IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

Case Number: A75/2025

In the matter between:

GILES ALEXANDER POWER MAYNARD Appellant

and

CARRICK WEALTH (PTY) LIMITED Respondent

CORAM: SHER J, MANGCU-LOCKWOOD J, et JONKER AJ

Date of hearing: 21 January 2026

Date of judgment: 4 March 2026

Summary: Appeal against dismissal of application to halt debarment proceedings in terms of s 14 of the FAIS Act - appellant transmitted confidential information to a competitor employee - settlement agreement concluded before debarment notice issued - leave to appeal confined to two factual grounds: whether respondent had a duty to initiate proceedings, and whether ulterior motive established - interpretation of ss 14(2) and (3): provisions prescribe mandatory procedural steps forming an integrated scheme with the substantive duty to debar in s 14(1); the duty to initiate is implicit in, and a necessary incident of, the peremptory language of ss 14(2) and (3) read purposively with s 14(1); a contrary interpretation would frustrate the Act's protective purpose - objective threshold for initiating proceedings met - statutory

duties imposed in the public interest cannot be displaced by private agreement regardless of timing - ulterior motive not established on the papers - appeal dismissed with costs.

ORDER

1. The appeal is dismissed.
2. The appellant shall pay the respondent's costs of the appeal, including the costs of two counsel, with senior counsel's fees to be taxed on scale C and junior counsel, where employed, on scale A.

JUDGMENT

JONKER AJ (SHER J et MANGCU-LOCKWOOD J concurring):

INTRODUCTION

[1] This is an appeal against the judgment of Janisch AJ, delivered on 15 November 2024, dismissing the appellant's application for declaratory and final relief aimed at halting debarment proceedings initiated against him by the respondent. The respondent is a financial services provider (FSP), under section 14 of the Financial Advisory and Intermediary Services Act 37 of 2002 ('the FAIS Act').

[2] On 20 December 2024, Janisch AJ expressly granted leave to appeal on two narrow factual questions: (i) whether, on the facts of this case, the respondent had a duty to initiate debarment proceedings, which duty could not be compromised by agreement; and (ii) whether the respondent's alleged ulterior motive was established on the papers.

THE UNDISPUTED FACTS

[3] The essential facts are comprehensively set out in the judgment a *quo* and are not in material dispute. The facts are as follows:

[4] The appellant was a representative of the respondent until 31 October 2023. On 11 October 2023, while still in the respondent's employment and during his notice period, he sent an email to a Ms. Lategan, which contained confidential client information. Ms. Lategan was a former employee of the respondent who, at the time, was working for a direct competitor of the respondent in the financial services industry.

[5] The information transmitted included a list of the names of approximately 80 clients of the respondent, together with certain confidential details pertaining to them, including and principally the total value of their assets under management. Included in the list were the names and details of about 20 clients who were acquaintances, friends and family members of the appellant, who he was servicing on behalf of the respondent, whom he claimed he wished to buy out.

[6] The appellant did not obtain the consent of any of the clients before disclosing their confidential information.

[7] Following a letter of demand from the respondent's attorneys, the parties entered into negotiations that culminated in a settlement agreement on 7 November 2023.

[8] The settlement agreement included restraint provisions, confidentiality undertakings, and a full and final settlement clause. It expressly permitted the appellant to service 15 specified clients immediately and a further 6 clients from 1 January 2024.

[9] On 8 November 2023, a day after the settlement agreement was concluded, the respondent delivered a Notice of Enquiry under section 14(3)(a) of the FAIS Act, notifying the appellant of its intention to debar him and commencing the statutory debarment process which is provided for in the FAIS Act.

[10] The appellant thereafter launched an application for declaratory and final relief aimed at halting debarment proceedings initiated against him by the respondent. It was dismissed.

AMBIT OF THE LEAVE TO APPEAL

[11] The appellant sought leave to appeal on various grounds, two of which were unsuccesful: Firstly, that another Court might find that there was no duty on a FSP to initiate debarment proceedings, and therefore that it could not be concluded that an agreement not to initiate was necessarily incompetent.

[12] Secondly, that another court might take a different view as to the threshold test for when such a duty arose.

[13] Janisch AJ did not consider there to be a realistic prospect of another court finding that where it an FSP had a duty to debar, it did not have a corresponding duty to commence the debarment proceedings and furthermore, that there was no reasonable prospect that another court could find that it was competent to contract out of the duty to initiate the proceedings where a duty to debar existed. Leave to appeal was accordingly refused on both these grounds.

