

THE CONSEQUENCES OF DISHONESTY IN THE FINANCIAL SERVICES SECTOR

by

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CHAPTER 1

INTRODUCTION

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1.1 BACKGROUND

Since 2008 the world has been suffering the effect of an unprecedented financial crisis, the cause of which has been laid squarely at the door of various banks around the globe. An esteemed South African banker recently had the following to say:

As I write this statement towards the end of August 2012, I see no positive developments in this regard in the global banking sector. In the last six months alone we have witnessed the LIBOR fixing issue at Barclays, the money laundering fine for HSBC and Standard Chartered fined for circumventing US sanctions against Iran. Some banks seem to continue to push the boundaries from a risk and regulatory perspective to generate profits, and when this finally backfires it confirms what everyone thinks about banks – they can't be trusted.

It also begs the question – how much more bad news is there to come? Was this behaviour systemic during the golden years of banking, and now, following increased scrutiny from regulators, the accusations and fines will follow? I sincerely hope not as the effects are beginning to spill over into a broader negativity, which ultimately impacts customer perceptions of banks. The trust of depositors is a bank's fundamental licence to operate but it is also ephemeral in nature, therefore we need to guard against any kind of breakdown in this relationship.¹

The resolve of government to ensure an effective regulatory framework for its financial services sector cannot be underestimated. In 2011 the National Treasury published a policy document for comment. It lists the second of its four "policy priorities" as "Consumer protection and market conduct".² The Financial Regulatory Reform Steering Committee, created to look at how these policy priorities could be

¹ Laurie Dippenaar, Chairman of the FirstRand Group on p 7 of the Group's 2012 annual report.

² National Treasury *A Safer Financial Sector to Serve South Africa Better* (2011) 39.

achieved, produced recommendations in February 2013 contained in a document³ aimed at providing more detailed implementation proposals. In the forward to the latter document, the Minister of Finance formulated and motivated Government's stance as follows:

South Africa is committed to the highest standards for regulating the financial sector. This is because the financial sector affects all – people and companies – who transact through the financial system, including those who do so from outside South Africa's borders. It affects pensioners, workers, depositors, employers, businesses – as all receive, invest, or send money via a financial institution.

Of course banks don't "act" unless an employee does something and to research the phenomenon of dishonesty at banks, it is imperative to start at an individual level. Considering the importance of the trust of its depositors, the following dictum from Tip AJ with reference to discharging an employee's duty of good faith in the banking sector, comes as no surprise:

There can in my view be no discounting of these principles in an environment such as the conduct of banking, every level and every transaction of which must be permeated with unqualified good faith and honesty.⁴

1.2 RESEARCH PROBLEM / STATEMENT OF PROBLEM

Recognising the importance of integrity in maintaining a healthy financial sector and admitting that staff dishonesty remains a fact of life across all sectors of the economy, one cannot but question what could and should be done to ensure the survival and sustainability of such a crucial sector in the economy.

However, in considering mechanisms designed to protect the industry and its clients, one cannot afford to lose sight either of the constitutionally guaranteed freedom of trade, occupation and profession and the right to fair labour practices.⁵

1.3 RESEARCH QUESTION

The main research question of this study is to evaluate the three most important current consequences of dishonesty in the South African financial services sector, i.e. dismissal, debarment and RED listing by testing them against the Constitution,

³ National Treasury *Implementing a Twin Peaks Model of Financial Regulation in South Africa* (2013) 2.

⁴ *Standard Bank of SA Ltd v Commission for Conciliation, Mediation & Arbitration* (1998) 19 ILJ 903 (LC) at 914A - B.

⁵ S 22 and 23 of the Constitution of the Republic of South Africa, 108 of 1996.

Labour Relations Act (LRA)⁶, common law principles and the conventions of the International Labour Organisation (ILO).⁷

1.4 SIGNIFICANCE OF THE STUDY

South Africa appears to find itself in a somewhat unique position. On the one hand its banking sector has survived the latest international banking crisis quite admirably. In the words of the Governor of the South African Reserve Bank, Ms Gill Marcus, “the South African banking system was one of the few that did not experience a crisis in 2008”.⁸

On the other hand, statistics (across all sectors) show that even despite increasing unemployment, an ever increasing number of dismissals for misconduct end up at the CCMA. In its 2012 annual report the CCMA reported that an average of 649 new cases had been referred to it for every working day (an increase of 5% on the previous year) and it predicted a further increase in the following year.⁹

As individual bank clients, the population in general probably takes comfort from reading in the annual reports of our respective banks that:

- The board strongly upholds and reinforces a policy of zero tolerance towards any form of dishonesty, or the concealment thereof.¹⁰
- The group has ... implemented ... a zero-tolerance policy in respect of staff dishonesty.¹¹
- The bank is committed to carrying out business fairly, honestly and openly and adopts a zero tolerance approach to fraud, bribery and corruption. The bank requires all staff to act honestly and with integrity at all times, and to report all reasonable suspicions of fraud, bribery or corruption.¹²
- [The Group] maintain a policy of zero tolerance towards any dishonesty among our staff members.¹³

⁶ Act 66 of 1995.

⁷ Especially Convention 158.

⁸ South African Reserve Bank Annual Report 2009/10 at 3.

⁹ CCMA Annual Report 2011/12 at 42. See also the statistics quoted by Paul Smit Disciplinary Enquiries in terms of Schedule 8 of the Labour Relations Act 66 of 1995 (unpublished thesis UP 2010) at 9.

¹⁰ African Bank Investments Ltd Integrated Report for the year ended 30 September 2012 at 111.

¹¹ Capitec Bank Holdings Ltd Integrated Report 2012 at 103.

¹² Standard Bank Plc Consolidated Annual Report 2012 at 101.

¹³ Nedbank Ltd Annual report 2012 at 236.

However, it goes without saying that such “zero tolerance” in respect of staff involved in dishonesty will have adverse consequences for those found to have been dishonest. Those consequences could include¹⁴ one or more of the following:

- summary dismissal;
- debarment in terms of the Financial Advisory and Intermediary Services Act¹⁵; and
- RED listing.

Not all South African banks report on dismissals for misconduct in the same way. What is clear from their annual reports though is that significant numbers of their staff are dismissed annually for misconduct and in particular for dishonesty.¹⁶ In *Muthusamy v Nedbank Ltd*¹⁷ the Court remarked:

Over the past decade or so, Nedbank has added 1,348 names of dismissed employees to the database. In all, there are now over 9,164 names on the register.

The need to ensure that a fair balance is struck between protection of a key industry and its clients, the public, on the one hand and the interests of the affected employees or former employees on the other hand, becomes self-evident.

1.5 PROPOSED METHODOLOGY

This study will therefore seek to examine the phenomenon of employee dishonesty, firstly by considering the employment relationship and the legal rules governing that relationship and its termination through dismissal. Those rules will be traced back to the common law relationship between master and servant. The role of the International Labour Organisation (ILO) and its key conventions pertaining to security of employment will be considered next. In doing so, the role of the ILO and the legal status of its conventions in South African law will be dealt with briefly.

¹⁴ The Standard Bank Group Annual Integrated Report 2012 at p 90 announces that “[t]he group aims to extend the rollout of the staff dismissal broadcast system in Africa, whereby the details of individuals dismissed due to fraud and related misconduct, are disclosed on the intranet.”

¹⁵ Act 37 of 2002.

¹⁶ ABSA Group Ltd Integrated Report 31 December 2012 at 46. African Bank Investments Ltd Integrated Report for the year ended 30 September 2012 at 140.

¹⁷ (2010) 31 *ILJ* 1453 (LC).

The advent of the new constitutional order and the promulgation of the LRA, in particular Schedule 8 thereto, also known as the Code of Good Practice: Dismissal, will be researched and discussed.

Once the regulatory framework has been dealt with, the focus will shift to a brief exposition of the law pertaining to the three most common consequences of employee dishonesty in the financial services sector, namely dismissal, debarment and RED listing.

Lastly, these consequences will be tested against the regulatory framework, where after conclusions will be drawn on the extent to which the three consequences referred to above succeed in striking a fair and lawful balance between providing protection to employers in the industry and their clients, the general public, and the interests of individual employees or former employees who may have to suffer the consequences of their dishonest behaviour in the workplace. To the extent that it may appear necessary, suggestions for reform or modifications to the measures and/or procedures will be included.

Before judging these various measures too harshly, one would do well to keep the following remarks of Professor Baxter in mind:

[O]ne of the most important regulatory mechanisms of all – indeed the glue that hold markets together – is a sense of mutual understanding among the participants and the critical *self-regulation* this induces. And mutual understanding endures only on the basis of a deep and widespread commitment to moral integrity within a market. So even though it has lately been unfashionable to focus on market morality and ethics, we ignore the moral dimension at our peril.¹⁸

¹⁸ Baxter *Adaptive regulation in the amoral bazaar* (2011) SALJ 353 at 269.

CHAPTER 2

THE ROLE AND FUNCTION OF LABOUR LAW

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2.1 INTRODUCTION

Van Niekerk *et al*¹⁹ quote the description of labour law by Langille as being a “dimension of life” rather than just a concept. They in turn describe this dimension as the “world of work and people’s engagement in it”. Labour law has been premised on the principle that its central purpose is individual employee protection and the regulation of collective bargaining.²⁰

It is often said that people are defined by and even build their own identities around the work that they do. That may seem fairly positive, if not optimistic. This research is aimed at looking at the consequences of what amounts to employment gone wrong as a result of employee dishonesty. For those persons the reality may be a rather gloomy picture defined by being unemployed and considered unfit to resume duty in the sector against whose values they have offended.

It will soon become apparent that the mere fact that the world of work depends on people on both sides of the contractual bargain, is a sure recipe for a constantly changing and evolving engagement. What is at stake here is however not only the relationship between employer and employee, but the interventionist role that the state has to play in regulating or facilitating, as the case may be, the nature and to some extent also the terms of those relationships.

¹⁹ Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law@work* (2012) 2.

²⁰ Du Toit “What is the Future of Collective Bargaining (And Labour Law) in South Africa?” (2007) 28 *ILJ* 1405 at 1434.

As will be seen in chapter 3, the worldwide realisation that all three are partners in the world of work, has resulted in the unique tripartite composition of the International Labour Organisation. The fact that there is broad consensus on the need for some intervention by the state, by no means suggests that the nature, extent and/or timing of such intervention enjoys universal support. On the contrary, it is often described to be the exact opposite.²¹

2.2 OTTO KAHN-FREUND

Otto Kahn-Freund was born in Germany and had been a judge in the German Labour Court, before moving to England during 1933, where he continued his work. He was of the view that a properly functioning labour relations dispensation was one of the great achievements of British civilisation. When he wrote in 1972, he claimed that maintaining the dispensation in place then had been the policy of the legislature for more than 100 years. In his view, continuing the status quo and even strengthening the system of labour relations provided a guarantee of the welfare of the nation.²²

He was alive to the fact that the law could only make “a modest contribution” to the population’s standard of living. He illustrated this by pointing out that it could easily regulate safety at work, but has much less influence determining wages and employment levels, both of which are considered to be crucial issues. This he said, apply both in capitalist and communist societies.²³

In Kahn-Freund’s view, social welfare depends on the productivity of labour, the forces of the labour market and on the extent to which workers are effectively organised in trade unions. In all of these he described the law as but a “secondary force”.²⁴ He stated that, as with any other aspect of a legal system, “Labour law is a technique for the regulation of social power”. However, the law is not always the primary source of such power. In his view labour law then:

²¹ Skedinger *Employment Protection Legislation* (2010) 123 states that “[e]mployment protection legislation is one of the most controversial institutions on the labour market. There is an intense and ongoing debate among politicians and representatives of unions and employer organisations regarding the positive and negative effects of the legislation”.

²² Davies and Freedland *Kahn-Freund’s Labour and the Law* (1983) 12.

²³ *Idem* 18.

²⁴ *Ibid.*

[I]s concerned with social power...irrespective of the share which the law itself has had in establishing it. This is a point the importance of which cannot be sufficiently stressed. We are speaking about command and obedience, rulemaking, decision-making, and subordination. As a social phenomenon the power to command and subjection to that power are the same no matter whether the power is exercised by a person clothed with a "public" function, such as an officer of the Crown or of a local authority, or by a "private" person, an employer, a trade union official, a landlord regulating the conduct of his tenants... The law does and to some extent must conceal the realities of subordination behind the conceptual screen of contracts considered as concluded between equals. This may partly account for the propensity of lawyers to turn a blind eye to the realities of the distribution of power in society.

The principal purpose of labour law, then, is to regulate, to support and to restrain the power of management and the power of organised labour.²⁵

He believed that an individual worker usually has no social power and only possesses some bargaining power as an individual in exceptional cases. Examples of such exceptional individuals are top scientists, skilled craftsmen whose skills cannot easily be replaced, or senior managers that possess unique experience. The rest simply have to accept whatever conditions are offered by an employer. For workers the only power is therefore a "collective power".²⁶

Kahn-Freund observed that:

There can be no employment relationship without a power to command and a duty to obey, that is without this element of subordination in which lawyers rightly see the hallmark of the "contract of employment." However, the power to command and the duty to obey can be regulated ... By doing so the law limits the range of the worker's duty of obedience and enlarges the range of his freedom. This, without any doubt, was the original and for many decades the primary function of labour law.²⁷

With this in mind, the function of the law, although still quite important, remains of secondary importance when compared to the impact that the forces of supply and demand within the labour market has on labour relations.²⁸

He stated unequivocally that trade unions are far more effective than the law has been or could ever be as a "power countervailing" mechanism. As such the extent to which the law will succeed in achieving its objective would depend more on the unions, than the unions depend on the law for its success. In some instances though,

²⁵ *Idem* 15.

²⁶ *Idem* 17.

²⁷ *Idem* 18.

²⁸ *Idem* 19.

both law and unions depend on forces which neither can control. For instance, union membership tends to fall when employment decreases.²⁹

Selznick's view was that the state has both the right and the duty to ensure that there is industrial justice in individual employment relationships. In his view the best way to achieve that, would be to import into employment relationships in the private sector notions and standards from public law. He saw legislation as the ideal means to achieve that, thereby relying on both parliamentary and judicial intervention.³⁰

Kahn-Freund's English successors eventually produced a piece of legislation (the Industrial Relations Act 1971) that contains provisions that *inter-alia* provided for unfair dismissal. Those provisions of the act surprisingly survived the longest, considering that the drafters of the legislation, as everybody else, did not have "a very precise idea" of how to extend the concept of unfair dismissal. The only shared consensus at the time being that a radical departure from the common law contract of employment had been required.³¹

The relationships and interplay created by intervention has been likened to the working of democracy in the political sphere. In a democratic society the citizens who have to obey the rules have a legal and moral duty to vote and thereby elect representatives. Their right to participate in the making of the rules are entrusted to their chosen representatives. In any employment context, a worker doesn't get to participate directly in making the rules that govern his or her work. In this context the unions that represent workers negotiate with employers on behalf of the workers.³²

Davis summarises Kahn-Freund's view of the purpose of labour law as being "to regulate, to support and to restrain the power of management and the power of organised labour". He explains the vulnerability of individual workers with the following quotation from Marshall:

²⁹ *Idem* 21.

³⁰ Davies and Freedland *Labour Law: Text and Materials* (1979) 350.

³¹ *Idem* 348-349.

³² Deakin and Morris *Labour Law* (2012) 23.

Labour is often sold under special disadvantage arising from the closely connected facts that labour power is perishable, that the sellers of it are commonly poor and have no reserve fund and that they cannot easily withhold it from the market.³³

Of particular relevance to modern day South Africa is Kahn-Freund's observation that there is a single shared interest between labour and management, namely:

that the inevitable and necessary conflict should be regulated from time to time by reasonably predictable procedures, procedures which do not include the ultimate resort to any of those sanctions through which each contending party must – in case of need – assert its power.³⁴

2.3 NOT UNIQUELY SOUTH AFRICAN CIRCUMSTANCES

While there may be certain unique features about the details of South African labour law, it is by no means unique in the sense that it owes its existence to a realisation that the previously available protection for the individual worker was wholly inadequate. The background to similar legislation in England is described as follows:

The law of unfair dismissal originated in the defects of the common law of wrongful dismissal. That is to say, the new law of unfair dismissal represented a reaction to the inadequate protection afforded to the employee by his contract of employment. The common law had developed in such a way that the law of wrongful dismissal left the worker exposed and unprotected in two main respects. First, it accorded to the employer so wide an implied right of summary dismissal that the employee's chances of successfully challenging a dismissal for cause were slight indeed. Secondly, the wrongfully dismissed worker was entitled to so extremely limited a set of remedies that it was hardly worth his while to sue in the courts.³⁵

Davies and Freedland pay tribute to the Donovan Commission for having identified the obsolete and neglected nature of the common law which, if allowed to remain without interference, would have had unjust consequences in addition to having failed to comply with international standards.³⁶

2.4 CONCLUSION

Henrico and Smit submit that the rationale for the LC not only dispensing law, but also equity, is "a means, albeit implied, of addressing the inherent power imbalance between the parties in the employment relationship". They then describe the differentiating factor between employment relationships and other commercial

³³ Davis "The Functions of Labour Law" (1980) *CILSA* 212-213.

³⁴ Davies and Freedland *Kahn-Freund's Labour and the Law* (1983) 27.

³⁵ *Idem* 346-347.

³⁶ *Idem* 347. The authors describe the workplace at that stage as being a battlefield where "the law had an inadequate presence".

relationships as being that in the former “human beings exchange not objects but themselves”.³⁷

This appears to be in line with the view expressed by Vettori that the function of the law is “to react and adjust to socio-economic forces in order to attain justice and equity”.³⁸

Considering the extent to which South African labour law has borrowed from its English cousin, it is interesting to note how the focus in England has shifted since the 1960s and 1970s to the most recent times of the 21st century. So much so, that compared to their European Union neighbours, the English talk of “light regulation”. In this context it is said that:

The conception of “light regulation” which is deployed here is one which can be traced back to the Kahn-Freundian ideal for labour law, namely, that, it being admitted that the law is a secondary rather than a primary source of power in Labour relations, it is nevertheless the mission of labour law to redress in favour of workers an inherent inequality of power between them and their employers.³⁹

In recent times it would not be surprising for ordinary South Africans to associate the trade union movement with often unrealistic wage demands, mostly followed by prolonged and violent strikes.⁴⁰ The events at Marikana and the associated loss of life are still fresh in the memory of most, especially since the commission of enquiry appointed to investigate the tragic events has yet to conclude the evidence of the parties before it.

