2017. This application was initially before court as an urgent application, but was not heard in the urgent court, due to a lack of urgency. Hence the present hearing.

(2) At the outset the applicants abandoned prayers 1, 4, 5, 6, 7, 8, 10, 11 and 12 of the Notice of Motion.

(3) According to the applicants the court has to decide if the debarment of the applicants by the first respondent constitutes procedurally fair administrative conduct as determined in **PAJA[3] ;** if the *audi alterem maxim* has been complied with; and if the guidelines in terms of **FAIS[4]** have been complied with during the debarment process.

PARTIES:

(4) The first applicant was the acting Chief Executive Officer ("CEO") and Financial Service Representative of the first respondent since March 2004, and the holder of 39% shares in the first respondent.

(5) The second applicant was an employee of the first respondent since 1 February 2007, employed as the General Manager, and registered as Financial Service Representative and Key Individual with the first and second respondents.

(6) The first respondent is 40 Group Solutions (Pty) Ltd, a private company.

(7) The second respondent is the Financial Services Board, incorporated by the **FAIS Act[5].**

---

[1] Act 3 of 2000
[2] Act 37 of 2002
[3] *Supra*
[4] *Supra*
[5] *Supra*

STRIKING OUT APPLICATIONS:

(8) The first respondent served an application to strike paragraphs 63 of 89 of the founding affidavit on the basis that the contents are allegedly vexatious, scandalous or irrelevant. The applicants conceded, at the outset that these paragraphs should be struck and did not oppose the application.

(9) The applicants applied to have paragraphs 3(a) to 3(e) of the confirmatory affidavit of Johan Jacob Ferreira struck out as irrelevant and subsequently that paragraph 46 of the answering affidavit of the first respondent be struck out as the contents thereof are irrelevant.

(10) Rule 6(15) of the Uniform Rules of Court provides:

> *"The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted."*

(11) In the heads of argument and during argument in court the applicants submitted that the evidence in paragraph 46 of the first respondent's answering affidavit and paragraphs 3(a) to 3(e) should be struck as being hearsay and irrelevant. It is so that Mr Ferreira was not employed by the first respondent at the time of the incident, but he deposed to the confirmatory affidavit pertaining to the letter he submitted, as the current Chief Compliance Officer. He has been employed by the first respondent since 1 January 2016. It is so that the deponent did not have direct dealings with the applicants. It must be, however, taken into consideration that he deposed to the affidavit when the application had been launched as an urgent application. Furthermore these allegations by Mr Ferreira are highly relevant in the matter at hand. The applicants did not at any stage

submit that this evidence of Mr Ferreira will cause them prejudice if not struck out, nor did they deny any of the allegations. See **Vaatz v Law Society of Namibia**[6] It is so that in urgent applications the court may admit hearsay evidence, provided the source of the information and the grounds for belief in its truth is stated, as is the case here.

(12) In these circumstances I am not ordering the striking out of paragraphs 3(a) to 3(e) of Mr Ferreira's confirmatory affidavit, nor the contents of paragraph 46 of the founding affidavit.

LEGAL FRAMEWORK:

(13) In terms of section 13(2)(a) of the **FAIS Act**[7]**,** an authorised Financial Service Provider ("FSP") must be satisfied that its representatives are competent to act and comply with the requirements contemplated in paragraphs 8(1)(a) of the FAIS Act relating to the personal character qualities of honesty and integrity ("fit and proper requirements").

(14) Section 14(1) of the **FAIS Act**[8] obliges an FSP to debar a representative, who is found to be no longer fit and proper in terms of section 13(2)(a) from rendering any new financial service. The name of such a authorised representatives, as well as the FSB's register.

(15) The Registrar determines the fit and proper requirements for FSP's, in terms of section 6A of the **FAIS Act**[9] **,** as set out in Board Notice 106 of 2008[10]. Part· II of Board Notice 106 of 2008 deals with personal character qualities of honesty and integrity.

