THE FINANCIAL SERVICES TRIBUNAL

CASE NOS.: A47/2020 and A51/2020

In the reconsideration applications of

| | |
|---|---|
| DIANE MARGARET BURNS | First applicant (A47/2020) |
| And | |
| CHARL JOHANNES PIETER CILLIERS | Second Applicant (A 51/2020) |
| against | |
| FINANCIAL SECTOR CONDUCT AUTHORITY | Respondent |

Tribunal panel: LTC Harms (chair), Ms Zama Nkubungu-Shangisa and Adv William Ndinisa

For the applicants: Adv BW Burman SC instructed by Harry Nossel Attorneys

For the respondent: Adv A Cockrell SC instructed by Robert Charles Attorneys

Hearing: 20 October 2022

Date of decision: 10 November 2022

In re: reconsideration in terms of sec 230(1) of the Financial Sector Regulation Act 9 of 2017 of debarments from rendering financial services - sec 45 of the Short-Term Insurance Act 53 of 1998 - sec 2 of the Financial Institutions (Protection of Funds) Act 28 of 2001

DECISION

1 The applicants, Ms Burns and Mr Celliers, applied in separate applications for the reconsideration of decisions of the respondent ('the Authority') to debar them for a period of five years from rendering financial services or acting as a key individual in terms of Financial Advisory and Intermediary Services Act 37 of 2002 ('the FAIS Act)' of any financial institution as from 24 August 2020 (Ms Burns) and 20 August 2020 (Mr Celliers). The applications were argued as one because the material facts are the same or similar.[1]

2 The applicants raised two procedural issues, namely non-compliance with the audi principle and the striking out of vexatious allegations, and the substantive merits of the debarment – a simple case, according to the applicants' argument. We dismiss the procedural issues for reasons that will be stated later and proceed to deal with the merits of the application for reconsideration.

THE APPLICABLE DEBARMENT STATUTE

3 The actions on which the Authority relied in issuing the orders straddle 1 April 2018 when the Financial Sector Regulation Act 9 of 2017 ('FSR Act') came into effect. Prior to that date, debarments of financial service providers and representatives from providing financial services or acting as key individuals of financial institutions were (for present purposes) regulated by sec 14A of the FAIS Act. Since that date the issue is dealt with by sec 153 of the FSR Act. Uncertain about the 'retrospectivity' of the latter Act, the Authority issued the order in slightly different words in the alternative, relying first on the FSR Act and then on the FAIS Act.

[1] The augmented grounds are to be found as Ann BB at D2/316.

4 Although much was made in especially the application of Ms Burns of which Act applies, Mr Burman did not argue that the FSR Act was not the applicable Act, which it clearly is. Section 153(1)(a) states namely that the Authority:

> 'may make a debarment order in respect of a natural person if the person has contravened a financial sector law in a material respect.'

It does not matter when the contravention occurred if it took place under a then existing financial sector law.[2]

5 The jurisdiction facts for a debarment are, accordingly, a finding that the person concerned contravened a financial sector law in a material respect. The 'financial sectors laws' are listed in the FSR Act (Schedule 1).

THE ALLEGED CONTRAVENTIONS

6 The debarments related to the business affairs of Insure Group Managers Ltd ('IGM'). It was a category 1 financial services provider and was a controlled subsidiary of Inshare (Pty) Ltd. The applicants were the controlling shareholders of the latter and ran the business of both companies. Ms Burns was a director and financial services representative of IGM and Mr Celliers was a director and its key individual. They were, in short, the controlling minds of IGM.[3]

7 IGM rendered intermediary services as defined in the FAIS Act, inter alia, by collecting short term insurance premiums from policyholders for and on behalf of various insurance companies and accounting for such premiums to the insurance companies.

8 The findings of the Authority were in essence that IGM, in the process, contravened sec 45 of the Short-Term Insurance Act 53 of 1998 ('the STI Act') and, therefore, sec 2 of the

[2] The Tribunal dealt with the issue before in *Mamepe Capital (Pty) Ltd v FSCA* A4/2019.

[3] Ms Burns disputed this but her letter at B458 tells another story.

Financial Institutions (Protection of Funds) Act 28 of 2001 ('the FI Act') and sec 8A(a) of the FAIS Act.