With that rather bleak picture in mind, it is once again instructive to consider the development of labour law in England, where it is said to have moved out of the zone of “social law” and worker protection and has evolved to become part of a different vision of labour market regulation. It is aptly summarised as follows:

³⁷ Henrico and Smit “The Contract of Employment in Labour Law: Obstacle or Panacea?” (2010) *Obiter* 247 at 259.

³⁸ Vettori “Alternative Means to Regulate the Employment Relationship in the Changing World of Work” (2005) Faculty of Law, University of Pretoria

³⁹ Davies and Freedland *Towards a Flexible Labour Market* (2007) 71.

⁴⁰ Brassey “Labour Law After Marikana: Is Institutionalized Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?” (2013) 34 *ILJ* 823 at 833.

[L]abour law and the regulation of employment relations were viewed...as instrumental to the securing and maintaining of a political equilibrium constructed around the key notions of full employment, carefully controlled inflation, taxation and social security expenditure, and financially efficient provision of public services.⁴¹

One can but express the hope that as the post-democratic South Africa and its labour relations develop, this will in due course become increasingly true of the South African situation too.

⁴¹ Davies and Freedland (2007) 5.

CHAPTER 3

THE INTERNATIONAL LABOUR ORGANISATION AND ITS ROLE IN SOUTH AFRICAN LABOUR LAW

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3.1 INTRODUCTION

As a signatory to the Treaty of Versailles that was signed in 1919 and provided for the establishment of the League of Nations, the former Union of South Africa also became a founding member of the International Labour Organisation (ILO).⁴²

The Conference, being the ILO's highest policy-making body, has annual meetings which are attended by delegations from all member states. Each of those delegations are made up of two representatives from government and one each representing employers and workers. The adoption of new labour standards is viewed as the most important function of the Conference.⁴³

Conventions and recommendations are two of the most important ILO standards. Whereas conventions have to be ratified by member states before they become binding on the state in question, recommendations, as the term suggests, neither require ratification, nor are they binding on the members of the ILO.⁴⁴

⁴² Van Niekerk, Christianson, McGregor, Smit and van Eck *Law@work* (2012) 19.

⁴³ *Idem* 20.

⁴⁴ *Idem* 21.

Van Arkel points out that:

[I]t is a unique feature that the ILO *based on membership alone* is able to require of its members to respect, to promote and *to realize* international labour standards, regardless of ratification of the conventions that guarantee them.⁴⁵

3.2 SOUTH AFRICA'S RELATIONSHIP WITH THE ILO

From 1959 onwards international pressure on South Africa to withdraw from the ILO as a result of its apartheid policies, increased. This culminated in proposals to amend the ILO Constitution to provide for the suspension of member countries and finally resulted in the South African government announcing in 1964 that it would be withdrawing from the ILO.⁴⁶

South Africa re-joined the ILO in 1994. Even before resuming its membership of the ILO, South Africa consented in February 1989 to a complaint by COSATU being investigated by a fact finding and conciliation commission of the ILO.⁴⁷

Interestingly, South Africa is not the only country that had been a member of the ILO since inception, but that has not enjoyed continued membership since. It shares this record of broken membership with none other than the former USSR and the United States of America.⁴⁸ Van Niekerk⁴⁹ points out that the ILO had played a more significant role in the development of South African labour law during the 28 years during which South Africa had not been a member of the ILO, than in the almost 50 years before it left the organisation.

⁴⁵ Van Arkel *A Just Cause for Dismissal in the United States and the Netherlands* Erasmus University Rotterdam (2007) 299.

⁴⁶ Van Niekerk, Christianson, McGregor, Smit and van Eck (2008) 20.

⁴⁷ Saley and Benjamin "The Context of the ILO Fact Finding and Conciliation Commission Report on South Africa" (1992) 13 *ILJ* 731 at 34.

⁴⁸ *Ibid.*

⁴⁹ Van Niekerk "The International Labour Organisation (ILO) and South African Labour Law" (1996) *CLL* Vol 5 No 12 111 at 112.

3.3 CONVENTIONS AND RECOMMENDATIONS OF PARTICULAR RELEVANCE TO DISMISSAL

Recommendation 119 titled Termination of Employment Recommendation, 1963 was the first to tackle the concept of unfair dismissal. It was superseded in 1982 by Convention 158 (Convention Concerning Termination of Employment at the Initiative of the Employer 1982) and Recommendation 166 (Recommendation Concerning Termination of Employment at the Initiative of the Employer 1982).⁵⁰

Convention 158 is divided into four parts. Part two is headed “Standards of General Application”. It is in turn divided into four parts, A, B, C and D respectively, set out as follows:

- “A: Justification for termination;
- B: Procedure prior to or at the time of termination;
- C: Procedure of appeal against termination; and
- D: Period of notice.”

Since parts B, C and D deal with procedural matters, they fall outside the main scope of the present research and are therefore not dealt with in the same level of detail. The focus will however be on the justification requirement provided for in part A.

Part A consists of Articles 4, 5 and 6 which, given their importance for present purposes, are quoted in full:

4. The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.
5. The following, inter alia, shall not constitute valid reasons for termination:
 - a. union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
 - b. seeking office as, or acting or having acted in the capacity of, a worker’s representative;
 - c. the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;

⁵⁰ Le Roux and Van Niekerk *The South African Law of Unfair Dismissal* (1994) 31.

- d. race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- e. absence from work during maternity leave.

6.1. Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.

6.2. The definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the application of paragraph 1 of this Article shall be determined in accordance with the methods of implementation referred to in Article 1 of this Convention.

3.4 THE INCORPORATION OF INTERNATIONAL LABOUR STANDARDS INTO SOUTH AFRICAN LAW

Van Niekerk⁵¹ points out that the first challenge of a dismissal on the basis that an employer had to have reasonable grounds for believing that an employee was guilty of misconduct before the employee could be dismissed for misconduct came before the Industrial Court at the end of 1982. In *Metal and Allied Workers Union v Stobar Reinforcing (Pty) Ltd* the Court quoted ILO Recommendation No 119 (1963) on Termination of Employment in full.⁵² At that stage, South Africa had not been a member of the ILO for many years. Furthermore, Recommendations by their very nature are not binding, not even on member states. The Industrial Court however based its finding on an acceptance of the principle that the employer should have taken steps to verify the truth of the allegations by way of an investigation and given the employee an opportunity to state his case. While at this stage of our dismissal law's development, it may seem insignificant, but at the time, it constituted a huge leap forward at the time.

The South African Legislature has similarly been influenced by the ILO's instruments.⁵³ The remarkable impact that the wording of particularly Convention 158 has had on the choices made by the drafters of the LRA is best illustrated by tabulating the key parts to provide for an easy comparison. The table below therefore compares the wording of Articles 4 and 5 of Convention 158 with that of Section 187 and 188 of the LRA and highlights the similarities by reflecting key (shared) concepts in bold print. In order to match the comparable sections, the order in which the

⁵¹ Van Niekerk "In Search of Justification: The Origins of the Statutory Protection of Security of Employment in South Africa" (2004) 25 *ILJ* 853 at 863.

⁵² (1983) 4 *ILJ* 84 (IC) at 91B – 92H.

⁵³ Du Toit *et al Labour Relations Law: a Comprehensive Guide* (2008) at 394.

provisions of Convention 158 appear had to be adjusted slightly, but the numbering has been retained.

Convention 158		LRA	
Article 4	The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking , establishment or service.	(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove- (a) that the reason for dismissal is a fair reason- (i) related to the employee's conduct or capacity ; or (ii) based on the employer's operational requirements ;	Section 188 (1) Other unfair dismissals
Article 5	The following, inter alia, shall not constitute valid reasons for termination :	(1) A dismissal is automatically unfair if the employer , in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is-	Section 187 Automatically unfair dismissals
	(a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;	(a) that the employee participated in or supported , or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV;	
	(b) seeking office as, or acting or having acted in the capacity of, a workers' representative;		
	(c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities ;	(d) that the employee took action , or indicated an intention to take action, against the employer by- (i) exercising any right conferred by this Act ; or (ii) participating in any proceedings in terms of this Act ;	
	(e) absence from work during maternity leave .	(e) the employee's pregnancy , intended pregnancy, or any reason related to her pregnancy;	
	(d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin ;	(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility ;	

Van Niekerk AJ (as he was then) pointed to this heritage when he remarked in *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation & Arbitration*:

The observations and surveys by the ILO's Committee of Experts on Convention 158 are equally important as a point of reference in the interpretation of chapter VIII of the LRA and the code since they give content to the standards that the convention establishes. This is particularly so in the present instance because both chapter VIII and the code draw heavily on the wording of Convention 158.⁵⁴

Not all commentators are equally enthusiastic though about the influence of this Convention on our dismissal law. Brassey⁵⁵ points out that the unfair dismissal provisions in the LRA were largely based on the jurisprudence of the Industrial Court. He argues that the Court in turn had been “much influenced by ILO instruments and English law”.⁵⁶

He suggests that the Industrial Court should have questioned the wisdom of applying ILO instruments that South Africa had not ratified, as well as English rules pertaining to unfair dismissals, that had been formulated in a country with low levels of unemployment, when South Africa was already experiencing extensive levels of unemployment at the time.⁵⁷

Brassey nevertheless refers to ILO Convention 158 as a “useful frame of reference” and goes on to state that an employer can hardly claim to have made a reasonable decision unless it has made a concerted effort to obtain all the relevant facts, inter-alia by listening to the contrary view.⁵⁸ He therefore recognises the need to afford an employee an opportunity to be heard. His criticism of the South African dismissal requirements is summarised thus:

[T]he process of internal enquiry makes little sense because the selfsame ground is covered in the ensuing statutory proceedings in which the dismissal is then challenged. We are getting the worst of two worlds. Our procedures are complex and cumbersome because the enquiry is into facts, not perceptions, and they are twice played out, once in the internal and a second time in the external enquiry.

We have borrowed holus bolus from ILO Convention 158 and drawn our inspiration from the principles of English law, but these are norms devised for first world countries at a time when

⁵⁴ (2006) 27 ILJ 1644 (LC) at 1652I – 1653A.

⁵⁵ Brassey “Fixing the Laws that Govern the Labour Market” (2012) 33 *ILJ* 1.

⁵⁶ *Idem* 10.

⁵⁷ *Idem* 10 – 11.

⁵⁸ *Idem* 14.

their levels of unemployment were negligible. Ours are not and, for reasons already explained, this makes a profound difference.⁵⁹

Van Niekerk penned an article as a specific response to these views expressed by Brassey.⁶⁰ The philosophical differences in their approaches and the validity of their respective interpretations of Rawls' theory of justice are not relevant for present purposes. Van Niekerk points out that the constitutionally entrenched right to fair labour practices also encompasses the right to work security. Those rights, according to him, are equally promoted by the Constitution and ILO Convention 158. That being the case, he concludes that "[t]here is no clear conceptual basis therefore for treating a right not to be unfairly dismissed any differently from the rights to equality or to freedom of association".⁶¹

He summarises Brassey's approach as being a cost-benefit analysis, the result of which is that for the benefit of society in general, it would be best to abolish the statutory provisions that protect employees against unfair dismissal. Put differently, the protection currently afforded against unfair dismissal does not justify the resultant high unemployment rate. Society would therefore only benefit if such protective measures were to be done away with.⁶²

In an ever-changing society one can hardly expect employment conditions and the forces that impact thereon to remain unchanged. In April 2011 the ILO convened a tripartite meeting of experts to examine the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166). Taking part in the meeting were six experts each representing Government, Employers and Workers. Illustrative of the evolving nature of South Africa's relationship with the ILO, is the fact that one of the worker experts at the time was Ms Shamima Gaibie, a Johannesburg-based attorney, has since served as an acting judge of the LC. Various other parties also attended as observers.⁶³

⁵⁹ *Idem* 14 - 15.

⁶⁰ Van Niekerk "Is the South African Law of Unfair Dismissal Unjust? A Reply to Martin Brassey" (2013) 34 *ILJ* 28.

⁶¹ Van Niekerk (2013) 34 *ILJ* 33.

⁶² *Ibid.*

⁶³ Final Report of the Tripartite Meeting of Experts to Examine the Termination of Employment Convention (No. 158) and the Termination of Employment Recommendation, 1982 (No. 166) 1.

In its final report the meeting dealt with provisions in Convention No. 158 that give rise to difficulties. In paragraph 55 thereof the Government expert from South Africa is quoted as finding it unacceptable that, based on the 1982 consensus, no changes could be made to the exclusions specified under Article 2, paragraph 6, even when the decision was based on social dialogue. Paragraphs 4 and 5 of Article 2 both provide for certain categories of employed persons to be excluded from the application of this Convention or certain provisions thereof. Paragraph 6 then requires members that have ratified the Convention to list in the first reports such categories of persons which may have been excluded in pursuance of paragraphs 4 and 5 of Article 2.

In paragraph 62 of the same report it is recorded that the fact that a “lack of trust” is not included in Article 4 as a valid reason for termination, was viewed by some as being problematic. In this respect it was pointed out that especially in countries where labour relations are based on trust, the employer’s loss of trust in the worker as a valid reason for termination is not adequately catered for. This factor is of particular importance later on when we deal with the criteria for dismissal to be gleaned from South African jurisprudence.

Commenting on how the ILO standards found their way into different different legal systems around the world, Cheadle points out that some of these labour law concepts and principles are applied universally even though their description in different countries may differ. He uses the example of the universal concept of justifiable termination of employment, provided for in Convention 158, that is described as “termination for a just cause” in the United States and Canada, as “in accordance with the principles of good industrial practice” in Trinidad and Tobago and “for a fair reason” in South Africa.⁶⁴

3.5 CONCLUSION

As set out above, the LRA caters more than adequately for the rights and protection against dismissal provided for in Convention 158, by not only borrowing from its

⁶⁴ Cheadle “Reception of International Labour Standards in Common-Law Legal Systems” (2012) *Acta Juridica* 348 at 361.

wording, but going even further in the protection afforded to workers. In essence that only leaves the mechanisms designed to ensure the enforcement of those measures to be considered before expressing a view on the extent of South Africa's compliance with the Convention.

Having discussed the problems and difficulties in having labour disputes adjudicated by the CCMA, LC and LAC since the current LRA came into operation in 1996, Steenkamp and Bosch (in my view correctly) come to the conclusion that “[w]e have much to celebrate and of which to be proud”.⁶⁵ Of course it is the CCMA, LC and LAC that are responsible for ensuring that the appeal process provided for in Part C (Article 7 to 10) of Convention 158 functions effectively and thus provides a meaningful opportunity for those dismissed unfairly, to be reinstated or re-employed, or to be awarded compensation. It follows that both the substantive and procedural requirements laid down by ILO Convention 158 are complied with by the current South African dismissal regime.

⁶⁵ Steenkamp and Bosch “Labour Dispute Resolution under the 1995 LRA: Problems, Pitfalls and Potential” (2012) *Acta Juridica* 120 at 146.

CHAPTER 4

DISMISSAL

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4.1 INTRODUCTION

It goes without saying that neither dishonesty, nor dismissal, is unique to the financial services sector. However, with dishonesty and its employment-related consequences being the focus of this research, it is imperative that the prospect of dismissal as a predictable consequence of dishonesty be considered in some detail.

Rycroft argues that a perception has developed amongst employers that once serious misconduct has been proved, the irretrievable breakdown in the employment relationship has similarly been proven. As he puts it, “the intolerability of certain kinds of misconduct is so obvious that it does not need to be spelt out”.⁶⁶ By way of illustration the general principle applicable to an employee’s dishonest conduct was spelt out in a single sentence that read “Any dishonest act of an employee during the rendering of his services justifies the employer in dismissing him.”⁶⁷

There are indeed indications, which could tend to justify such a perception, discernible from court decisions over a long period. In *Ngutshane v Ariviakom (Pty) Ltd t/a Arivia.kom* Pillay J said that in circumstances where an employee's

⁶⁶ Rycroft “The Intolerable Relationship” (2012) 33 *ILJ* 2271.

⁶⁷ Van Jaarsveld and Van Eck *Principles of Labour Law* (2002) Butterworths at 109.

misconduct is “manifest, common cause or not in dispute, a less formal process will suffice”.⁶⁸

In *Theewaterskloof Municipality v SALGBC (Western Cape Division)* Tip AJ described the effect of the misconduct on the relationship as follows:

At a general level, Ms Hartzenberg submitted that the municipality had not shown that the employment relationship had become intolerable. I do not agree. In the first place, **the facts are strongly self-demonstrative.**⁶⁹ (Emphasis added)

In *Council for Scientific & Industrial Research v Fijen*⁷⁰ Harms JA (as he was then) who delivered the majority judgment said the following with regard to “conduct clearly inconsistent” with an employment relationship and the status of trust and confidence in that relationship:

It is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitles the 'innocent party' to cancel the agreement (*Angehrn & Piel v Federal Cold Storage Co Ltd* 1908 TS 761 at 777-8). On that basis it appears to me that our law has to be the same as that of English law and also that a reciprocal duty as suggested by counsel rests upon the employee. There are some judgments in the LAC to this effect (for example, *Humphries & Jewell (Pty) Ltd v Federal Council of Retail & Allied Workers Union & others* (1991) 12 ILJ 1032 (LAC) at 1037G). I may add that this much was not placed in issue for the respondent by Mr Scholtz. It does seem to me that, in our law, it is not necessary to work with the concept of an implied term. The duties referred to simply flow from *naturalia contractus*.

Le Roux and Van Niekerk take a slightly softer line by stating that “[a]ny form of dishonest conduct compromises the necessary relationship of trust between employer and employee and will **generally** warrant dismissal”.⁷¹ (Emphasis added) By the following year Le Roux explained that in most cases “the test adopted for deciding whether dismissal was justified is whether the trust relationship between employer and employee has been destroyed”.⁷²

In *Edcon Ltd v Pillemer NO* Mlambo JA (as he was then) introduced what arguably amounted to a new procedural requirement facing employers that wanted to motivate the dismissal of an employee. He explained in some detail why an

⁶⁸ (2009) 30 ILJ 2135 (LC) at 2142H.