[14] Despite the refusal , the appellant contends that this Court can entertain points of law beyond those for which leave to appeal was granted. In support of this submission, the appellant relies on *Minister of Safety and Security v Mohamed*[1] in which the following was said:

> '[18] *The principle above was stated in relation to this court as it had jurisdiction to extend the grounds on which leave to appeal was granted. The*

[1] 2012 (1) SACR 321 (SCA).

court a quo had no such jurisdiction. If the appellants, for example, were not satisfied with the fact that Samela AJ granted leave to appeal on one ground alone, they had to direct a petition to this court, not the full court, to extend the grounds. Thus, even if any of the parties asked the court a quo to extend the grounds of appeal – other than when a point of law arose – it had no jurisdiction to do so. Harlech-Jones Treasure Architects CC & Others v University of Fort Hare 2002 (5) SA 32 (ECD) at 51I-52B *and* Queenstown Girls High School v MEC, Department of Education, EC 2009 (5) SA 183 (Ck) at 186G-187A.'

[15] I accept that our law has long recognised a residual power in an appellate court to raise and decide, *mero motu*, a point of law that arises on the established facts, even if the parties did not raise it and it was not covered by the grounds of appeal. This principle is conceptually distinct from a party seeking unilaterally to expand the grounds on which leave was granted. Read in context, the qualifying phrase in *Mohamed* - 'other than when a point of law arose' - is best understood as a recognition of this residual power: where a legal issue emerges or becomes apparent during proceedings, a court may address it without requiring the parties to commence fresh proceedings.

[16] Critically, however, this residual power does not avail the appellant. The appellant is not confronted with a new or unforeseen legal issue that has emerged during the hearing of this appeal. On the contrary, he seeks to re-argue a specific legal question, whether an FSP has a duty in law to initiate debarment proceedings and whether that duty may be waived by agreement, on which Janisch AJ expressly *refused* leave to appeal. The proper remedy, as the Supreme Court of Appeal made clear in *Mohamed* itself, was to petition the Supreme Court of Appeal to extend the grounds of appeal. The appellant did not do so.[2]

[17] Whilst debate was had about the powers of this court and the ambit of what this court can do, both parties agreed that this court only has jurisdiction on appeal to determine issues that flow from the leave to appeal that was

[2] As confirmed in *Harlech-Jones Treasure Architects CC v University of Fort Hare* 2002 (5) SA 32 (ECD).

granted. Accordingly, this Court is bound by the scope of the leave-to-appeal order. We cannot revisit the legal conclusions reached by Janisch AJ regarding the existence of a statutory duty to initiate debarment proceedings or the impermissibility of contracting out of that duty. Those findings stand and are not before us on appeal.

[18] In any event, counsel for the appellant conceded during argument that where a legal duty to initiate debarment proceedings exists, that duty cannot be contracted out of. This concession substantially undercuts the very legal argument the appellant seeks to introduce and confirms that, even on his own case, reopening the legal question would not avail him.

[19] The appeal is accordingly confined to the two grounds upon which leave was granted.

THE ISSUES

[20] The issues that this Court must determine are: (i) whether, on the facts of this case, the respondent had a duty to initiate debarment proceedings, which duty could not be compromised by agreement; and (ii) whether the respondent's alleged ulterior motive was established on the papers.

[21] Once that is determined, this Court must consider whether the requirements for a final interdict were met.

THE FINDINGS OF THE COURT A QUO

[22] The court a *quo, f*or present purposes, confirmed the following to be applicable to the matter:

[23] An FSP has a statutory duty to debar a representative in the circumstances set out in s 14(1) of the Act.

[24] There is an implicit but necessary duty to initiate debarment proceedings where circumstances warrant.[3]

[25] Drawing on *Viking Pony*[4], that duty arises when the FSP becomes aware of information which, if verified following the statutory process, could warrant a debarment under section 14(1).[5]

[26] This does not mean that the merest hint, in the words of the Court a *quo*, triggers the duty; rather, there must be '*a reasonable degree of conviction that information exists that may, in the circumstances of the case, warrant a debarment*'[6].

[27] The initiation of debarment proceedings, though not administrative action for PAJA purposes, constitutes an exercise of public power subject to review under the principle of legality.

[28] An exercise of public power is unlawful if undertaken for an ulterior purpose or motive rather than the proper statutory purpose.

[29] The debarment process must not be used to satisfy contractual or other grievances or be abused for an ulterior purpose.[7]

[30] The debarment regime exists to safeguard the investing public by ensuring that only fit and proper persons serve as representatives.

[31] The requirements for final interdictory relief are well-established. The appellant must demonstrate (i) a clear right; (ii) irreparable harm; and (iii) the absence of an adequate alternative remedy.[8]

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[3] Para 84 of the judgment.
[4] *Viking Pony Africa Pumps (Pty) Ltd v Hidro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC),
[5] Para 87 of the judgment.
[6] Id, para 88.
[7] FSCA Guidance Note, para 3.5.1.
[8] *Setlogelo v Setlogelo* 1914 AD 221 at 227.

