REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED: YES / NO

(4) SIGNATURE [redacted]

CASE NO: 23807/2020

In the matter between:

ILSE BECKER	**First Applicant**
EUGENE BECKER	**Second Applicant**
FUSION GUARANTEES (PTY) LTD	**Third Respondent**

and

THE FINANCIAL SERVICES CONDUCT AUTHORITY	**First Respondent**
THE HONORABLE MINISTER TITO TITUS MBOWENI, IN HIS CAPACITY AS THE MINISTER OF FINANCE OF THE REPUBLIC OF SOUTH AFRICA	**Second Respondent**
THE NATIONAL CREDIT REGULATOR	**Third Respondent**

JUDGMENT

NCONGWANE AJ:

[1] In this matter, the applicants seek an order declaring sections 154, 167 and 231 ("the impugned sections") of the Financial Sector Regulation Act No 9 of 2017 ("the FSR Act") unconstitutional as well as orders declaring that those impugned sections are invalid and should be set aside.

[2] In addition to the orders of unconstitutionality and invalidity, the applicants' seek an order suspending the declaration of invalidity for a period of 12 (twelve) months and that the court should direct the second respondent ("the Minister") to correct the alleged constitutional defects in the FSR Act within 12 (twelve) months of this court order.[1]

[3] It is the applicants' contention that the impugned sections of the FSR Act violate the following of the applicants' entrenched constitutional rights as contained in the Bill of Rights:

[3.1] Section 22 - the right to freedom of trade, occupation and profession,

[3.2] Section 33 – the right to fair and just administrative action;

[3.3] Section 34 – the right of access to the courts.[2]

[4] The application is opposed by the Financial Services Conduct Authority ("the Conduct Authority") and by the Minister of Finance of the Republic of South Africa ("the Minister"). The third

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1 Applicants' HoA, p53, para 147.2.
2 FA, para 21, p12.

respondent is the National Credit Regulator played no part in the proceedings and did the Prudential Authority who due to the direct interest it may have in the outcome of the application was subsequently joined but filed a notice to abide the decision of the court.

[5] Before me, Mr Mundell SC, with Mr D. Van Niekerk, appeared for the applicants and Mr Cockrell SC appeared for the first respondent. Ms Gcabashe SC with Ms P. Jara appeared for the second respondent.

Adumbrated version of the applicants' case

[6] The thrust of the applicants' contention is that the impugned section 154 of the FSR Act, regardless that it provides that, prior to imposing of a debarment order (which is provided for in section 153 of the FSR Act) in respect of a natural person, the Conduct Authority must, inter alia, invite the applicants to make submissions on the matter, the impugned section however, does not, afford a right of access to an impartial and independent tribunal or forum which will objectively assess the merits of the proprietary of each order. The process, as contented by the applicants, is inherently unfair for the reasons that section 154 does not require that prior to making of the debarment order or the imposition of a fine those results be adjudicated upon in a fair, open public hearing.

[7] The constitutionality of section 167 of the FSR Act which makes provision for the imposing by the Conduct Authority of an administrative penalty, in the event that, an entity such as Fusion

has contravened the financial sector law, is challenged on the grounds that, it does not afford the applicants the rights to have the dispute regarding the imposing of the administrative penalty and/or the quantum thereof resolved by the application of law in a fair public hearing before an independent and impartial tribunal or forum.

[8] In the applicants' notice of motion and the founding affidavit, a claim for an order of unconstitutionality in respect of both sections 230 and 231 of the FSR Act was pursued. Applicants have elected not to persist in seeking relief in relation to section 230 of the FSR Act.[3] In this regard, the submissions were only in relation to the relief on the declaration of invalidity in respect of section 231 of the FSR Act. A submission made on behalf of the applicants is that although section 230 of the FSR Act allows for a reconsideration by the Tribunal of a decision by the Conduct Authority at the instance of an aggrieved person, section 231 of the FSR Act substantially limits the benefit of that right by stipulating that an application for such a reconsideration does not suspend the decision unless the Tribunal so orders [4].

[9] The constitutionality of the impugned sections are weighed against the provisions of sections 22, 33 and 34 of the Constitution which ensure that everyone has the right to freedom of trade, occupation and profession, to administrative action that is lawful, reasonable and procedurally fair and to have any dispute that can be resolved by the application of law decided in a fair public hearing before a

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3 See: Applicants' HoA, p38 - para 119, p53 - para 147.1.

4 The Financial Services Tribunal established in terms of section 219 of Chapter 15 of the FSR Act.

court or, where appropriate, by an independent and impartial tribunal or forum.

BACKGROUND

[10] The primary component of the third applicant's *("Fusion")* business is the issue of building guarantees and deeds of surety, primarily in the import, export and construction industries[5].

[11] The first and second applicants *("the Beckers")* are Fusion's directors and its controlling minds.

[12] Fusion is a credit provider in terms of the National Credit Act 34 of 2005 *("the NCA")*[6]. Fusion is not registered as a short-term insurer in terms of the Short-Term Insurance Act, 53 of 1998 *("the STIA"),* and makes historical contention, as submitted on its behalf, in that, registration as an insurer is unnecessary as the guarantees/deeds of surety in issue do not constitute *"any kind of short term insurance business"* as contemplated in section 7 of the STIA.

[13] The Conduct Authority was established in terms of section 56 of the FSR Act and is primarily responsible for the application and enforcement of the FSR Act in its entirety.

[14] The Act introduced what is called *"twin peaks"* model of financial regulation[7] which resulted in a creation of a market conduct regulator *("the Conduct Authority")* and the new prudential regulator called the *("Prudential Authority")*. As stated above, it is

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5 Founding Affidavit ("FA") para 36 at p16.