⁶⁹ (2010) 31 ILJ 2475 (LC) at 2494D.

⁷⁰ (1996) 17 ILJ 18 (A) at 26E-G.

⁷¹ *The South African Law of Unfair Dismissal* (1994) 131.

⁷² “The Labour Appeal Court’s approach to dishonest employees” (2011) 21 *Contemporary Labour Law* 1 at 5.

employer is required to lead evidence on an actual breakdown in the trust relationship, as opposed to a mere acceptance, as a matter of course, that such a breakdown in the relationship had occurred as a result of the misconduct being dishonesty:

[20] Edcon's policy regarding the misconduct at issue here was also before Pillemer. But that document is just that - a policy - and is no evidence of the consequences of misconduct based on it. On its own it evinces Reddy's failure to comply with its dictates. It cannot be correct that mere production thereof would suffice to justify a decision to dismiss. The gravamen of Edcon's case against Reddy was that her conduct breached the trust relationship. **Someone in management and who had dealings with Reddy in the employment setup, as already alluded to, was required to tell Pillemer in what respects Reddy's conduct breached the trust relationship.** All we know is that Reddy was employed as a quality control auditor; no evidence was adduced to identify the nature and scope of her duties, her place in the hierarchy, the importance of trust in the position that she held or in the performance of her work, or the adverse effects, either direct or indirect, on Edcon's operations because of her retention, eg because of precedent or example to others. In *De Beers Consolidated Mines Ltd v CCMA & others*(2000) 21 ILJ 1051 (LAC) at paras 17-27 Conradie JA considered the relationship between an employee's dishonesty and continued employment, and the bearing of such factors as long service, which Pillemer also considered. In the present context he said (at para 23):

The seriousness of dishonesty – i.e. whether it can be stigmatized as gross or not - depends not only, or even mainly, on the act of dishonesty itself but on the way it impacts on the employer's business.'

But to get here evidence showing adverse impact, if any, on the 'business' is critical.⁷³
(Emphasis added)

It is against this background that Rycroft suggests a reconsideration of four key questions. Firstly, why and in what way does an employment relationship have to be tolerable? Secondly, what does it take to make an employment relationship intolerable? Thirdly, how do you prove that the relationship is intolerable? Fourthly, does intolerability have to be balanced against other criteria?⁷⁴ Those questions will be considered in more detail below, but for a proper understanding of how the concept developed, considering the history of intolerability as a determining factor in determining the suitability of dismissal in cases of misconduct, is imperative. As is set out below, that history has both a legislative and jurisprudential component.

Before turning to those components, it is necessary to remind oneself that the primary requirement remains that dismissal should be fair and that fairness applies equally to both employer and employee. In *National Education Health & Allied*

⁷³ (2009) 30 ILJ 2642 (SCA).

⁷⁴ Rycroft (2012) 33 ILJ 2271.

*Workers Union v University of Cape Town*⁷⁵ the Constitutional Court quoted with approval from both the minority and majority judgments of the former Appellate Division in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd*⁷⁶ where it respectively held that:

Fairness comprehends that regard must be had not only to the position and interests of the workers, but also those to the employer, in order to make a balanced and equitable assessment.

and

The fairness required ... must be fairness towards both employer and employee. Fairness to both means the absence of bias in favour of either. In the eyes of the LRA of 1956, contrary to what counsel for the appellant suggested, there are no underdogs.

With that in mind, Basson *et al* state that the question whether dismissal is the appropriate sanction is a factual one, but remains “one of the most difficult aspects of workplace discipline”.⁷⁷

4.2 THE JURISPRUDENTIAL ROOTS OF THE NOTION OF INTOLERABILITY

Rycroft traces the idea of an intolerable relationship as a factor justifying dismissal, back to case law dating back to before the 1995 LRA.⁷⁸ He relies quite convincingly on the following judgments to illustrate the point that they had sown the seeds for the subsequent acceptance of “intolerability” as a key concept in dismissal law:

- *Humphries & Jewell (Pty) Ltd v Federal Council of Retail & Allied Workers Union*,⁷⁹

⁷⁵ (2003) 24 ILJ 95 (CC) at 112 C – E.

⁷⁶ (1996) 17 ILJ 455 (A)

⁷⁷ Basson *et al Essential Labour Law* (2008) 120.

⁷⁸ *Ibid.*

⁷⁹ (1991) 12 ILJ 1032 (LAC) at 1037F-H where Spoelstra J said:

In our view a disregard by an employee of his employer's authority, especially in the presence of other employees, amounts to insubordination and it cannot be expected that an employer should tolerate such conduct. The relationship of trust, mutual confidence and respect which is the very essence of a master-servant relationship cannot, under these circumstances, continue. **In the absence of facts showing that this relationship was not detrimentally affected** by the conduct of the employee **it is unreasonable to compel either of the parties to continue with the relationship**. We consider it improper to order reinstatement in such a case and it seems to us a case where the employee should be content with compensation. (Emphasis added)

- *H L van der Berg (Pty) Ltd t/a Metpress Manufacturing v Steel Engineering & Allied Workers Union of SA*,⁸⁰ and
- *MAN Truck & Bus (SA) (Pty) Ltd and United African Motor & Allied Workers Union*.⁸¹

Rycroft⁸² expresses the view that the most influential of those pre-1995 LRA decisions was the judgment delivered in *Anglo American Farms t/a Boschendal Restaurant v Komjwayo*⁸³ where Thring J accepted the Appellant's submission that:

[T]he value of what was stolen was of comparatively little importance in this matter, and that the true question to be considered was whether or not what the respondent did had the effect of destroying, or of seriously damaging, the relationship of employer and employee between the parties, so that the continuation of that relationship could be regarded as intolerable.

Thring J then referred with approval to the earlier decision in *National Union of Mineworkers v Vaal Reefs Exploration & Mining Co Ltd*⁸⁴ where the test pertaining to intolerability, laid down in the excerpt quoted above, had been formulated in the following terms:

[T]he question whether an employer had good grounds or good reason (in the employer-employee relationship) to dismiss an employee depended on whether the conduct

⁸⁰ (1991) 12 *ILJ* 1266 (LAC) at 1281G-H where Spoelstra J also said:

So 'n agterdog teen 'n werknemer versteur die verhouding tussen die werkgewer en werknemer tot so 'n mate dat dit nie van 'n werkgewer verwag kan word om, in die afwesigheid van feite wat aantoon dat die versteuring van die verhouding van geringe aard is, so 'n werknemer in diens te hou nie. So 'n versteurde verhouding en die breuk in die onderlinge vertroue kan nie tot gesonde arbeidsverhoudinge op die werkplek aanleiding gee nie.

⁸¹ (1991) 12 *ILJ* 181 (ARB) at 186A-D where Brassey, sitting as an arbitrator, summarised the position thus:

Before an employee can be dismissed for his shortcomings, they must be serious. This is as much a rule of the common law as of our equity jurisprudence. The rule presumably reflects the fact that no employee is perfect: some allowance must be made for minor shortcomings, else in dismissing the employer would simply be replacing one fallible employee with another, equally fallible, one. No doubt it also owes something to the fact that dismissal, the final severing of the relationship, is the ultimate and most drastic sanction - the industrial relations equivalent of capital punishment, as it is sometimes described. But whatever the reason, it is beyond doubt that, to justify dismissal, the misconduct must be gross, the incapacity egregious. Within the range of what is reasonable, **retaining the employee** in the former case **must be intolerable**, impossible in the latter. (Emphasis added)

⁸² Rycroft (2012) 33 *ILJ* 2271.

⁸³ (1992) 13 *ILJ* 573 (LAC) at 589G-H. The misappropriation of a single tin of Fanta (a soft drink) had resulted in the respondent's dismissal.

⁸⁴ (1987) 8 *ILJ* 776 (IC) at 589H-I.

concerned 'clearly indicated that the continuance of the employer-employee relationship has been made intolerable.

4.3 THE LEGISLATIVE ROOTS OF THE NOTION OF INTOLERABILITY

Section 186 of the LRA, under the heading “Meaning of dismissal and unfair labour practice” defines constructive dismissal and does so in the following terms in subsection(1)(e):

(e) an employee terminated a contract of employment with or without notice because the employer made continued employment **intolerable** for the employee. (Emphasis added)

Section 188 of the LRA deals with “Other unfair dismissals” and provides that:

(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-

(a) that the reason for dismissal is a fair reason-

(i) related to the employee's conduct or capacity; or

(ii) based on the employer's operational requirements; and

(b) that the dismissal was effected in accordance with a fair procedure.

(2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.

The two most important aspects for present purposes that arise from this provision are firstly that the onus is on the employer to prove the fairness of the dismissal and secondly that the employee's conduct could be the reason why dismissal was fair. The relevant items of the Code of Good Practice, referred to in Section 188(2), are dealt with below.

Section 193(2) of the LRA that deals with “Remedies for unfair dismissal and unfair labour practice” reads:

(2) The Labour Court or the arbitrator **must require the employer to reinstate or re-employ** the employee **unless-**

(a) the employee does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure. (Emphasis added)

It follows that a finding that a dismissal is unfair would almost inevitably result in reinstatement or re-employment, as the case may be, unless 'a continued

employment relationship would be intolerable'.⁸⁵ Statistics of the outcomes of CCMA arbitrations analysed by Murphy suggest that reinstatement is awarded in about 10% of the unfair dismissal disputes referred to the CCMA where the matter proceeds to arbitration and the arbitration is attended by both parties.⁸⁶

Item 3(4) of Schedule 8 to the LRA (the Code of Good Practice: Dismissal) provides the following indication of when dismissal may be appropriate:

(4) Generally, it is not appropriate to dismiss an employee for a first offence, **except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable.** Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of section 188. (Emphasis added)

It thus appears that intolerability once again plays a pivotal role. Furthermore, of particular relevance for present purposes is the listing of “gross dishonesty” as an example of the type of misconduct that may be so “serious and of such gravity” that it results in making the relationship intolerable.⁸⁷ Grogan and Myburgh⁸⁸ describe the concept of intolerability as an “elastic concept” and thus welcome the examples provided in the Code of Good Practice. They conclude from these examples in the Code that when an employee “steals from or defrauds the employer”, an employment relationship becomes intolerable.

The provisions created by the legislature therefore provide for both parties to an employment relationship, who seek to end the relationship, to do so fairly on the basis that the relationship has broken down irretrievably and that a continued relationship would accordingly be intolerable.

That in turn creates the impression that an employment relationship should be (at least) 'tolerable' to the parties thereto. Rycroft points out, in my submission quite

⁸⁵ R le Roux “Reinstatement: When Does a Continuing Employment Relationship Become Intolerable?” 2008 (29) 1 *Obiter* 69.

⁸⁶ Murphy “An Appeal for an Appeal” (2013) 34 *ILJ* 1 at 18.

⁸⁷ Du Toit *et al* *The Labour Relations Act of 1995* (1996) at 355.

⁸⁸ Grogan and Myburgh “Cracking the Code – The Code of Good Practice: Dismissal” (1997) *Employment Law* at 123.

correctly, that something that is described as “tolerable” is far from ideal, but may at least allow one to put up with it in the short term. As a result thereof he suggests “functional” as a more suitable antonym to “intolerable” in this particular context, since a functional relationship “is one which provides enough on both sides to ensure that the employer's interests ... and the employee's interests” are satisfactorily catered for.⁸⁹

Different people have different levels of tolerance. Their views of what is tolerable in a particular situation (including conditions in the workplace) would therefore be predictably varied. Many former employees who alleged that they had been constructively dismissed, may have been shocked to read, in the rulings of those appointed to adjudicate their claims, that the conditions under which they had resigned (or merely left) were far from intolerable.⁹⁰

Employers may have been equally shocked when reinstatement was ordered when they had subjectively believed that the relationship had become intolerable.

Before the matter came before the Constitutional Court, Cameron JA (as he was then) described and explained this measure of subjectivity in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA*⁹¹ in the following terms:

The code states that it is generally not appropriate to dismiss for a first offence unless the misconduct is serious and of such gravity that it makes a continued employment relationship 'intolerable'. 'Intolerable' means 'unable to be endured' (*The Concise Oxford English Dictionary*). This necessarily imports a measure of subjective perception and assessment since the capacity to endure a continued employment relationship must exist on the part of the employer. It follows that the primary assessment of intolerability unavoidably belongs to the employer. This is not to confer a subjective say-so. Allowing some leeway to the employer's primacy of response does not permit caprice or arbitrariness. A mere assertion on implausible grounds that a continued relationship is intolerable will not be sufficient. The criterion remains whether the dismissal was fair.

⁸⁹ Rycroft (2012) 33 *ILJ* 2272.

⁹⁰ *Solid Doors (Pty) Ltd v Commissioner Theron* (2004) 25 *ILJ* 2337 (LAC). During a hearing the employee was told by the chairman of the hearing, who was also his supervisor, to 'f... off' where after the employee left the hearing. In *Moyo and Standard Bank of SA Ltd* (2005) 26 *ILJ* 563 (CCMA) at 568A-B the Commissioner remarked:

He was a senior manager and in this position one is expected to deal with ambiguity, conflict in relationships, power struggles, office politics and demands for performance where if not delivered no payment is made. They do not constitute intolerable working conditions.

⁹¹ (2006) 27 *ILJ* 2076 (SCA) para 45.

While an employer would therefore have the opportunity to express a view on the impact that the misconduct has had on the employment relationship, his/her subjective view in this regard will still have to be evaluated independently. One therefore has to determine whose view will ultimately be the deciding factor and on what basis such view would be determined.⁹²

Section 115(2)(g) of the LRA provides that the CCMA may publish guidelines in relation to any matter dealt with in the Act itself. The LRA also places an obligation on commissioners to take into account such guidelines published by the CCMA that are relevant to a matter being considered during arbitration.⁹³ The CCMA published guidelines on misconduct arbitrations that came into effect on 1 January 2012.⁹⁴

Clause 93 thereof provides that:

The test is whether the employer could fairly have imposed the sanction of dismissal in the circumstances, either because **the misconduct** on its own **rendered the continued employment relationship intolerable**, or because of the cumulative effect of the misconduct when taken together with other instances of misconduct. (Emphasis added)

4.4 THE BASIS FOR A DECISION THAT DISMISSAL WAS APPROPRIATE OR THAT A RELATIONSHIP HAD BECOME INTOLERABLE

In 2000 Myburgh and van Niekerk⁹⁵ examined the history of the manner in which South African courts had dealt with determining an appropriate penalty for misconduct and came to the conclusion that although the Industrial Court had adopted the “the reasonable employer test” from English law during the mid-1980s, that approach had not survived for long after the turn of the decade. English authors described the test as being a message from the Court that employers “should be given a long leash: only if an employer has reached a decision to dismiss an employee that no reasonable employer could have reached should a tribunal conclude that the dismissal was unfair”.⁹⁶

⁹² Smit “How Do You Determine a Fair Sanction? Dismissal as Appropriate Sanction in Cases of Dismissal for (Mis)conduct” (2011) *De Jure* 49 at 56.

⁹³ S 137(6) of the LRA.

⁹⁴ Notice 602 of 2011 published in Gazette 34573 of 2 September 2011.

⁹⁵ Myburgh and van Niekerk “Dismissal as a Penalty for Misconduct: The Reasonable Employer and Other Approaches” (2000) 21 *ILJ* 2145.

⁹⁶ Collins *Employment Law* (2010) 161.

Fergus points out that the test, as a result of the limitation it places on the powers of arbitrators to determine independently whether a dismissal was justified, conflicts with ILO Convention 158.⁹⁷

The same authors credit John Brand, who sat as an arbitrator in *Tubecon (Pty) Ltd and National Union of Metal Workers of SA*,⁹⁸ with being the one who had introduced the change in approach that resulted in the end of the application in South African unfair dismissal law of the reasonable employer test that had been derived from English law.⁹⁹

Brand had motivated his view as follows:

In my view the reasonable employer approach is not what is required by the standard IMSSA terms of reference which require me to determine whether the discipline meted out by the company was fair. For the discipline to be fair the rule or norm which is breached must be a fair one; it must in fact have been breached and the sanction applied must be a fair one. Unless one's terms of reference specifically state otherwise there does not seem to be any justification in equity why a sanction should be looked at exclusively through the eyes of an employer. The correct approach it seems to me is to consider whether the sanction is fair having regard to existing industrial relations common law and norms.

Myburgh and van Niekerk describe what they term the “first stirrings of a resurrection of the reasonable employer approach”¹⁰⁰ with reference to the decision of Brassey AJ in *Computicket v Marcus NO & others*.¹⁰¹ In dealing with the finding of the arbitrator, with which he disagreed, Brassey AJ said:

The question of sanction for misconduct is one on which reasonable people can readily differ. One person may consider that dismissal is the appropriate sanction for an offence, another that something less, such as a warning, would be appropriate. There are obviously circumstances in which a reasonable person would naturally conclude that dismissal was the appropriate sanction, for example if there had been theft of a significant amount of money, fraud or other untrustworthy conduct on the part of the third respondent.

After the decision in *Computicket* the LAC also had occasion to determine the approach to be followed by arbitrators that have to consider the decisions of employers to dismiss and determine whether or not such decisions justified

⁹⁷ Fergus “The 'Reasonable Employer's' Resolve” (2013) 34 *ILJ* 2486 at 2488.

⁹⁸ (1991) 12 *ILJ* 437 (ARB).

⁹⁹ Myburgh and van Niekerk (2000) *ILJ* 2145.

¹⁰⁰ *Idem* 2148.

¹⁰¹ (1999) 20 *ILJ* 342 (LC).

interference. The LAC came up with no fewer than four different answers to what Myburgh and van Niekerk describe as “this deceptively simple question”.¹⁰²

Although all of them were reported between 1999 and 2000, the decisions in *Nampak Corrugated Wadeville v Khoza*,¹⁰³ *County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration*,¹⁰⁴ *Toyota SA Motors (Pty) Ltd v Radebe*,¹⁰⁵ and *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation & Arbitration*¹⁰⁶ provide for four (different) possible approaches.

¹⁰² Myburgh and van Niekerk (2000) *ILJ* 2148.

¹⁰³ (1999) 20 *ILJ* 578 (LAC).

¹⁰⁴ (1999) 20 *ILJ* 1701 (LAC).