ANALYSIS

The duty to initiate debarment proceedings:

[32] That in certain instances there is a statutory duty on an FSB to debar, was confirmed by the Supreme Court of Appeal in *Basson*[9] where Dambuza JA held as follows:

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

[33] In ss 14(2) and (3) of the FAIS Act, the procedure for debarment is prescribed as follows:

> *"(2) (a) Before effecting a debarment in terms of subsection (1), the provider must ensure that the debarment process is lawful, reasonable and procedurally fair.*
>
> *(b) If a provider is unable to locate a person in order to deliver a document or information under subsection (3), after taking all reasonable steps to do so, including dissemination through electronic means where possible, delivering the document or information to the person's last known e-mail or physical business or residential address will be sufficient.*
>
> *(3) A financial services provider must-*
>
> *(a) before debarring a person-*
>
> *(i) give adequate notice in writing to the person stating its intention to debar the person, the grounds and reasons for the debarment, and any terms attached to the debarment,*

[9] *Associated Portfolio Solutions (Pty) Ltd and Another v Basson and Others* 2021 (1) SA 341 (SCA).

including, in relation to unconcluded business, any measures stipulated for the protection of the interests of clients;

(ii) provide the person with a copy of the financial services provider's written policy and procedure governing the debarment process; and

(iii) give the person a reasonable opportunity to make a submission in response;

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

(c) immediately notify the person in writing of-

(i) the financial services provider's decision;

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

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

[34] The procedural steps prescribed in sections 14(2) and (3) are the mechanism through which the substantive duty to debar in section 14(1) is to be discharged. Accordingly, the duty to debar cannot be fulfilled without first initiating and completing those procedural steps. The question is therefore not whether the statute expressly provides a duty to initiate, but whether such a duty arises as a necessary incident of the duty to debar. That question is one of statutory interpretation.

[35] The proper approach to the interpretation of s 14 is that set out by the Supreme Court of Appeal in *Endumeni*[10], where Wallis JA held in paragraph 18:

'*Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to*

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[10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'

[36] Applying the *Endumeni* framework, the following considerations are decisive.

[37] The language of section 14 is consistently peremptory. Section 14(1)(a) provides that an FSP *must* debar a representative who does not meet, or no longer complies with, the requirements of fitness and propriety. Section 14(2)(a) provides that the provider *must* ensure that the debarment process is lawful, reasonable and procedurally fair. Section 14(3) provides that a financial services provider *must* give adequate written notice, provide a copy of its debarment policy, and afford the person a reasonable opportunity to respond. The word *must* is used throughout. In ordinary grammar and syntax, *must* imposes an obligation; it does not confer a discretion. They are obligatory steps that an FSP is required to take before it may effect a debarment.

[38] Section 14 must be read as a whole. Sections 14(1), (2) and (3) do not create separate and independent obligations. They form an integrated statutory scheme. Section 14(1) imposes the substantive duty to debar. Sections 14(2) and (3) prescribe the procedural means by which that duty is to be discharged. The procedural means cannot be engaged without initiation. It follows that the duty to debar in s 14(1) necessarily encompasses a duty to commence the process that ss 14(2) and (3) prescribe. There was no need to state the duty to initiate separately because it is inherent in the mandatory language of ss 14(2) and (3), read in the context of s 14(1).

[39] The apparent purpose of s 14 is to protect the investing public by ensuring that only fit and proper persons serve as representatives of financial services

providers. That purpose, which is a matter of public interest, is achieved by requiring FSPs to act when they become aware that a representative may no longer satisfy the statutory requirements. An interpretation that acknowledges a duty to debar but recognises no corresponding duty to commence the process that leads to debarment would frustrate that purpose entirely.

[40] Finally, *Endumeni* directs that a sensible meaning is to be preferred to one that leads to insensible results or undermines the apparent purpose of the provision. If ss 14(2) and (3) impose no duty to initiate proceedings, then an FSP that is satisfied, or has reasonable grounds to believe that a representative is unfit, could simply decline to commence the debarment process. The substantive obligation in s 14(1) would be rendered meaningless, because the FSP would never be called upon to make the decision that s 14(1) contemplates. That is a manifestly insensible result. It would mean that the Legislature went to the trouble of enacting a detailed procedural framework for debarment while leaving the activation of that framework entirely to the goodwill of the FSP. No rational Legislature could have intended such an outcome.

[41] Counsel for the respondent pointed out that, whilst the wording of s 14(1) explicitly states that an FSP must debar (if the circumstances in s 14(1)(a) or s 13(2)(a) are satisfied) , ss 14(2) and (3) are silent as to when proceedings to debar must be initiated. He contended that if the Legislature intended there to be an obligation to initiate, the statute would have said so expressly, and that such a duty accordingly cannot be inferred. He submitted further that the situation under the FAIS Act was to be distinguished from that in *Viking Pony*, where the legislation explicitly stated what had to be done.