(16) Section 3(1) of **PAJA**[11] provides:

> *"Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.* "

---

[6] 1991(3) SA 563 **(NM)** at 566J to 5679
[7] *Supra*
[8] *Supra*
[9] *Supra*
[10] GG315144 dated 5 October 2008
[11] *Supra*

(17) In terms of section 3(2)(b)(i) - (v) of **PAJA**[12] the first respondent had to provide the applicants with:

> *"(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 of review or internal appeal, where applicable; and*
>
> *(v) adequate notice of the right to request reasons in terms of section* 5."

THE FACTS:

(18) It is common cause that the first respondent employed the applicants. The first applicant was employed as Chief Executive Officer for approximately 14 years and the second applicant as General Manager for approximately 8 years.

(19) During October 2016 the first respondent, who is an authorised FSP, obtained information indicating that the first and second applicants no longer qualified as being fit and proper in terms of section 8(1)(a) of the **FAIS Act**[13] The information pertained to allegations that the two applicants were making secret profits in respect of business that the first applicant was conducting with African Unity Life Ltd ("AUL"). According to the information obtained, an amount of R2.3 million had been paid to the

---

[12] *Supra*
[13] *Supra*

applicants by AUL. This, according to the first respondent, was in breach of the fiduciary duty they owed the first respondent. The first respondent considered the dealings of the applicants with AUL as a breach, as in effect they were competing with the first respondent.

(20) On 25 October 2016 the two applicants did not receive their salaries and were served with a notice of suspension on 26 October 2016. The first respondent afforded the applicants 72 hours within which they could make representations concerning the suspension.

(21) The applicants resigned from their employment on 15 November 2016 as a result of not being paid their salary and receiving no further particulars, as requested from the first respondent. The first respondent did not accept their resignations. On 24 November 2016 the applicants received an email notice of their debarment in terms of section 14(1) of **FAIS**[14] **.**

(22) The applicants were in fact debarred on 22 November 2016 and the second respondent recorded the debarment on its register of debarred persons on that date. On 7 December 2016 the applicants' attorney insisted to have their names reinstated in the register of representatives at the Registrar of the FSB. On 8 December 2016 the first respondent replied, through its attorney, and acknowledged that the decision to debar the applicants could not have been taken without affording the applicants the opportunity to be heard. In this letter the applicants were informed, *inter alia:*

> *"However, in the light of what is stated in paragraphs 2 to 5 above, your clients are now given notice that 40 will again consider whether or not your clients comply with the fit and proper requirements as contemplated in section 13(2)(a) of the FAIS Act. As* a *result, your clients are invited to make written representations to 40 why they should not be debarred as contemplated in the FAIS Act and the Registrar be notified accordingly.*
>
> *Your clients' written representations should reach 40 prior to*

[14] *Supra*

close of business on Thursday 15 December 2016 ('the closing date') and may be forwarded by electronic mail to any of the following email addresses: EbersohnJ@4.dco.za; KrugerJA@4d.co.za. Failure to respond timeously will be regarded as an indication that you do not intend to contest or oppose the matter and we will advise Client in such circumstances to proceed to take the decision concerning the debarment or not of your clients without further delay."

(23) The facts and information that the first respondent relied on was properly set out in the letter:

"On a *date that is currently unknown to 40 but probably on or before 1 March 2014, Mr Dirk Coetzee to the knowledge of Mr Renier Coetzee, concluded an agreement with African Unity Life Ltd ("AUL") in terms whereof AUL appointed Mr Dirk Coetzee* as a *consultant to earn commission in the course of or by means of his position as employee of 40 . In terms of this agreement, AUL· paid the following amounts to Mr Dirk Coetzee as appears from the letter from AUL a copy whereof is attached* as *Annexure 'A':*

01/03/2014- 28/02/2015	*R757,814.00*
01/03/2015- 28/02/2016	*R940,777.00*
01/03/2016- 28/02/2016(sic)	*R576,355.00*

Your clients at no stage disclosed to 40 the existence of the agreement with AUL and/or payments made by AUL to your clients in terms thereof. Nor did they disclose the fact that Mr Dirk Coetzee, who was in full time employ of 40 in a senior management position, concluded an agreement with a *product provider of 40 in terms of which Mr Dirk Coetzee became entitled to* a *secret commission/remuneration."*

(24) There could have been no doubt by the applicants as to the allegations leading to their proposed second debarment.