¹⁰⁵ (2000) 21 *ILJ* 340 (LAC). At 352C-F Nicholson JA also made the following remarks relating to a suitable sanction in cases of dishonesty:

[43] Theft and fraud have always constituted good grounds for dismissal as they frequently constitute a fundamental breach of the employment contract. The cases have in the past emphasized, with good reason, the breach of the relationship of trust that occurs where an employee is guilty of such a misdemeanour. The employer and employee are parties to an enterprise that produces goods or services which generate profits. If one party is dishonest to such a degree that the enterprise or a part of it is jeopardized then I am sure that there has been such a fundamental breach. The courts have frequently upheld dismissal for dishonesty; see *Sappi Novoboord (Pty) Ltd v Bolleurs* (1998) 19 *ILJ* 784 (LAC) at 786F; *Standard Bank of SA Ltd v Commission for Conciliation, Mediation & Arbitration & others* (1998) 19 *ILJ* 903 (LC) at 913D; *Metcash Trading Ltd t/a Metro Cash & Carry v Fobb & another* (1998) 19 *ILJ* 1516 (LC).

He however cautioned that it is not an “invariable rule” that misconduct involving dishonesty necessarily result in dismissal, but that the facts of each case (including the mitigating features) should be assessed and taken into account.

At 344B-F Zondo AJP (as he was then) added the following comments to Nicholson JA’s remarks on this score:

Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty...

I hold that the first respondent's length of service in the circumstances of this case was of no relevance and could not provide, and should not have provided, any mitigation for misconduct of such a serious nature as gross dishonesty. I am not saying that there can be no sufficient mitigating factors in cases of dishonesty nor am I saying dismissal is always an appropriate sanction for misconduct involving dishonesty. In my judgment the moment dishonesty is accepted in a particular case as being of such a serious degree as to be described as gross, then dismissal is an appropriate and fair sanction.

¹⁰⁶ (2000) 21 *ILJ* 1051 (LAC).

The first may be described as the classic application of the reasonable employer test that doesn't permit interference unless no reasonable employer would have resorted to dismissal. Slightly more employer-friendly is to require an arbitrator to defer to the right of an employer to determine the standards of conduct in the workplace and that interference with the sanction imposed by the employer is thus only allowed where it is determined to have been manifestly unfair.

The third approach entails that the decision and reasoning of the employer are considered to be irrelevant and that one only needs to determine whether the arbitrator's powers had been properly applied. Fourthly, the onus is placed on the employer to establish the facts on which it relies and if it succeeds in doing so, the arbitrator must determine the fairness or otherwise of the dismissal. To make that determination, the arbitrator should defer to the employer, but has to consider society's prevailing norms and values in general and in particular those of the industrial relations community.¹⁰⁷

Although the 'primary assessment' of intolerability, referred to in the passage quoted above from Cameron's judgment in *Rustenburg Platinum*, may begin with the employer (in an ordinary misconduct related dismissal) or with the employee (in a dispute based on constructive dismissal) an arbitrator or judge would have to consider whether the subjective assessment of the employer or employee (as the case may be) is sufficiently supported by facts and circumstances to be sustained. As Zondo JP explained in *Engen Petroleum Ltd v CCMA*:

It goes without saying that, generally speaking, an employee's first act of misconduct, even if serious, would not render a dismissal fair if it was not, in the words of the code, 'of such gravity that it makes a continued employment relationship intolerable'. And, of course, the ipse dixit of the employer that a particular act of misconduct is of such gravity that it makes a continued employment relationship with the employee intolerable is not good enough. In my view **whether or not in a particular case the act of misconduct by the employee is of such gravity that it makes a continued employment relationship intolerable is a question that must be determined by a party other than one of the two disputants**, for example, the court or an arbitrator objectively after taking into account all of the facts and circumstances of the case¹⁰⁸ (Emphasis added)

¹⁰⁷ *Idem* 2152.

¹⁰⁸ (2007) 28 *ILJ* 1507 (LAC) at 1544D-F.

It follows that there is also a need for a clear understanding of what it is that is deemed to make a relationship intolerable and that will be considered in more detail next.

4.5 WHAT MAKES AN EMPLOYMENT RELATIONSHIP INTOLERABLE FOR AN EMPLOYER?

As pointed out before, although (mis)conduct that one employer finds intolerable, may have little or no adverse effect on another, the former's subjective assessment that it caused the intolerability of a continued relationship would be considered afresh by an arbitrator or judge when dealing with an unfair dismissal dispute.

As the South African Constitution has entrenched fair labour practices as a fundamental right and thereby endorsed a norm that is diametrically opposed to the American concept of 'employment-at-will', various South African decisions have referred in the harshest terms imaginable to dismissal as "the industrial relations equivalent of capital punishment"¹⁰⁹; being akin to "a sentence of death"¹¹⁰; "the economic equivalent of the death sentence"¹¹¹ and "the death sentence of industrial relations"¹¹².

Grogan and Myburgh¹¹³ interpret the examples provided in the Code of Good Practice: Dismissal to mean that "[o]ffences such as those listed tend to [destroy a trust relationship] at first instance", while "minor misdemeanors merely erode it". Determining with a higher degree of certainty what circumstances may objectively be deemed sufficient to cause intolerability is therefore of paramount importance. Although Rycroft¹¹⁴ gives specific consideration to a number of factors, namely incompatibility, gross negligence, gross insubordination, incapacity and criminality, a breakdown in trust and serious misconduct, as examples of such circumstances, only the latter two are relevant to the present research and are considered in more

¹⁰⁹ *MAN Truck & Bus (SA) (Pty) Ltd and United African Motor & Allied Workers Union* at 186C p22 FN61.

¹¹⁰ *Sayles v Tartan Steel CC* (1999) 20 ILJ 647 (LC) at 654C.

¹¹¹ *National Construction Building & Allied Workers Union v Natural Stone Processors (Pty) Ltd* (2000). 21 ILJ 1405 (LC) at 1410H.

¹¹² *Pretorius v Rustenburg Local Municipality* (2005) 26 ILJ 2382 (LC) at 2387G.

¹¹³ Grogan and Myburgh (1997) 118 at 123.

¹¹⁴ (2012) ILJ 2274.

detail below. Before analysing the concept of a breakdown in trust, one has to acknowledge that such a breakdown of course presupposes a pre-existing trust relationship. It is therefore necessary to determine firstly how and when such a relationship is established.

4.5.1 The establishment and breakdown of trust

Although the Appellate Division (currently known as the SCA) found in *Council for Scientific & Industrial Research v Fijen* that “it is well established that the relationship between employer and employee is in essence one of trust and confidence¹¹⁵, Rycroft,¹¹⁶ relying on C Norman-Scoble *Law of Master and Servant in SA*,¹¹⁷ states that:

[T]rust is not a definitional requirement of the employment contract and, if anything, 'subordination' emerges from the law of master and servant as the pivotal concern. Nevertheless, it has since become part of our law that if the employer does not trust the employee, that is a symptom that the relationship may have become intolerable.

Taking the analogy of a “symptom” and an illness one step further, it stands to reason that an employer that has lost its trust in an individual employee may be indicative of an employment relationship that has been fatally wounded. It is difficult to envision a functional employment relationship that exists despite a lack of trust. In *Amalgamated Pharmaceuticals Ltd v Grobler NO*¹¹⁸ the employer’s suspicions against his staff (and their resultant dismissal) were solely based on polygraph tests that had showed that they “could be” responsible for stock losses. It was common cause during the review application before the LC that there was actually no credible evidence against them to sustain a guilty finding. Because of the alleged lack of trust, the employer nonetheless resisted their reinstatement. Pillay J was however not prepared to accept that mere suspicion could justify a refusal to reinstate them. She explained:

Whether there is or is not a reasonable suspicion and breach of trust is a factual enquiry and depends on the circumstances of each case ... The mere fact that the applicant does not trust the individual respondents cannot, without more, be a basis for holding that the

¹¹⁵ (1996) 17 *ILJ* 18 (A).

¹¹⁶ *Ibid.*

¹¹⁷ (1956) at 158-9.

¹¹⁸ (2004) 25 *ILJ* 523 (LC).

employment relationship has broken. In a constitutional democracy implicit in the notion of fair labour practice is the obligation to balance the respective interests of the parties. To punish the individual respondents with unemployment, even if this is accompanied with some compensation, without finding them guilty of any wrongdoing is grossly unfair. The breach of trust, if there was such, was not caused by the individual respondents.¹¹⁹

A somewhat lesser standard applies to employees on probation. Item 8(1)(j) of the Code of Good Practice: Dismissal provides that:

Any person making a decision about the fairness of a dismissal of an employee for poor work performance during or on expiry of the probationary period ought to accept reasons for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period.

The rationale behind this provision appears to be that, rather than miraculously appearing on the day that the employment contract is signed by the parties, trust is gradually built up and is strengthened by periods of reliable service and dedication. That, according to Rycroft,¹²⁰ is why during the initial stages of the relationship, the parties proceed “independent of trust” until such time as they can rely on each other. In *Makubalo v Council for Higher Education*¹²¹ Bhoola J said:

The arbitrator found correctly that in evaluating the fairness of the dismissal of an employee on probation in the context of Schedule 8 – The Code of Good Practice: Dismissal (“the Code”), that “one needs to accept less stringent requirements for dismissal as compared to that applicable to tenured employees”.

The LC therefore confirmed the principle that less stringent requirements apply when determining the fairness of the dismissal of an employee on probation. Rycroft argues that this supports his theory that the trust relationship is being established during the period of probation.¹²² His argument does not seem to cater though for the fact that not all employment contracts provide for a period of probation.

4.6 CONCLUSION

Despite the relative importance of intolerability in determining the fairness of a dismissal at arbitration stage, an employer is not expressly required to prove intolerability at an internal disciplinary enquiry. The requirements to be met at that

¹¹⁹ At 525H-J.

¹²⁰ 2012 *ILJ* 2274.

¹²¹ [2010] JOL 25063 (LC) para 16.

¹²² 2012 *ILJ* 2275.

stage are contained in Item 7 of the Code of Good Practice. They are merely to prove that the employee contravened a workplace rule that is valid or reasonable, of which the employee was aware, or could reasonably be expected to have been aware, which has been consistently applied and for the contravention of which dismissal is an appropriate sanction.

Various factors may play a role in determining whether or not a dismissal is appropriate in a particular set of circumstances. Those factors include the employer's policy, a consistent past practice of dealing with a particular form of misconduct in a particular way, a commercial rationale (e.g. sound risk management principles), deterrence, or, sometimes the intolerability of a continued relationship.

As a result of the provisions of Section 193(2)(b) of the LRA evidence tendered at an arbitration about intolerability, may not guarantee a finding that the dismissal was fair, but may at least succeed in avoiding reinstatement of the offending (former) employee.

When determining whether a continued employment relationship would be intolerable, the test to be applied should be if there had been conduct, without reasonable cause, which is calculated or likely to destroy, or seriously damage, the relationship of confidence and trust between parties. The employee's misconduct has to be evaluated holistically to determine whether its effect, judged reasonably and sensibly, is such that the employer cannot be expected to put up with it.¹²³

Van Niekerk aptly summarises the approach that is called for post the Constitutional Court's decision in *Sidumo* by stating that the need to balance the employer's interests (expressed by the reasons for dismissal) with those of the employee (expressed by challenge to the fairness of the dismissal) is at the centre of the enquiry. The departure point is that both employer and employee are "the beneficiaries of the constitutional right to fair labour practices, and that the enquiry commences with the scales evenly balanced".¹²⁴

¹²³ Rycroft (2012) *ILJ* 2287.

¹²⁴ Le Roux and Rycroft *Reinventing Labour Law Reflecting on the first 15 Years of the Labour Relations Act and Future Challenges!* (2012) 112.

CHAPTER 5

THE RED SYSTEM INTRODUCED AND MAINTAINED BY THE BANKING ASSOCIATION OF SOUTH AFRICA

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5.1 INTRODUCTION

The importance of honesty for bankers that deal with the public’s money can hardly be overstated. A brief reference to the provisions of the Banks Act¹²⁵ should suffice. When dealing with determining whether a particular person is a fit and proper person to hold the office of a director or an executive officer of a bank, the Act specifically directs the Registrar to have regard to the qualities of probity, competence and soundness of judgment and diligence of the person concerned.¹²⁶ In order to achieve that, the Act enjoins the Registrar to consider amongst others, whether the candidate was convicted of the offence of fraud or any other offence of which dishonesty was an element, or has contravened the provisions of any law appearing to the Registrar to be designed for protecting members of the public against financial loss due to the dishonesty or incompetence of, or malpractices by persons engaged in the provision of banking, insurance, investment or other financial services.¹²⁷

¹²⁵ Act 94 of 1990.

¹²⁶ S 1(1A)(a).

¹²⁷ S 1(1A)(b).

5.2 ORGANISATIONAL BACKGROUND

The Banking Association of South Africa (“BASA”), previously known as the Banking Council of South Africa, is an industry body incorporated during 1992.¹²⁸ It claims to represent all registered banks in South Africa (i.e. both South African and international banks). Its Main Board comprises of the Chief Executives of the five largest South African banks, as well as two representatives each from international banks and other South African banks respectively.¹²⁹ Its functions are fulfilled by no fewer than 19 committees. For present purposes the Industrial Relations Committee is the only one of relevance. One of its functions is to “manage the implementation of the Register of Dismissed Employees database”.¹³⁰

During or about 1999 the so-called “RED system” was introduced. Over the ensuing years the acronym referred to different names used in respect of the same system that varied from “Register for Dismissed Employees”, “Register of Dismissed Employees”, “Register of Employees Discharged for fraudulent conduct” in the late-1990s and more recently, simply “Register for Employee Dishonesty”. The system involves creating and maintaining a database. Member banks who have signed a participation agreement essentially agreed to have the names of staff members who had been dismissed for dishonesty loaded onto the central database maintained by BASA. Each participant is entitled to submit names of applicants for employment to BASA in order to determine whether such an applicant may have been dismissed for dishonesty by another participant (BASA member).

The aim of the database is to serve as an employment screening tool¹³¹ and participants specifically agree not to exclude candidates from the recruitment process who may be listed on the database, solely because of the fact of their listing. When dealing with the available case law, further reference will be made to this aspect.¹³²

¹²⁸ 1992/001350/08.

¹²⁹ BASA website (<http://www.banking.org.za/index.php/about-us/board-members/>.)

¹³⁰ BASA website (<http://www.banking.org.za/index.php/about-us/committees/>).

¹³¹ *Muthusamy v Nedbank Ltd* (2010) 31 ILJ 1453 (LC) at 1455A.

¹³² See para 5.3 to 5.5 below.

As the name suggests, the system initially only provided for the capturing of data in respect of employees who had actually been dismissed for dishonesty. As is the case with debarment in terms of the Financial Advisory and Intermediary Services Act,¹³³ that is discussed in chapter 6 below, employees soon seem to have realised that they could avoid the consequences of their names being listed on the database by resigning or absconding before the employer could dismiss them. Another scenario for which the original agreement had not catered, is encountered when the alleged dishonesty is only discovered after an employee had already left the participating bank's employ.

Shortly after 2000 BASA therefore amended the terms of the underlying agreement to include provision for the listing of the names of those who had been found to be dishonest, despite the fact that at the time of such finding they may no longer have been in the employ of a participating bank. Despite the references to the RED system in a number of law reports, the rules thereof do not appear on the BASA website. A copy of the so-called "Guidelines for implementation" was annexed to the respondent's papers in *Muthusamy*. For ease of reference, a copy thereof is attached, marked **Appendix 1**.

In an attempt to deal fairly with those affected by such an extension to the scope of the system, the participants agreed to conduct an enquiry similar in procedure to what would have been the case in a normal disciplinary enquiry.¹³⁴ The most important distinction being that while the purpose of a disciplinary enquiry would include imposing some form of disciplinary action or sanction on those found guilty of misconduct, the purpose in respect of those whose employment relationship with the participating bank had already been terminated, would solely be to establish (with a view to determine whether or not to list them on the database) if they had indeed been guilty of dishonesty and if so, whether such dishonesty would have justified dismissal.

Enquiries convened for the latter purpose are commonly referred to in the industry as "post-termination enquiries". Participating banks therefore invite and even

¹³³ Act 37 of 2002.

¹³⁴ Appendix 1 at 2.

encourage former employees to attend these enquiries despite the fact that the employment relationship had already terminated.¹³⁵ Based on the writer's own research, significant numbers of former employees accept the invitation and participate in the ensuing enquiries. The agreement between the participating banks does however provide for such enquiries to proceed (as is the case with regular disciplinary enquiries) in the absence of the former employee if, after proper service of a notice to attend, the individual fails to attend or to seek a postponement.¹³⁶

In those cases where findings of guilt are made, participating banks proceed to list the details of the affected former employee in the same manner that would apply if any employee were to be dismissed for dishonesty. The fact of the listing being the result of a post-termination enquiry, as opposed to a regular disciplinary enquiry, is however communicated to the administrators of the database.

It is against this backdrop that one has to consider the legal implications associated with BASA's administration of the database, as well as the participating banks' contribution of data and access to the data available on the system.

While no specific rule of law either expressly sanctions or prohibits the conduct of the parties set out above, various common law rules and statutory provisions could potentially impact on the arrangement. The most obvious is that of wrongful interference with freedom of occupation. In testing the legality of the system, various other potential causes of action may be explored, such as defamation, breach of privacy and delictual liability based on negligence. The latter three however fall outside of the scope of the limited research presently undertaken.

A key factor to be taken into account in respect of such potential causes of action, is the element of consent. The agreement between BASA and the participating entities provide for the incorporation of the agreement into the participants' employment contracts with its employees and/or its human resource policies. On that basis it is contended that individual employees agree on accepting employment with any of the participants, to those actions that may be performed in terms of the RED agreement

¹³⁵ *Muthusamy v Nedbank Ltd* (2010) at 1455D – E.