[42] In my view, the argument does not withstand scrutiny when tested against the *Endumeni* interpretative factors set out above. The silence upon which the respondent relies is not a gap in the legislative scheme; it is the natural consequence of the fact that the duty to initiate is already implicit in the mandatory procedural language of ss 14(2) and (3), read purposively in the context of s 14(1). Sections 14(2) and (3) do not exist in a vacuum. They are the prescribed means of fulfilling the s 14(1) obligation. When the Legislature enacted ss 14(2) and (3) using

peremptory language and prescribed a sequence of mandatory steps that an FSP must take before debarring a person, it necessarily presupposed that those steps would be initiated whenever the substantive grounds for debarment are engaged. There is accordingly no force in the contention that what the Legislature did not say expressly it did not intend. There is equally no basis for distinguishing *Viking Pony* on this ground, and the analogy drawn by Janisch AJ was, with respect, correct and must be accepted.

[43] The appellant drew a distinction between certain tribunal decisions cited and the present case. He submitted that cases such as *Chaane*[11] were distinguishable as they dealt with *ex post facto* settlements, that is, settlements concluded after debarment proceedings had already been initiated.

[44] The appellant further submitted that the present case was distinguishable because the settlement agreement had been concluded before the debarment proceedings commenced. He contended that this was an *a fortiori* situation: if an FSP cannot settle debarment obligations after proceedings have started, then surely, with even stronger reason, it should be able to prevent such proceedings from ever arising by settling beforehand.

[45] On appellant's counsel's own concession during argument, he accepted that if there is a duty to initiate debarment proceedings, one cannot contract out of it. However, he maintained that the *a fortiori* argument merited consideration.

[46] Though not without initial appeal, this argument fundamentally misunderstands the nature of statutory obligations and inverts the proper legal analysis. Section 14(2) requires that the debarment process must be lawful, reasonable and procedurally fair, which is achieved by adhering to and complying with section 14(3). As demonstrated above, the duty to initiate debarment proceedings arises as a necessary incident of the duty to debar in section 14(1): section 14(1) imposes the substantive obligation; ss 14(2) and (3) prescribe the mandatory procedural means by which that obligation is to be fulfilled; and the procedural means cannot be engaged without initiation. The duty to initiate is the

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[11] *Chaane v NBC Holdings (Pty) Limited* [2020] ZAFST 75.

logical and necessary precondition for the discharge of the express statutory duty. The appellant's *a fortiori* argument, which depends on the premise that the duty to initiate is something distinct from and additional to the duty to debar, accordingly falls away.

[47] The fundamental principle, as correctly identified by the court a *quo*[12], is that parties cannot by agreement achieve a result that a statute prohibits, or avoid compliance with a statutory obligation. The timing is legally irrelevant to the question of permissibility.

[48] Should the appellant's submissions be upheld, it would permit FSPs and representatives to insulate themselves entirely from regulatory consequences through private negotiation, before any public interest scrutiny occurs.

[49] Also, if the appellant's *a fortiori* argument were to be accepted, settlement agreements will be concluded in which FSPs will benefit commercially from not pursuing their statutory duty and their employee representatives would avoid regulatory consequences. Public interest would be sacrificed for private commercial gain.

[50] This is precisely the mischief that making such agreements impermissible seeks to prevent.

[51] The tribunal dicta support impermissibility regardless of timing**.** In *Thako v African Bank Limited* (FSP 7/2020), cited with approval in *Chaane*, the tribunal stated:

> '*These duties cannot be waived or settled especially since, if the debarment were to be set aside by this Tribunal, the matter has to be referred back to the FSP for reconsideration*.'

[52] The tribunal was articulating a principle of general application.

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[12] Judgment paras 103-104.

[53] The correct legal principle is straightforward: statutory obligations imposed in the public interest cannot be contracted out of, whether prospectively or retrospectively.

[54] As stated in *Cool Ideas*[13]:

> '*Our law has long recognised that any act performed contrary to the direct and express prohibition of the law is void and of no force and effect*.'[14]

[55] This principle applies to agreements not to perform a statutory duty just as it applies to agreements to do a prohibited act. The timing of the agreement does not affect its validity or invalidity.

[56] The *ex post facto* versus *a fortiori* distinction is therefore legally irrelevant and provides no basis for distinguishing the tribunal decisions or departing from the fundamental principle that statutory duties cannot be compromised by private agreement.

[57] In the circumstances the appellant's concession during argument, that one cannot contract out of a duty to initiate debarment proceedings, where there is clearly a duty to debar, was correctly made.

Threshold met?

[58] What this Court must then ultimately determine is whether, on the particular facts of this case, the requisite threshold was objectively met, which triggered the respondent's duty to initiate debarment proceedings.

[59] The appellant submits that the threshold was not met, advancing several arguments. These arguments can be summarised as follows:

(a) The disclosure was an isolated incident in the context of settlement negotiations regarding the appellant's departure.

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[13] *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC).

[14] Para 53.

(b) The appellant's purpose was legitimate viz to determine a buy-out price for clients of the respondent he wished to take over.