6 Fusion was so registered in March 2010 and was allocated registration number NCR CP4426

7 A concept pioneered in Australia.

common cause between the parties that the Prudential Authority has an interest in the outcome of the application and was subsequently joined as the respondent but abides by the decision of the court.

[15] The object of the FSR Act is, inter alia, to *"achieve a stable financial system that works in the interests of financial customers"* and *"support balanced and sustainable economic growth in the Republic"*. The impugned section 154, 167 and 231 of the FSR Act are integral part of the mechanism that are intended to achieve these objects. Section 153 (1) of the Act authorises the Conduct Authority to make a debarment order in respect of natural persons in the event that the Conduct Authority is satisfied that the jurisdictional requirements of section 153 (1) have been met, and justifies a debarment order[8].

[16] A brief overview of the dispute as contained in the historical record of the proceedings that have preceded this application and to which I was referred by counsel for the parties, only serves to give context and the factual matrix of the subsisting dispute between the parties.

[17] The factual background to this application can be traced as far back as 2010 when the Financial Services Board ("the FSB") the Conduct Authority's predecessor, initiated an investigation into

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8 Section 153 (2) prohibits the debarred natural person (for the period specified in the debarment order) from providing or being involved in the provision of specified financial products or financial services. In addition the debarred person's is precluded from engaging in any conduct that, directly or indirectly, contravenes the debarment order.
Section 153 (4).

Fusion's business.[9] The investigation report found that the applicants conducted an unregistered insurance business by issuing guarantee policies *"in contravention of section 7 (1) of the STIA"*

[18] Based on the report by inspectorate team of the FSB the FSB concluded that the first applicant no longer satisfied the requirements of *"honesty and integrity"* established by section 8 of FAIS. As a consequence, Ms Becker was barred for a period of five (5) years.

[19] Most significantly, when that matter served before the appeal board, that forum found in favour of Ms Becker on the same grounds of appeal and the appeal was upheld and the registrar was ordered to reconsider the debarment order.

[20] Despite that finding the appeal board concluded that, by issuing guarantees, Fusion has been conducting business of a short term insurer in conflict with section 7 of the STIA.

[21] Fusion sought the review of that finding in the High Court (Gauteng Provincial Division) but that review application was dismissed with costs as was an application for leave to appeal to the Supreme Court of Appeal.[10]

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9 Both the First and the Second Respondents have detailed this *"prior litigation"* in their affidavits, at some length in an attempt to sustain an argument that the applicant's have, for an extended period, been in persistent breach of the provisions of the STIA and the Financial and Advisory and Intermediary Services Act, 37 of 2002 ("the FAIS Act").

10 FA, para 49 at p18 read with Annexure "FA 5", at pp 204 to 219.

[22] Subsequent thereto, the registrar of short term insurance issued a directive that the first applicant and Fusion were to cease any contravention of section 7 (1) of the STIA and should not issue guarantee policies without being registered as a short term insurer. The directive is contained in the notice dated the 12th of February 2020 ("the 12th February notice").[11] The applicant submitted that it has presented a response to the Conduct Authority setting out the opposition to the notice and submit that they have arguable grounds of opposition to the 12th February notice and this application is not merely dilatory. The respondents did not seriously seek a finding from court that the applicants' application, as argued on the papers, is aimed at delaying the inevitable outcome of the Conduct Authority's processes, Accordingly, I am not required to make such a determination.

THE CONCISE ISSUES FOR DETERMINATION

[23] The crisp issues before me can be summarised as firstly, involving the determination on whether the impugned provisions are constitutionally compliant. This aspect must per force interrogate whether sections 154 and 167 as currently formulated, seek to promote and fulfil, rather than undermine section 22, 33 and 34 of the Constitution.

[24] The Conduct Authority has not yet taken any final decision to make a debarment order or impose an administrative penalty. This application has nothing to do with the merits of any debarment order that may be issued or any administrative penalty that may be imposed in due course, if so required. The question is whether

11 A copy of the directive appears as Annexure "FA 6" at pp220 to 222.

the applicants would have remedies at their disposal to challenge any debarment order or any administrative penalty if and when those decisions are made and if so, whether the applicable remedies meet constitutional muster.

[25] The application is concerned with the constitutionality of the impugned provisions. It is not based on any subjective circumstances of the applicants, but it involves an objective enquiry. If the impugned provisions are unconstitutional, then they will be unconstitutional against the world at large and not merely against the applicants. This judgment therefore is not aimed at resolving the enduring dispute between the applicants and the Conduct Authority by analysing the submissions made by the parties regarding that pending dispute. My determination is only in respect of the relief sought in Part B of the Notice of Motion, and in particular, to consider each of the impugned provisions and the constitutional rights relied on by the applicants in challenging those provisions.

THE APPLICANTS' ATTACK ON SECTION 154 OF THE FSR ACT

[26] Section 154 of the FSR Act creates a regime that must be adhered to by the Conduct Authority if it is minded to make a debarment order.[12]

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12 Section 154 of the FSR Act provides that: *"1. Before a debarment order in respect of a natural person, the responsible authority must –*
(a) give a draft of the debarment order to the person and to the other financial sector regulator, along with reasons for and/or other relevant information about the proposed debarment, and
(b) invite the person to make submissions on the matter, and give the person reasonable period to do so.
2. The period contemplated in terms of sub-section 1d must be at least one (1) month.

