IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION – PORT ELIZABETH

CASE NO: 629/2013

REPORTABLE

Heard: 27 June 2013

Delivered: 16 July 2013

In the matter between:

FRANCOIS GIDEON PIENAAR APPLICANT

and

THE REGISTRAR OF FINANCIAL SERVICES FIRST RESPONDENT

NATIONWIDE FUNERAL SERVICES CC

(Registration Number 2000/015435/23)

(In Liquidation) SECOND RESPONDENT

JUDGMENT

MAGEZA AJ

The statutory provisions and Registrar's directives

to financial service providers.

[1] Section 14(1) of the Financial Advisory and Intermediary Services Act No. 37 of 2002 (FAIS Act) makes provision for the debarment of financial services representatives and requires that an authorized financial services provider must ensure that any representative who no longer complies with the 'fit and proper' requirements referred to in section 13(2) (*a*) read with section 8(1), or has contravened or failed to comply with any provision of this Act in a material manner, is prohibited by such provider by the withdrawal of any authority to act on behalf of the provider, and that the representative's name is removed from its register referred to in section 13(3).

[2] Section 14(2) enjoins, "For the purposes of the imposition of any prohibition contemplated in subsection (1), the authorized financial services provider must have regard to –

> (a) information regarding the conduct of the representative as provided by the registrar ...; and
>
> (b) any contravention of, or failure to comply with, any relevant provision of this Act by the representative."

Section 14(3) provides that an authorized financial services provider must within a period of fifteen days after the removal of the name of a representative from the register as contemplated in subsection 14(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. The registrar may then make known any such debarment and the reasons therefor by notice in the Gazette or by means of any other appropriate public media.

[3] The Registrar of Financial Services Providers has, in terms of the amended section 13(3)(a) of the FAIS Act, made available by way of a circular to all financial services providers, a 'request for debarment' form, in a prescribed format in which a

provider must notify the Registrar of the removal of the debarred representative's name from the register and the reasons for the debarment. This form is titled:

> "Form and manner of notification to registrar of financial services providers regarding debarment of representatives under the section 14 of the financial advisory and intermediary services Act, 2002"

and provides:

> "Instructions on completing the prescribed form -
> (a) Providers must ensure that the prescribed form is completed in full and that subsequent alterations are initialed.
> (b) Full reasons for the debarment must be provided and the information and documentary evidence in support of the reasons must be attached." (my underlining)

Appearing at the bottom of the body of the form itself, is the further directive that a requester must:

> "7. Attach all relevant documentation including, but not limited to-
> (i) evidence and information supporting the reasons for debarment;
> (ii) a copy of the service contract or mandate between FSP and debarred representative;
> (iii) transcript of disciplinary hearing; and
> (iv) forensic/investigation report (if any)."

These are the first respondent's own directives which it requires of financial services providers to follow and comply with in requesting a debarment.

[4] This Court is called upon to decide whether (a) second respondent, represented by one Mari van Rooyen, had lawful reason to request and secure a debarment of the appellant without complying with the above statutory provisions and directives and; (b) whether the first respondent acted lawfully in effecting the debarment. The application is

directed at the review and setting aside of the decision of the second respondent, effected by the first respondent at the request of second respondent. The applicant is of the view that there has been a lamentable failure by both respondents to comply with the law and directives provided and set out in the above paragraphs. The relief he seeks is the following:

> "1. That the Second Respondent's debarment of the Applicant on 17 October 2012, in terms of Section 14 of the Financial Advisory and Intermediary Services Act, 37 of 2002 is declared to be a nullity.
>
> 2. Alternatively that the said debarment be set aside.
>
> 3. That the First Respondent be directed to amend his central representative register to reflect the decision of this Honourable Court in terms of 1, alternatively 2 above;
>
> 4. That the First Respondent be directed to pay the costs of this application.
>
> 5..."

[5] First respondent is defined as a person contemplated in section 2 of the Financial Advisory and Intermediary Services Act, 37 of 2002 (FAIS Act) charged with the duty to enforce compliance by registered financial services providers and exercises public power and function as contemplated in the definition of "administrative action" in section1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The second

respondent in turn, prior to its liquidation, conducted business as an administrator of group funeral insurance policy schemes and sold funeral insurance policies. Second respondent does not oppose the relief sought and it has thus been left to the first respondent to resist the relief sought by applicant on the grounds set out hereunder.