9 In the case of Ms Burns and Mr Celliers the Authority held:

- From about December 2013 until 1 August 2018 when IGM was placed under statutory management, you contravened section 2 of the Fl Act on the basis that you, in your capacity as a director[4] of IGM, failed to observe utmost good faith and failed to exercise proper care and diligence with regard to the premiums held and controlled by IGM for and on behalf of various short-term insurance companies by improperly causing or permitting IGM to use those short-term insurance premiums contrary to the provisions of section 45 of the Short-Term Insurance Act and the relevant regulations, and by investing these funds in illiquid assets for the benefit of IGM and/or lnshare.
- From about December 2013 until 1 August 2018, you contravened section 8A(a) of the FAIS Act in a material manner in that you failed to continuously comply with the fit and proper requirements relating to the personal character qualities of honesty and integrity as evidenced by the fact you caused and/or permitted IGM to use short-term insurance premiums contrary to the provisions of section 45 of the Short-Term Insurance Act (and applicable regulations) and to make unauthorised investments of such premiums to the detriment of the insurance companies, which amounted to the misappropriation of the premiums. This caused systemic risk to the short-term insurance sector and the financial services industry.

10 The Authority added, in respect of Mr Celliers, in his capacity as key individual, the following:

> From about December 2013 until 1 August 2018 in your capacity as a representative contravened and/or in your capacity as the key individual of IGM caused and/or permitted IGM to contravene:

[4] In the case of Mr Celliers 'as key individual and director'.

- section 2 of the Code, in that you caused and/or permitted IGM to use the short- term premiums collected for and on behalf of insurance companies for IGM's and your benefit which resulted in you and IGM not rendering intermediary services honestly, fairly, with due skill, care and diligence and in the interests of the financial services industry.
- section 3(1)(b) and 3(1)(d) of the of the Code, in that you used and invested and/or caused and/or permitted IGM to use and invest the short-term premiums collected for and on behalf of insurance companies in a manner that created (and did not avoid) conflicts of interest and was not in accordance with the contractual relationship and requests of the short-term insurance companies.

THE FINANCIAL SECTOR LAWS

11 Section 2 of the FI Act states as follows in redacted form:

> A financial institution . . . or director, . . . official, employee or agent of the financial institution . . ., who . . . holds, . . ., controls, administers . . . any trust property-
>
> (a) must, with regard to such funds, observe the utmost good faith and exercise proper care and diligence;
>
> (b) must, with regard to the trust property and the terms of the instrument or agreement by which the trust or agency in question has been created, observe the utmost good faith and exercise the care and diligence required of a trustee in the exercise or discharge of his or her powers and duties; and
>
> (c) may not alienate, invest, pledge, hypothecate or otherwise encumber or make use of . . . trust property . . . in a manner calculated to gain directly or indirectly any improper advantage for any person to the prejudice of the financial institution or principal concerned.

12 IGM was a 'financial institution' and 'trust property' is defined to mean

any . . . asset invested, held, kept in safe custody, controlled, administered or alienated by any person, partnership, company or trust for, or on behalf of, another person, partnership, company or trust.

13 Section 45 of the STI Act states as follows:

No independent intermediary shall receive, hold or in any other manner deal with premiums payable under a short-term policy entered into or to be entered into with a short-term insurer and no such short-term insurer shall permit such independent intermediary to so receive, hold or in any other manner deal with such premiums—

(a) unless authorised to do so by the short-term insurer concerned as prescribed by regulation; and

(b) otherwise than in accordance with the regulations.

14 The regulations, as they then existed, provided the following:

Regulation 4.1 (1):

A short-term insurer may, subject to subregulation (2) [which deals with security], in writing authorise an independent intermediary [in casu IGM] to receive, hold or in any other manner deal with premiums payable to it under short-term policies.

Regulation 4.3 (1):

A person authorised, as contemplated in regulation 4.1, shall, within a period of 15 days after the end of every month in which premiums are received, pay to the short-term insurer concerned the total amount of those premiums received during that month . . .'