[27] The regime contemplated in section 154 is that prior to the issue by the Conduct Authority of the debarment order, and having established that the natural person (such as the Beckers) has contravened the Financial Sector Law in a material way, or has traded, adverted, adduced or procured another person (such as Fusion) to contravene such a Financial Sector Law, the Conduct Authority is, inter alia, required[13] to invite the affected person to make submissions on the matter within a reasonable period[14]. In deciding on whether or not to make a debarment order the Conduct Authority is required to take into account at least any submissions made by the affected person. Self-evidently, section 154 deals with matters of process and not matters of substance.

Violation of Section 22 of the Constitution

[28] In their founding affidavit, the applicants contend that section 154 of the FSR Act violates section 22 of the Constitution.

[29] Section 22 of the Constitution provides as follows:

> *"Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."*

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3. In deciding whether or not to make a debarment order in respect of a natural person, responsible authority must take into account at least – (a) any submission made by, or on behalf of, the person, and (b) any advice from the other financial sector regulator."

13 The word used is must.

14 Which must be at least a month – section 154 (2).

[30] The meaning of section 22 was considered in the leading case of **Affordable Medicines Trust v Minister of Health 2006 SA 247 (CC).** The Constitutional Court held as follows: *1. "Section 22 protects every citizen's right "to choose their trade, occupation or profession freely."* The right to choose one's trade includes the right to practice it. Any law which prohibits a trade altogether or bars any citizen from practising it, limits this right. Such a limitation is unconstitutional and invalid unless it can be justified in terms of section 36 of the Constitution.

[30.1] Section 22 only protects a citizen's freedom of choice. It does not protect the manner in which a trade is practised. The state may freely regulate the practice of a trade as long as it does not prohibit the trade altogether or exclude citizens from it.

[30.2] A law which regulates the manner in which a trade is practised without prohibiting the trade altogether or excludes anybody from it, does not need to be justified in terms of section 36 of the Constitution. It merely have to conform to the requirements applicable to all law, which means that it must be rational and must not infringe any of the other provisions of the Bill of Rights.

[31] It is apparent that *"only a citizen"* may claim the benefit of the first sentence of section 22. Since Fusion is not a citizen, it cannot claim that benefit. The first and second applicants contend that it is the Conduct Authority's intention to make a debarment order against them that *"constitutes an infringement"* of their constitutionally guaranteed right to freely choose their trade,

occupation or profession.[15] This contention in my view, appears to be oblivious of the precise provision of section 154 of the FSR Act, which does not make any provision for debarment. It is section 153 of the FSR Act that empowers the Authority to debar persons, but the constitutionality of section 153 is not challenged by the applicants. Section 154 merely specifies the process that must be followed before the making of a debarment order. In their heads of argument, the applicants make no any further argument than merely alluding that the impugned section 154 violates section 22 of the Constitution.[16]

[32] On the grounds stated above, the debate regarding the challenge to section 154 based on section 22 has no merit, and insufficient to influence a different view.

Violation of Section 33 of the Constitution

[33] The applicants argue that the rights *"in terms of section 33 of the Constitution are violated and inasmuch as [the Conduct Authority's] conduct in making the debarment order and/or imposing the administrative penalty does not amount to just administrative action."*[17]

The principle of subsidiarity

15 Founding Affidavit, para 45, page 32, and para 106.4, page 39

16 Applicants Heads o Argument, para 18.1.
17 Founding affidavit para 108.6, page 54.

[34] The applicants' contention is that section 154 of the FSR Act violates section 33 of the Constitution.

[35] It is common cause that the requirements of section 33 of the Constitution have found expression in the Promotion of Administrative Justice Act, 3 of 2000 *("PAJA")*.[18] In this matter, the applicants rely directly on an alleged violation of section 33 of the Constitution and seek to contend that section 154 of the FSR Act violates section 33 of the Constitution directly. Before me, during argument, Mr Mundell persisted with the assertion that the fact that PAJA has been enacted to give effect to section 33 is irrelevant for purposes of the applicants' case. He disavowed PAJA and confined the applicants' case strictly on the provisions of section 33 of the Constitution, as violated by the impugned section 154 of the FSR Act.

[36] In my view, this contention is not sustainable because of the principle of constitutional subsidiary. The principle entails that *"where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the constitution without challenging that legislation as falling short of the constitutional standard."*[19] The principle has been developed by the Constitutional Court in a long line of cases.[20] The

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18 Applicants' Heads of Argument, para 51,
See: First Respondent's Answering Affidavit, para 74, page 171, Second Respondent's Answering Affidavit, para 106-110, page 37.

19 **South African National Defence Union v Minister of Defence 2007 (5) SA 400 (CC) (para 51).**

20 For instance: **Chirwa v Transnet 2008 (4) SA 367 (CC) para 123, Sibumo v Rustenburg Platinum Mines 2008 (2) SA 24 (CC) para 248, MEC for Education, Kwa Zulu Natal v Pillay 2008 (1) SA 474 (CC) para 40, Mazibuko v City of Johannesburg 2010 (4) SA 1 (CC) para 73, Gcaba v Minister for Safety and Security 2010 (1) SA 238 (CC) paras 37 and 38, PFE International v Industrial Development Corporation of SA 2013 (1) SA 1 (CC) para 4, Minister of Defence**

respondents, relying on the principle of subsidiarity, contend that the applicants' reliance on section 33 of the Constitution to the exclusion of PAJA is misconceived. I find merit in the respondents' contention that principle of subsidiarity applies in this matter and should be enforced.

