THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 20207/2014

In the matter between:

FINANCIAL SERVICES BOARD **APPELLANT**

and

PERCY GEORGE EDWARD BARTHRAM **FIRST RESPONDENT**

DISCOVERY LIFE LTD **SECOND RESPONDENT**

Neutral citation: *Financial Services Board v Barthram* (20207/2014) [2015] ZASCA 96 (1 June 2015)

Bench: Ponnan, Cachalia and Leach JJA and Dambuza and Gorven AJJA

Heard: **19 May 2015**

Delivered: **1 June 2015**

Summary: Financial Services Advisory and Intermediary Services Act 37 of 2002 – debarment in terms of s 14(1) – precludes representative from rendering financial services on an industry-wide basis.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Makgoba J, sitting as court of first instance):

In the result:

(1) The appeal by the Financial Services Board is upheld and the order of the court below is set aside and replaced with the following:

'The interim order issued against the second respondent, the Financial Services Board, on 18 September 2012 is set aside and the application against it is dismissed.'

(2) The appeal by Mr PGE Barthram is upheld with costs, such costs to be paid by Discovery Life Ltd and the order of the court below dismissing his application against Discovery Life Ltd is set aside and replaced with the following:

'(a) The decision taken by the first respondent, Discovery Life Ltd, to debar the applicant, Mr PGE Barthram, purportedly in terms of section 14(1) of the Financial Advisory and Intermediary Services Act 37 of 2002, is set aside.

(b) The first respondent is ordered to pay the costs of the application, such costs to include those occasioned by the urgent application of 18 September 2012.'

JUDGMENT

Ponnan JA (Cachalia and Leach JJA and Dambuza and Gorven AJJA . . .):

[1] On 15 September 2009 Mr Percy Barthram and Discovery Life Limited (Discovery), an authorised Financial Services Provider (FSP) as defined in the Financial Services Advisory and Intermediary Services Act 37 of 2002 (FAIS),[1] concluded a written 'contract of employment', in terms of which the former was appointed: 'a full-time employee to market and sell the products and policies and to provide Financial services in relation to the Products and Policies to existing and prospective clients of Discovery.' In terms of clause 6 of the agreement, the applicant warranted that '[he] was aware of the Applicable Legislation having relevance in [his] capacity as a representative as defined in FAIS'.[2] Clause 7 of the agreement provided:

'7.1 It is a mandatory requirement that the Consultant complete the NQF60 credits level or RFP2 examination as indicated in the fit and proper requirements as per the FAIS Act on signature of this Agreement or during 2006.

7.2 The Consultant shall further ensure that they do all things necessary to achieve and maintain the above qualifications and fit and proper requirements imposed by law or regulation or as such other qualifications and requirements as required by Discovery, and any changes thereto from time to time.

7.3 The Consultant acknowledges that Discovery shall be entitled to terminate the Consultant's employment, if the Consultant fails to meet, achieve and maintain the qualifications and requirements as set out in 7.1 and 7.2 above.

7.[4] Discovery conducts business in the financial services sector in which the qualities of honesty and integrity are integral to the reputation of Discovery and to this contract of

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[1] In terms of s 1 of FAIS a financial service provider means 'any person, other than a representative, who as a regular feature of the business of such person-
(a) furnishes advice; or
(b) furnishes advice and renders any intermediary service; or
(c) renders an intermediary service'.

[2] In terms of s 1 of FAIS a representative means any '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 . . .'.

employment. Accordingly, the Consultant undertakes to act with honesty and integrity. The Consultant undertakes to refrain from conducting themselves, either during working hours or outside working hours, in a manner which compromises the trust relationship between the parties or causes harm to Discovery or its reputation.

7.[5] The Consultant undertakes to conduct their personal financial affairs in a responsible way.'