(25) On 12 December 2016 in an email sent to the applicants' attorney the first respondent reiterated once more:

> *"Failure by the FSB to attend to the instruction to uplift (indicated by your Mr Terblanche as reason why your clients are not yet attending to their representations) nor any other reasons that may be indicated for any delay in your clients providing their representations regarding their possible debarment being considered by the* FSP *timeous/y, will be accommodated and failure to provide the representations by or before the date and time indicated will be taken as an election not to make the representations that they say they were not afforded the opportunity to make."*

Once more the applicants were invited to make representations, which they did not do.

(26) On 15 December 2016 the applicants' attorney requested further information and particulars from the first respondent. This was, according to him, to enable the applicants to make proper representations concerning the serious allegations and set out:

> *"We accordingly advise, should 4DGS proceed to again apply for the debarment of our clients without providing us with the information we have requested and giving us proper opportunity to make representations, we will launch an urgent application against 40BS for appropriate relief."*

This threat was sent although the information had been fully set out in the letter of 8 December 2016.

(27) On 3 January 2017 the first respondent extended the deadline for the making of representations to 12 January 2017 and agreed to make the requested documents and information available:

> *"Our Client noted with concern that your clients had chosen not to make representations to our Client prior to the 15 December 2016 deadline and that they contended themselves with bare*

denials and threats to our Client with litigation should the latter proceed to take the steps it is obliged to do in terms of the FAIS Act."

And

"The documentation requested by your clients(to the extent that these may exist) will be available for inspection on reasonable prior notice during office hours to be arranged from Tuesday 3 January 2017 onwards."

(28) The first respondent confirmed in the letter that the first respondent will take the decision whether the applicants comply with the fit and proper requirements as set out in section 13(2)(a) of the **FAIS Act**[15]**,** as soon as possible after expiry of the 12 January 2017 deadline. The applicants had by then had almost one month to make the necessary representations.

(29) On 4 January 2017 the applicants' attorney confirmed receipt of the lengthy letter, setting out the position, from the first respondent's attorney as follows: *"We confirm receipt of your letter dated 3 January 2017 and will respond thereto in due course."* It is important to note that the applicants did not alert the court as to the existence of this letter. The applicants did not respond prior to the deadline of 12 January 2017 and no representations were forthcoming.

(30) The applicants failed to make any representations to the first respondent. Furthermore the applicants did not contest their re- appointment as representatives of the first respondent at any stage.

(31) On 16 January 2017 the first respondent's board of directors considered whether the applicants comply with the fit and proper requirements as contemplated in section 13(2)(a) of the **FAIS Act1**[16] Present at the board meeting were all the directors of the company, namely: Ms EC Botha, Mr

[15] *Supra*

JAS Kruger and Mr TJP Ebersohn. Resolution 2 reads:

"After giving careful consideration to especially:

The content of the Broker Consultant Agreement ("BCA") concluded between Dirk Coetzee and African Unity Life Ltd 28 March 2014 (together with the amendments thereto): Renier and Dirk Coetzee's failure after 28 March 2014 to disclose the existence of the BCA and the benefits one or both obtained on the strength thereof·,

- All correspondence received from Renier and Dirk Coetzee's legal representative pertaining to their debarment and Renier and Dirk Coetzee's failure to respond either meaningfully or at all to the Jetter by 4DGS's attorney dated 3 January 2017 (a copy of this Jetter is attached); Renier and Dirk Coetzee's clear refusal to divulge all details pertaining to the exact nature of the services rendered by Dirk Coetzee to African Unity, payments and/or benefits received from Afrikan Unity and the basis *upon which they became entitled to such payments and/or benefits;*

It was *resolved that Renier and Dirk Coetzee no longer comply with the fit and proper requirements* as *contemplated in section 13(2)(a) of the FAIS Act and that the company's compliance officer be requested to proceed with the debarment of*

Mr Josias *Renier Coetzee ID number [….]*

And
Mr Dirk Johannes Coetzee ID number [….]"