[37] O'Regan J explained the matter clearly in *Mazibuko*[21] *"where legislation has been enacted to give effect to the right, a litigant should rely on that legislation in order to give effect to the right or alternative challenge the legislation has being inconsistent with the Constitution."* Particularly, the principle of subsidiarity means that if legislation gives effect to the Constitution and the legislation is alleged to fall short of the Constitutional standards, it is the legislation that must be challenged as being unconstitutional and recourse cannot be had directly to the Constitutional right. The majority of the Constitutional court made the point in *My Vote Counts*:[22]

> *"Axiomatically, it cannot be that the principle of subsidiarity applies only where the legislation does exactly that which is constitutionally required. If that were the case, they could hardly ever be any meritorious challenges based on constitutional deficiencies or other basis of constitutional invalidity."*

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and Military Veterans v Motau 2014 (5) SA 69 (CC) para 27, De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another 2016 (1) BSLR 1 (CC) para 53, My Vote Counts MPC v Speaker of the National Assembly 2016 (1) SA 132 (CC) para 161

21 **Mazibuko v City of Johannesburg 2010 (4) SA 1 (CC) para 73.**

22 My **Vote Counts NPC v Speaker of the National Assembly 2016 (1) SA 132 (CC) para 166.**

[38] Jafta J, made the same point with reference to PAJA in his dissenting judgment in *PG Group*:[23]

> *"[112] ... Where legislation has been passed to give effect to constitutional rights, the party that seeks to vindicate those rights must rely on that legislation and not directly on the Constitution. Therefore, it would not have been competent for the review applicants to rely on the principle of legality sourced directly from the Constitution.*
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> *[113] ...Litigants should not be allowed to sidestep PAJA where it applies, by relying on the principle of legality. To permit this would seriously undermine PAJA and the constitutional principle of subsidiarity..."*

[39] The applicants further contend that the FSR Act does not contain provisions that entitle the Conduct Authority to exercise the discretion contemplated in section 3 (3) of PAJA.[24]

[40] Amongst others, section 3 (3) of PAJA provides that, in order to give effect to the right to a procedurally fair administrative action, an administrator (such as the Conduct Authority) may, in its discretion, give an affected person an opportunity to:

[40.1] obtain assistance and, in serious or complex cases, legal representation,

[40.2] present and dispute information in argument,

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23 **NERSA v PG Group (Pty) Limited 2020 (1) SA 450 (CC)**

24 Founding Affidavit, para 100 and 102, page 37.
In Applicants' heads of argument para 96

[40.3] appear in person.

[41] The contention is that these rights (guaranteed by the constitution) have been removed from the applicants. An analysis of the hearing provided for in section 3 (3) of PAJA including the provisions of section 154 of the FSR Act, has to occur in conjunction with section 91 of the FSR Act which makes it clear when it provides as follows:

> *"The Promotion of Administrative Justice Act applies to any administrative action taken by the financial sector regulator in terms of this Act or a specific financial sector law."*

[42] Accordingly, the contention that the FSR Act does not contain the provision which entitle the Conduct Authority to exercise that discretion and in the circumstances the applicants are precluded from addressing the Conduct Authority in requesting that prior to any decision being made which is adverse to the applicants, be afforded fair and proper hearing and to be entitled to test the evidence on which the first respondent intends to rely, is not entirely correct. The discretion provided for in section 3 (3) of PAJA has not been removed by the FSR Act. But to the contrary, section 91 of the FSR Act makes it clear that section 3 (3) of PAJA applies to any administrative action contemplated by the Conduct Authority.

An impartial and an independent Tribunal

[43] The applicants contend that, if a debarment order is to be made, an affected person should be afforded a fair and public hearing

before an impartial independent Tribunal or Forum to assess the relevant evidence.[25] In the absence of such a hearing, the applicants' complain that the Conduct Authority would be *"judge, jury and executioner".*[26]

[44] The applicants' argument is therefore that section 33 of the Constitution requires that an affected person be afforded *"a full hearing before an impartial Tribunal or Forum before a decision is taken."*[27]

[45] For this reason, the applicants ask for an order declaring that section 154 is unconstitutional *"to the extent that it does not provide for a hearing before an impartial Forum prior to the decision maker imposing the intended decisions and sanctions".*[28]

[46] On the other hand, the Conduct Authority contends that applicants have confused the right to fair administrative action (section 33 of the Constitution) with the entitlement to have a dispute resolved before a court or independent Tribunal (section 34 of the Constitution). The applicants, so the argument goes, seemingly want to super impose the right enshrined in section 34 of the Constitution onto administrators. In effect, what the applicants are saying is that administrative action may only be performed by an independent Tribunal or Court. In my view, the applicants' startling proposition cannot be correct because it elides the distinction in section 33 and section 34 of the Constitution. There is nothing in the language of section 33 of the Constitution that refers to a

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25 Founding Affidavit, paras 99, 106.6.1, 106.17 and 107.7, page 36.
26 Founding Affidavit, para 106.28, page 47.
27 Founding Affidavit, para 106.17, page 45.
28 Founding Affidavit, para 118, page 57.

hearing before an *"independent and impartial Forum"*. That is indeed language of section 34 of the Constitution, but section 34 is not concerned with administrative action. The Constitutional Court rejected a similar argument in **Islamic Unity Convention v Minister of Telecommunications 2008 (3) SA 333 (CC),** which Authority was relied upon by both counsel for applicant and for first respondent in their submissions.

