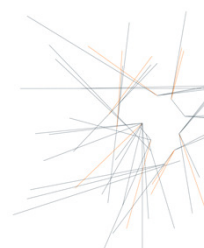


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**DEBARMENT OF REPRESENTATIVES:
REFRESHER AND UPDATE**
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DEBARMENT OF REPRESENTATIVES

INTRODUCTION:

- ❖ Debarment of representatives (employees or mandated reps) are increasingly contested in court
- ❖ **Time consuming** and **costly litigation** ensues
- ❖ Purpose of today's training?
 - refresher on current legal principles;
 - discussion of proposed new legal principles
 - practical considerations

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DEBARMENT OF REPRESENTATIVES

RESOURCES

- ❖ Financial Advisory and Intermediary Services Act, 37 of 2002 (**FAIS**)
- ❖ Determination of Fit and Proper Requirements for Financial Services Providers, (Notice 108 of 2008, as amended) (**Determination**)
- ❖ Code of Conduct for FSPs and Representatives, (Notice 80 of 2003) (**Code**)
- ❖ Guidance Notes issued by the FSB (**Guidance Notes**)
- ❖ Judgements of the Appeal Board, High Court and Supreme Court of Appeal (**Case law**)
- ❖ Financial Sector Regulation Bill (**Bill**)

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LEGAL PRINCIPLES – FAIS

■ Section 14: debarment **by financial services provider:**

FSP must ensure that representative who **does not comply with requirements set out in section 13 (2) (a)** or **who has contravened or failed to comply with FAIS in a material manner** is **prohibited** from rendering any new financial service by –

- ✓ **withdrawing** the representative's authority to act; and
- ✓ **removing** name of representative (and any key individuals of representative) from **register** (section 13(1)) i.e. debarment

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LEGAL PRINCIPLES – FAIS

Section 14 is peremptory i.e. it casts a **positive** obligation on FSP

? when must FSP act?

✓ **if Rep doesn't meet requirements of section 13 (2)(a)**

FSP must **at all times** be **satisfied** that rep and its key individuals are **competent to act** and **comply with fit and proper requirements** and **comply with any other requirements** contemplated in section 13 (1) (b) (ii) – being the requirements determined by the registrar for reappointment

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LEGAL PRINCIPLES - FAIS

✓ **if Rep doesn't meet requirements of section 13 (2)(a) (continued)****competent to act:**

- has met the requisite legal requirements, including:
- service contract or other mandate in place;
- competent to provide advice in relation to products i.e. qualified etc.

comply with fit and proper requirements:

- section 6A requires registrar to determine fit and proper requirements for each category of financial service provider and for representatives in each such category.

comply with any additional requirements:

- Reappointment requirements set by the Registrar

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LEGAL PRINCIPLES - FAIS

**comply with
fit and proper
requirements:**

• section 6A requires registrar to determine fit and proper requirements for each category of financial service provider and for representatives in each such category. This includes:

- appropriate standards pertaining to **character** (honesty and integrity)
- **competence** – skills, qualification and knowledge
- **operational** ability
- **financial** soundness
- continuous **professional development**

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LEGAL PRINCIPLES – DETERMINATION: FIT AND PROPER REQUIREMENTS

- ✓ different classifications of service providers by reference to product being offered
- ✓ qualification requirements and processes
- ✓ **character requirements – honesty and integrity**
- ✓ competency requirements
- ✓ experience requirements for each category/classification
- ✓ operational ability
- ✓ financial soundness

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LEGAL PRINCIPLES – DETERMINATION: FIT AND PROPER REQUIREMENTS

character requirements – honesty and integrity

Rep must be a person who is **honest** and has **integrity**

Prima facie evidence that Rep does not qualify includes:

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LEGAL PRINCIPLES – DETERMINATION: FIT AND PROPER REQUIREMENTS

if in the previous 5 years –

- guilty in criminal proceedings or liable in civil proceedings by a court (anywhere) of acting fraudulently, dishonestly, unprofessionally, dishonourably or in breach of fiduciary duty
- guilty by a statutory professional body/ voluntary professional body recognised by the Board (anywhere) of acting dishonestly, negligently, incompetently, or of mismanagement serious enough to impugn the FSP;
- denied membership of any body (see above) on grounds of dishonesty, negligence, incompetence or mismanagement, sufficient to impugn the FSP
- guilty by any supervisory or regulatory body recognised by the Board (anywhere) or had its authorisation to act withdrawn, refused, suspended on account of dishonesty, negligence, incompetence, or mismanagement, sufficient to impugn the FSP
- licence issued by any supervisory or regulatory body recognised by the Board withdrawn or suspended for reasons above

if at any time -

Rep has been disqualified or prohibited by any court from taking part in the management of a company or any other statutory body irrespective of whether the disqualification has been lifted

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LEGAL PRINCIPLES - CODE

Binding on FSPs and representatives

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LEGAL PRINCIPLES – GUIDANCE NOTES

Guideline on the Debarment Process

Guidance notes

Guideline on the Determination of Reappointment of Debarred Representatives

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LEGAL PRINCIPLES – GUIDANCE NOTES