(32) In an email dated 17 January 2017 the applicants' attorney sets out the following to the FSB:

"Now to come to the purpose of this letter. It is *our understanding*

---

[16] *Supra*

that the FSP will again consider the fit and proper status of our clients after our clients have refused to make representations when given the 'opportunity' to do so *and* most *probably attempt to debar our clients."*

In this email it is admitted that the applicants refused to make representations to the first respondent. This contention is in contrast to the basis on which the applicants bring the review application. They allege that they were not afforded the opportunity to make representations, but this cannot be true if regards is had to the letter of 4 January 2017 to the first respondent and this email to the FSB.

(33) On 13 December 2016 the second respondent confirmed that the debarment had been uplifted at the request of the first respondent. Mr de Beer, the first respondent's attorney, provided the full particulars of the required facts and information to the applicants in a letter dated 8 December 2016. I have already quoted some of the portions of this letter above. The applicants insisted, after their resignation, to be placed back on both the FSP and FSB's registers, which was done on 8 December 2016.

(34) In paragraph 5 of the letter it is set out:

"4D considered these payments your clients received from AUL secret profits or commission s. Irrespective of what the true nature of these payments may be, the undisputable fact remains that your clients negotiated the agreement with AUL in secret and deliberately failed to disclose to 4D the terms thereof and the payments that were made pursuant thereto."

In the letter dated 3 January 2017 the first respondent's attorney recorded that a decision will be taken on 12 January 2017 to decide *"whether or not your clients comply with the fit and proper requirements as contemplated in section 13(2)(a) of the FAIS Act as soon as is practicable after expiry of the above deadline of 12 January 2017."*

(35) There could have been no doubt in the minds of the applicants as to when

the first respondent intended taking the decision. The applicants chose to ignore this opportunity to make representations.

(36) In **Financial Services Board v Barthram and Another**[17] Ponnan JA referred, with approval to **Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another**[18] where Colman J held:

> *"It is clear on the authorities that a 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* a *judicial trial. 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."*

(37) In the present instance the principles set out by Colman JA above were observed. It is obvious that the applicants had been invited on more than one occasion to make representations, to such an extent that the deadline for making such representations was extended to enable them to do so. Both applicants were invited to inspect the documents relied on by the first respondent. The applicants were afforded a reasonable time *"to assemble the relevant and to prepare*

---

[17] (2015)3 All SA 665 (SCA)
[18] 1980(3) SA 476 {T) at 486 E-G

and put forward his representations "[19]*.*

(38) There was no response to this letter, apart from the applicants' attorney informing the first respondent on 4 January 2017 that they will deal with it *"in due course".*

(39) All the facts, the first respondent relied upon to decide that the applicants were no longer fit and proper to be registered in terms of section 13(1)(b)(iA) of the **FAIS Act**[20]**,** were set out in the various letters to the applicants. An authorised FSP must in terms of section 13(2)(5), at all times be satisfied that their representatives are, when rendering a financial service on its behalf, comply with the fit and proper requirements. It is peremptory and the second respondent has no choice, but to act when it finds that the representatives are no longer fit and proper persons as required.

(40) **Cora Hoexter: Administrative Law in South Africa** at p371 deals extensively with the opportunity to make representations:

> *"It is sometimes assumed that an opportunity to make representations implies an oral hearing at which the aggrieved party will be able to appear in person. Our common law (quite rightly) recognises no right to either of these elements, however, and s 3 of the PAJA follows that approach. By distinguishing between* 'a *reasonable opportunity to make representations' in s 3(2)(b)(ii) and 'an opportunity to ... appear in person' in s 3(3)(c), - the wording of the Act suggests that representations may be merely written ones. Hearings on paper are likely to be quicker and cheaper than oral hearings, which entail the risk of over-judicialising proceedings. Indeed, our courts tend to the view that oral representations are unnecessary where adequate provision is made for written ones."*

(41) In **Sokhela and Others v MEC for Agriculture and Environmental**

---

[19] Heatherdale case *supra*
[20] *Supra*

Affairs (Kwazulu-Natal) and Others[21], Wallis J, as he then was held:

> *"That case illustrates the point that, in order for a hearing or an opportunity to make representations to be effective, it is necessary that the hearing must concern the matters giving rise to the decision, and the opportunity to make representations must relate to those matters."*

(42) In this instance it was communicated several times to the applicants that a decision-would be taken, after the 12th of January 2017 deadline had expired. All the facts, which the first respondent relied upon, to come to the decision, was communicated to the applicants. They chose not to make representations. It is further important to note that at no stage did the applicants deny the allegations against them.