(c) Ms. Lategan remained bound by her own confidentiality obligations to the respondent.

(d) The settlement agreement's authorisation for him to service 21 clients demonstrated that the respondent did not genuinely believe he was not fit and proper to practice.

(e) The timing, by initiating debarment the day after settlement, evidenced that no genuine concern existed as to his fitness, and was indicative that this was simply any attempt by the respondent to get back at him.

[60] I am of the view that these arguments do not withstand scrutiny when measured against the objective facts and the proper application of the *Viking Pony* threshold test.

[61] I say so because: Firstly, the appellant's conduct is not in dispute**.** The appellant admits that he transmitted confidential client information, including names, policy numbers and asset values, to a third party without the clients' consent or that of the respondent. On the face of it this constituted a breach of s 3(3) of the General Code of Conduct for authorised financial services providers and representatives, which provides as follows:

> '*A provider [including a representative] may not disclose any confidential information acquired or obtained from a client... unless the written consent of the client... has been obtained beforehand or disclosure of the information is required in the public interest or under any law*.'

[62] As the court a quo held, the General Code is binding on all representatives by virtue of ss 1 and 15 of the FAIS Act.[15] A contravention of the Code is a contravention of the Act for the purposes of s 14(1)(a)(iv).

[63] Secondly, the circumstances under which the unauthorised disclosure was made, are significant. This was not merely a technical or inadvertent disclosure. The

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[15] Para 28 of the judgment.

information was sent to someone who was working for a direct competitor, precisely the scenario the confidentiality provisions in the Code are designed to prevent. After leaving the respondent's employ the appellant took up employment with the competitor.

[64] The disclosure extended to 80 clients, not the 20 or so friends and family the appellant claims to have been negotiating about. The appellant provided no credible explanation for why confidential information pertaining to the 60 additional clients needed to be shared for the purpose he stated.

[65] The information included highly sensitive financial details, and the total value of the client assets under management was considerable, and would be of obvious competitive value.

[66] Most importantly, no client consent or that of the respondent was sought or obtained.

[67] Thirdly, the appellant's subjective explanation does not eliminate the objective threshold. The appellant says he shared the information to facilitate buy-out negotiations and that it was once off. Even accepting this explanation at face value for present purposes, it does not in itself render his conduct lawful or eliminate the regulatory concern. The Code does not contain an exception for commercial convenience or exit negotiations. If the appellant's contentions were to be accepted, it would create a significant loophole in client protection, which is a primary concern of the Act.

[68] Fourthly, Ms. Lategan's own confidentiality obligations are irrelevant. The appellant's duty not to disclose confidential client information was personal to him. He could not discharge that duty by asserting that the recipient also had obligations. Moreover, Ms. Lategan was by then working for a competitor, a relationship that created the risk of misuse. It is also important to note that Ms. Lategan's employer, Legacy Wealth, was engaging with appellant at the time, with a view to him joining it as a shareholder and director, as he subsequently did. It had an obvious financial

interest in any clients and business of the respondent which he could bring across with him, when he joined it.

[69] In the fifth place, the terms of the settlement agreement did not negate the threshold. The appellant places great weight on the fact that the settlement agreement authorised him to service 21 clients. This argument fundamentally misunderstands the distinct nature of contractual relations and regulatory obligations.

[70] The settlement agreement resolved private disputes between the parties, including disagreement over restraint of trade obligations, client ownership, and contractual claims. It was entered into with the full knowledge and understanding of their position.

[71] However, the debarment process serves an entirely different purpose. As was elucidated by the Supreme Court of Appeal in *Barthram*[16]:

> '[16] *A representative who does not meet [fitness and propriety] requirements lacks the character qualities of honesty and integrity... and thereby poses a risk to the investing public generally. Such a person ought not to be unleashed on an unsuspecting public*'"

[72] The purpose of debarment is protection of the public, not vindication of private commercial interests. The respondent could not settle its regulatory statutory obligations any more than a prosecutor can agree not to prosecute in exchange for a civil settlement. The two spheres are distinct.

[73] The FAIS tribunal has consistently recognised this distinction. In *Chaane,*[17] it held that FAIS and employment proceedings are distinct from one another, and the duties of an FSP cannot be waived or settled.

[74] The respondent says that the fact that it was prepared to permit the appellant to service certain clients with whom he had personal relationships (family and close

[16] *Financial Services Board v Barthram* 2018 (1) SA 139 (SCA)
[17] *Chaane v NBC Holdings (Pty) Limited* [2020] ZAFST 75

friends) does not mean it accepted that he was fit to serve the general investing public. The settlement represented a pragmatic commercial solution for it, as those 21 clients would likely have followed the appellant in any event. This is fundamentally different from certifying to the industry and the public at large that the appellant meets fit and proper requirements.