[6] Applicant details in his papers that he is the founder of the second respondent and commenced the business in 1994 'literally from nothing'. According to him, at the time of its liquidation in 2012, the business yielded a turnover of some seven million rands in revenue. Ms Mari van Rooyen, his daughter, joined him in the business at a time when she was still a student and had, over a period of time, admittedly made a substantial contribution in the development thereof. Motivated by her contribution, he decided to relinquish some of his member's interest in the close corporation in her favour with a view to increasing her personal holding gradually over time, in anticipation of his own retirement from the business.

[7] These laudable intentions however did not come to pass as the relationship between father and daughter took a nasty turn, leading in the end to a complete breakdown in their relationship and eliminating, as he puts it, 'the possibility of any future co-operation between us.' He says, in an effort to hound him out of the enterprise and to assume his participation and member's interest therein, his daughter launched an urgent application for Interdictory relief against him on 15 October 2012 before the Western Cape High Court under case number 1976/2012. He says:

> 'The relief van Rooyen sought in the Cape Town application was couched in the form of a temporary interdict pending the conclusion of a substantive application she intended lauching in terms of Section 36 of the Close Corporations Act, 69 of 1984 whereby she would seek the approval of the court

for my removal as a member of the Second Respondent and the acquisition by the Second Respondent of my membership interest.'

[8] He goes on to say that:

'Contemporaneously with the launching of the Cape Town application van Rooyen, unilaterally, formally notified the First Respondent that I had been debarred from acting as a representative of the Second Respondent, as contemplated in section 14 of the Act.'

and that,

'On 5 November 2012 the First Respondent wrote to Ms van Rooyen, confirming that he had recorded my purported debarment in its central representative register.'

[9] Applicant also makes reference to a prescribed form circulated by first respondent to all financial services providers, the completion of which form is mandatory for purposes of lodging debarment requests with first respondent. This form was completed and submitted by Ms van Rooyen on 17 October 2012. The form bears the following inscription at the top thereof,

'DEBARMENT IN TERMS OF SECTION 14 OF THE

FAIS.'

He points out that contrary to what is anticipated in the first respondent's own prescribed forms, no reasons for the request to debar him are evident and no relevant document was attached thereto. The debarment was also neither authorized by the second respondent, as no resolution to this effect had been taken by the members, nor was he informed or afforded an opportunity to answer any "charges" of wrongdoing against him. According to him he had in fact committed no wrongdoing, save that her daughter's only interest was his removal from the business by any means necessary. Applicant also relies on a further ground. He alludes to a meeting held in Cape Town on 22 October 2012 during which it was agreed that van Rooyen would immediately attend to uplifting the debarment in order for the first respondent to amend its records accordingly. This meeting held to attempt to settle the dispute before the Western Cape High Court was attended by their respective legal representatives. In light of the view I take of the matter on the main ground advanced by applicant, I do not propose to canvas the detail relating to this alleged agreement.

[10] First respondent in its answer deals with how debarments are initiated and undertaken by a financial services provider as well as, what it views as, its role in such proceedings as follows:

> "7.1 Its [first respondents] primary function is to oversee the activities of financial institutions (other than banks) and exercises supervision over compliance with the laws regulating financial institutions.
>
> 7.2 In terms of section 13(2) of the FAIS Act it is the responsibility of an authorized financial services provider (in this instance second respondent) to ensure and to be satisfied that its representatives at all times comply with the fit and proper requirements prescribed by section 8(1) of the FAIS Act.

7.3 Section 14(1) of FAIS Act requires the financial services providers to debar representatives who, *inter alia*, do not comply with the fit and proper requirements. The responsibility in terms of the FAIS Act to ensure that representatives comply with the Act rests on the financial services providers themselves. The Registrar plays no role in the debarment and any aggrieved person must address such grievance with the financial services provider directly.

7.4 The Registrar is not required to evaluate or adjudicate on the reasonableness, validity or otherwise of the reasons for the debarment.

First respondent does nevertheless point out in a letter dated 9 November 2012 to applicant's attorneys that,

> '... the Registrar must ensure that a financial services provider acts in accordance with the provisions of the Act. As such, the Registrar may engage a financial services provider to determine whether a debarment was effected in accordance with the requirements of section 14(1) of the FAIS Act.'