[47] The Constitutional Court, as per Jafta J, remarked as follows:

> *"[53] In this case we are not concerned with a court of law or with the fair resolution of social conflict, but with a regulatory body that performed an administrative function. The question is whether a constitutional challenge against legislation conferring investigative and adjudicative powers on an administrative tribunal like the BMCC, based on institutional bias, can be sustained under the right of access to court provisions of section 34 of the Constitution."*
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> *[54] It was submitted on behalf of the first respondent that section 34 was not implicated in this case and that section 33 was. Counsel for the applicant argued, however, that the "dispute" was whether the applicant had breached the Code of Conduct which was determined by the BMCC by the application of that Code of Conduct (a law) to the facts in relation to the complaint. The guarantees of independence impartiality and fairness in section 34 are not limited to a hearing before a court, but extend to a hearing before other tribunals or fora resolving disputes by the application of law. This is buttressed, so the argument continued, by section 8(1) of the Constitution* which

provides, inter alia, that the Bill of Rights applies to all law and all organs of state, including the BMCC.

[55] ..In view of the basis of the applicant's constitutional challenge, it is unnecessary to express a firm opinion on this issue. It suffices to say that it is doubtful whether section 34 is implicated in the present matter. Even if the complaint could be characterised as a "dispute" the BMCC did not resolve it. The BMCC's function of investigating and adjudicating the complaint was but the first of a two-stage process. It was a higher authority, namely ICASA, which took the final decision. The writers Currie and De Waal submit on this issue that before an administrative agency has taken a final decision, there is no "dispute" that can be resolved by an application of law. This view is indeed persuasive.

[48] It is accepted that section 230 and section 235 of the FSR Act guarantee the applicants a hearing before an independent Tribunal and a Court respectively. This right however can only be exercised after the Conduct Authority has made its decision (which issue is not before me). The Tribunal is an independent impartial body that operates independently of the Authority.

[49] Confronted by the availability of this remedy, the applicants are driven to contend that the right of access to a court or tribunal in terms of the FSR Act is *"not real" but is a "chimera".*[29]

[50] In advancing their argument in support of this contention, the applicants submit that before the Authority makes a decision to

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29 Applicants Heads of Argument, para 61.

impose a debarment order, they have no right to *"an impartial and independent Tribunal or Forum"*.[30] This argument boils down to the fact that, almost all administrative actions may be unlawful since they are routinely performed by decision makers that do not function as independent Tribunals, I am unable to be persuaded by this assertion. In any event, there is nothing in section 33 of the Constitution that guarantees the applicants a hearing before an independent and impartial Tribunal before a decision is taken to impose a debarment order. The first respondent's contention in this regard is that the applicants have actually been afforded such a hearing. The applicants were given from the 12th of February 2020 until 1st June 2020 (a period of three and a half months) to state their case in response to the intention notice. The extension requested by the applicant was granted. The indulgence afforded to the applicants was reasonable, both from the perspective of section 154 (2) of the FSRA (which requires a notice period of 1 month) and section 2 (b)(ii) of PAJA (which requires reasonable opportunity). As matters stand currently, the Conduct Authority has not yet decided whether to allow the applicants to appear in person (as contemplated in section 3 (3) of PAJA) before a final decision is made. I therefore, conclude that the applicants' rights in terms of section 33 of the Constitution are in no way violated by section 154 of the FSR Act.

Violation of Section 34 of the Constitution

[51] Section 34 of the Constitution guarantees three distinct rights. Those are:

30 Applicants' Heads of Argument, para 74 and para 75, also in para 85.

[51.1] Right of access to a court or other Tribunal or Forum,

[51.2] The Tribunals or Forums, other than courts, be independent and impartial when they engage in the resolution of legal disputes, and

[51.3] The creation of a due process guarantee which requires that the legal disputes to which it applies are decided in a fair and public hearing.[31]

[52] The applicants contend that, because the Authority is vested with the power to debar, their rights under section 34 of the Constitution have been violated. In terms of the FSR Act, it is only once the Conduct Authority has made a final decision that a dispute may be said to arise that *"can be resolved by the application of law"*, within the meaning of section 34 of the Constitution. It is on this ground that the first respondent contends that applicants have conflated the administrative process that may result in a dispute between them and the Conduct Authority with the right to have such a dispute determined in a court of law.[32]

[53] As pointed out elsewhere in this judgment, the Conduct Authority has not made any decision in respect of the dispute between the applicants and the Conduct Authority. In my view, until such time the Conduct Authority has taken a final decision, there is no dispute on which a court may adjudicate. The applicants' contention that a finding as regards to the contravention of law can only be determined by impartial and independent adjudicators or courts cannot be correct. If this were to be correct it would mean that almost all administrative actions would be unconstitutional

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31 Para 104 at 37 and 38.

32 First respondent's heads of argument, para 39 and 40, pp 17.

since countless of such decisions are taken by decision makers that do not operate as independent Tribunals.

[54] Accordingly, if a final decision were to be made by the Conduct Authority, the applicants will at that stage be able to exercise the guaranteed right to a hearing before an independent Tribunal, since applicants, if aggrieved by that decision, will be entitled to approach the Tribunal in terms of section 230 of the FSR Act to reconsider the decision. In addition thereto, section 235 of the FSR Act entitles a party to proceedings or an application for reconsideration of a decision who is dissatisfied with an order of the Tribunal to institute proceedings for judicial review of the order in terms of PAJA or any applicable law.

[55] I accordingly agree with the respondents' contention that there is nothing in section 154 of the FSR Act that violates the applicants' rights under section 34 of the Constitution. Before approaching a court in order to have any dispute with the Conduct Authority determined, PAJA requires that applicants must first exhaust any internal remedy as may be available. In this instance, the applicants will be entitled to make application to the Tribunal for reconsideration if aggrieved as a result of any decision taken by the Authority. Undoubtedly, the process followed by the Conduct Authority in arriving at the decision is administrative in nature. Applicants cannot claim a violation of their rights under section 34 in circumstances where a dispute has not arisen. I therefore conclude that there is no merits in the challenge to the constitutionality of section 154 of the FSR Act. Unless and until a final decision is made by the Conduct Authority, section 34 of the Constitution is not implicated at all.