[2] On 31 May 2012 Mr Barthram purported to terminate his employment with Discovery on 24 hours' notice and he commenced employment a day later with Old Mutual Life Insurance Limited. Thereafter, on 1 June 2012, certain employees of the forensic department of Discovery called on Mr Barthram's office and demanded the return of all client files. In his absence, his wife, Natalie, handed over those files. On 12 June 2012 the Barthrams met with Messrs Mark Bamford and Warren Allan, respectively, a forensic investigator and compliance officer in Discovery's employ. At approximately 5 pm that evening, Mr Allan telephonically informed Mr Barthram that Ms Surina Meintjes, Discovery's Chief Compliance Officer, had taken the decision to notify the Financial Services Board (FSB) or more accurately the Registrar of Financial Services Providers (the Registrar),[3] that the applicant 'did not comply with the requirements of the FAIS for continued appointment as a representative of [Discovery].'

[3] On 13 June 2012, Discovery withdrew Mr Barthram's authority to act on its behalf and removed his name from its register.[4] In its notice to the FSB, Discovery marked with an 'X' the block labelled 'honesty and integrity' as the reason for the withdrawal of his authority to act. On receipt of the notice from Discovery, Mr Barthram was listed on the FSB's website as a debarred representative. The reason given was that he 'does not comply with personal character qualities of honesty and integrity'.

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[3]In terms of s 2(1) the executive officer referred to in s 1 of the Financial Services Board Act 97 of 1990 is the registrar of financial services providers and has the powers and duties provided for by or under FAIS.

[4]In terms of s 13(3) an authorised FSP must maintain a register of representatives, and key individuals of such representatives, which must be regularly updated and be available to the Registrar for reference or inspection purposes.

[4] After failing in his quest to have his debarment lifted, Mr Barthram launched an urgent application in the North Gauteng High Court, Pretoria. Although both Discovery and the FSB were cited as respondents, only the former opposed the application. On 18 September 2012, Hiemstra AJ issued the following interim order by agreement between Mr Barthram and FSB:

'1. THAT the Second Respondent [FSB] be and is hereby [ordered] to reinstate the Applicant as a representative of an authorized financial service provider with immediate effect, should such an application be received;

2. THAT the FSB is to immediately enter the name of the Applicant in the register referred to in Section 13(3) of the Financial Advisory and Intermediary Services Act 37 of 2002 (hereinafter "the Act");

3. THAT the FSB is to remove any mention of the debarment of the Applicant by notice in the Government Gazette or by means of any other appropriate public media in which it is presently published, including its website;

4. THAT the relief as set out in paragraphs 2 to 4 above, shall act as interim orders pending the finalization of review proceedings, reviewing, setting aside and/or varying the decisions and/or rulings of the Respondents [Discovery and the FSB] to bar the Applicant and to publish such debarment, to be instituted within 30 days of the hearing of this application;

5. THAT costs shall be costs in the review.'

[5] On 16 October 2012, Mr Barthram launched the review application envisaged in paragraph 4 of the interim order. He sought an order in the following terms:

'1. Reviewing and setting aside the decision/s purportedly taken by the First Respondent [Discovery], alternatively the Second Respondent [FSB], alternatively both the First and Second Respondents on the 13th of June 2012, alternatively in the period from 13 June 2012 to 20 August 2012, to debar the Applicant, purportedly in terms of section 14(1) of the Financial Advisory and Intermediary Services Act 37 of 2002 (hereinafter "the Act");

2. Reviewing and setting aside the decision of the Second Respondent to update the register of debarred persons to include the name of the Applicant on 13 June 2012, alternatively in the period from 13 June 2012 to 20 August 2012;

3. Exempting the Applicant in terms of section 7(2)*(c)* of the Promotion of Administrative Justice Act No 3 of 2000 (hereinafter "PAJA") from the obligation to exhaust any internal

remedies that may be provided for in the Act in respect of the first decision or any decisions thereafter taken by the Respondents, insofar as it may be necessary;

4. Extending the period of 180 days referred to in section 7(1) of PAJA in terms of section 9(1)*(b)* of PAJA insofar as it may be necessary;