¹³⁶ *Muthusamy v Nedbank Ltd* (2010) at 1455E.

during the course of their employment with the participating entity. A specific clause is further included that provides that the individual's consent would survive the termination of the employment agreement. Furthermore, the implementation of the system has also been agreed with the trade unions that enjoy organisational rights with the banking sector.¹³⁷

5.3 CONSTITUTIONALLY ACCEPTABLE?

One of the fundamental rights contained in chapter 2 of the Constitution of the Republic of South Africa¹³⁸ is that “[e]very citizen has the right to choose their trade, occupation or profession freely”. However, the very next sentence provides for a very significant qualification in that it provides that “[t]he practice of a trade, occupation or profession may be regulated by law”.¹³⁹

Currie and De Waal state that the right contained in Section 22, although framed as an individual right, also has a different dimension in that the public has an interest in the ability of individuals to earn their own living, rather than being dependent on public funds. The public is also entitled to benefit from the skills of all individuals.¹⁴⁰ The same authors point out that Section 22 should be interpreted to afford “some protection against arbitrary regulation of an occupation”.¹⁴¹

They point out that the Constitutional Court has ruled that legislation, such as the Harmful Business Practices Act¹⁴² constitute “a praiseworthy governmental objective to protect consumers from exploitation,” and is therefore acceptable despite the fundamental right contained in Section 22.¹⁴³

The rights contained in the Bill of Rights are in any event not absolute and the regulation of those rights, such as that provided for in Section 22, is specifically provided for in Section 36:

¹³⁷ Appendix 1 at 1; “Integrity of RED on Trial” (2010) Vol 32 No 1 *SASBO News* 2.

¹³⁸ 108 of 1996.

¹³⁹ S 22. See also Van Jaarsveld and van Eck *Kompendium van Arbeidsreg* (2006) at para 66 and 263 and the authorities cited there.

¹⁴⁰ Currie and De Waal *The Bill of Rights Handbook* (2010) 491.

¹⁴¹ *Idem* 493.

¹⁴² 71 of 1988.

¹⁴³ *Idem* 495.

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights¹⁴⁴

Applying the limitations clause contained in the Interim Constitution,¹⁴⁵ Chaskalson P explained the approach to be followed as follows:

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1). The fact that different rights have different implications for democracy and, in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis.¹⁴⁶

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*¹⁴⁷ the Constitutional Court (per Ackerman J) explained the approach to limitations placed on fundamental rights as follows:

The balancing of different interests must still take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose.¹⁴⁸

More recently the Constitutional Court followed that same approach in *Johncom Media Investments Ltd v M*¹⁴⁹ where it had to deal with the tension between the right to freedom of expression and the blanket prohibition against publication contained in Section 12 of the Divorce Act 70 of 1979¹⁵⁰. It did the same in *Twee Jonge Gezellen*

¹⁴⁴ S 36 of the Constitution of the Republic of South Africa.

¹⁴⁵ S 33(1) of Act 200 of 1993.

¹⁴⁶ *S v Makwanyane* 1995 (2) SACR 1 (CC) at 43C – E.

¹⁴⁷ 1999 (1) SA 6 (CC).

¹⁴⁸ At 31 C – E.

¹⁴⁹ 2009 (4) SA 7 (CC).

¹⁵⁰ At 15F – 16C.

*(Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank*¹⁵¹ when dealing with a challenge to the common law remedy of provisional sentence.¹⁵²

5.4 PRE-CONSTITUTIONAL PRONOUNCEMENTS

Long before the advent of constitutionalism in SA, a similar approach was followed by Howie J (as he was then) in *Hawker v Life Offices Association of South Africa*.¹⁵³

Because of the distinctions to be relied on between the facts of Hawker's case and the current situation in the financial services industry, it is necessary to delve into Howie J's summary of the facts of the matter in some detail.

In that case the applicant, a life insurance representative, had resigned from his employment with an insurer but, as a result of certain incidents during his tenure of office, his former employer gave him what used to be referred to by members of the Life Offices Association of South Africa ("LOA") as an "S reference". This indicates that he is unfit to sell life insurance.¹⁵⁴ His former employer, who was bound to do so as a member of the LOA, caused this reference to be recorded in the register maintained by the LOA for that purpose.

The consequence of such registration is that, by reason of the terms of the LOA's intermediaries' agreement, the parties to which are all members of the LOA, no member may employ a person such as the applicant as an intermediary. Furthermore, no member may accept new business from him or pay him commission. Howie J found that "[e]ffectively, this is a ban on applicant's working for the vast majority of life insurers, and a great number of brokers. In terms of LOA rules the duration of the ban is 20 years but one may apply for a review five years after a ban is imposed."¹⁵⁵

On the facts of the matter the court found that being bound by the S referencing system did not form part of the applicant's employment agreement with his former

¹⁵¹ 2011 (3) SA 1 (CC) – at 5419C – E.

¹⁵² 108 of 1996.

¹⁵³ 1987 (3) SA 777 (C) 19.

¹⁵⁴ 779E-F.

¹⁵⁵ 778D –H.

employer. As a result, the court found that the matter was not governed by contract, but by the common law and that the employer's decision thus, "even if bone fide, must not be unreasonable".¹⁵⁶

In the course of his judgment, Howie J addressed a number of issues that, especially considering the dearth of case law on the matter, are crucially important for the way in which both the RED database and the FAIS debarment systems are run and are therefore quoted quite extensively. Those include the nature of the enquiry, reasonableness of imposing the sanction, the nature of the dishonesty, the impact of the dishonesty, as well as unlawfulness and proportionality. The latter relates to a weighing up of the competing interests of the industry, the public and the former employee. Each of these are dealt with separately below.

5.4.1 The nature of the enquiry

On the facts of the matter, there was a significant dispute between the parties about what had happened between the applicant and his client, who had complained about him. The respondent (the LOA) saw fit to deal with the matter without affording the applicant an opportunity to face his accuser, or to cross-examine him. It made its decision solely on the basis of correspondence.

The Court found that is not necessarily expected of the LOA to hold an enquiry that would attain "forensic standards of procedure or adjudication". However, it believed that where there are such conflicts of credibility, reasonableness require that the officials responsible for taking the essential decision (i.e. whether or not to impose the S reference) should hear and, if necessary, question the persons concerned.

In this respect it referred to the LOA's own procedures that urge its members to hold a "full investigation". Not surprisingly, given the LOA's failure to follow its own procedures, the Court found:

¹⁵⁶ p785 D.

In the instant matter there was nothing more than 'scrutiny' of the documentation ... what preceded applicant's S reference was a cursory trial by correspondence. In the circumstances of the case that was unreasonable.¹⁵⁷

5.4.2 Reasonableness

It was argued on behalf of the applicant that the effect of imposing an S reference on him was not in keeping with the seriousness of the conduct attributed to him.

The Court therefore formulated the key question to be answered as whether the applicant had shown that the imposition of an S reference for the particular misconduct had been “unreasonable”.¹⁵⁸

5.4.3 The nature of the dishonesty

The court appeared to have been persuaded to accept in the applicant's favour that it had not been shown that greed had motivated his conduct and that he had not benefited financially from his dishonest conduct. This appears to be a much more sustainable approach than that which is discussed in paragraph 5.4.5 below. Instead of trying to force clearly dishonest conduct into a different classification, the Court accepted it to have been dishonest, but seems to have taken that into account in the applicant's favour almost as a mitigating factor that he did not seek to derive financial gain from his conduct.

It said:

Applicant was not covering up unlawful conduct on his part. He was, as I have said, dishonestly concealing an instance of his own inefficiency. But he was not seeking to mislead Meaker or any other member of the public or to secure a monetary gain or to cause respondent loss.¹⁵⁹

5.4.4 The impact of the dishonesty

Similarly, the Court was quite prepared to accept that the applicant's employer had every reason to disapprove of his conduct and said that his falsification of a letter and preparing of a false memorandum were “quite understandably unacceptable” to his superiors. It confirmed that he stood to be disciplined for it. However, it was

¹⁵⁷ p785 I.

¹⁵⁸ p788A.

¹⁵⁹ p788D.

much more reluctant to accept that it merited preventing him from pursuing a career in insurance for a period of 20 years.

Howie J expressed his reservations in this regard as follows:

Such conduct may well have merited dismissal in the view of some but that is not the question. The question is whether it warranted the imposition of what is, for practical purposes, a bar from virtually the industry for a probable 20 years.¹⁶⁰

In effect this once again suggests the need to evaluate the impact of the dishonesty on the employer and its business when considering what steps would be appropriate in the circumstances.

5.4.5 Unlawfulness and Proportionality: Weighing up the interests of the industry, the public and the former employer

The Court specifically dealt with both the public interest and that of the industry in ensuring that dishonest conduct by people like the applicant is dealt with appropriately. In this regard it found:

As to the interests of respondent, the industry and the public, this 'offence' was rightly considered unacceptable conduct. Had applicant not already resigned, dismissal would have been a reasonable measure. **Apart from dismissal, however, an adverse report lawfully given by respondent to prospective new employers would have sufficed, in my view, in this particular case, to protect the industry and the public. If on receipt of such report other insurers chose not to employ applicant, he could not complain; that would be their unfettered choice, not their obligation.**¹⁶¹ (Emphasis added)

In explaining how an appropriate balance should be struck between the competing interests of the parties, the Court suggested a proportionality test in order to determine the appropriate action to be taken. In doing so, it also emphasised the public interest:

The community at large, in formulating its legal convictions, its *boni mores*, would have regard to all the foregoing features concerning the conflicting interests of the parties and the interests of the industry. It would also take into account the disproportion between the 'offence' and the punishment imposed. It is in the public interest that dishonesty be effectively and firmly dealt with, especially in an industry where so much is done in the strength of information given and taken in good faith. It is also in the public interest, however, that trained personnel with ability be not lost to the industry and that, as far as it is reasonable to allow, a man be at liberty to pursue his chosen calling.¹⁶²

¹⁶⁰ p788I – 789A.

¹⁶¹ p790C – E.

¹⁶² p790 E – F.

Having applied this test, the court found that giving applicant an S reference was so disproportionate to the applicant's misconduct that the LOA's action was unreasonable and therefore, "delictually speaking", wrongful.¹⁶³

Almost 24 years after the decision in *Hawker*, the LC dealt with what amounted to a challenge to the effect of the application of the RED system in *Ehrke v Standard Bank of SA*.¹⁶⁴ A brief summary of the facts is required before dealing with some of the implications of the decision. Applicant was employed as a consultant in Standard Bank's home loan division and at the time of the alleged misconduct had been put on a performance improvement programme.¹⁶⁵ Because the applicant was worried that one of his clients might complain about him to management, he agreed to meet with the client at a time when he was actually required to attend a bank function. To justify his absence from the function, he lied to his manager by claiming that he had to meet with a client who was about to leave for the USA and therefore required urgent attention. A couple of days later he repeated the same lie to his manager and another bank employee.¹⁶⁶

He was summoned to a disciplinary enquiry and charged with dishonesty. He pleaded guilty, was found guilty, dismissed and his name put on the RED register.¹⁶⁷ He referred a dispute to the CCMA, but his dismissal was ruled to be substantively fair. On review to the Labour Court it was argued amongst others that the applicant's actions did not amount to dishonesty and did not justify a listing on the RED database or debarment (referred to in the judgement as "disbarment") in terms of the FAIS Act. It was further contended that the 'untruth' that the applicant had told, caused no harm and could be described as a "white lie".¹⁶⁸

The court made the following observations regarding the RED database, apparently based solely on the evidence that the applicant had tendered before the CCMA:

¹⁶³ p 790 G.

¹⁶⁴ (2010) 31 ILJ 1397 (LC).

¹⁶⁵ p 1398 J – 1399 A.

¹⁶⁶ p 1400 A – H.

¹⁶⁷ p 1401 A – B.

¹⁶⁸ p 1401E – H.

- his name was also put on the register of employees dismissed for dishonesty (RED), which is an interbank blacklist.
- Banks that are members of RED system in practice do not employ a person listed on that list. The listing is for life and it does not expire. The name of a former employee who has been put on that list remains there for good unless the conviction for dishonest conduct is overturned.
- This effectively means that the former employee who has been put on the list is most unlikely to ever find employment in the financial services or the banking sector for the duration of his life.
- Indeed the applicant states that after his conviction, listing and dismissal as aforesaid he has applied for work at all the major banking institutions in the country but he has not been able to secure any employment because of his RED listing.¹⁶⁹

Considering the stated objective of the RED database to serve as an employment screening tool, the use of the term “blacklist” may arguably be not only misleading, but also incorrect.

Although no such evidence was tendered in this particular matter at the CCMA, BASA maintains that there are numerous examples of people who have been employed by banks that are participants in the RED database, despite their names being listed on the database. To that extent the possibility of being unable to find employment in the financial services or banking sector could hardly be laid squarely at the door of the RED database. Put differently, whilst there is no prohibition of any kind preventing businesses in general from appointing former convicts, the mere fact of the previous conviction or incarceration may well, if known to the prospective employer, make it at least more difficult for such applicants to find gainful employment. Whatever the applicant may subjectively have believed the reason for his failed attempts to find a job were, the RED implementation guidelines make it abundantly clear that an applicant should not be refused employment solely because his or her name happens to appear on the database.

Shortly after the *Ehrke* decision was delivered¹⁷⁰, BASA changed the rules of the system to reduce the period for which a person’s details would be stored on the database to 10 years. Despite the complaint contained in the applicant’s founding affidavit about debarment in terms of the FAIS Act¹⁷¹, there is no further reference in the court’s judgment to that issue.

¹⁶⁹ 1401B – D.

¹⁷⁰ 22 January 2010.

¹⁷¹ Mentioned at 1401G.

In what appears to be the court's attempt to illustrate a lesser degree of blameworthiness on the part of the applicant, it sought different ways of referring to the applicant's lies. It started out by observing that:

[N]ot every lie would constitute the type of dismissible dishonesty that is envisaged in the first respondent's code of conduct set out above. He recognizes that there are situations where, for example a young employee finds himself in a position where he has to tell a 'white lie' to a supervisor for being a few minutes late, or where during business hours he dashes to a girlfriend's office for a cup of coffee. Such lies are not too serious and they may well be for an understandable or forgivable motive where the 'misleading' does not really go to the heart of the trust relationship. In my view, and taking into account all the circumstances surrounding the telling of the lie in issue herein, a reasonable decision maker would conclude that the lie falls in the category of such 'white lies'.¹⁷²

These remarks create the impression that there are different categories of dishonesty – at least – dismissible and non-dismissible dishonesty.

Zilwa AJ then made what is arguably a rather unfortunate further comment:

Those are hardly the actions of a compulsive liar actuated by dishonesty of such a nature that the trust relationship between him and his employer may be said to be destroyed in consequence of the lie.¹⁷³

Whilst one must agree with the statement that not every lie would constitute dismissible dishonesty, it stands to reason that there is no authority (or logical justification) for the proposition that unless an employee has been proved to be a compulsive liar, his or her lies could never justify dismissal.

In 2013 the period for which a name is retained on the RED database was further substantially reduced to five years. That latest reduction not only softens the impact of RED listing significantly, but brings it in line with the period of debarment provided for in the FAIS Act which is dealt with in Chapter 6 below.

5.5 WHEN IS “INTERFERENCE” PROHIBITED?

In *Ebrahim t/a Broadway Fisheries v Mer Products CC*¹⁷⁴ Williamson J referred with approval to the following dictum from De Villiers JA in *Matthews v Young*:¹⁷⁵

¹⁷² p 1405F – H.

¹⁷³ p 1405H.

In the absence of special legal restrictions a person is without doubt entitled to the free exercise of his trade, profession or calling, unless he has bound himself to the contrary. But he cannot claim an absolute right to do so without interference from another. Competition often brings about interference in one way or another about which rivals cannot legitimately complain. But the competition and indeed all activity must itself remain within lawful bounds. All a person can, therefore, claim is the right to exercise his calling without unlawful interference from others.

5.6 AVOIDING A LISTING THROUGH RESIGNATION

In *Muthusamy v Nedbank Ltd*¹⁷⁶, a senior employee whose conduct had been the subject of an investigation by his employer, resigned when he saw the proverbial “writing on the wall” and realised that he would be disciplined for alleged dishonesty. Despite ruling that the LC did not have jurisdiction to entertain the applicant’s claim, Tip AJ made the following remark:

Indeed, in the present case, the applicant does not mount an attack on the RED system per se but confines himself to the submission that his resignation places him beyond that system's reach. At its most elemental, the applicant says that he has resigned, that he is therefore no longer an employee, that he can hence not be dismissed, and that an essential RED system requirement can consequently not be addressed, being that employees can be entered on the register only if they have been dismissed for a dishonesty related offence. Although I do not decide the point, I would remark that it might be thought a little startling if the underlying purpose of such database - bearing as it does an important public interest ingredient - could be stultified in a particular instance through no more than a resignation.¹⁷⁷

It would appear from these remarks that, based on the public interest being served by the RED system, the court was reluctant to accept that dishonest employees could escape the consequences of their actions merely by tendering a well-timed resignation.

5.7 WHAT CAN PROPERLY BE TERMED “DISHONEST CONDUCT” FOR PURPOSES OF RED?

In *Nedcor Bank Ltd v Frank*¹⁷⁸ the LAC provided the following definition of dishonesty:

Dishonesty entails a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently. (See *Toyota SA Motors (Pty) Ltd v Radebe & others* (2000) 21 ILJ 340 (LAC) at 345F-H; *R v Brown* 1908 TS 21; *R v White* 1968 (3) SA 556 (RA); *Ex parte Bennett* 1978 (2) SA 380 (W) at 383H-384C; *S v Manqina*; *S v Madinda* 1996 (1)

¹⁷⁴ 1994 (4) SA 121 (C) at 125B – D.

¹⁷⁵ 1922 AD 492 at 507.

¹⁷⁶ (2010) 31 ILJ 1453 (LC) at 1456J – 1457B.

¹⁷⁷ At para 9.

¹⁷⁸ (2002) 23 ILJ 1243 (LAC).

SACR 258 (E) at 260e-h and *The Oxford Dictionary*.) In the Canadian case of *Lynch & Co v United States Fidelity & Guaranty Co* [1971] 1 OR 28 (Ont SC) at 37-38, the following was said (per Fraser J):

"Dishonest is normally used to describe an act where there has been some intent to deceive or cheat. To use it to describe acts which are merely reckless, disobedient or foolish is not in accordance with popular usage or the dictionary meaning."¹⁷⁹

Idensohn points out that only "[i]n certain circumstances, employees owe their employers fiduciary duties".¹⁸⁰ She therefore distinguishes between duties that attach to all employees and duties that attach to employees (only) in their capacity as fiduciaries. She also points out that fiduciary duties apply to persons who have some access to or exercises some power in relation to the assets or affairs of another person.¹⁸¹ It follows that those employees who manage client portfolios or render financial advice may often have additional fiduciary duties arising from their employment. The abuse of such positions of trust through undisclosed conflicts of interest may well give rise to allegations of dishonesty.¹⁸²

In *Carter v Value Truck Rental (Pty) Ltd* Grogan AJ held that:

The success of any enterprise depends on the absolute integrity and honesty of its employees, and any form of dishonesty or deception potentially may have more serious and far-reaching consequences at executive level".