15 Board Notice 80 of 2003 contains the General Code of Conduct for Authorised Financial Services Providers and Representatives. Paragraph 10(1)(d)(i) and (iv) state that subject to the provisions of any other applicable Act, a provider who receives or holds financial products or funds of or on behalf of a client must:

- open and maintain a separate account, designated for client funds, at a bank and–

- ensure that any interest accruing to the funds in the separate account is payable to the client or the owner of the funds.

16 The obligations to keep the premiums received in a separate account and to pay the interest on the funds to the insurer do not apply to a provider who is subject to section 45 of the STI Act, 'if the provider complies with the requirements contemplated in that section.' (Reg 10(3).

17 Section 8A(1)(a) of the FAIS Act states that an authorised financial services provider, key individual, representative of the provider and key individual of the representative must continue to comply with the fit and proper requirements.

THE BUSINESS MODEL

18 This explains why providers did not keep the short-term premiums in a separate trust account although the premiums were, under the FI Act, nevertheless trust property.

19 Providers kept the interest earned as their commission since they were not otherwise permitted to be remunerated for this service (sec 48 of STI Act). The 45-day float 'held' by IGM was more than R1 billion.

20 But this case does not deal with the legality or propriety of providers to have kept interest earned on the float because the applicants were not debarred for that reason.

21 The case is whether IGM had written or any other authority to place the float at risk by 'investing' it, directly or indirectly, in illiquid assets for their own profit.

22 As the applicants admit, they required the consent of the insurers to use the premiums 'because they [the insurers] owned the premiums (and not the insured).'

23 IGM did not only invest the float to obtain compensation – it used it, in the words of counsel, 'to build a balance sheet' or to 'build a capital base' for shareholders (per Ms

Burns B485)[5] to be able to obtain the necessary guarantees and to qualify as a qualifying intermediary. Since the following facts are not in serious dispute, we quote from the Authority's argument:[6]

> IGM rendered intermediary services by collecting short-term insurance premiums from policyholders on behalf of various insurance companies and paying the premiums to the insurance companies. After IGM collected the insurance premiums from policyholders, IGM used the premiums to make illiquid investments inter alia in Ericode (Pty) Ltd and PCI Rentals. These investments comprised of equity investments and loans amounting to approximately R1,3 billion.[7] The investments were made for the benefit of IGM. The investments constituted were not diversified and created a concentration risk. The investments included a mining rehabilitation plant and immovable property.

24 The nature of the risk created was thus explained:

> Assume that on 1 January IGM collected R1 billion in insurance premiums from policyholders and invested the money in illiquid investments. In terms of the Regulations under the Short-term Insurance Act, IGM would be required to pay that R1 billion (less commission) to the insurance companies by 15 February. However, IGM did not have immediate access to that R1

[5] See also Burns at B487: The investments formed part of a business transformation and growth plan to expand the business and its strategy to generate more income to support all Stakeholders - banks, securities, premium growth and the like. And Burns D107.

[6] This has been set out on many occasions in the record. See e.g. B99 to 100; B113 et seq; B62 et se3q; B442 et seq

[7] Ms Burns explained at B486: The investments in Ericode (Ply) Ltd and PCI Rentals (Pty) Ltd were not the only Investments. Subsequent events required IGM to step in and take over the entities to protect the original Investment exposures from performance and inappropriate activities stemming from poor management and the inability of several BEE shareholders to contribute capital *to* those investments. It was the IGM board's decision and fiduciary responsibility to act, step in and protect the corrosion of value at the time and sustain the true value identified at inception.

billion since it was invested in illiquid investments. So instead IGM would pay over to the insurance companies the R1 billion that was collected in February.

The same would occur in the months of March, April, May and so on. This business model would be sustainable for so long as new premium money was being collected by IGM. However, it would collapse like a house of cards if new premium money were to dry up. That is because, if no new premium money were to come in, there would be no liquid funds available to pay the R1 billion that was due to the insurance companies in that month.

25 In explaining (and denying) the roll-over, Ms Burns did not address the issue of risk created and private profit raised by the scheme (D134-135) while Mr Celliers understood the obligation of IGM 'to receive and hold the monthly insurance premiums on behalf of its clients' (D144) and IGM knew of the risk (D160). Although the risk materialised (Ms Burns at B494) that fact and the reasons for the implosion of IGM are not germane to the question whether by creating the risk the applicants contravened the FI Act to (inter alia) gain directly or indirectly an improper advantage for themselves to the prejudice of the insurance companies.