[75] In the sixth place, the timing does not negate the objective threshold**.** The appellant suggests that if grounds truly existed, the respondent would have acted sooner. Whilst it may be so, it could be contended that it was not unreasonable for the respondent to resolve the restraint and confidentiality issues first before addressing its regulatory obligations. The respondent was at liberty to first secure contractual protections for its legitimate commercial interests before initiating regulatory proceedings that served a different purpose.

[76] Also, the six-month limitation period in section 14(5) had only recently begun to run from 31 October 2023. There was no urgency requiring immediate action before settlement discussions concluded.

[77] Returning to the test articulated by the court a *quo*: did the respondent become aware of information which, if verified through the statutory process, could warrant debarment? The answer is plainly yes. The import of the information, which the respondent had reflected there was:

(a) an admitted breach of a binding statutory code of conduct;
(b) transmission of confidential client information;
(c) to someone working for a direct competitor;
(d) covering 80 clients;
(e) without client or the FSP's consent; which
(f) potentially evidenced lack of character qualities of honesty and integrity.[18]

[18] Financial Services Board Notice 194 of 2017, section 9.

[78] If these facts are verified and established through the debarment process, and the appellant's explanations and mitigating circumstances are weighed, they could potentially warrant a finding that he lacks the fit and proper requirements or has contravened the FAIS Act in a material manner.

[79] That is the threshold. It is deliberately set at a relatively low level because s 14 provides for a full procedural process (notice, opportunity to make representations, consideration of response, decision, right to tribunal reconsideration, right to judicial review) before any debarment results. The threshold asks only whether proceedings should be commenced, not whether debarment is ultimately warranted.

[80] The appellant's arguments about context, explanation, and mitigation are precisely the matters that should be ventilated in the debarment process itself. They do not and cannot prevent that process from being triggered.

[81] Accordingly, I am satisfied that on an objective assessment of the facts, as was held by the court a *quo*,[19] the threshold test articulated in *Viking Pony,* was met and the respondent had a duty to initiate debarment proceedings.

[82] This ground of appeal must accordingly fail.

Ulterior motive:

[83] The appellant sought final relief. The applicable *Plascon-Evans*[20] standard is well-established and was correctly articulated by the court a *quo*.[21]

> '*To succeed, [the Applicant] must establish his case on the basis of the facts put up by the Respondent, together with those facts averred by him that the Respondent cannot deny. The factual version put up by the Respondent will only be disregarded if, exceptionally, it can safely be rejected on the papers alone*.'

[19] Para 124 of the judgment.
[20] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] (3) SA 623 (A).
[21] Id para 6.

[84] As the Supreme Court of Appeal confirmed in *African National Congress v Ezulweni Investments (Pty) Limited,* [22] a respondent's version will only be rejected where it is utterly untenable and without veracity and not capable of belief. [23]

[85] The appellant referred to the robust approach articulated in *Soffiantini v Mould* [24] and *Steyn v Hasse.* [25]

[86] However, even that approach does not permit a court to reject a respondent's sworn evidence simply because certain circumstances raise suspicion. There must be compelling objective grounds demonstrating that the respondent's version is false or untenable.

[87] The question is whether, on the papers before us, the appellant has established that the respondent initiated debarment proceedings for an ulterior motive. Specifically, to suppress competition rather than to comply with its statutory obligations and protect the investing public.

[88] In its answering affidavit, the respondent states under oath that:

(a) The appellant's conduct in sharing confidential client information was serious and fell outside even the alleged rationale of determining a buy-out price.

(b) The respondent faces potentially severe statutory penalties, including criminal liability under s 36(a) of the FAIS Act, if it fails to comply with its s 14 obligations.

(c) The respondent had no alternative but to institute debarment proceedings in the face of the admitted disclosure of confidential client information.

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[22] [2023] ZASCA 159.
[23] Para 23.
[24] 1956 (4) SA 150 (E)
[25] 2015 (4) SA 405 (WCC).

(d) The allegation of anti-competitive motive makes no sense because the respondent had already secured suitable restraint undertakings in the settlement agreement and had no need for any additional restraint.

(e) The 21 clients the appellant was permitted to deal with were essentially close friends and family who, in all likelihood, would not have remained with the respondent in any event.

[89] The appellant relies on circumstantial evidence to invite the Court to reject the Respondent's stated motivation. Janisch AJ acknowledged that there was room for doubt as to whether the respondent's conduct was exclusively motivated by its understanding that it was compelled by law to initiate debarment proceedings. The circumstances relied upon by the appellant do raise concerns as to the appellant's stated motivation and are, on any fair reading, somewhat suspicious. They include the following:

(a) The timing i.e. the issuing of the debarment notice a day after securing the settlement agreement.

(b) The absence of any warning before settlement that debarment might be pursued.

(c) The inconsistency between permitting the appellant to service 21 clients and simultaneously viewing his conduct as being such as to disqualify him entirely from acting as a representative .

(d) The allegedly greater commercial advantage of debarment compared to the six-month contractual restraint.