The applicants' attack on Section 167 of the FSR Act

[56] Section 167 of the FSR Act provides for an imposition by the Conduct Authority of administrative penalties in the event that an entity, such as Fusion, has contravened a financial sector law. In determining the appropriate administrative penalty the Conduct Authority is required to consider those issues detailed in sub-paragraph 167 (2) of the Act.[33]

[57] Applicant's contentions is that section 167 similar with the debarment order contemplated in section 154 of the FSR Act, does not afford the applicants' *"the right to have a dispute regarding the imposition of the administrative penalty and/or quantum thereof resolved by application of law in a fair public hearing before an independent and impartial Tribunal or Forum."*[34]

[58] As pointed out above, I have not been able to find, and nothing has been pointed out to me, any provision in the Constitution that requires administrative decisions to be made in the sequence advocated by the applicants. Upon consideration of the relevant provisions of the Constitution, no provision that requires the Conduct Authority, if it intends to impose an administrative penalty, that it must do that *"after having afforded the aggrieved*

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33 Section 167 (2) of the FSR Act provides that "In determining an appropriate administrative penalty for a particular conduct – (a) The matters that the responsible authority must have regard to include the following:
(1) The need to deter such conduct,
(2) The degree to which the person has cooperated with the Financial Sector Regulator in relation to the contravention, and
(3) Any submissions by, or on behalf of, the person that is relevant to the matter, including litigating factors referred to in those submissions."

34 Applicants' Heads of Argument, para 112.

party a fair public hearing before an independent and impartial Tribunal or Forum." This argument is not borne out of the proper reading of section 33 of the Constitution. There is nothing in section 33 of the Constitution that guarantees the applicants a hearing before an independent and impartial Tribunal before a decision is taken to impose a debarment order.

The applicants attack on Section 231 of the FSR Act

Section 231

[59] In view of the applicants not persisting with the relief in relation to section 230 of the FSR Act, this judgment will only confine itself to a challenge for a declaration of invalidity in relation to section 231 of the FSR Act.

[60] Section 231 of the FSR Act is in the following terms:

> *"Neither an application for a reconsideration or a decision, nor the proceedings on application, suspends a decision of the decision maker unless the Tribunal so orders."*

[61] The process established for an application for the suspension of a "decision" pending a reconsideration by the Tribunal is provided for in the Tribunal Rules 15 to 21.[35]

[62] Rule 15 provides:

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35 The Financial Services Tribunal Rules issued by the Chairperson of the Tribunal.

"An application in terms of section 231 of the Act for suspension of a decision pending the hearing of an application for reconsideration may be made only once there is a pending application for reconsideration of a decision."

[63] Applicants' contention is that, because section 231 does not automatically undo or suspend the operation of a debarment order, their right to choose a profession or practice a profession or occupation is limited and therefore contend that this *"default position"* established by section 231 of the FSR Act is, for those reasons, unconstitutional, invalid and falls to be set aside. It is also contended by the applicants that a decision by the Conduct Authority, for instance on making a debarment order and imposing of the administrative penalty on Fusion, will lead to the publication of the decision to the general public and such decision will remain until the process established by section 230 (the lodging of an application for reconsideration) has been complied with by the applicants.

[64] The Conduct Authority's contention is that the applicants are plainly wrong to say that section 231 means that the applicants are "*precluded from practising their chosen trade*". The applicants have confused the effect of a debarment order with the procedural remedies provided for by section 231 of the FSR Act. Section 231 of the FSR Act as submitted by the Conduct Authority provides for an internal remedy as contemplated in section 7 of PAJA. It does not limit the applicants' rights in terms of section 33 or 34 of the Constitution.

[65] The applicants' dispute is on the basis that a different rule applies in terms of the common law where there is an appeal against a decision of a court. But that common law rule does not apply in the case of an appeal against an administrative decision.

[66] In this regard, I was referred by the applicants to various authorities, to corroborate a submission that such authorities should equally be equated to the launching of an application for reconsideration provided for under section 230 of the FSR Act. The authorities that I was referred to mainly deal with the suspension of the execution of court judgments upon the noting of an appeal or filing of an application for leave to appeal by the aggrieved party. The argument is to the effect that the foundation of the common law rule, which later became codified into legislation, or a standard court rule maintain a just legal principle that the noting of an appeal permits the suspension of the execution of the judgment in order to prevent irreparable damage that may be occasioned by the execution of the judgment pending the outcome of the appeal on an application for leave to appeal.[36]

[67] I do not intend to deal, in quite great extent with the authorities relied on by the applicants in them emphasising the well-established premise of the common law that the granting of a relief by the court to a successful party to proceed with the execution of a judgment where an appeal or a leave to appeal is still pending before court. What is of considerable significance as was re-stated in the common law principle **South Cape Corporation (Pty) Ltd v**

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36 **Ried and Another v Godart and Another 1938 AD 511, and also South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A)**

Engineering Management Services[37] is that in exercising of the discretion on the special application whether or not to grant leave to execute pending the appeal the court is to determine on what is just and equitable in all the circumstances and will have regard to the following four factors:

[67.1] the potentiality of irreparable harm if leave to execute were to be granted;

[67.2] the potentiality of irreparable harm if leave to execute were refused;

[67.3] the prospects of success on appeal;

[67.4] where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience as the case may be.