(43) Although counsel for the applicants argued strongly that an independent person had to deal with the debarment of the applicants, I could find no authority for this contention and neither did he refer me to any authority in this regard. The applicants were invited to make representations, but failed to do so. It is therefor not for the applicants, at this late stage, to argue that the *audi alterem partem* rule had not been complied with. It was their choice not to deal with the situation by not making representations. There was no request at all for an oral hearing, until the argument in court. It was thus never the applicants' case that they had insisted on an oral hearing which was not granted.

(44) At no stage do the applicants make out a case in the founding affidavit that the first respondent was biased when the first respondent took the decision to debar them on 16 January 2017. According to the Plascon Evans rules the court has to decide the matter, in this instance, on the respondent's answering affidavit, as no replying affidavit was filed. It is stated:

> *"I categorically deny that the First Respondent did not have* a *sincere and bona fide motive to debar the Applicants. The facts as*

---

[21] 2010(5) SA 574 (KZP) at para 55

stated herein contradict the Applicant's contention. Also, the Applicants' continued failure to address the grounds on which they were debarred, affirms and fortifies the First Respondent's conclusion that they no longer comply with the fit and proper requirements. "

And

"It is significant that the Applicants chose not to deal with the merits of the decision taken by the First Respondent. I submit this is because the Applicants concede that, as a *result of their actions (detailed in Mr de Beer's letter of 3 January 2017), the First Respondent correctly concluded that they no longer meet the fit and proper requirements".* The requirements as set out in section 3(2)(b)(i)-(v) of **PAJA**[22] were met by the first respondent in all respects.

(45) The second ground of review is that the applicants had resigned before they were debarred. The further basis for the review is that they had resigned with effect 15 November 2016 and the first respondent was thus not entitled to debar them at any stage thereafter.

(46) In the **Barthram case**[23] the Supreme Court of Appeal held:

"The court below appears to have misinterpreted the legal effect of a debarment in terms of s 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 the character qualities of honesty and

---

[22] *Supra*

integrity or Jacks 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 s 14(1), must perforce be debarred on an industry-wide basis from rendering financial services to the investing public."

It should thus not be interpreted that the provisions of section 14(1) only focusses on the existence or absence of the specific contractual relationship between the applicants and the first respondent. In the present instance the reasons for the debarment occurred whilst the applicants were still in the employ of the first respondent. The purpose of section 14(1) must be to protect the public from unscrupulous representatives, as otherwise a mere termination of the agreement between the employer and representative would have sufficed. This would enable such persons to carry on regardless of the purpose of the Act, to safeguard the public from persons not fit and proper to act as representatives, will be avoided.

(47) I have considered all the facts, as well as the authorities, in this matter. The heads of argument by the applicants' and first respondent's counsel were once more canvassed, after hearing oral argument. It is quite clear that the applicants were afforded an opportunity to make representations on more than one occasion and they chose not to do so. This is confirmed by the applicants' attorney in the letter to the second respondent. They cannot complain that the *audi alterem partem* rule had not been taken into account, where it was their choice not to do so. The fact that they had, according to them resigned, cannot be entertained, for the reasons set out above. I find, in these circumstances that the applicants' application should be dismissed with costs.

(48) In the result I make the following order:

1. The application for review is dismissed ;
2. The resignation of the first and second applicants are declared to be

---

[23] *Supra* at paragraph 16

valid and binding with effect from 15 November 2016;

3. The applicants are ordered to pay the costs.

_____

Judge C Pretorius

Case number	: 13530/2017
Matter heard on	: 9 November 2017
For the Applicant	: Adv A Loubser
Instructed by	: Terblanche Attorneys Inc
For the First Respondent	: Adv BC Stoop SC
Instructed by	: Gerber Attorneys
Date of Judgment	