5. Directing the First Respondent and any other parties opposing the matter jointly and severally to pay the costs of the application on the scale as between attorney and client;

6. Granting further and/or alternative relief to the Applicant.'

[6] Once again only Discovery opposed the application. In its answering affidavit, Ms Meintjes on behalf of Discovery stated:

'21.10 The Applicant has failed to draw the vital distinction between what is contained in sections 14 and 14A of the FAIS Act. Section 14 of the Act, although styled "*Debarment of Representatives*" effectively allows for the removal by a financial services provider (such as the First Respondent) of a representative (such as the Applicant) from the statutorily required register. The effect thereof is that the representative can no longer represent that particular financial services provider in the rendering of any financial services.

21.11 Conversely, section 14A of the FAIS Act deals with the debarment by the Registrar of "*a person*" rather than a representative. A section 14A debarment precludes a representative from rendering any financial services on behalf of any services provider for a specified period. In effect, the debarment by the Registrar of a person in terms of section 14A of the FAIS Act precludes such person from rendering financial services on behalf of any services provider whereas a debarment in terms of section 14(1) of the FAIS Act precludes the debarred representative only from representing the particular services provider who effects the debarment.

21.12 In the result, the effect of the removal of the Applicant from the First Respondent's register (the debarment in terms of section 14(1) of the FAIS Act) did not and will not preclude the Applicant from rendering financial services on behalf of his new employer, Old Mutual. That prohibition could only arise from a debarment by the Registrar as contemplated in section 14A of the FAIS Act read together with section 9(2) thereof – the withdrawal of the Applicant's licence to act as a financial services provider/insurance intermediary at all.

. . .

28.5 The First Respondent, as a registered financial services provider with many thousands of clients, has a responsibility placed upon it by the provisions of the FAIS Act to ensure that only fit and proper persons act as its representatives or intermediaries. Once facts had become

available to me which confirmed that the Applicant was not so fit and proper, I was compelled to act in terms of section 14(1) of the FAIS Act.

. . .

31.4 I reiterate that, as clearly contemplated by section 14(1) of the FAIS Act, the function of the First Respondent was no more than to convey to the Second Respondent its election to have the Applicant removed from the First Respondent's Register given that, in the First Respondent's view (as determined by me), the Applicant was no longer a fit and proper person to represent the First Respondent in the provision of financial advice to the public. The steps to be taken by the Second Respondent following thereon have nothing to do with the First Respondent.'

[7] The review came before Makgoba J who, on 19 November 2013, concluded that: (a) Mr Barthram had 'not made out a case for the relief that he seeks against [Discovery]' and accordingly dismissed his application as against it with costs including the costs occasioned by the urgent application; and (b) as the FSB did not oppose the application, the 'interim relief obtained against [it] on 18 September 2012 is confirmed and made a final order of this Court.'

[8] The learned judge reasoned:

'12. A vital distinction should be drawn between what is contained in section 14 and 14A of the FAIS Act. Section 14 of the Act allows for the removal by a financial services provider of a representative from the statutory required register. The effect thereof is that the representative can no longer represent that particular financial services provider in the rendering of any financial services. In addition, the consequence of such debarment is the removal of the representative from the financial services providers section 13 register of representatives.

13. In the context of this case the effect of a debarment in terms of section 14(1) of the Act was that the applicant was thereby precluded from rendering any new financial service on behalf of the First Respondent. This preclusion was achieved by removing the Applicant's authority to represent the First Respondent and by removing the Applicant's name from the First Respondent's register. However, the Applicant was still at liberty to render financial services with other financial services providers, as he continued doing with Old Mutual.