(e) Differential treatment, as alluded to in supplementary affidavits, that other employees who allegedly engaged in similar conduct did not face debarment.

[90] I accept that the timing is troubling and understandably gave the court a *quo* pause. The issuing of the debarment notice the very day after securing the settlement agreement is, on its face, difficult to reconcile with a purely regulatory motive. That said, the timing alone does not, in my view, compel the inference of improper motive. As noted above, the respondent was entitled to resolve private law disputes before addressing regulatory obligations. These are separate spheres.

From a practical perspective, it is not implausible that the respondent would wish to achieve contractual certainty before commencing a process that might strain relations further or trigger hostile litigation, as indeed occurred.

[91] The respondent was not required to forewarn the appellant. The FAIS Act does not mandate pre-notice consultation. Once the threshold is crossed, the FSP must issue the s 14(3)(a) notice and afford procedural fairness through that process.

[92] Once the respondent determined, whether on its own assessment or on legal advice, that it had a duty to initiate proceedings, it properly did so through the formal statutory notice process.

[93] The appellant's argument that the settlement terms contradict the debarment is not without some force. However, upon closer analysis, it does not establish the ulterior motive contended for. As already explained, the 21 clients were friends, family, and close connections who would likely have followed the appellant regardless. Releasing them was commercially pragmatic.

[94] Moreover, the debarment process had not yet concluded. The respondent had not yet formed a final view on whether debarment was warranted, it had merely concluded that the threshold for initiating the process was met. These are distinct questions.

[95] The appellant submits that a successful debarment would provide greater competitive protection than the six-month restraint, thereby exposing the true motive. This argument is speculative. There is no certainty that the debarment process will succeed. The appellant will have full opportunity to make representations, and the determination of whether to debar him or not, will be made by independent senior counsel, as the respondent undertook. The matter can thereafter also proceed to the Financial Services tribunal for reconsideration on appeal and the courts, if warranted, for review. The appellant can apply to the tribunal for a stay of suspension pending the outcome of any appeal and/or review process.

[96] Regarding other employees who have not faced debarment, the apparent differential treatment is a cause for concern. The respondent's evidence, however,

was that it was awaiting legal advice on those matters. Whilst this explanation is not entirely satisfying, it is not so implausible or demonstrably false as to warrant rejection on the papers. In any event, even differential treatment would not, without more, prove ulterior motive in this case. Each case must be assessed on its own facts.

[97] This evidence, taken at face value, provides a rational, lawful explanation for the respondent's conduct: statutory compliance in the face of a serious breach. The question, however, is whether, in light of the circumstances identified above, that explanation can safely be rejected on the papers. It is to this question that I now turn.

[98] Does the objective facts and reasonable inferences necessarily compel the rejection of the respondent's stated motivation as utterly untenable, palpably implausible or far-fetched, leaving ulterior motive as the only or overwhelming explanation?

[99] In my view the threshold has not been met. I wish to make clear that I do not dismiss the appellant’s concerns lightly. The circumstances, viewed cumulatively, give rise to legitimate questions about the respondent’s motivations, as the court a *quo* acknowledged. However, suspicion, even well-founded suspicion, does not meet the stringent standard required to reject sworn testimony on motion.

[100] The respondent has provided a rational explanation: it became aware of serious conduct breaching the statutory code, determined that it had an obligation to initiate proceedings, and did so.

[101] The appellant's case depends on inviting this Court to draw inferences contrary to the respondent's sworn evidence, based on circumstantial factors (timing, settlement terms, lack of warning).

[102] This is precisely the situation in which the *Plascon-Evans* rule applies. The respondent has provided sworn evidence offering a plausible explanation consistent with the objective facts. The applicant's case depends on inviting the court to prefer inferences pointing the other way. It is well-established that it is only where a respondent’s version can be said to be palpably implausible or untenable, that it can

be rejected. The respondent’s version in this matter, however suspicious the circumstances may be, cannot be so characterised.

[103] The court a *quo* grappled with these very considerations and reached the correct conclusion:

> ‘*Despite my concerns as expressed above, I do not think that I can safely reject the Respondent's statements as to its purpose and motivation on the papers alone. The Applicant's conduct in disclosing a client list with sensitive information to a third party is, again without prejudging any aspect, not insignificant*.’[26]

[104] I respectfully agree. The learned acting judge correctly applied the applicable legal standard and reached a conclusion that was justifiable on the papers.

[105] Moreover, even the robust approach invoked by the appellant does not assist. Here, the objective facts and probabilities, whilst raising legitimate and serious concerns, do not permit a clear conclusion that the respondent's stated motivation was false. They raise troubling questions, but questions alone do not constitute proof of bad faith on the papers. The appellant will be able to canvass this aspect during the debarment process, at which he will have an opportunity, no doubt, to tender evidence and to make submissions and to interrogate and refute any evidence and submissions which are put up by the respondent.