He went on to explain that "honesty" in the employment context "does not merely mean refraining from criminal acts; it embraces any conduct which involves deceit". Referring to the decision in *Sappi Novoboard (Pty) Ltd v Bolleurs*¹⁸³ he held that even if the employee did not act dishonestly, but his conduct "was of such a type that it was inconsistent, in a grave way – incompatible – with the employment in which he had been engaged as manager" the employer would be entitled to dismiss.¹⁸⁴

5.8 FURTHER DEVELOPMENTS

Given the similarities between the LOA's S referencing system and the RED system managed by BASA, the former's history since the decision in *Hawker* deserves further attention. In October 2008 the LOA, together with the Association of Collective Investments (ACI), the Investment Management Association of South

¹⁷⁹ 1247D – G.

¹⁸⁰ Idensohn "The Nature and Scope of Employees' Fiduciary Duties" (2012) 33 *ILJ* 1539.

¹⁸¹ *Idem* 1542.

¹⁸² *Herholdt v Nedbank Ltd* (2012) 33 *ILJ* 1789 (LAC)

¹⁸³ (1998) 19 *ILJ* 784 (LAC).

¹⁸⁴ [2005] 1 *BLLR* 88 (SE).

Africa (IMASA) and the Linked Investment Service Providers Association (LISPA) were replaced by a new body, the Association for Savings and Investment SA (ASISA).¹⁸⁵

With this amalgamation ASISA inherited the S reference system from the LOA. However, it no longer accepted recommendations for new S references, but did however deal with those matters reported before 1 October 2008. ASISA published its “Standard on the S Reference System” on its website. For ease of reference, a copy thereof is attached hereto, marked “**Appendix 2**”.

It is clear from Appendix 2 that a number of the refinements had been introduced to the system since the decision in *Hawker*. The importance of the latter decision to the industry is illustrated by the excerpt quoted from Howie J’s judgement in paragraph 3 of Appendix 2. Despite these refinements, it appears from paragraph 5 of Appendix 2 that the S reference system continued to constitute an absolute bar to any new business being done between a member of the Association (traditionally an insurance company or brokerage) and a person on whom an S reference had been imposed.

Paragraph 7 of Appendix 2 highlights the need to balance the requirement to protect the industry against unscrupulous operators against the grave implications that imposing an S reference could have on an individual. While it is understandably reluctant to attempt to define exactly what conduct could result in an S reference being imposed, Annexure A thereto, which is emphasised not to constitute an exhaustive list, includes misrepresentation and dishonesty as primary examples of such behaviour.

Paragraph 8 of Appendix 2 provides for a process to be followed in determining the appropriateness of S reference in particular circumstances. It stipulates that a member (employer) would start with normal disciplinary proceedings before considering whether in the context of the “industry and general public interest” whether or not to recommend the imposition of an S reference.

On receipt of such a recommendation, ASISA submits all the relevant documents to a panel constituted for this purpose. The panel has the authority to inform the

¹⁸⁵ www.asisa.org.za.

affected individual of the recommendation, the reasons for making the recommendation, as well as his rights to hearing and to submit papers in response to the recommendation.

Importantly, paragraph 9.2(k) provides that names added to the register of those on whom an S reference had been imposed will stay on the register for a period of five years. This of course constitutes a major reduction from the 20 year period that applied at the time when *Hawker* was decided.

Paragraph 11 specifically provides for a hearing where both the affected individual and the participant that had recommended that an S reference be imposed are entitled to be heard. Both parties are also allowed representation, although legal representation is specifically excluded. Paragraph 11.4 records the requirement of a fair hearing that includes a fair and reasonable procedure.

Paragraph 13 and 14 respectively make provision for a re-hearing in the event that new evidence is uncovered, as well as the option of review and appeal before a specially established Appeal Board.

Given what appear to be these far-reaching improvements following the criticisms expressed by the Court in *Hawker*, it is telling that there are no examples of reported cases where people on whom an S reference had been imposed, had successfully challenged that measure in court.

5.9 CONCLUSION

Hepple, in his appeal for what he termed a “Rights-based ‘regulated flexibility’ ”, advocated that “[e]mployers and workers must have the space in which to adopt labour standards to a particular sector or workplace over time”.¹⁸⁶ Given the buy-in of organised labour into this system devised by an employer body, the RED system could arguably be viewed as a manifestation of such “regulated flexibility”.

The RED system appears to have benefited from most of the important refinements that had been made to the former LOA’s S referencing system. The most important

¹⁸⁶ *Reinventing Labour Law Reflecting on the first 15 Years of the Labour Relations Act and Future Challenges* (2012) 13.

procedural distinction that remained is that in the case of RED, it is the finding by a disciplinary tribunal that triggers an individual's listing. It follows that if that finding is set aside by the CCMA, the LC, LAC or another court, the basis for a listing simultaneously falls away. In that way it provides for a simplified process in that it is not necessary to duplicate hearings or appeals for that matter.

The most important substantive difference between RED and the S reference system in its final format is that whereas the former remains but a factor to be considered when evaluating candidates for employment, the latter constituted an absolute bar to participation in the industry.

It is submitted that in the circumstances RED complies with all the requirements of South African law and does not offend against any of the principles set out in the ILO instruments discussed above.

CHAPTER 6

DEBARMENT AND THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT

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6.1 INTRODUCTION

The Financial Advisory and Intermediary Services Act¹⁸⁷ (FAIS) introduced a number of significant new structures to the financial services industry in South Africa.¹⁸⁸ While it is not necessary for present purposes to list all of them, the following examples should suffice to illustrate the wide ranging new measures brought about by the promulgation of the Act:

- provision for the compulsory registration as a financial services provider (FSP), coupled with a prohibition on acting as an FSP without the appropriate license;¹⁸⁹
- introduction of so-called “fit and proper” characteristics;¹⁹⁰
- setting of minimum requirements for representatives of FSPs;¹⁹¹
- provision for dealing with FSPs and their representatives that fail to comply with the requirements of the Act and the respective codes of conduct provided for in the Act;¹⁹²
- creation of an Ombud for financial service providers.¹⁹³

¹⁸⁷ Act 37 of 2002.

¹⁸⁸ Swanepoel *FAIS 2010: The Paradigm Shift* (2009) 1.

¹⁸⁹ S 7 of the FAIS Act 37 of 2002.

¹⁹⁰ S 8(1) of the FAIS Act 37 of 2002.

¹⁹¹ S 13 of the FAIS Act 37 of 2002.

¹⁹² S 14 and 14A of the FAIS Act 37 of 2002.

¹⁹³ S 20 of the FAIS Act 37 of 2002.

It would appear that FAIS is aimed primarily at the protection of investors against unethical or ill-informed financial services providers and the advisors that represent them.¹⁹⁴ Du Toit highlights the Act's aim that FSPs and their representatives should act "fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry".¹⁹⁵

To explain the problem FAIS is meant to address, Millard quotes the words of an old song by Billy Joel:

Honesty is such a lonely word, everyone is so untrue. Honesty is hardly ever heard and mostly what I need from you

in what she says could as well be the refrain of a call from the FSB to financial service providers.¹⁹⁶

Different sections of FAIS came into operation on different dates that ranged from 15 November 2002 to 30 September 2004.¹⁹⁷ It seeks to achieve those aims *inter alia* by stipulating competency levels required for selling different types of financial products. It also makes it obligatory for financial advisors to conduct a comprehensive needs analysis before giving advice to their clients. It goes without saying that customers need accurate information to make informed choices.¹⁹⁸ It follows that FAIS can confidently be described as consumer protection legislation.¹⁹⁹

This chapter will focus on the fit and proper requirements contained in section 8 (1) and the debarment provisions in section 14 and 14A.

¹⁹⁴ Moolman *et al* *Financial Advisory and Intermediary Services Guide* (2010) 6.

¹⁹⁵ Du Toit "The FAIS Specific Code of Conduct for Authorised Financial Services Providers and Representatives conducting Short-term Deposit Business and the Bank and Customer Relationship" (2004) *TSAR* 574 at 575.

¹⁹⁶ Millard *So Much Owed by so Many to so Few: How the Financial Advisory and Intermediary's Act 37 of 2002 Addresses "Conflict of Interest"* (2012) 162.

¹⁹⁷ Kloppers *The Regulation of Advice within the Financial Services Sector* (2007) *Obiter* 135.

¹⁹⁸ Van Zyl "Codes of Conduct for the Financial Services Industry" (2006) *TSAR* 510 at 511.

¹⁹⁹ Moolman *et al* (2010) 291 – 29.

6.2 PROCEDURAL MATTERS

While sections 8(1)(a), (b) and (c) deal with personal character qualities of honesty and integrity, competence and ability, and financial soundness respectively, only the former is relevant for present purposes and will be dealt with in more detail below.

Section 8(2) and 8(3) contain provisions that are aimed at assisting the Registrar in making an informed decision on the issues referred to in section 8(1).²⁰⁰

Section 8(6) requires the Registrar to notify an applicant whose application is refused of such refusal, as well as to furnish the applicant with reasons for the refusal. The significance of this is that the FAIS Act specifically provides for an appeal by any person who feels aggrieved by any decision by the Registrar to an Appeal Board, created in terms of the Financial Services Board (FSB) Act.²⁰¹

6.3 FIT AND PROPER

Section 13 lays the table for the enforcement of the fit and proper provisions. It does so by prohibiting an individual from providing financial services on behalf of another, unless the latter is an authorised FSP and by requiring such individual to be able to provide written proof from the FSP that he/she is employed or mandated by the FSP to represent it and that the FSP accepts responsibility for his/her activities.²⁰²

²⁰⁰ S 8(2) and 8(3) read as follows:

(2) The registrar may-

(a) require an applicant to furnish such additional information, or require such information to be verified, as the registrar may deem necessary; and

(b) take into consideration any other information regarding the applicant, derived from whatever source, including the Ombud and any other regulatory or supervisory authority, if such information is disclosed to the applicant and the latter is given a reasonable opportunity to respond thereto.

(3) The registrar must after consideration of an application-

(a) if satisfied that an applicant complies with the requirements of this Act, grant the application; or

(b) if not so satisfied, refuse the application.

²⁰¹ S 39 of the Financial Services Board Act 97 of 1990.

²⁰² S 13(1) of the FAIS Act 37 of 2002. See also Kloppers (2007) *Obiter* 136.

The next step in ensuring compliance is achieved by imposing an obligation on an FSP to be satisfied “at all times” that its representatives comply with the fit and proper requirements contained in section 8 (1) when rendering a financial service on behalf of the FSP, as well as to ensure that they comply with the applicable code of conduct and other relevant legislation in discharging the duties.²⁰³

FSPs are furthermore required to maintain a regularly updated register of all representatives employed by them.²⁰⁴ It is against this regulatory background that the debarment provisions contained in section 14 and 14A should be viewed.

A key requirement in determining whether or not a representative qualifies as being “fit and proper” is that such a person possesses the character qualities of “honesty and integrity”. “Honesty” entails being free of deceit; truthful and sincere, while integrity includes “the quality of having strong moral principles”.²⁰⁵

Van Zyl explains that the strong focus of the FAIS Act on “fit and proper” requirements follows international regulatory trends in the financial services industry which require management of financial institutions to be conducted by “competent staff of integrity” and that those who carry on the business of an FSP should be “honest, competent and solvent”.²⁰⁶ He points out that unless continuous compliance with these “fit and proper” requirements are monitored, it would induce a false sense of security.²⁰⁷

6.4 DEBARMENT

An FSP is required to ensure that any of its representatives who no longer complies with the fit and proper requirements or who has contravened any provision of the FAIS Act in a material manner, is prohibited from rendering any new financial service.²⁰⁸

²⁰³ S 13(2) of the FAIS Act 37 of 2002. See also Kloppers (2007) Obiter 136.

²⁰⁴ S 13(3) of the FAIS Act 37 of 2002. See also Kloppers (2007) Obiter 136.

²⁰⁵ Hattingh and Millard *The FAIS Act Explained* (2010) 94.

²⁰⁶ Van Zyl *Financial Advisory and Intermediary Services Manual* (2004) 1-53.

²⁰⁷ *Ibid.*

²⁰⁸ *Idem* 105-106.

6.4.1 Debarment by FSP

An FSP is required to achieve this by withdrawing any authority to act on its behalf and by removing the representative's name from the register referred to in section 13(3). Despite such removal of the errant representative's name, the FSP remains responsible to take immediate steps to ensure that the debarment does not prejudice the interest of clients of the representative, and that any unconcluded business of the representative is properly concluded.²⁰⁹

The Act further imposes an obligation on the FSP to inform the Registrar in writing within fifteen days after it has removed the name of a representative from the register. Such a written notice should also include the reasons for the debarment in a format required by the Registrar²¹⁰. For ease of reference a copy of the latest form that the Registrar requires an FSP to complete, is enclosed, marked "**Appendix 3**". It is apparent from the outlay of the form that the Registrar requires details of the FSP's investigation into the circumstances that led to a debarment in that it calls for a transcript of a disciplinary inquiry and a forensic investigation report where applicable.

The Registrar in turn is authorised to make the fact of such debarment, as well as the reasons therefore, known by notice in the Gazette or "any other appropriate public media"²¹¹. Visitors to the website of the Financial Services Board can access a list in Excel format with the names of representatives who had been debarred. On 2 September 2013 that list contained 3446 names in total.²¹² This provides useful perspective on the extent of the problem of dishonesty and the consequent need to take effective steps in order to protect both the industry and the general public.

One of the practical problems with implementing debarment in terms of section 14(1) is that it presupposes a fact-finding process between the FSP who had made the appointment, and the representative so appointed, about the suspected actions of

²⁰⁹ S 14(1) of the FAIS Act 37 of 2002.

²¹⁰ S 14(3) of the FAIS Act 37 of 2002.

²¹¹ S 14(3)(b) of the FAIS Act 37 of 2002.

²¹² www.fsb.co.za.

the representative that had given rise to the belief that he or she may no longer comply with the fit and proper requirements. Assume for example that a client complaint relating to alleged dishonesty by the representative were to reach the FSP in question. In fairness to both the client (complainant) and its employee (representative) the FSP would first collect facts to determine whether, at least on the face of it, there is any merit to the complaint. Assuming further that the FSP, having concluded an internal investigation, then holds the view that there is evidence to suggest that the representative in question may indeed have been dishonest, it would have to convene a disciplinary enquiry to determine the guilt or innocence of the representative.²¹³

Realising that a guilty finding may well lead to not only dismissal (which in itself would make for a rather unpleasant inclusion in anybody's CV), but also to debarment, representatives finding themselves in such a situation often opted to resign before any disciplinary action could be taken. In so doing they managed to terminate the employment relationship, which by definition also meant that they could no longer be viewed as representatives of the FSP. That in turn placed them conveniently beyond the reach of the provisions of section 14(1).

It is clear from the different approaches provided for that FAIS envisioned that FSPs should be licenced (authorised) by, and if the need arises, have their licences suspended or withdrawn by the Registrar, whereas representatives who are appointed by an FSP, should also be debarred by an FSP.²¹⁴

6.4.2 Debarment by the Registrar

In an effort to close the loophole described above, a new Section 14A was inserted in 2008.²¹⁵ Section 14A provides for debarment by the Registrar. It makes provision for the Registrar to debar "a person, including a representative" for a specified period

²¹³ Moolman, Pillai, Bam and Appasamy *Financial Advisory and Intermediary Services Guide* (2010) 87-89.

²¹⁴ Compare the wording of S 9 (Suspension and withdrawal of authorisation) with that of S 14 (Debarment of representatives) of the FAIS Act 37 of 2002.

²¹⁵ S 54 of the Financial Services Laws General Amendment Act 22 of 2008.

from rendering financial services.²¹⁶ The basis on which this authority is given to the Registrar is almost identical to that on which an FSP could debar its representatives, i.e. that the person doesn't meet (or no longer meets) the fit and proper requirements, or that he or she contravened or failed to comply with any provision of the FAIS Act.²¹⁷

The FSB issued a guideline dated 3 March 2011 on how it expects FSPs to deal with debarments in terms of section 14A. The guideline reiterates that an FSP "cannot debar a representative that is no longer in its employ" in terms of Section 14(1) and confirms that the insertion of Section 14A had not changed that.²¹⁸

In giving effect to the new section, responsibility for debarment falls on the Registrar, as opposed to the FSP. To exercise the powers given to it to achieve this purpose, the Registrar nevertheless has to rely on the evidence submitted to it by whoever lodges the complaint.²¹⁹

The guideline also sets out a process to be followed by the Registrar to enable him to decide whether or not to debar. Essentially a process, similar to that which a corporate employer would follow when dealing with an allegation of serious misconduct by an employee, is followed by the Registrar.²²⁰ Some of the key elements are: collecting information about the complaint, notifying the person affected that a decision about possible debarment will be taken, inviting the affected person to provide a response and basing a decision on a consideration of the facts submitted by the complainant and the affected person.²²¹

If a notice of debarment is issued, it has to state the grounds for the debarment, the reasons therefore, as well as the period of debarment.²²² As indicated above, an appeal to the appeals board is also provided for.²²³ A remaining shortcoming

²¹⁶ S 14A(1) of the FAIS Act 37 of 2002.

²¹⁷ S 14A(1)(a) and 14A(1)(b) of the FAIS Act 37 of 2002

²¹⁸ Paragraph 2.

²¹⁹ Paragraph 2. See too Moolman, Pillai, Bam and Appasamy (2010) 87-89.

²²⁰ Paragraph 3.

²²¹ Paragraph 3.1 to 3.7.

²²² Paragraph 3.10.