14. Conversely section 14A of the FAIS Act deals with the debarment by the Registrar of a person. A section 14A debarment precludes a representative from rendering any financial

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

15. The Applicant prays for the Court to review and set aside the decisions of the Respondents to debar the Applicant and to publish such fact, in terms of PAJA and the common law. The Applicant contends that the First Respondent could not purport to debar the Applicant in terms of section 14 of the Act, as the Applicant was no longer in its employ when the First Respondent purported to debar the Applicant and therefore did not have the authority to act in terms of section 14 of the Act.

The Applicant further contends that even if the Court finds that the Respondents acted within their authority and correctly in terms of section 14(1) of the Act, their actions are to be reviewed and set aside on the basis that various of the other requirements of PAJA and common law are not satisfied especially reasonableness and procedural fairness.

16. As pointed out earlier in this judgment, I do not deem it necessary to address the Applicant's abovementioned contentions or arguments. This is so in the light of the legal and/or factual points raised by the First Respondent with which I agree.

. . .

20. It is common cause that the Applicant is currently still in the employ of Old Mutual and not the First Respondent. In the result the effect of the removal of the Applicant from the First Respondent's register (that is the debarment in terms of section 14(1) of the FAIS Act) did not and will not preclude the Applicant from rendering financial services on behalf of his new employ, Old Mutual.'

[9] It was only after the matter had been finally determined against it by the High Court that the FSB chose to enter the fray. It sought and obtained condonation as also leave from Makgoba J to appeal to this court. The learned judge further granted leave to Mr Barthram to appeal against the dismissal of his review application against Discovery. In the result, before this court the FSB has come to be cited as the first appellant and Mr Barthram as the second. Discovery, who was cited as the respondent, takes no part in the appeal.

[10] Not having participated in the proceedings before the High Court, the FSB now seeks the leave of this court to adduce further evidence on appeal. On the narrow issue that we are called upon to decide, as the intention of the legislature is proclaimed in clear terms either expressly or by necessary implication, in my view, it is not necessary to rule on the application. I thus turn to a consideration of the relevant legislative provisions without recourse to the evidence sought to be adduced by the FSB.

[11] The FSB contends that the High Court erred in its finding that the effect of a debarment of Mr Barthram by Discovery was that he was only precluded from rendering financial services to the public on behalf of the latter. Upon a proper construction of the provisions of ss 13 and 14 of FAIS, so the contention proceeds, the High Court should have concluded that the effect of his debarment by Discovery was to preclude him from rendering financial services to the public on behalf of any FSP. According to the FSB, the interpretation by the High Court of s 14(1) has significant industry-wide consequences inasmuch as the judgment appealed against has already formed the basis of representatives who have been debarred in terms of s 14(1), justifying their continued employment by a different provider notwithstanding that disbarment.

[12] In terms of s 7 of FAIS 'a person may not act or offer to act as a [FSP] unless such person has been issued with a licence under s 8, which authorises the rendering of those services.' Section 8(1) provides that an application for an authorisation must satisfy the Registrar that 'the applicant complies with the fit and proper requirements determined for financial services providers . . . in respect of *(a)* personal character qualities of honesty and integrity; *(b)* competence; *(b*A*)* operational ability; and *(c)* financial soundness'. In terms of s 16A(2)*(a)* 'fit and proper requirements' may include, but are not limited to, appropriate standards relating to 'personal character qualities of honesty and integrity'. Where an application is granted, the Registrar may: impose such conditions and restrictions on the exercise of the authority granted by the licence (subsec (4)*(a)*); and issue a licence authorising such applicant to act as a FSP (subsec 5*(a)*(i)). Section 8A imposes an obligation on a FSP and representatives of such FSP to continue to comply with the fit and proper requirements.

[13] In terms of s 13(1)*(a)*, a person may not carry on business by rendering financial services to clients for or on behalf of any person who is not authorised as a financial services provider (or exempted from the application of the Act). And in terms of s 13(1)*(b)*, no person may act as a representative of an authorised FSP, unless such person:

'(i) prior to rendering a financial service, provides confirmation, certified by the provider, to clients-

(aa) that a service contract or other mandate, to represent the provider, exists; and *(bb)* that the provider accepts responsibility for those activities of the representative performed within the scope of, or in the course of implementing, any such contract or mandate; and

(iA) meets the fit and proper requirements . . .'