WRITTEN AUTHORITY OR CONSENT

26 The question, as stated, is whether IGM had written authority from the insurers to invest the premiums as they wished or, more narrowly, did they give consent for IGM to invest in these specific companies in the manner it did? As to the second part, Mr Burman said it is unlikely that insurers would have given such consent.

27 Not one insurer authorised the provider to hold the money for more than the prescribed days or to deal with the money at its discretion or place it at risk. As Ms Burns (B481) and Mr Celliers (B516) stated in response to the allegation by the Authority:

The FSCA states in 3.6.2 that in IGM's agreements with insurers there were no express or implied term permitting IGM to use the premiums for its own benefit but, similarly, there are

no express or implied terms in those Agreements or, for that matter, in the STIA or its regulations discouraging it.

28 That evasive response ought to have been the end of the enquiry, but they proceeded to rely on trade usage and the security the insurers held and later argued otherwise, alleging that the insurers did give their consent to IGM to invest premiums (D109-110).

29 That brings us to the submission that IGM had written authorisation from the insurers (using the words of sec 45) 'to receive, hold or deal' with the premiums, and that they thereby expressly consented to any method of dealing by IMG.

30 Ms Burns argued that consent to 'deal' with premiums included express consent to invest them for the purpose of building a balance sheet. To 'deal' can, in the context of the Act, only refer to a dealing within the contemplation of the Act.

31 Although some insurers used the words of the section in their mandates, most were more circumspect and used the terms 'receive' and 'hold' only.

32 One can take Hollard Insurance as an example. The agreement is in writing and has a non-variation clause. Hollard appointed, empowered and authorized 'the intermediary to collect and distribute premiums payable, per instruction, with respect to accredited financial service providers under short term insurance policies' and 'premium so collected must be dealt with strictly in accordance with section 45 of the Act as a read with regulation 4.'

33 Ms Burns' interpretation (D112) is baffling:

> The authority [of Hollard] authorises IGM to collect and distribute premiums as instructed and to deal with in accordance with Section 45 read with Regulation 4. This authority thus allows IGM to do what is provided for in Section 45 and Regulation 4 which includes dealing with the premiums.

34 Santam authorized IGM to collect and account for premium payable to it under short-term insurance policies subject to the provisions of the STI Act and any applicable regulations.[8] The Mutual and Federal authorization was for the collection of premiums strictly in accordance with sec 45 and regulation 4, and for payment over to the insurer within the prescribed period. The agreement also has a non-variation clause. Constantia authorized IGM to collect and receive premiums and 'premiums so collected' had to be remitted to Constantia in terms of the Act and in conjunction with the Regulations. The agreement with Zurich is the same.

35 It is unnecessary to proceed with the analysis because the submission of written authority or consent lacks any factual basis or credibility.

36 The complaint about juniors who do not know the facts and provide hearsay evidence is, once again, without merit. The insurers were asked two discrete questions, namely whether the insurers knew of the long-term investments in various assets such as property and a mine dump, and whether the investments were done with the insurer's approval. The answer to both on the common-cause facts is despite some shadow boxing the same: No.

IMPLIED CONSENT

37 It is difficult to come to grips with the submission about implied consent. It was not raised in the original or augmented grounds for reconsideration. In the written argument it was said that 'the insurers gave written consent or impliedly gave consent'.

38 The regulations are not satisfied by implied consent and sec 45 does not permit insurers to give authority otherwise than in terms of the regulations.

[8] There is some issue about whether there may have been another authorization but no other wording was suggested.

39 Maybe the intention was to use the 'tacit term' concept as known in contract law, which amounts to this: A tacit term may be actual or imputed. It is an actual term if both parties thought about a pertinent matter but did not bother to express their agreement on the point. The term is imputed if the parties would have agreed on such a matter if only they had thought about it 'which they did not do because they overlooked a present fact or failed to anticipate a future one' (*Wilkins v Voges* [1994] 2 All SA 349 (A), 1994 (3) SA 130 (A)).