Guideline on the Debarment Process in terms of Section 14(1) (5 November 2013)

- ✓ Issued by the FSB - "merely a guide"
- ✓ "A debarment in terms of section 14(1) is a regulatory instrument intended to rid the industry of incompetent and dishonest representatives"
- ✓ Should not be used to satisfy FSP's grievances against rep for **reasons unrelated to fitness or competency** (Revenge)
- ✓ Recognition of **abuse of powers** by FSP (for example, to enforce a restraint of trade)
- ✓ Termination of mandate is not synonymous with debarment
- ✓ Debarment is not synonymous with dismissal

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LEGAL PRINCIPLES – GUIDANCE NOTES

Guideline on the Debarment Process in terms of Section 14(1) (5 November 2013)

- ✓ Lists fatal errors made by FSPs:
 - ❑ **lack of authority or unlawful delegation**: if there is no contractual relationship (i.e. employment contract of mandate agreement) between FSP and rep at time of debarment, not a valid debarment provided that if reason for debarment existed at time there was a contractual relationship, then may validly debar. Person effecting debarment must be **key individual or duly delegated** by FSP to do so.
 - ❑ **bias**: person making the decision must be impartial and be seen to be impartial – **systems and processes must be in place** within FSP to ensure impartiality. Pre-debarment procedure encompasses *audi alterem partem* rule – RIGHT TO BE HEARD; OPPORTUNITY TO RESPOND, IMPARTIAL CHAIRPERSON

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LEGAL PRINCIPLES – GUIDANCE NOTES

Guideline on the Determination of Reappointment of Debarred Representatives , 13/07/11

- ❑ Merely restates the fit and proper requirements contained in the Determination (and deals with additional issues for reappointment of Representative)
- ❑ **bias**: person making the decision must be impartial and be seen to be impartial – **systems and processes must be in place** within FSP to ensure impartiality. Pre-debarment procedure encompasses *audi alterem partem* rule – RIGHT TO BE HEARD; OPPORTUNITY TO RESPOND, IMPARTIAL CHAIRPERSON.
- ❑ **failure to comply with empowering provision**: FSPs are obliged to comply with section 14(1) i.e. to withdraw mandate and debar if Rep is not fit and proper etc. Must notify the FSB within 15 days after removal of name from register and submit prescribed documentation to FSB – FSP's failure to do so is a breach of FAIS.
- ❑ **rationality, legality and reasonableness**: only used for the purpose for which it is intended. Test is one of reasonableness, justifiability and relevance. The sanction of debarment must be for the **purpose envisaged by the law**.

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LEGAL PRINCIPLES – CASE LAW

Recent case law concerning debarments

- F G Pienaar / FSB / Nationwide Funeral Services CC (2013) (High Court)
- PG Bartram / Discovery Life / FSB (2013) (High Court)
- Mondisa Cindi / Registrar of FSB (2013) (FSB Appeal Board)
- N Odendaal / ABSA Brokers / FSB (2009) (High Court)
- FSB / Bartram (2015) (SCA)

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LEGAL PRINCIPLES – CASE LAW

❖ Summary of Principles

- ✓ FSPs must use prescribed form (available on FSB website) - requirement of [documentary evidence](#) for debarment
- ✓ FSB plays [extremely limited role](#) in relation to section 14(1) debarments – responsibility vests completely with FSP (this was a vexed question until recently)
- ✓ debarment by FSP of a Rep [without determinable reason is unlawful](#)
- ✓ [prior process must be followed](#) by FSP, for example, in relation to employee, duly convened disciplinary inquiry
- ✓ SCA has confirmed that [DEBARMENT IS INDUSTRY WIDE](#) (not limited to particular FSP) – constitutional issues?

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DEBARMENT OF REPRESENTATIVES

❖ Overview of the Legal Procedures (Application of Promotion of Administrative Justice Act) (PAJA)

- ❑ When a FSP implements a debarment of a representative, considered to be "administrative action" for purposes of PAJA
- ❑ Subject to Review in High Court
- ❑ Purpose of PAJA: to give effect to [administrative action](#) that is [lawful, reasonable and procedurally fair](#) and to give the affected party a right to written reasons
- ❑ When FSP debars a Rep it is exercising a public power and therefore falls under PAJA
- ❑ Aggrieved representative may, on an urgent basis, institute an application in High Court seeking an interim order for the upliftment of the debarment pending the conclusion of a judicial review of the FSP's decision
- ❑ Administrative acts not authorised by law are a nullity

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DEBARMENT OF REPRESENTATIVES

❖ The Bill

- Tabled in Parliament on 27 October 2015
- Deletion of section 14A debarments (FSB debarments)
- Changes to section 14 –
 - FSP must debar person who is or was a representative of FSP or a key individual of representative if FSP is **satisfied on the basis of available facts and information** that the person –
 - does not meet or longer complies with requirements of section 13(2)(a); or
 - has contravened or failed to comply with FAIS in material manner; and
 - the reasons for debarment occurred and became known to FSP whilst person was a representative of FSP (i.e. can debar after termination of employment/mandate)