An authorised FSP must in terms of s 13(2),[5] at all times be satisfied that its representatives are, when rendering a financial service on its behalf, competent to act and comply with the fit and proper requirement. To that end, s 13(3) requires an authorised FSP to maintain 'a register of representatives, and key individuals of such representatives, which must be regularly updated and be available to the Registrar for reference or inspection purposes.' Such register must, according to s 13(4): '*(a)* contain every representative's or key individual's name and business address, and state whether the representative acts for the provider as employee or as mandatory; and *(b)* specify the categories in which such representatives are competent to render financial services.' The Registrar relies, inter alia, on the register contemplated in subsection (4) to maintain and continuously update a central register of all representatives and key individuals (subsec 5).

[14] Section 14, which lies at the heart of the appeal and is headed 'debarment of representatives', reads:

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[5]Section 13(2) provides:
'An authorised financial services provider 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.'

'(1) An authorised financial services provider must ensure that any representative of the provider who no longer complies with the requirements referred to in section 13(2)*(a)* or has contravened or failed to comply with any provision of this Act in a material manner, is prohibited by such provider from rendering any new financial service by withdrawing any authority to act on behalf of the provider, and that the representative's name, and the names of the key individuals of the representative, are removed from the register referred to in section 13(3): Provided that any such provider must immediately take steps to ensure that the debarment does not prejudice the interest of clients of the representative, and that any unconcluded business of the representative is properly concluded.

(2) For the purposes of the imposition of a prohibition contemplated in subsection (1), the authorised financial services provider must have regard to information regarding the conduct of the representative as provided by the registrar, the Ombud or any other interested person.

(3)*(a)* The authorised financial services provider must within a period of 15 days after the removal of the names of a representative and key individuals from the register as contemplated in subsection (1), inform the registrar in writing thereof and provide the registrar with the reasons for the debarment in such format as the registrar may require.

(*b*) The registrar may make known any such debarment and the reasons therefor by notice on the official web site or by means of any other appropriate public media.'

[15] Sections 13(2)*(a)* and *(b)*, as also s 14(1) and (2), are couched in peremptory terms. Failing compliance with those provisions the FSP itself is liable to sanction.[6] FAIS requires an authorised FSP not just to be authorised and licenced as such by the Registrar, but also to exercise oversight in respect of the initial and continuing fitness of its chosen representatives. The FSP having itself gone through a vetting process at the hands of the Registrar is eminently suited to subject its representatives to a similar initial vetting and thereafter to exercise oversight in respect of them. The Registrar would only get to learn of a representative's employment or appointment by an FSP in consequence of the updating of the FSB's central register by such FSP pursuant to s 13(5). A debarment of a representative in terms of s 14(1) is complete when the FSP

[6] In terms of s 36, any person who inter alia contravenes ss 7(1) or (3), 13(1) or (2) and 14(1), is guilty of an offence and liable on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment.

has withdrawn the representative's authority to act on its behalf and has removed such person's name from its own register in terms of s 13(3). Moreover, the Registrar only gets to learn of a representative's debarment, after the event, on being informed of such by the FSP in terms of s 14(3). Upon removal of the representative's name from the FSP's register, the FSB's central register is correspondingly updated.

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

[17] It follows that the FSB's appeal must succeed. As to costs: It is so that in approaching this court the FSB is acting in its regulatory capacity in the public interest. Moreover, it has succeeded in overturning the decision of the court a quo. In those circumstances it ought, ordinarily at any rate to have been entitled to its costs on appeal. As against that, it ill-advisedly chose not to participate in the proceedings before the High Court. That court was thus denied the benefit that such participation would have brought. Had it participated, it could possibly have influenced the outcome of those proceedings. In that event an appeal may not have been necessary. In those circumstances Counsel for the FSB was constrained to accept that in the event of its appeal succeeding there should be no order as to costs.