40 There is nothing in the record that justifies a conclusion that there was actual agreement on the subject. As to an imputed term, the assumption that the insurers would have agreed to a term that their premiums might be placed at risk and invested at the discretion of the provider for its own profit is unlikely. Once it is accepted, as the applicants do, that the insurers would not have given consent to investing in the specific investments, it is unrealistic to suppose that they would have issued a blank cheque.

41 Much was made of a practice among providers of investing premiums to obtain remuneration. As the insurers explained (D 335):

> The insurers were aware that collection FSPs, such as IGM, retained the interest earned on the premiums which they held (during the 45-day period) as income. This was indeed standard industry practice because collection FSPs were not entitled to receive commissions in contra-distinction to advice FSPs. As mentioned above, the aggregate of premiums which IGM collected amounted to some R1,8 billion per month - about 36% of the premium income paid to short-term insurers in terms of short-term insurance policies in South Africa. The insurers at all times understood that IGM (as was the case with other collection FSPs) held these funds in interest bearing bank accounts and that they retained the interest. Interest on a balance of R1,8 billion would generate an income for IGM more than R100 million per annum. . .. The

term "interest" implied that the premiums would be deposited with a financial institution which paid interest to IGM.

"Interest" does not in normal business language indicate returns on illiquid investments. The "investments" which IGM made into its subsidiaries consisted of non-interest bearing inter-company loans. The subsidiaries did not pay interest for the use of the funds to IGM and IGM did not act as the banker of the subsidiaries but as the holding company in a group of companies. . .. It implies the deposit ("Investment"} of funds against the receipt of interest. "Interest" indicates deposit and not investment in illiquid ventures.

42 Much was also made of the Authority's knowledge of the practice. The relevance is unclear, but it will be dealt with. The applicants rely on a comment that IGM had made on the draft directive of 15 April 2011. This reference by Ms Burns is misleading because the comment dealt with the practice of 'the benefit of the interest earned on premiums whilst lawfully in the possession of such intermediary' (D 181) and not with the present problem.

43 Next there was reliance on the *ex post* position paper of the Authority of 9 April 2019 (B541). It came about because of the liquidity problems of IGM. As it stated (slightly redacted):

- During 2017 and 2018 the former FSB and the FSCA began closely monitoring IGM's financial position due to increasing concerns about its ability to meet its liquidity obligations in terms of the FAIS Act.
- It became clear that IGM's precarious liquidity position arose because of its abuse of the 45-day premium remittance period. It transpired that IGM had been using the 45-day period to "roll premiums" on a monthly basis in order to fund the acquisition of highly illiquid assets and loans to other intermediaries.
- IGM was able to engage in these practices because the 45-day remittance period allowed it to collect a full month's premium before it was required to pay the previous

month's premiums over to insurers. Accordingly, IGM, as would be the case with other premium collection agencies, had a permanent cash float at its disposal.

44 As to the prior knowledge of the Authority and its predecessor (the Registrar), the report, once again, spoke to the use of interest which is not the issue:

- The FSCA is aware that it has been a long-established industry practice for persons collecting premiums to set up payment arrangements in such a way so as to retain such premiums in their bank accounts for the maximum allowable period (45 days) in order to maximise interest earnings on premium monies during this period.
- The interest earned on premiums is retained by the person collecting the premiums and often a part of the interest is also shared with the relevant intermediary.
- Premium collection agencies and intermediaries appear to place great reliance on interest earned on premium monies as additional revenue and expenditure management streams as well as a source of funding for medium to long term investments. It is also concerning to note that the aforementioned practices appear to have endured in many cases with the explicit or implicit knowledge of insurers who are the rightful owners of the premium monies, including any interest earned on such monies during the remittance period.
- It is unclear why insurers have been willing to forego their rights to such earnings unless this practice is used as an incentive to secure access to distribution channels.

45 The applicants further submitted that the Authority should have noted from its filed financial statements that it used premiums to invest in illiquid assets. When asked to show us, counsel referred to two line items in the financial statement and submitted that a knowledgeable person would have known what the line items represented.

46 The Authority disputed that and said (D322-323) that the line items only reflected investments in the two subsidiaries as assets of IGM that were "available for sale" without any notes indicating that they were acquired (or for that matter, one may add, were being funded) with short-term premium income. The fact that they were acquired with short-term premium income was also not disclosed in any other earlier financial statements of IGM since the time those assets were acquired.