[68] Having expressed the views that the onus in this applications for leave to execute was then a vexed one[38],Corbett JA concluded [39]:

> *"Applying this concepts to an application for leave to execute the judgment pending an appeal, the onus proper (or overall onus) rests as I have already indicated, upon the applicant. This is so, in my view, irrespective of whether the judgment in question is one sounding in money only or is one granting other form of relief. Where the judgment is for money only, then, in an appropriate case, the inference to be drawn, prima facie, that the furnishing of security de restutiendo would protect the appellant against irreparable harm or prejudice.*

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37 **South Cape Corporation, supra at p545 D-E**
38 **South Cape Corporation, supra at p546 B.**
39 At p548 C to D.

[69] As stated above, and relied on by the applicants, is that the same principle of common law has been re-stated in the amended Uniform Rule 49 (11)[40]:

> *"Where an appeal has been noted or an application for leave to appeal ... has been made, the operation and execution of the order in question shall be suspended pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs."*

[70] Section 18 (1) of the Superior Courts Act, 10 of 2013 is in the following terms:

> *"Subject to sub-section 2 and 3, and unless the court under exceptional circumstances orders otherwise the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal."*

[70.1] Section 18 (2) of the Superior Courts Act allows the court to direct that a decision which is a final judgment is not suspended pending the decision of an application for leave to appeal or an appeal under exceptional circumstances.

[71] In a consideration of the concept of *"exceptional circumstances"* as employed in section 18 of the Superior Courts Act, the Supreme Court of Appeal in **University of the Free State v Afri**

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40 Which was repealed with effect from 22nd May 2015 (GNR 317 at 7 April 2015 GG 38694 of 17 April 2015)

Forum[41] concluded[42] that, in enacting section 18 (1) and (3) of the Superior Courts Act the legislature had proceeded from a well-established premise of the common law that the granting of the relief which entitles a successful party to immediate execution of a judgment subject to an application for leave to appeal on appeal, constitutes an extraordinary deviation from the norm. That exceptionality has found expression in section 18 (4) of the Superior Courts Act which provides for the following distinctive consequences to such an order:

[71.1] the court granting an order must immediately record its reasons;

[71.2] the aggrieved party have an automatic right of an appeal;

[71.3] the appeal must be dealt with as a matter of extreme urgency;

[71.4] pending the outcome of the appeal the execution order is automatically suspended.

[72] It is also noteworthy that the Supreme Court of Appeal in the **University of Free State v Afri Forum** said[43] that the requirements introduced in section 18 (1) and (3) of the Superior Courts Act are in fact more humorous than those of the common law. Reference was made, for example, to the requirement that the applicant *"in addition"* is required to prove on the balance of probabilities that he or she will suffer irreparable harm if the order is not made, and that the other party will not suffer irreparable harm if the order is made.

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41 **2018 (3) SA 428 (SCA).**
42 In para 9.
43 In para 10.

[73] Fourie AJA, emphasised that[44]:

> *"...in evaluating the circumstances relied upon by an applicant, a court should bear in mind that what is sought is an extraordinary deviation from the norm, which, in turn, requires the existence of truly exceptional circumstances to justify the deviation."*

[74] In **Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another**[45] the Constitutional Court gave consideration to the similar constitutional challenge in regard to the provisions of the Value Added Tax Act[46]. In the context of the so called *"pay now, argue later"* the court was confronted with the argument that sections 36 (1), 40 (2), 40(5) , and 42 of the Vat Act were unconstitutional as they illegitimately infringed on Metcash's right of access to court, a right protected by section 34 of the Constitution.

[75] Section 36 (1) of the Vat Act provides, under the heading *"Payment of Tax pending appeal"*:

> *"(1) The obligation to pay and the right to receive and recover any additional Tax penalty interest chargeable under this Act shall not, unless the Commissioner so directs, be suspended by any appeal pending for the court of law, but if any assessment is altered on appeal or in conformity with any such decision... a due adjustment shall be made, amounts paid in excess being refunded with interest... and amounts*

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44 **In para 13.**
45 **2001 (1) 1109 (CC)**
46 Act 39 of 1991.

short paid being recoverable with penalty interests calculated as provided in s. 39 (1)".

[76] Section 40 (2)(a) of the Vat Act permits the Commissioner, on failure of any person to pay any tax, to file with the clerk or registrar of the court a certified statement setting forth the amounts due after that statement will have the effect of a civil judgment lawfully given in that court in the amount specified in the statement.

[77] The processes contemplated in that portion of the Act concludes with section 40 (5) which provides that it is not competent for any person in proceedings in connection with any statement filed in terms of sub-section 2 (a) to question the correctness of any assessment notwithstanding that the objection and appeal may have been launched against that assessment.

[78] The High Court found[47] that the impugned sections of the Vat Act infringed the fundamental rights of access to the courts afforded by section 34 of the Constitution whereafter the court declared that the three challenged provisions of the Act to be invalid and referred the order of the constitutional invalidity to the Constitutional Court in terms of sub-section 167(5) and 172 of the Constitution.

[79] In declining to confirm the High Court's order[48] Kriegler J emphasised the following features of the impugned provisions:

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47 Per **Snyders J in Metcash Trading Ltd v Commissioner of South African Revenue Services and Another 2000 (2) SA 232 W.**

48 **Metcash Trading, supra para [74] at p1145.**

[79.1] The Commissioner is not a judicial officer. Decisions by the Commissioner not *"judgments of a court"* but are proceedings in terms of a specially created statutory mechanism which makes provision for the appropriate corrective action by a specialist Tribunal.[49]

[80] The Vat Act does not exclude judicial review in the normal cause, but leaves intact all other avenues of relief to the dissatisfied vendor.[50] The common law rule of judicial practice relating to automatic suspension of execution by the noting of an appeal does not apply to the appellate procedure established in the Vat Act.[51] The obligation to pay notwithstanding appeal is not inexorable. Section 36 (1) of the Vat Act furnished the Commissioner with the discretion and encompassed in the phrase *"unless the Commissioner so directs"*. The exercise by the Commissioner of that discretion constitutes administrative action which is reviewable in terms of the principles of administrative law[52].