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LEGAL PRINCIPLES – THE BILL

FSP must ensure that debarment is lawful, reasonable and procedurally fair by following set process:

- adequate notice in writing stating intention to debar;
- set our grounds for intention and reasons;
- terms attached to debarment;
- provide copy of written policy and procedure governing debarment
- reasonable opportunity to make representations;
- consider representations;
- make decision
- immediately notify representative in writing of decision, reason for decision, **right of appeal to appeal body established by "Authority" and subsequent right of review to Tribunal**
- period within which appeal or review will be heard;
- adequate notice in writing stating intention to debar;
- set our grounds for intention and reasons;
- terms attached to debarment;

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DEBARMENT OF REPRESENTATIVES

FSP must ensure that debarment is lawful, reasonable and procedurally fair by following set process:

- terms attached to debarment;
- provide copy of written policy and procedure governing debarment
- reasonable opportunity to make representations;
- consider representations;
- make decision
- immediately notify representative in writing of decision, reason for decision, **right of appeal to appeal body established by "Authority" and subsequent right of review to Tribunal**
- period within which appeal or review will be heard;
- FSP must immediately withdraw authority to act
- remove name of person from register
- notify the Authority within **5 days** in prescribed form
- confirmed that FSP must institute debarment after termination of employment/mandate – must be commenced without delay from date of awareness and not longer than 3 months after that date

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DEBARMENT OF REPRESENTATIVES

WHAT IS 'FIT AND PROPER'?

- No set list of what constitutes 'fit and proper' and conversely what conduct is not 'fit and proper'
- Places FSPs in a bind – FAIS places **positive duty** on employer
- To recap:
 - honesty and integrity
 - financial soundness
 - experience
 - qualifications
 - operational ability
 - continuous professional development
 - competence;
 - material non-compliance with, or breach of FAIS
 - compliance with any other requirements (established by registrar for re-appointment)
 - *prima facie* principles

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DEBARMENT OF REPRESENTATIVES

WHAT IS 'FIT AND PROPER'?

- Appeal Board in AGM Coetzer and Registrar of FSB (2014):

"...it is now established that, to determine the necessary honesty and integrity indeed requires a moral judgement, taking into account a person's conduct in both her private life and in her interaction with others...she must possess the qualities of unqualified honesty, the ability to avoid the conflict of her own interests with those of her clients, placing them above her own. And particularly relevant in this matter, honesty and integrity implies the possession of incorruptible virtue."

- FSB Guide: FSP must ask itself two questions:

- ✓ was the act of the Rep one that an ordinary and decent person consider to be dishonest (**objective**)
- ✓ If yes, must the rep have realised that what he was doing, by those standards, dishonest (**subjective**)?

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DEBARMENT OF REPRESENTATIVES

WHAT IS 'FIT AND PROPER'?

- The sanction of debarment is for the purpose of envisaged by the law and not for ulterior purpose (FSB)
- FAIS objective: To regulate the rendering of certain financial advisory and intermediary services to clients.

"In the discharge of their duties, the provider must always take into account the object of the enabling provision for debarment under the Act and that is, debarment is a regulatory tool aimed at protecting the public." (FSB)

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TEST FOR DEBARMENT DOES IS NOT SAME AS TEST FOR DISMISSAL

Dismissal:

substantive and procedural fairness – reason for dismissal must be FAIR and based on one of three grounds – capacity, gross misconduct and/or operational requirements. **Focuses on system of progressive discipline.** Subject to the dispute resolutions of the LRA

Debarment:

Lawful, reasonable and procedurally fair – relating to the fitness of the individual to be a representative. **Focuses on the interests of the client.** Subject to the dispute resolutions principles of PAJA and FAIS

There may be times when conduct justifying debarment does not justify dismissal for gross misconduct (incapacity or retrenchment?)

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TEST FOR DEBARMENT DOES IS NOT SAME AS TEST FOR DISMISSAL

- Questions for consideration in debarment/disciplinary proceedings:
 - ✓ **Should they form part and parcel of same process?** Argument has been made that because they are different processes, subject to different standards, it is improper for the process to happen together. Employer wearing two different hats at same time.
 - ✓ **Should legal representation be permitted?** Given that employer is performing an administrative action with far-reaching consequences – indefinite suspension of employee's ability to work in their field of expertise.
 - ✓ **Should an independent chairperson be used?** FSB Guidelines refer to use of an 'independent chair' (Question of 'institutional bias')

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DEBARMENT OF REPRESENTATIVES

EXAMPLES FOR DISCUSSION

(1)

Employee resigns and goes to work for a competitor in breach of restraint of trade. No evidence that employee took client information but it emerges that employee starts to contact clients of and FSP?

Should employee be debarred?

(2)

Employee negligently forgets to obtain signature from a client in contravention of the provisions of FAIS

Employee is debarred. Ought he also to be dismissed?

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DEBARMENT OF REPRESENTATIVES

EXAMPLES FOR DISCUSSION

(3)

Employee resigns and it emerges after his resignation that he took client information from an FSP prior to leaving

Should employee be debarred?

How can the FSP debar the individual post termination of employment?

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