47 The applicants avoided the point made by the Authority by stating in reply that the accounts were audited according to auditing standards and that such a note is not appropriate or necessary (D600). How the Authority or anyone else should have read the accounts in the manner originally stated by the applicants is not explained.

48 To conclude on this aspect of consent. The applicants knew that the insurers could not give consent as to how premiums collected may be dealt with otherwise than through written consent. Trade usage and knowledge or the failure of supervision do not create written or even other consent.

THE FINDINGS OF THE AUTHORITY

49 The Authority correctly found that:

- IGM was required to pay over the total amount of premiums received for a particular month to the insurance company within 15 days after the end of the month during which premiums were received;
- the relevant terms of the agreements that IGM concluded with the different insurance companies revealed that IGM was required to pay over the premiums in accordance with section 45 of the STI Act;

- there was no express or implied term permitting IGM to use the premiums for its own benefit;
- IGM instead, and contrary to the provisions of section 45 and applicable regulations, used the premiums collected for subsequent months to pay over the premiums that were due for the previous month, a practice commonly known as "roll over".
- IGM invested these premiums for the benefit of IGM and its shareholders.
- This was not disclosed to the insurance companies.

50 It further, correctly, found that

- the investments constituted illiquid investments, were not diversified and created a concentration risk;
- they created conflicts of interest for the applicants, IGM, IGM's management and IGM's shareholders, because these investments formed part of the assets of IGM;
- The unlocking of any value of these assets would accrue for the benefit of IGM and its shareholders and not to the insurance companies;
- the long-term and illiquid investment of insurance premiums designated for payment to insurance companies in the short-term by IGM also amounted to the misappropriation of the premiums collected;
- the utilization of the collected premiums for investment into IGM's private investment vehicles enabled IGM to make a secret profit using the premiums belonging to the insurance companies and created a conflict of interest that was avoidable.

51 Concerning financial soundness, the Authority held that

- IGM as a registered FSP, was required to comply with the financial soundness requirements as prescribed in paragraph 9(3)(a) on BN 106 of 2008 read with BN 202 of 2012;
- in terms of the financial soundness requirements, IGM was required to have adequate assets (both in terms of amount and quality) to carry out its financial services activities and ensure that it meets its liabilities as and when they fall due;
- the Ericode and PCI investments were excluded from the assessment of IGM's financial soundness, resulting in IGM breaching paragraph 9(3)(a) on BN 106 of 2008 read with BN 202 of 2012;
- consequently, IGM was in material breach of the prescribed financial soundness requirements, causing systemic risk to the short-term insurance sector and the financial services industry;
- IGM's failure to comply with its financial soundness requirements contributed to IGM being placed under statutory management whereafter its business was placed under curatorship.

52 The last aspect needs some amplification. It is common cause that the applicants knew that the underlying asset value of the two companies could not be counted as part of IGM’s solvency requirements. They sought to rectify it and instead of rectifying, all went sour. Mr Burman submitted that since they had sought an exemption and believed that one would be forthcoming, there was no contravention of the Board Notices, which is not an answer.

FAILURE TO ADHERE TO THE PRINCIPLES OF NATURAL JUSTICE

53 Mr Burman submitted that the procedure adopted by the Authority was contrary to the principles of natural justice and unfair because the Authority provided the applicants with a notice of intention to debar, which consisted of 4 to 5 pages, to which they were required to respond but after the debarment order it became apparent that the Authority had made its decision on a record of some 637 pages (the Authority's record as filed).

54 This ground was never raised in the augmented grounds, probably because the applicants knew what the issues were and did not require documents to answer. The second observation is that, as this Tribunal has stated repeatedly elsewhere, it is not a review tribunal. All the facts are before us, and we must reconsider the matter.

55 Third, about merit: The Notice of intention to Debar of 4 to 5 pages (B465) dated 30 September 2019 is not said to have been unclear. It was very clear and to the point and Ms Burns was able to respond to it line by line in 38 pages (B470). She had no complaint about lack of documents. Mr Celliers responded similarly (B509), using 32 pages and no had complaint about lack of documents.