[81] The determination made by the Constitutional Court in Metcash, in my view, equally applies to the issues raised by the applicants in this matter. It is indeed so that the Conduct Authority is not a judicial officer and its decisions are not judgments of the court but are a result of proceedings stemming from a specially created statutory corrective process or mechanism that is constitutionally legitimate for the maintenance of financial discipline in the financial sector as well as protection of financial sector customs.

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49 At para 32 on pp1129 to 1130.
50 At para 33 on pp1130.
51 At para 36 on pp1132.
52 At para 38 and 40 on pp 1132 and 1133.

[82] The applicants endeavour to distinguish the relief sought in this application from the outcome in Metcash case by contending that section 231 contains no remedial provision that is similar to section 36 (1) of the Vat Act which, effectively amounts to the grant to the affected vendor of security *de restituendo*. In the circumstances governed by the FSR Act, the applicants' argument is that there is no warrant for the limitation imposed on section 22 of the Constitution as is contemplated in section 36 (1) of the Vat Act. This is centred around what appears in the final phrase of section 36 (1) which requires the Commissioner, *if the assessment altered on appeal in favour of the vendor, to refund the vendor any excess amounts paid together with interest.*

[83] The applicants concede that the debarment order under section 153 of the FSR Act is a necessary tool as a corrective action. And Conduct Authority's power of imposing a penal administrative order in terms of section 167 is not challenged. In the context of section 231 of FSR Act, it is the non-existence of a provision for an automatic suspension of the debarment order in section 231 of the FSR Act that applicants contend is a violation of the Constitutional provision of section 22 of the Constitution.

[84] It appears to me that the applicants' case in respect of the challenge on section 231 of the FSR Act is limited to the alleged existence of the limitation imposed by that section on section 22 of the Constitution and not necessarily on section 33 and 34 of the Constitution.

[85] In my view, the enforcement of the remedy availed to the aggrieved party in section 231 of the FSR Act, will call upon the Chairperson of the Tribunal to consider the interest of justice after weighing all the prevailing circumstances of each case, in the exercise of his discretion to grant a suspension of the operation of the decision or not.

[86] In terms of section 231 of the FSR Act read with the Financial Sector Tribunal Rule 15, the Chairperson of the Tribunal has the discretion to suspend the decision of the Conduct Authority, on application by the aggrieved party. I see no reason why, in appropriate case, the chairperson of the Tribunal should not invoke the same test developed and followed by the Supreme Court of Appeal. In my view, the aggrieved party is not left without a remedy since the decision by Chairperson of the Tribunal can be challenged by launching a court application to suspend the decision where the factual circumstances are exceptional and upon consideration of the test similar to the test developed by the Supreme Court of Appeal in the **University of Free State v Afri Forum**, when analysing the relevant considerations in making an order in terms of section 18 (4) of the Superior Court Act.

[87] The mere fact that the legislation deviates from the common law does not in itself give rise to any constitutional complaint. The complaint raised by the applicants that the application to suspend the Conduct Authority's decision would amount to a reversal of the standard principle of onus as applicants would be required to persuade the Tribunal that the suspension of the fine/debarment would be appropriate in the circumstances, has no substance as the applicants have failed to set out succinctly the grounds they

rely on as to why such an application has to be approached on the basis of an onus. In my view, the Chairperson of the Tribunal will have a general discretion in terms of which such an application is to be dealt with. Implicit in that is that the chairperson of the Tribunal should not fetter his/her own discretion and in particular, can direct any party to produce any document or evidence that may assist in arriving at a rational and fair decision. In my view, the issue of onus is not an inflexible matter in the consideration of the application by the Chairperson as onus shifts from one party to the other based on the circumstances of the prevailing issues for determination.

[88] Having regard to all the relevant factors, I am of the view that the applicants' challenge to the constitutionality of the impugned sections 154, 167 and 231 of the FSR Act is not well founded and is speculative in the extreme. And in these circumstances, I am not in a position to issue an order of invalidity sought in the notice of motion. The applicants have failed to make out a case that the impugned provisions are unconstitutional and therefore cannot succeed in this application for an order declaring the impugned provisions invalid.

[89] I am accordingly of the view that the application stands to be dismissed.

[90] In so far as the issue of costs is concerned, no submissions were made that the general principle that costs should follow the event should not be applied. The applicants and the second respondent employed more than one counsel. Only one counsel appeared on behalf of the first respondent. In my view however, there is no

reason not to award the costs of two counsel employed by the third respondent.

[91] In the result, the following order is made:

[91.1] The applicants' application is dismissed with costs, such costs to include the costs occasioned by the costs of two counsel where so employed.

NCONGWANE AJ
Acting Judge of the High Court

Date of hearing: 03 September 2021
Date of Judgment: 28 January 2022

Appearances:

For the Applicants:	Adv ARG Mundell SC With Adv D. Van Niekerk
Attorneys for the Applicants:	Korsten and Beukes Attorneys, Alberton.
For the First Respondent:	Adv A. Cockrell SC
Attorneys for the First Respondent:	Mothle Jooma Sabdia Inc, Pretoria.
For the Second Respondent:	Adv L. Gcabashe SC With P. Jara
Attorneys for the Second Respondent:	The State Attorney, Pretoria.