[18] Turning to Mr Barthram's appeal: Although the court a quo dismissed his application to review Discovery's decision to debar him, it arrived at that conclusion

without entering into the merits of the matter. There was a dispute on the papers as to whether Mr Barthram was still in the employ of Discovery when the decision was taken to debar him. From the Bar in this court, however, his counsel accepted that we should approach this aspect of the matter on the factual footing that he was still in Discovery's employ at the relevant time.

[19] In support of the review application, Mr Barthram stated:

'I agree that the First Respondent [Discovery] has a responsibility to ensure that only fit and proper persons act as its representatives or intermediaries. I deny that I was not a fit and proper person and specifically deny that the First Respondent was entitled to act in terms of Section 14(1) of the FAIS Act as alleged or at all. The decision taken by the First Respondent was unwarranted and this would have been clear had the First Respondent afforded me an opportunity to represent myself and to present my case.'

He accordingly complained that:

'there was not a proper disciplinary hearing and furthermore whether the First Respondent had used the correct process, both in terms of the FAIS Act, common law, PAJA and the rules of natural justice when it took the decision to debar me. It will be argued on my behalf at the hearing of this matter that there is nothing before this Honourable Court to prove that I am not a fit and proper person to act as a legal representative.'

In opposing the application Ms Meintjies stated:

'23.1 My decision, as the First Respondent's Chief Compliance Officer, to invoke the provisions of Section 14(1) of the FAIS Act and to report to the Registrar the First Respondent's election to debar the Applicant as one of its authorised representatives followed on consultations that I held with Messrs Mark Bamford (a forensic investigator in the First Respondent's employ).

23.2 I was furnished by Messrs Bamford, Allan and Hudson with certain reports which formed part of my report to the Second Respondent. Those reports form part of annexure "PB14" to the Applicant's founding affidavit. It was on the strength of the facts contained in the annexed reports and what was conveyed to me by Messrs Allan and Bamford of their meeting with the Applicant (referred to below) that I made my decision.

. . .

23.4 The contents of the aforesaid reports warranted the conclusion that the Applicant was not a fit and proper person to function as a representative of the First Respondent in the

provision of financial advice to members of the public as defined in the FAIS Act. It was that fact which was reported by me to the Registrar on 13 June 2012.'

[20] The meeting between the Barthrams and Messrs Bamford and Allan was thus an important feature of Ms Meintjies' decision. A transcript thereof served before the High Court. To the extent relevant for present purposes, it reads:

'Mr Bamford: We are recording the interview for record keeping purposes and obviously it is just so that we can reflect back on our notes, what we have said what was discussed. You are more than welcome to speak in Afrikaans. I am going to speak in English, if you are comfortable with that, and Warren will address you in whatever language he is comfortable in. And then we have just got a few concerns that we are going to present to you and try and get your input on what our concerns are if that is okay. Do you object to having the meeting recorded?

. . .

Mr Barthram: I actually resigned the Thursday . . .

. . .

Mr Bamford: Okay. So obviously we are in this, when that type of thing happens, we then just go and do an audit just to make sure that everything that you have left behind for us to deal with, is in order and that is obviously where Warren come in and where I come in.

Mr Barthram: Yes, I understand.

Mr Bamford: You understand that? Okay. So during that process there were certain things that I have picked up in the file which I do not believe are correct, but perhaps you can just shed some light on the concerns that I have and I think we should just jump straight in.

Mr Barthram: Sure.

Mr Bamford: Warren, is there anything else that you want to . . .?

Mr Allan: No, I (inaudible) under that, I will just ask one or two questions regarding some replacements.

Mr Bamford: Okay, that is good.

Mr Barthram: Do you have some paper and pen for me as well so that I can also just make some . . .

Mr Bamford: Like I said, the files that I have got here, is just a sample of what we found and I believe if you can explain what has happened here, then it will pretty much apply to what has happened in the other cases.