56 The debarment notices (with reasons) followed, and Ms Burns filed her application for reconsideration consisting of 13 pages, closely typed and argued. Mr Celliers was less loquacious but neither complained about a lack of documents. The applicants then filed an application for the submission of further evidence (83 pages), which was granted. Ms Burns spoke for 56 additional pages and Mr Celliers, adopting what she said, added 14. With new documents, a total of 319 pages.

57 Reverting to the content of the record of the Authority, it was not a record only but a file which dealt with much more than what related to the debarment. Forty pages consisted of the letters of the different insurance companies about the scope of the consent and copies of the sec 45 mandates. The importance of the balance of some 600 pages to the debarment can be gauged by the references thereto in the applicants' argument. Save for the mentioned 40 pages (analysed by Ms Burns at D109), there is but one. The applicants knew that the main issue was whether they had been authorised and they were put and had in possession of such information which rendered their right to make representations a real, and not an illusory one. See *Staufen Investments (Pty) Ltd v The Minister of Public Works, Eskom Holdings SOC Ltd & Registrar of Deeds, Cape Town* [2020] 2 All SA 738 (SCA); 2020 (4) SA 78 (SCA); *Chairman, Board on Tariffs and Trade, and Others v Brenco Inc and Others* 2001 (4) SA 511 (SCA); *Park-Ross v Director for Serious Economic Offences* 1998 (1) SA 108 (C); *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* 2011 (1) SA 327 (CC).

58 The objection is overruled.

THE APPLICATION TO STRIKE OUT

59 Following on the applicants' application before the Tribunal for the filing of further evidence and documents of some 320 pages, the Authority filed an answer. Since the 'new' evidence related in the main to the affected insurance companies, the Authority provided them with the papers and invited them to respond to the allegations that fell within their knowledge. This they did in the form of a combined Statement of Fact (D327). The applicants seek to have the document struck from the record for various reasons.

60 They submit that the Authority abrogated its powers under the FSR Act by delegating them to the insurers and not exercising them independently. The submission is without merit. The Authority exercised its powers when it debarred the applicants. Obtaining evidence for purposes of opposing the present application from parties who know the facts can in no sense be seen as a delegation of its functions. It was already functus officio.

61 They also allege that the insurers have an interest in the matter because of civil litigation instituted by the insurers against them. That may relate to credibility, but not to admissibility or relevance.

62 The next ground is that the document contains argument. It does, but it was in response to an affidavit that was argumentative. This case is about legal argument and, for instance, Ms Burns' response to the 'warning letter' was replete with legal argument and she attached an addendum entitled 'Legislative References' to support her submissions. In her application for reconsideration she presented at length legal argument and even attached the STI Act in full. And the applicants in their final reply argued the propositions made by the insurers in detail (D606).

63 The legal submissions in the Statement made are what they are, submissions, and we treated them as such. This Tribunal can distinguish between argument and fact, and the submission that the applicants were prejudiced is baseless.

64 The final ground for striking out is that we should strike out certain passages but even if we do that, we should be disqualified from hearing the matter because our minds might have been poisoned by the allegations. It is unclear what process counsel had in mind. Should we uphold the application for reconsideration because of the offensive remarks or should we recuse ourselves from hearing the merits of matter?

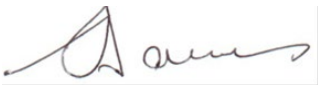
65 The content of the document played no role in the argument of either counsel, and in this decision there is one quotation from it (D335), something that was already stated in the record, and which is not a passage objected to and was dealt with in detail by the applicants in their reply (D608).

66 The main complaint relates to those passages where the insurers allege, directly and indirectly, that the applicants had committed theft. But that is what the Authority had already said in different words, namely that the applicants were party to the misappropriation of trust funds (as intended by the FI Act). That this was a breach of good faith, the Authority had said at the outset. Then there is the complaint about the statements about rolling-over of premiums and a Ponzi scheme, namely paying a debt with new income, something that has the risk of failing once the income flow is reduced. This is nothing new on the papers and has all along been the Authority's case even though not labelled as a Ponzi scheme.

ORDER

The applications for reconsideration are dismissed.

Signed on behalf of the Tribunal panel on 10 November 2022.



LTC Harms (chair)