²²³ S 39 of the Financial Services Board Act 97 of 1990.

highlighted by the guideline itself, is the fact that notices sent to individuals to notify them of the intention to debar, are primarily sent by registered post, but that the majority of those are returned because the addressees failed to collect them.²²⁴

It is clear from the above that debarment, whether by the FSP²²⁵ or the Registrar²²⁶ often has two major factors in common with disciplinary action resulting from alleged dishonesty, namely: an allegation of dishonesty and a fact-finding process to determine guilt, and if applicable, an appropriate sanction. In the case of section 14(1) debarments, the consequence of any employee's dishonest behaviour in the workplace will more often than not be of a dual nature, in that the employment relationship will be terminated through summary dismissal, whereas the status as representative will be terminated through debarment by the FSP (employer).

As indicated above, those employees who are found to have been dishonest, but managed to terminate the employment relationship through their resignation before disciplinary action can be taken, may sooner or later suffer the same consequences as a dishonest colleague who had been dismissed. This is so because debarment in terms of section 14A will probably follow as a result of a report by the FSP (the former employer) to the Registrar.

6.5 THE EFFECT OF DEBARMENT

The next issue to consider is the effect of debarment on the ability of a former representative to earn a living in the field where he or she may have built up certain expertise. The FSB's guideline on the section 14A debarment process, dated 3 March 2011, states that "the period of debarment is dependent on the severity of the transgression and is usually between two and five years".²²⁷

The FSB's annual reports provide valuable insights into the number of debarments effected annually from which certain trends can be gleaned. The first statistic pertaining to debarments that was published by the FSB appears in its 2007 annual

²²⁴ Paragraph 3.17.

²²⁵ In terms of S 14(1).

²²⁶ In terms of S 14A.

²²⁷ Paragraph 3.13.

report which records that 93 representatives were debarred during that year.²²⁸ That number shot up to 242 persons during 2008²²⁹ and 349 in 2009²³⁰. During the 2012 reporting period 578 persons were debarred in terms of section 14(1) and 54 persons were debarred in terms of section 14A. While a total number of 632 persons saw their names added to the register of debarred persons, 80 of those previously debarred were reappointed during the same period.²³¹

The decisions of the appeal board are published on the FSB website and constitute a valuable resource that provides indications of at least three factors that are of importance for this study, namely what is viewed as dishonest for purposes of debarment, what period of debarment is considered to be appropriate and how, once debarred, someone could return to the profession.

The following very brief summaries from four separate rulings of the appeal board is provided to illustrate the manner in which the FSB deals with these requirements:

Robert Jan Picard and Registrar of Financial Services Providers

The Board decided that the requirements of honesty and integrity mean that truthfulness is required, whereas deceit, duplicity and dishonesty are excluded.

Determining whether a person is of sound character involves a moral judgment. In arriving at that judgment, it is necessary to have regard to the manner in which the person has conducted himself not only in his private life, but also in his dealings with those whom he has come into contact with during the course of his business dealings.

²²⁸ FSB 2007 annual report 28.

²²⁹ FSB 2008 annual report 30.

²³⁰ FSB 2009 annual report 30.

²³¹ FSB 2012 annual report 39 - 40.

The Board took into account that the Appellant's conduct reflects negatively on the financial services industry. It also made the point that the integrity of the financial services industry is largely dependent on the public's perceptions. Public confidence in the financial industry would be undermined if persons who have made themselves guilty of dishonest conduct and have displayed a lack of integrity were to be allowed to continue operating in the financial services industry.

Quantum Financial Services and Registrar of Financial Services Providers

The Board reiterated that an FSP must ensure that its representatives and key individuals at all times comply with the personal character qualities of honesty and integrity as outlined Section 13(2) (a) of the FAIS Act.

It pointed out that it is not uncommon to find persons who initially meet all the requirements, but whose long-term intent is to abuse the profession and exploit clients for financial gain. That is why the FAIS provides for the suspension of licenses when the licensees no longer meet the requirements contemplated in Section 8.

The Board referred with approval to the decision in *Tatam v Haslar* (1889) 23 Q.B.D. 345 where Denman J referred to what Lord Blackburn said in *Jones v Gordon* (1877) 2 App. Cas. 616 (HL) concerning the difference between negligence and dishonesty. It remarked that Lord Blackburn had pointed out that a distinction must be drawn between a person who was "honestly blundering and careless" and one, "who has acted not honestly", that is, not necessarily with the intention to defraud but not with an honest belief that the transaction was a valid one.

The Board quoted the following from *Jones v Gordon* at 629 in respect of a person who was

[N]ot honestly blundering and careless, but [who] must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind — I suspect there is something wrong, and if I ask questions and make further enquiry, it will no

longer be my suspecting it, but my knowing it and then I shall not be able to recover — I think that is dishonesty.

Labuschagne and Registrar of Financial Services Providers

The Board highlighted the strong focus of FAIS on “fit and proper” requirements and stated that the main goal of institutional safety and soundness implies that management of financial institutions must be conducted by “competent staff of integrity”, and that, on an individual basis, persons who conduct the business of an FSP should be fit and proper in the sense of being “honest, competent and solvent”.

Jaco Nel and Registrar of Financial Services Providers

In this case the appellant sought re-entry into a FAIS affected position. In determining his fitness to do so, the Appeal Board ruled that it had to determine whether the Applicant, who had admitted his previous wrongdoing, has integrity and has been” properly and permanently reformed to such an extent that he will never again fall foul of criminal behaviour and/or lack of resistance to the temptation to further his own interest and those of his clients”.

In doing so, the Appeal Board would apply the test formulated by the courts for the readmission of an attorney who had previously been struck from the roll. That means that the Applicant bears the onus to establish on a balance of probabilities that he has undergone a genuine, complete and permanent reform; that the defect of character that led to him previously being struck off, no longer exists; and that if readmitted, he will conduct himself as an honourable member of the profession.

Factors to be considered in determining whether these facts had been proved, include:

- the nature and degree of the conduct that occasioned the initial removal (debarment in the FAIS context);
- the explanation furnished for such conduct;
- his actions in regard to any enquiry into his conduct;
- the lapse of time between the removal (debarment in the FAIS context) and his application for re-admission;
- his activities subsequent to his removal; and

- the expression of contrition and his efforts at repairing the harm caused to others by his conduct.

6.6 CONCLUSION

Much has been done by the FSB, as the primary regulator in the industry, to ensure that the industry enjoys the faith of the public in the industry as a whole and in the various FSPs that render financial services. The law reports reveal a small number of challenges to the way in which the FSB has exercised its statutory powers. In fact, the major criticism levelled against the FSB relates to its alleged failure to prevent harm to consumers, by stepping in earlier to stop unlawful practices before losses to the public ballooned out of control.

The biggest losses two members of the public however seem to occur as a result of persons and entities who are not registered as FSPs in the first place and therefore don't submit to the rigorous registration and regulation processes of the FSB.

The research into the debarment options has not revealed any matters that could convincingly be said to offend against either of the applicable Constitutional or ILO principles. If implemented in accordance with the current provisions of both the FAIS Act and the regulations made in terms thereof, the system has by all accounts succeeded in striking a fair balance between the interests of the public and that of individuals acting as representatives for purposes of FAIS.

CHAPTER 7

CONCLUSION

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7.1 INTRODUCTION

During the course of this research various forms of regulatory measures have been identified. Those measures include instruments that have their origin both in and outside of South Africa. The international norms to be considered for present purposes include ILO Convention No. 158 and Recommendation No. 166.

Locally, the sources of regulation include the constitution, legislation (particularly in the form of the LRA and FAIS), the Code of Good Practice: Dismissal, regulations issued under FAIS, as well as arbitration awards issued by the CCMA, and court decisions.

In the summary, each of the identified consequences of dishonesty has been tested against these measures that effectively function as a yardstick for these purposes.

7.2 DISMISSAL

In chapter 3 above it has been established beyond any doubt that ILO Convention No. 158, although not formally ratified by South Africa, has already played a surprisingly influential role in shaping not only the wording of the LRA, but also finding favour with the courts, at all levels, up to and including the Constitutional Court.

The principles underlying South African dismissal law have therefore been shaped and refined in accordance with these internationally formulated instruments. There is

no reason to doubt that any dismissal of a worker employed by a person or entity within the jurisdiction of a South African court would consequently enjoy all of the protection envisaged by the drafters of ILO Convention 158.

7.3 LISTING ON THE RED DATABASE

The RED database created and maintained by BASA and its member banks has to be treated somewhat differently, at least because it involves the administration of an employment related measure, operated and regulated entirely by and within the private sector. Put differently, it has no legislative support.

As a result, the operation of the system has been tested above against both the international and South African norms. Given the fact that listing of a candidate on the database depends on a guilty finding, either at a conventional disciplinary enquiry, or in exceptional circumstances at a so-called post termination enquiry that in all material aspects mimic the procedures followed during a conventional disciplinary enquiry, it is argued that on that score alone, it is at least no more objectionable procedurally speaking than any other dismissal for dishonesty.

All those dismissed following a conventional disciplinary enquiry, have the option of a referral of a dispute to the CCMA (the equivalent of an appeal for purposes of ILO convention 158). Were they to succeed at the CCMA, or any court that may deal with a subsequent review, or appeal, such success would on the face of it only affect the dismissal that had been alleged to be unfairly. However, since the RED listing is dependent on a finding that the individual was guilty of dishonesty, having that finding set aside, automatically removes the basis for a RED listing. There is consequently no need for a special appeal process to deal specifically with the merits of a RED listing for this category of employees.

Those facing a post-termination enquiry convened for purposes of deciding on whether or not they had been guilty of dishonesty during the period of employment and on that basis ought to have their names listed on the database, may well complain that they do not have a similar opportunity of an appeal. This is so, because the finding of the tribunal convened by the former employer is not called upon to decide on a sanction, such as dismissal, since the employment relationship

had already been terminated. That was the basis for the LC's finding in *Muthusamy*²³² that it lacked jurisdiction to hear the matter.

One can therefore predict with a fair amount of certainty that the CCMA, being a creature of statute, would similarly lack jurisdiction to hear a dispute about a matter where the relief sought falls outside the scope of what it is empowered to award, namely reinstatement, re-employment, or compensation.²³³ The matter doesn't end there though. The long series of decisions dealing with the jurisdiction of the High Court and Supreme Court of Appeal in matters related to employment issues, never excluded access to the High Court to matters which the LRA had not specifically assigned to the specialised structures provided for in it. There is consequently no existing legal precedent that prevents an aggrieved party from approaching the High Court to review proceedings before a tribunal that had found the applicant guilty of dishonesty that may result in a listing of the applicant's name on the RED database. In chapter 5 the requirements listed by Howie J in *Hawker*²³⁴ have already been dealt with in some detail. The conclusion there that the system complies in all material respects with the requirements of the prevailing legislative prescripts therefore still seems valid.

Two potentially contentious matters may arise though. It could be argued that only those who are found guilty of dishonesty that is considered so serious on the particular facts of the matter that it also justifies dismissal, ought to be listed on the database. Put differently, if a person is found guilty of dishonesty, but is retained in the employment of the employer that had brought the allegations of dishonesty in the first place, such a person may convincingly argue that the dishonesty of which he or she had been found guilty is therefore also not of a sufficiently serious nature to justify a RED listing. It remains to be seen whether BASA in its continued refining of the system would make any amendments to the implementation guidelines to specifically provide for such a situation, or whether court action by an aggrieved party may pre-empt such changes.

²³² (2010) 31 *ILJ* 1453 (LC).

²³³ S 115(4) of the LRA.

²³⁴ 1987 (3) SA 777 (C).

Lastly, the 10 year term during which a person's details would have remained on the RED database until it was recently reduced to a five year period, may well have given rise to a challenge by an affected party, based on an allegation that it is an unfairly long period to do so. Such an argument would likely be based primarily on the balancing act required when considering measures which seek to limit fundamental rights, dealt with in Chapter 5. The significant latest reduction may well have pre-empted a challenge to the system.

As it currently stands, it is impossible to predict the outcome of such a challenge, as it is likely to be strongly influenced by the factual matrix on which a particular applicant would rely. There are obvious arguments for and against intervention in this respect that present themselves. Whereas an applicant would, until the most recent reduction in the period, have been able to argue that even the registrar (in terms of FAIS) does not impose "bans" as a result of debarment for periods of longer than five years, such argument is no longer available. Furthermore, one has to remain mindful of the fact that while debarment constitutes an absolute barrier to participation in rendering services, regulated by FAIS, RED listing by itself achieves no more than alerting a prospective employer to the fact of a previous dismissal.

7.4 DEBARMENT IN TERMS OF FAIS

As pointed out before, FAIS is not aimed at the regulation of employment matters, but has instead consumer protection as its primary aim. That notwithstanding, it is patently obvious that those who are active in the financial services sector, and whose activities require registration with the registrar, irrespective of whether they fulfil the function as employees, employers (owners of an FSP) or in any other capacity, all remain subject to the fit and proper requirements of FAIS that include honesty and integrity.

As for the factual determination of whether or not somebody in a FAIS affected role has been guilty of conduct that would suggest that the person is lacking in honesty and integrity, it has been pointed out that the prescribed procedure requires a fact finding exercise, similar to that provided for by the LRA and Code of Good Practice: Dismissal in order to ensure that a dismissal (in the case of employee misconduct) may be viewed as procedurally fair.

Once the individual's actions suggest that he or she may no longer qualify in terms of those characteristics, that person inevitably risk being debarred, whether in terms of Section 14 or 14A. Such debarment is therefore not dependent on the existence of any employment relationship (whether past or present), but is merely the direct result of dishonest behaviour. It follows that debarment remains an equally onerous reality for employees and non-employees alike. To the extent that this research however focused on the consequences of dishonesty for people employed in the financial services industry, it remains of the utmost importance to consider debarment as an integral part of the consequences that may follow from employee dishonesty.

In line with the protection envisaged by Article 8 of ILO Convention No. 158, Section 26 of the FSB Act has created a special appeals tribunal that offers those who may feel aggrieved about actions of the registrar that affect them, an opportunity to have those actions revisited on appeal by an independent tribunal.

As indicated in chapter 5, preventing someone from applying the trade or profession of his or her choice, may on the face of it fall foul of the Constitutional guarantee offering, what may at first glance appear to be, an unfettered choice in terms of career options. However, we have also seen that Section 22 specifically provides for regulation of professions, while Section 36 of the Constitution provides a framework for how any limitations on such rights have to be evaluated. The balancing act, required to determine whether or not such limitations would pass constitutional muster, has similarly been discussed.

In my view there is little reason to doubt that the protection of society in general against the potentially unscrupulous actions of an employee (or any other person for that matter) who has already, through his or her own actions, proved to lack the required characteristics of honesty and integrity, is eminently justified in a constitutional democracy based on human dignity, equality and freedom. This should hold true especially in a society where poverty and unemployment remain such pressing social evils that it has been described as "rampant".²³⁵ In summary

²³⁵ *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) at 1173.

therefore, the debarment provisions in FAIS appear to comply in all material respects with the terms of both international and local standards aimed at improving security of employment.

7.5 SUMMARY

There is no empirical evidence available on which one could draw conclusions about the extent to which the (relative) health of the South African financial services sector could be attributed to the measures discussed in this research. However, to the extent that these measures, including the dismissal of those employees who make themselves guilty of dishonesty, serve to protect the public at large that depend on and make use of the services offered by FSPs, one cannot but recognise the contribution of these measures towards safeguarding the interests of society in general.

Employers in the Financial Services Sector have (with some encouragement and assistance from the Courts and the Legislature) thus succeeded admirably in striking a fair and lawful balance between providing protection to their industry and their clients, the general public, and the interests of individual employees or former employees who may have to suffer the consequences of their dishonest behaviour in the workplace. The continued fine-tuning of their response to the threat posed by employee dishonesty has thus created a fair and principled basis to deal with the bad apples, while hopefully also serving as somewhat of a deterrent to those who may contemplate venturing beyond the boundaries of honesty and integrity.

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REGISTER OF EMPLOYEES DISHONESTY SYSTEM

Guidelines for implementation

As a result of the two legal opinions obtained during 1998 we propose that the guidelines below be followed when implementing RED in each participating institution.

1. Ensure that the disciplinary proceedings are conducted properly as required by law and agreed with the trade unions and/or staff associations.
2. Retain the record of the disciplinary proceedings in terms of which a listing will follow.
3. Ensure that information listed is accurate.
4. The register should be seen (and treated) as one of the sources of information for applicant reference purposes and must serve as the starting point for enquiries rather than the sole reason for exclusion from employment.
5. In the event of an applicant being considered for employment, disclosure of the fact that his/her name is listed on the register should be made to that person and he/she should be given the opportunity to explain the inclusion of their name on the register and to demonstrate, should that be appropriate, that they do not constitute a potential “dishonesty problem”.
6. Banks should amend their conditions of employment to include consent to listing under the appropriate conditions. Consent should cover both the listing and the subsequent reference checking.
7. It is desirable that all employees (existing) should be advised of the existence/implementation of the register. The fact that existing employees did not consent as in 6 supra, should not prevent them from being listed on the register see point 8 below. It is also necessary that the implementation of the register be clarified with the trade unions or staff associations.
8. It was suggested by counsel that the former employee (dismissed after disciplinary proceedings or in extreme circumstances without a hearing) be (i) given notice of the proposed listing and (ii) that he or her be afforded a period of time in which to challenge the listing if it is disputed. With regard to (i) it might be a good idea to include this notice at the end of the disciplinary hearing, and regarding (ii) to rely on the same period and process followed for notification of an appeal.
9. Where disputes are referred for external appeal, sections 1 to 8 must still apply, however the listing record must clearly note that an external appeal is pending. It is very important that participating banks take note of these guidelines as they will underpin any legal defence to the practice of excluding “convicted fraudsters” from the banking sector.
10. The RED (Register of Employees Dismissed for Dishonesty) system has been in use by the banking industry for the last two years, those banks who actively submit data and do enquiries, have no doubt realised the value of the database. It has become necessary to re-emphasise certain issues relating to the use of RED, and this communication will highlight the most important aspects around the use of RED.

- **BEFORE LISTING ON RED**

- Ensure that all staff is aware of the existence of RED and that their employment contracts reflect their understanding and/or agreement to being listed on RED when committing a dishonesty related offence.
- Ensure that the disciplinary proceedings are conducted properly as required by law and agreed with the trade unions and/or staff associations.
- Retain the record of the disciplinary proceedings in terms of which a listing will follow.
- Only dishonesty related offences must be listed on RED.