. . .

Mr Barthram: . . . If you want to nail me, you can.

Mr Bamford: No, the idea is not to nail you, Percy, the idea is to ask you questions.

Ms Barthram: I get the feeling it is.

Mr Bamford: No sir, the idea is to ask you questions. We have picked up some irregularities, we need to ask you questions.

. . .

Mr Bamford: Okay, that is what we have to do. It is a question and answer session, that is all. We had some concerns just around the documentation that was just incomplete, been signed, and I just want to just show you, just as an example. Okay, so just, we got this incomplete information here, all right, incomplete information. The (inaudible) is not completed.

. . .

Mr Bamford: Percy, we, I just want to come back to you. This is, we are asking questions, that is all. I had a job to do, you understood that, you acknowledged that I had a job to do, to go through your files. I found irregularities on the files and I am just asking you for information on these files.

. . .

Mr Bathram: Ja, I understood.

Mr Barthram: . . . So what is going to happen now?

Mr Allan: Well, what will happen is, Mark will draft his findings or whatever and then it will go through to compliance, Sorina there, the head of compliance and that, and they will just either make notes. From a risk point of view for Discovery, we may have to report certain things to the FSB, just to say we have reported this, the advisors are no longer in our employ, but we are just notifying them that these are the files and we will correct the error or whatever the case may be. That they will have to take up.

Ms Barthram: Okay, what we are looking here . . . (intervenes)

Mr Bamford: Need to be remindful, that is not our decision whether to debar or not to debar, that is the FSB's . . . (intervenes)

. . .

Mr Barthram: So the next call I will get is from the FSB?

Mr Bamford: Not necessarily, no. That is the really negative side, a way of looking at it, but Percy, thank you very much for coming through. I am going to switch the recording off now . . . (intervenes)

Mr Barthram: Ja.

Mr Bamford: So anything you say after this is off the record.

Mr Barthram: Okay.'

[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 486E-G, Colman J put it thus:

'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 lastmentioned 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.'

[22] Here none of the principles alluded to by Colman J were observed by Discovery in their dealing with Mr Barthram. If anything, it appears that he was positively misled as to the true nature and purpose of his meeting with Messrs Bamford and Allan. It must follow that his review application as against Discovery ought to have succeeded before the court a quo. Insofar as the costs are concerned: In dismissing Mr Barthram's application, the High Court ordered him to pay Discovery's costs, including the costs of the urgent application launched by him on 18 September 2012. That order obviously cannot stand. It was necessary for Mr Barthram to approach this court to vindicate his rights. Discovery's conduct prompted the litigation and it has now been found to have acted unlawfully. Notwithstanding the fact that Discovery elected not to participate in the appeal, it should be held liable for Mr Barthram's costs both in this court and the one

below.

[23] In the result:

(1) The appeal by the Financial Services Board is upheld and the order of the court below is set aside and replaced with the following:

'The interim order issued against the second respondent, the Financial Services Board, on 18 September 2012 is set aside and the application against it is dismissed.'

(2) The appeal by Mr PGE Barthram is upheld with costs, such costs to be paid by Discovery Life Ltd and the order of the court below dismissing his application against Discovery Life Ltd is set aside and replaced with the following:

'(a) The decision taken by the first respondent, Discovery Life Ltd, to debar the applicant, Mr PGE Barthram, purportedly in terms of section 14(1) of the Financial Advisory and Intermediary Services Act 37 of 2002, is set aside.

(b) The first respondent is ordered to pay the costs of the application, such costs to include those occasioned by the urgent application of 18 September 2012.'

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V M Ponnan

Judge of Appeal

APPEARANCES:

For First Appellant:	E C Labuschagne SC
	Instructed by:
	Rooth & Wessels Inc., Pretoria
	Phatshoane Henney Attorneys, Bloemfontein

For First Respondent:	J R Minnaar
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