[11] In a further affidavit filed [by agreement] by first respondent, paragraph 6 thereof sets out the following detail explaining the manner in which it had proceeded in effecting the debarment:

"6.1 Finally, I need to deal with the investigations by the Registrar's office into the matters alluded to in paragraph 6.8 of the answering affidavit.

6.2 Firstly the reasons for the debarment provided by Ms Van Rooyen on

behalf of Second Respondent in terms of section 14(3).

6.3 These reasons are not perused for the purposes of intervention into the fsp's (financial services provider) decision to debar a representative. That decision is the fsp's prerogative and duty as is abundantly clear from section 14(1) read with section 13.

6.4 The Registrar looks at the reasons to see that they relate to the representative's (in this case the Applicant's) fitness and propriety as understood by the FAIS Act; and that the debarment has not been effected for another reason. The reasons provided normally also serve to guide the Registrar in his decision whether the debarment and reasons therefor should be published in the Gazzette as contemplated by section 14(3)(b).

6.5 In this particular instance the Applicant queried the motives for his disbarment and prevailed upon the Registrar to investigate the debarment and to exercise his (the Registrar's) power to debar Ms Van Rooyen in terms of section 14A.

6.6 The reasons for the debarment were set out in a form used by the Registrar's office for this purpose. The office has also published

guidance notes on section 14 debarments. (The Registrar receives between 40 and 90 debarment notifications on a monthly basis). A copy of the debarment form received in this instance dated 17 October 2012 is attached marked GEA 5.

6.7 Attached to the form was a notice of motion (without any founding affidavit) in Case No 19761/2012 of the Western Cape High Court, in which van Rooyen figured as applicant and sought interdictory relief against Applicant (First Respondent in that matter) not to interfere in the affairs of Second Respondent.

6.8 These documents were scrutinized not only for reasons furnished by van Rooyen for the debarment of Applicant, but also against the background of the Applicant having insisted that the Registrar should exercise his powers to debar van Rooyen in terms of section 14A for the improper debarment of the Applicant.

6.9 As it were the Registrar's office was not satisfied that the information was sufficient and on 22 January 2013 advised van Rooyen to provide appropriate evidence that the debarment complied with the section 14 requirements."

Conduct of Ms Van Rooyen

[12] Ms Van Rooyen does not resist the relief sought and from the applicant's papers it does appear that the parties had started on a sound business footing but had over time gravitated apart with their relationship ultimately reaching the proverbial dead-end, disabling them from operating the business with the same goals and mutual tolerance. The genesis of this is not fully germaine to the relief sought but the fights led ultimately to a battle for control and complete takeover by Ms van Rooyen. The nature of the relief set out in the notice of motion filed with the Western Cape High Court makes this pretty clear and Ms van Rooyen was proceeding with a view to assuming all the members' interest in the second respondent. I will revert to the detail set out in this notice of motion.

[13] She was also (within the business) its compliance officer appointed and discharging the duties set out in terms section 17 of the FAIS Act. As a compliance officer, she was vested with a statutory power and function to ensure that representatives who no longer comply with the 'fit and proper' requirements set out in section 13(2)(a) read with section 8(1) are "prohibited" by her as compliance officer from rendering any new financial service and removed from the list of representatives (s13(3)).

[14] Contemporaneously with launching the Western Cape proceedings on 15 October 2012, she requested the first respondent to debar the applicant by letter dated 17 October 2012. The letter was accompanied by the prescribed form and, first respondent says, attached to this form was also the Western Cape High Court notice of motion. First respondent confirmed the debarment on 5 November 2012 without requiring any additional information underpinning the debarment. Once applicant became aware of the aforegoing, extensive correspondence was exchanged between

applicant (through his legal representatives) and the first respondent seeking removal of the debarment. First respondent adopted the attitude that in its view the second respondent had complied with the FAIS Act and that its only role was to simply effect the debarment.