[106] This ground of appeal accordingly also fails.

FINAL INTERDICT REQUIREMENTS:

Clear right?

[107] As already demonstrated in the discussion of the duty to initiate proceedings, the settlement agreement could not displace the respondent's statutory obligations.

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[26] At para 143.

[108] The Court a *quo* was correct to find that the appellant did not establish a clear right.

Irreparable Harm

[109] I cannot find that the appellant has shown that irreparable harm would ensue. The statutory scheme in the Act provides comprehensive protection. The appellant has the right to make representations in accordance with s 14(3)(a), which affords an opportunity to resist a debarment.

[110] The respondent furnished an undertaking that an independent senior counsel will conduct the debarment enquiry , which will provide additional fairness.

[111] As previously pointed out, in the event there is a decision to debar the appellant, he has the right to approach the tribunal for reconsideration thereof, in accordance with s 230 of the Financial Sector Regulation Act 19 of 2017, a process which may include a full re-hearing of the merits, including the ulterior motive allegations. This will entail a substantive reconsideration, not mere rubber-stamping. If debarment is upheld by the tribunal, the appellant has the right to review it before a court, in terms of PAJA.

[112] The appellant submits that being hauled through debarment proceedings will cause irreparable reputational harm. However, if the appellant is fit and proper, the process should vindicate him, not harm him. The setting aside of a debarment order, particularly one found to have been based on an ulterior motive, would vindicate the appellant. I accept that debarment proceedings, by their nature, carry some reputational risk, but this does not amount to irreparable harm where comprehensive procedural safeguards exist.

Alternative remedy

[113] Regarding the final interdict sought the appellant seeks to shut down the debarment process entirely at this preliminary stage. However, he has multiple

alternative remedies that are specifically designed to address the very concerns he raises.

[114] The appellant has the right under s 14(3)(a)(iii) to make written representations addressing the notice of intention to debar. He has not yet done so, instead, he launched urgent litigation to halt the process. He can (and should) make full representations addressing both the substantive conduct and any procedural concerns, including allegations of ulterior motive.

[115] Given the existence of these comprehensive alternative remedies, which are specifically tailored to the debarment process and provide for expert adjudication, it would be inappropriate to grant the drastic relief of shutting down statutorily-mandated proceedings at this preliminary stage.

[116] As the court a *quo* observed:

> '*The contention that the respondent was motivated by ulterior purposes of self-interest rather than a bona fide concern that a debarring offence had occurred is something that can and should be fully ventilated in the section 14(3) process... Moreover, if there is a debarment, the question can be referred to the Tribunal for reconsideration, and the same issue can again be tested*.'[27]

[117] And further:

> '*Given the public interest purpose of section 14, this Court should not be quick to shut down debarment proceedings on the basis of alleged ulterior motive, except in the very clearest of cases. Where there is doubt, it is generally preferable to have the point tested through the statutory structures and processes*.'[28]

[118] As Steyn CJ held In *Ismail* [29]:

> "*A Superior Court should be slow to intervene in unterminated proceedings in a court below, and should, generally speaking, confine the exercise of its powers to 'rare*

[27] Judgment para 144.
[28] Id para 146.
[29] *Ismail & Ors v The Additional Magistrate, Wynberg* 1963 (1) SA 1 (A) para 5

cases where grave injustice might ensue ? or justice might not by other means be attained.'"

[119] The court a *quo*'s findings are sound and reflect proper judicial restraint. This is not a case warranting intervention by the High Court at this stage.

CONCLUSION: A SUMMARY

[120] The respondent objectively had a duty to initiate debarment proceedings based on the threshold test established in *Viking Pony*.

[121] The appellant has not established on the papers, on a balance of probabilities, that the respondent was motivated by ulterior purpose rather than by its regulatory obligations.

[122] The appellant has also not satisfied the requirements for a final interdict.

[123] The court a *quo* cannot be faulted for dismissing the application. The appeal must consequently be dismissed.

COSTS

[124] I see no reason to deviate from the ordinary rule that costs follow the result. The respondent has been successful and is entitled to its costs. The matter was of sufficient complexity to warrant the employment of two counsel, and senior counsel's fees should be taxable on Scale C, and junior counsel on scale A.

ORDER

[125] In the result, I propose the following order be made:

1. The appeal is dismissed.
2. The appellant shall pay the respondent's costs of the appeal, including

the costs of two counsel, with senior counsel's fees to be taxed on scale C and junior counsel on scale A.

E JONKER

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

M SHER

JUDGE OF THE HIGH COURT

I agree.

N MANGCU-LOCKWOOD

JUDGE OF THE HIGH COURT

APPEARANCES:

Appellant's counsel: J Muller SC

Appellant's attorneys: Cowan-Harper-Madikizela Attorneys

Respondent's counsel: G Leslie SC and M van der Berg

Respondent's attorneys: Mcaciso Stansfield Inc.