[15] Now, what is in my assessment undeniable is that Ms van Rooyen filed a request for debarment without any reasons being provided other than the attached notice of motion. It is clearly evident that there were many proper courses available to her if she perceived there was financial misconduct on the part of applicant. The most immediate course would have been to source an internal auditor's report detailing misappropriation or wrongdoing. Once available and presented to applicant for comment, she could if dissatisfied with the response, commission an independent financial investigation based on such a report and if material wrongdoing was confirmed on the two reports becoming available, in my view justifiably approach the first respondent and submit these with a request to debar. Although a disciplinary hearing presided over by an independent chairperson is ideal, a small entity with two partners, members or co-shareholders acting also as representatives may well not have the ability to undertake a lengthy hearing. In such event it could sufficiently comply with a credible financial investigation in which a representative is afforded an opportunity to gainsay investigative findings. She neither did this nor did she convene a hearing. The legislative provisions entrust her with a crucial responsibility to serve a public good whose aim is the protection of a vulnerable public by prohibiting offending representatives and submitting requests to debar.

Conduct of the first respondent?

[16] First respondent failed to act lawfully by debarring applicant without determinable reason and exacerbated the situation by undertaking what I view as an inexplicable excursion to search for reasons post effecting the debarment. Its own letter dated 5 November 2012 acknowledged the letter requesting the debarment and with an

alarming innocence and lack of consciousness of its duties, assured her that it had recorded the debarment of applicant and had entered this in its central representative register "as per your notification in the letter referred to above". In this Court first respondent advanced differing alternative premises in justifying its conduct. First it denies that it has a role to play in the process of a debarment by a requester and states that "any aggrieved individual must address such grievance with the financial services provider." That, "the Registrar is not required to evaluate or adjudicate on the reasonableness, validity or otherwise of the reasons for debarment" but nonetheless it acknowledges that it has a duty to ensure the financial service provider acts within the terms of the FAIS Act and the law. The first respondent then makes the startling averment that Ms van Rooyen furnished it with reasons and, 'The reasons for the debarment were set out in a form used by the Registrar's office for this purpose' and, 'Attached to the form was a notice of motion (without any founding affidavit) in Case No 19761/2012 of the Western Cape High Court, in which van Rooyen figured as applicant and sought interdictory relief against Applicant (First Respondent in that matter) not to interfere in the affairs of Second Respondent.'

[17] I do not agree with this assertion made in first respondent's papers. In the first place, the prescribed form referred to by first respondent and annexed is no more than a sterile and bland document requiring only the personal details of the compliance officer and representative sought to be debarred. All that Ms van Rooyen had done in addition was to simply tick the 'Honesty and Integrity' box or column but failed to attach any report of a duly convened hearing or forensic investigative report from which the first respondent could have seen detail resembling reasons. There were none. The fact such a material assertion is made by an officer charged with the responsibility to independently navigate the obligations set out in the FAIS Act and enforce compliance, is disturbing.

[18] The notice of motion first respondent refers to is a document used in application proceedings and sets out little else but the relief claimed. Such a notice does not set out the facts upon which an applicant relies and the notice must refer to and be accompanied by at least one affidavit in which the facts constitute the evidence in support of the relief claimed. – Rule 6(1) of the Uniform Rules of Court; Wingaardt v Grobler 2010 (6) SA 148 (ECG)

No such affidavit was availed first respondent as at 5 November 2012 when the debarment was effected. A perusal of this notice of motion is also damning in that it clearly spells out that the applicant therein acted in her personal capacity and cited the applicant herein as first defendant and second respondent herein as second respondent. From this it is immediately decipherable that she was pursuing a pure personal interest against the present applicant. The relief therein was totally unrelated to the applicants conduct for purposes of the FAIS Act. She was not acting *qua* compliance officer as the relief sought was directed only at interdicting the applicant from participating in the day to day conduct of the business; implementing a so-called "Risk Management Plan"; entering the business premises; using its facilities; using motor vehicles and log books and conducting any financial transactions pending his leaving the business. First respondent could not have misconceived the relief sought and it eludes me as to how he could continue in his papers to make this assertion.

[19] Whilst I do not deem it necessary to burden this judgment with irrelevant matter, it is necessary to refer to the paragraphs (in the notice) which specify Ms van Rooyen's true intentions. Paragraph 4 states:

> "4. DAT die bevele uiteengesit in 2.1, 2.2 en 3 hiervan sal dien as 'n tussentydse interdik met onmiddelike werking, hangende die beregting van 'n aansoek ...

4.1 Dat die Eerste Respondent ophou om lid van die tweede Respondent te wees, en verder bevele dienaangaande wat insluit:

4.1.1 die verkryging van die Eerste Respondent se ledebelang deur die Tweede Respondent;

4.1.2 die bedrae (as daar is) wat betaal moet word opsigte van die betrokke ledebelang of die eise teen die tweede respondent van Eerste Respondent;

4.1.3 die bedraaie (as daar is) wat betaal moet deur die Eerste Respondent aan die Tweede Respondent van Eerste Respondent;

4.1.4 die wyse en tye van sodanige betalings; en

4.2 enige ander angellentheid betreffende die beeindiging van lidmaatskap wat die Hof mag goeddunk;

4.3 Koste

4.4 "

In my view, this lends credence to the applicant's averment that the request to debar was sought not for the purposes set out in the FAIS Act but for her own self-serving ends.

[20] There is the further unsupported proposition by first respondent that it was within its powers to enter the name of applicant in its list of debarred financial services advisory practitioners without considering reasons for the request. In making this groundless averment, first respondent relies for justification on the mistaken view that it plays no role in the debarment procedures available to financial services providers other than to enter the name of a non-compliant representative at the request of a compliance officer representing an authorized financial services provider. Having set this view out in the letter dated 9 November 2012 to applicant's attorneys, first respondent hastens to cover its rearguard by adopting the posture that,

> '... the Registrar must ensure that a financial services provider acts in accordance with the provisions of the Act. As such, the Registrar may engage a financial services provider to determine whether a debarment was effected in accordance with the requirements of section 14(1) of the FAIS Act.'

PAJA

[21] It is common cause that first respondent exercises public power and function as contemplated in the definition of "administrative action" in section1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Section 3(1) of PAJA provides that:

> "Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair."
>
> Section 3(2)(b) provides that an administrator must give an affected
>
> person
>
> "(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) ..."

Section 6(1) of PAJA provides that any person may institute proceedings in a court for judicial review of an administrative action where such an act was in terms of section 6(2)(c) procedurally unfair; or the action was taken in bad faith or arbitrarily or capriciously (section 6(2)(e)(v) and (vi)).

An administrative act?

[22] First respondent is admittedly a public body established by statute to protect the public from wrongful conduct of finance service representatives resulting in financial losses or prejudice. It owes its powers and duties to an act of parliament, serves a public function and performs an administrative act. Second respondent is an authorized financial services provider defined in terms of section 1 of the FAIS Act as "a person who has been granted authorization as a financial services provider by the issue to that person a licence under section 8."

[23] Ms Van Rooyen was a key individual appointed compliance officer in terms of section 17 charged with the responsibility to monitor compliance with the Act. One of these responsibilities contained in section 14 was to 'prohibit' a non-compliant representative from rendering such a service and ensuring a debarment by first respondent in order to protect the public.

Section1 of the PAJA defines administrative action as:

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

(a) ...

(b) A natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision which adversely affects the rights of any person and which has a direct or external legal effect ..."

In our law a legal entity "does not have to be part of government itself to be bound by the Constitution" – see AAA Investments (Pty) Ltd v Micro Finance Regulatory Council 2006 11 BCLR 1255 (CC). Section 239 of the Constitution defines an organ of state to include "any other functionary or institution ... exercising a public power or function."

It is instructive to note that the FAIS Act provides for debarment at the request of an authorized financial services provider (section 14) or (*mero motu*) by the Registrar or Deputy-Registrar of the Financial Services Board (section 14A, inserted by Parliament in 2008). Whether the debarment is requested in terms of section 14 or 14A an administrative function is performed and the provisions of PAJA find application. In President Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 CC at paras 140-141 it is emphasized that in determining whether an act is of an administrative nature the emphasis is on the function rather than on the functionary. What is important is the nature of the power that is being exercised. Whilst section 1 of PAJA defines administrative action in terms of 'a decision taken', the kind of action that will constitute a 'decision' is a matter of construction in the context of each case – see Bhugwan v JSE Ltd 2010(3) SA 335 (GSJ) and Mobile Telephone Networks (Pty) Ltd 2013(1) All SA 60 (SCA).

[24] The steps taken by first respondents' officials in receiving, considering and implementing a debarment must be lawful. In this sense, it is imperative that the reasons for the requested debarment must be evident in the documentation provided by the requester and attached to the form provided by the Financial Services Board. It is evident from the first respondent's own prescribed debarment forms that financial services providers are required to submit supporting documentation which include, but not limited to, a transcript of a disciplinary hearing pursuant to which a debarment is

sought. It is not for the Board to insulate itself from the obligation to act lawfully by denying that it owes a representative sought to be debarred from considering whether there were such valid reasons or not. Its consequence is that members of the public may be informed of such a debarment by a notice in the Government Gazzette and by way of an entry of the name of such a representative in first respondent's central representative register. In all such cases, the individual is entitled to just and reasonable procedure. Section 14(1) does not authorize unlawful acts either in respect of the conduct of the financial services provider or the first respondent.

[25] Section 3(1) of the Promotion of Administrative Justice Act (the Act) requires administrative action which materially adversely affects the rights or legitimate expectations of any person to be procedurally fair. A compliance officer in the position of second respondent must provide any such person in terms of section 3(2)(b) of the Act adequate notice of the nature and purpose of the administrative action; reasonable opportunity to make representations; notice of any right of review and right to request reasons for the administrative action. In terms of section 6 of the Act a court may review action taken by an administrator who was biased and/or where such action was procedurally unfair. In receiving the information and carrying out the public function of recording the details of the debarment and publishing a notice in the Government Gazzette for public information the first respondent concurrently carries out a public function and must act consonant with procedural fairness.

Must the non-compliance be visited with nullity?

[26] All administrative acts not authorized by law are invalid. This is expressed in the maxim *quid fit contra legem est ipso jure nullum.* The administrative agency is not simply free to use its powers as it pleases ... it must exercise them in a manner which advances the public interest whilst remaining faithful to the purpose of the enabling legislation. – see Lawrence Baxter, *Administrative Law* (1984) at p351.

Can the first respondent reverse the debarment?

[27] First respondent expressed the view in its papers that, having effected the debarment, it was not in a position to remove the same and that the only route for relief available to applicant was initiating Court proceedings for a review of the decision to have him debarred and to have the Court set aside the debarment. To put it differently, the debarment of the applicant stands until set aside in review proceedings. For once I agree with the first respondent in this restatement of the law. Although an act may be unlawful and thus invalid, our law acknowledges that pending a declaration of invalidity, the unlawful act carries factual effect ... and it is necessary to secure a Court order to obtain reparation or prevent the harm. – Baxter *op cit* at p 360.

[28] In Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) at para 26, this is put as follows:

> "For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided its belief was correct? In our view it was not. Until the Administrator's approval (and thus also the consequences of its approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognized that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."

[29] See also the as yet unreported decision of Plasket AJA in MEC for Health, Province of Eastern Cape NO and Another v Kirkland Investments (Pty) Ltd t/a Eye & Laser Institute (473/12) [2013] ZASCA 58 (16 May 2013) at para 21 where the learned Judge expands as follows:

"There is no suggestion in the above passage that the obviousness of the unlawfulness is a factor of any relevance. Indeed, Hoexter understands *Oudekraal* to mean – and she is in my view correct – that 'even an obvious illegality cannot simply be ignored'. One can easily understand why this is so. It would be intolerable and lead to great uncertainty if an administrator could simply ignore a decision he or she had taken because he or she took the subsequent view that the decision was invalid, whether rightly or wrongly, whether for noble or ignoble reasons. The detriment that would be caused to the person in whose favour the initial decision had been granted is obvious."- the Court went on to refer to Lawrence Baxter *Administrative Law* (1984) at p372 where the author states:

'Indeed, effective daily administration is inconceivable without the continuous exercise and re-exercise of statutory powers and the reversal of decisions previously made. On the other hand, where the interests of private individuals are affected we are entitled to rely upon decisions of public authorities and intolerable uncertainty would result if these could be reversed at any moment. Thus when an administrative official has made a decision which bears directly upon an individual's interests, It is said that the decision-maker has discharged his office or is *functus officio*.'

[30] The matter then in my view resolves as follows:

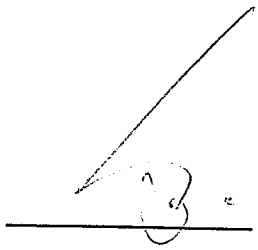
30.1 The application succeeds.

30.2 The second respondent's debarment of the Applicant on 17 October 2012, in terms of Section 14 of the Financial Advisory and

Intermediary Services Act, 37 of 2002 is declared to be a nullity.

30.3 The first respondent is directed to amend its central representative register to remove the debarment of the applicant Francois Gideon Pienaar.

30.4 First respondent is ordered to pay the costs of this application.



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