- **CAN THE PRESIDING OFFICER WAIVE THE LISTING ON RED?**

- The answer is no. The banks have agreed that listing on RED cannot be used as a 'bargaining tool' at disciplinary hearings.

- **CAN A NAME BE TAKEN OFF RED?**

- The only time a name will be taken off RED is when there was an appeal and the appellant succeeded. The bank must advise the RED system administrator in writing for the reason for removal of the name and only when the RED system administrator is convinced that there is a valid reason for removal, will she remove the name.

- **CAN THE CCMA DECIDE THAT A PERSON'S NAME BE TAKEN OF RED?**

- Only in certain circumstances. The use of RED has been agreed to between the banks and their respective Trade Unions and/or Staff Associations and should be part of the contract of employment between banks and employees. Therefore the CCMA has no mandate to order a bank to remove a person's name from RED except if the CCMA found the person to be innocent and therefore rules against the bank and in favour of the employee.

- **MUST A PERSON BE LISTED FOR ALL KINDS OF DISHONESTY?**

- Differently put, should we list a person when it is only their first offence and they only took R100? The answer is simple – if the offence was serious enough for the Employer to have a disciplinary hearing, and the Employee was found guilty and discharged, then the name must be listed on RED. There is no 'classes' of dishonesty as far as RED is concerned – when the criteria are met, the Employer is obliged to list on RED.

- **WHAT HAPPENS IF AN EMPLOYEE RESIGNS OR LEAVES BEFORE A DISCIPLINARY HEARING IS HELD?**

- The banks have agreed that a hearing will still take place (in absentia) and if the criteria of RED are met, the employee will be listed on RED.

- **HOW MUST WE USE THE INFORMATION ON RED?**

- The register should be seen (and treated) as one of the sources of information for applicant reference purposes and must serve as the starting point for enquiries rather than the sole reason for exclusion from employment.
- In the event of an applicant being considered for employment, disclosure of the fact that his/her name is listed on the register should be made to that person and he/she should be given the opportunity to explain the inclusion of their name on the register and to demonstrate, should that be appropriate, that they do not constitute a potential “dishonesty problem”.

PRINCIPLES FOR DECIDING WHETHER THE CONDUCT FALLS WITHIN THE CRITERIA TO BE DEALT WITH AND LISTED IN TERMS OF RED

Dishonest conduct of which the employee has been found guilty and which was the ground for dismissal in terms of the Disciplinary Procedures of the bank.

GUIDELINES

as to the type of offence which will be regarded as falling within the ambit of "dishonest conduct"

- deliberately giving untrue or misleading or erroneous information; be it verbal or written
- theft of any nature
- bribery or corruption including giving or accepting or receiving money, including other items, as an inducement
- misappropriation/misrepresentation including giving or accepting or receiving money or any other item as an inducement;
- unauthorised use of the bank's equipment or goods in own interests
- unauthorised removal or possession of property
- deliberate falsification of records
- fraud
- forgery
- industrial espionage
- setting up own business, without the necessary authorisation from the employer, which competes with the bank
- collusion with robbers or criminals
- breach of client or staff confidentiality, selling or passing on client information or databases to any unauthorised person
- guilty of a criminal offence involving dishonest conduct.

The offences listed above serve as guidelines only.

These guidelines will be reviewed from time to time in the light of experience, and the revised guidelines will be considered part of the agreement.

ASISA STANDARD ON THE S REFERENCE SYSTEM

THE S REFERENCE SYSTEM & PROCEDURES

1. This Standard is applicable to all intermediaries, representatives or agents irrespective of any title (such as broker, director, district manager or superintendent) that they may assume and all participating corporate brokers and/or their employees directly engaged in canvassing and procuring new business and irrespective of whether they are paid by commission or by salary or both (“intermediaries”).
2. The S Reference system is essentially a system of self-regulation within the long-term insurance industry, whereby the public at large, and the industry, are protected from persons who are not fit and proper to be engaged in the business of marketing the products of the industry, or in directly controlling or training those who are so engaged.
3. As Howie J said in *Hawker v LOA* 1987 (3) SA 777 at 790 -

“It is in the public interest that dishonesty be effectively and firmly dealt with, especially in an industry where so much is done on the strength of information given and taken in good faith. It is also in the public interest, however, that trained personnel with ability be not lost to the industry and that, as far as it is reasonable to allow, a man be at liberty to pursue his chosen calling”

4. In this Standard, the term “participant/s” refer to all long term insurance members of ASISA as approved corporate brokers which participate in the system, as explained in paragraph 9.1.
5. Participants in the S reference system will not employ, accept new business from, or pay commission to intermediaries with S references nor may they employ them in a position of control over intermediaries or in control of their training.

An intermediary on whom an S reference has been imposed may however be paid commission in respect of business accepted before the imposition of the S reference. In order to implement this clause, participants will require intermediaries to sign and date all proposal forms introducing new business and to print their names and dates of birth under their signatures.

6. Participants must inform all intermediaries of the existence of the S reference procedure, the fact that it will be applied to them, and that they should familiarise themselves with it. For their own protection, participants should, if possible, obtain written acknowledgement from intermediaries that they have been so informed and advised - but a failure to do so does not invalidate the procedure.

It is suggested that participants use the following wording when advising intermediaries as above:

“Your conduct in all matters relative to, or in any way connected with, your occupation as an insurance intermediary should always be such so as to bring credit to the insurance industry. Conduct which brings discredit to the industry may, in certain circumstances, lead to the imposition of an S reference in terms of a procedure set out from time to time in the ASISA Standard on the S reference system, which, since it is applicable to you, you should familiarise yourself with. The effect of the imposition of an S reference is that no participant in the S reference system may employ, accept new business from, or pay commission to an intermediary with an S reference nor may they employ such intermediary in a position of control over intermediaries or in control of their training.”

7. The imposition of an S reference is a very serious matter with grave consequences both for the Industry and the intermediaries concerned. It should therefore be approached with the required circumspection. Although ASISA imposes the S reference and remains in control of the system, individual employers play a crucial role. The rules and procedure for this, which are in the following paragraphs, must therefore be strictly adhered to.

Conduct warranting the S reference

- 7.1 The S reference in effect says that by reason of certain conduct the person is not fit and proper to be employed in the selling of products of the long-term insurance industry -i.e. long-term insurance policies as defined in the Insurance Act - or to directly control or train others who are so employed.
- 7.2 Although the imposition of an S reference is the responsibility of ASISA, a recommendation to the Panel for consideration is in itself a serious step which may have grave implications for the intermediaries as well as the participant laying the charge. A proper balance has to be struck between the responsibility to protect the industry against unscrupulous operators and the danger of referring less serious matters to the Panel as a matter of course. The S reference system should not be seen as an extension of disciplinary procedure or as additional punishment for minor transgressions or breaches. Participants must ensure separate treatment of these two issues.
- 7.3 The conduct which warrants a referral to the Panel cannot be precisely defined and much will depend on the circumstances of each case and on the judgement of the participant. However, long experience suggests that the conduct described in Annexure A is at least prima facie evidence of conduct for which the S reference would be an appropriate treatment. Annexure A is not an exhaustive or exclusive list of misconduct.
- 8.4 Conduct which has caused a person to be judged not fit and proper in an approved foreign jurisdiction may also be relevant, and may be taken into account, provided that -
- (a) the foreign determination shall not automatically result in an ASISA S reference being imposed;
 - (b) the individual must be judged on the facts, and the process set out in this Standard must be fully observed.

For the purpose of this Standard-

- (i) an “approved foreign jurisdiction” means a foreign entity that imposes an S reference (or its equivalent); and
- (ii) ASISA, with the approval of the ASISA Life & Risk Board Committee, may enter into a reciprocal agreement to exchange information on their S reference lists and to make case dockets available if required.

8. Process leading to the conclusion that an S reference should be imposed

- 8.1 The participants in this system are all long term insurance members of ASISA and the corporate brokers approved of by the ASISA Life & Risk Board Committee and listed on Annexure C (“approved corporate broker”).

- 8.2 The process leading to a recommendation for an S reference may be instituted by:
- 8.2.1 a member office in respect of its own employees, in respect of any broker or approved corporate broker with whom it has a broker contract, and in respect of any employee of a broker or approved corporate broker with whom it has a contract;
 - 8.2.2 an approved corporate broker, in respect of any of its qualifying employees.

If the participant is no longer the employer in its capacity as member office or approved corporate broker, the participant may still recommend an S reference, provided that the participant had been in a contractual relationship with the intermediary or his employer at the time of the occurrence of the event/s leading to the S reference recommendation.

- 8.3 When a participant is faced with misconduct, such as described in Annexure A or otherwise, his first course will be to deal with it in the context of the employer/employee relationship, where the normal disciplinary proceedings will be followed.
- 8.4 Whatever the outcome of the process in the employer/employee context, the participant must then consider the matter in the quite separate context of the industry and general public interest with a view to recommend the imposition of an S reference upon the intermediary concerned.
- 8.5 Since it has grave consequences, the recommendation of an S reference should be preceded by a very careful examination of all available evidence, of the circumstances and of the investigations carried out in the employer/employee context. Full consideration should be given to the conduct described in Annexure A and to the interests of the industry and the public, so that a properly considered decision can be reached whether or not the circumstances warrant the referral of the matter to the Panel for possible S referencing. Whilst the process should not be over-hasty, it is important that it be completed with the least delay.
- 8.6 If the participant determines that an S reference recommendation is the proper course to follow, this decision must be communicated to ASISA as soon as possible, in fact within 7 days after the decision is reached.
- 9.8 In order to avoid duplication and towards aligning existing processes and procedures, no participant shall be entitled to lodge, process and proceed with an S reference recommendation in respect of any representative who has been debarred as contemplated in section 14 of the Financial Advisory and Intermediary Services Act 37 of 2002.

9. Lodging and processing the S recommendation

NOTE: As from September 2008 no new recommendations for S references shall be lodged with or accepted by ASISA. However for record purposes, and with the exception of some cosmetic amendments, the process of lodging and processing of S reference recommendations remain unchanged.

- 9.1 The recommendation for S reference to ASISA must be in the form of a letter signed by the chief executive of the participant concerned or his delegate and addressed to the S Reference Registrar at the offices of ASISA in Cape Town. The name of the delegated

official, if applicable, must be forwarded to ASISA in advance.

9.2 The Registrar will be an official of ASISA appointed by the ASISA Life & Risk Board Committee which will also appoint an alternative to act in his absence. His functions will be:-

- (a) to receive the S recommendation and all supporting documents; to screen the papers and, if he deems fit, call for further information necessary to enable him to decide whether the case is sufficiently substantial to warrant referral to the Panel;
- (c) to decide whether or not it is appropriate for the case to be referred to the Panel for determination;
- (d) if a referral is appropriate, to inform the intermediary of the S recommendation and the reasons therefore, and of his rights to a hearing, and to receive responding papers from the intermediary for consideration by the Panel;
- (e) to set a date for hearing the matter and to appoint the Panel;
- (f) to process any application for review under paragraph 15(2) or for any appeal under paragraph 15(3).
- (g) to set a date for hearing an appeal and to appoint the two members to sit with the Chairman of the Appeal Board;
- (h) to decide whether new evidence warrants a re-hearing;
- (i) to authorise extensions of time limits for good cause;
- (j) generally to act as secretary to the process and handle all administration, and to allow extension of time in appropriate circumstances
- (k) to maintain a register listing the names of intermediaries on whom S references have been imposed as well a list indicating the names of intermediaries whose S references have changed to X references after a period of 5 years had elapsed.

NOTE: The Registrar is not a member of the Panel and does not attend the hearing unless called as a witness.

9.3 In the process described in the following paragraphs a number of time limits are fixed. It is necessary, in order to ensure an effective process, that these time limits be strictly observed. However, it is recognised that there will occasionally arise exceptional circumstances which require an extension. Such an extension may be authorised by the Registrar for good cause.

9.4 The letter recommending the S reference must be in the format set out in Annexure B to this Chapter and must contain the following information

(a) concerning the intermediary

surname, first name and initials
date of birth
identity number
date of appointment
date of termination of employment or broker contract
address

(b) concerning the conduct

a brief statement of the conduct complained of and on which the S recommendation is based, accompanied by supporting documentation.

Note : The Registrar may call for further information in substantiation for consideration by the Panel.

9.5 Upon receipt of the letter containing the S recommendation and such additional information as the Registrar may need and call for, which must be supplied within 14 days, the Registrar will decide whether or not the complaint is of such a substance that it warrants a hearing by the Panel. The Registrar will complete this process within 14 days of receipt of the letter or the supplementary information.

9.6 If the Registrar is satisfied that the S recommendation lacks substance, is inappropriate or vindictive or would otherwise have unreasonable consequences in view of the conduct complained of, he will advise the participant accordingly and the matter will then be closed. This is because the matter has been separated from the employer/employee context and placed exclusively within the sphere of ASISA as guardian of the industry and public interest.

9.7 If the Registrar is satisfied that the S recommendation has merit and warrants a hearing by the Panel he will send a pro forma letter to the intermediary informing him -

- (a) that an S recommendation has been lodged;
- (b) about the charges laid against him and the nature of the conduct upon which the recommendation is based;
- (c) about the consequences if the S reference is imposed;
- (d) of the procedure for a hearing by the Panel;
- (e) of the date set for the hearing by the Panel;
- (f) of his rights in relation to the hearing and appeals, in particular his rights to be represented, to call witnesses and to lead evidence in mitigation;

and will call upon the representative to submit a responding affidavit not later than 21 days after date of his pro forma letter.

9.8 The Registrar will simultaneously advise the S recommending office of his decision and of the date for the hearing.

9.9 The Registrar will set the matter down for hearing by the appropriate Panel on a date not later than 28 days after the date of the pro forma letter.

10. The Panel

10.1 There will be constituted two Panels for hearing and determining recommendations for the imposition of an S reference -

- (a) the Northern Panel, usually sitting in Johannesburg;
- (b) the Southern Panel, usually sitting in Cape Town.

The Panel may in its own discretion decide to hear the case at a place more convenient to the intermediary.

Additional Panels for other areas may be constituted in similar fashion if the ASISA Life & Risk Board Committee so decides.

10.2 Each Panel will consist of a Chairman and two other members.

10.3 The Chairman of each Panel will be appointed by the ASISA Life & Risk Board Committee

10.4 The other two members of each Panel will be appointed on each occasion by the Registrar from lists nominated by intermediary associations formally recognised for this purpose by the ASISA Life & Risk Board Committee

10.5 No official from the participant recommending the S reference may serve on the Panel hearing that case.

10.6 If, after a hearing has commenced, the Chairman or any member is unable, for whatever reason, to continue with the hearing, a new Panel may be constituted to hear the matter afresh or the remaining two or more members may continue the hearing.

10.7 For the purposes of its deliberations the Panel may seek assistance from, or call as witnesses, legal or other professionals, but the decisions must be those of the Panel.

11. The Hearing

11.1 The Registrar will arrange for the convening of the Panel upon the date set by him for the hearing and will do all that is necessary to ensure that the papers have been received and provided to the Panel at least 3 days before the date of the hearing.

11.2 Both the S recommending participant and the intermediary concerned are entitled to be heard in person by the Panel. Both may be represented or assisted at the hearing but not by a legal representative (although legal advice may of course be obtained outside of the hearing by either party).

NOTE: in this Chapter "legal representative" means: any person who has been admitted by the Supreme Court of South Africa to practise as an attorney or advocate; any person with a university degree in law; and any person employed as a legal adviser or legal consultant.

- 11.3 The parties concerned and the Panel may call such witnesses, including expert witnesses, as it deems necessary, upon its own initiative or at the request of either party and may cross-examine witnesses.
- 11.4 The essence of the Panel consideration of an S recommendation is that there should be a fair hearing of the parties, the proper application of the mind to the matter, and a procedure which is fair and reasonable in all the circumstances.
- 11.5 The procedure of the Panel will be kept as informal as possible, but subject to the rules of natural justice which entails among others that the intermediary must be given sufficient notice of the hearing and the allegations against him to enable him to prepare properly, that he may be represented at the hearing (subject thereto that no legal representation is allowed), that he must be given the opportunity to state his case and that he be advised of the review and appeal possibilities.
- 11.6 A record of the entire proceedings must be kept, preferably by tape recording but otherwise in detailed written form, and either party must upon request be provided with a copy of this record.

12. The Determination

- 12.1 The basic question for determination is whether to impose an S reference which is operative for a period of 5 years, or not to do so.
- 12.2 Only if the Panel is unanimously convinced that exceptional mitigating circumstances existed, which justify some reduction - not exceeding 24 months - of the basic 5 year period, may it determine to impose the S reference for a shorter period. The paramount consideration in reducing the term is the interest of the Industry and not the personal circumstances or hardships of the intermediary.
- 12.3 Subject to any new determination in terms of paragraph 14, a determination to impose an S reference may not be suspended, and there can be no subsequent decision to remove the S reference before its period has run its full course.
- 12.4 The effect of an S reference as set out in 5 applies from the date of the determination and is not suspended pending any appeal (see 13.8).
- 12.5 At the end of the 5 years (or other lesser period determined by the Panel) the S reference is removed from the S reference register and replaced by an X reference.
- 12.6 The Panel must provide brief reasons for its finding and sentence, and the determination must be reduced to writing within 2 days.
- 12.7 The written determination shall be sent to reach the Registrar not later than 72 hours after the Panel sitting. The Registrar shall, not later than 7 days after the sitting, send a copy of the determination to both parties and shall, in the case of an S reference, inform him of the availability of the review processes and appeal process in paragraph 15.

12.8 Regardless of the appeal or review process, the Registrar shall, if an S reference is imposed, immediately on receipt thereof make the necessary entry in the S/X reference register.

13. **Re-hearing on new evidence**

13.1 If an intermediary or the participant is able to produce new evidence on the matter - that is evidence which was not available, and therefore could not have been produced, at the time of the original hearing - he may submit this new evidence to the Registrar.

13.2 If the Registrar is convinced that the evidence is indeed new and was not available originally, and that it is sufficiently important to have influenced the original determination of the Panel, he will refer this to the Panel in the same way as an original referral. The hearing will be re-opened for consideration of the new evidence before the Panel as originally constituted or as nearly as possible to the original Panel. The same procedure will be followed as at the original hearing.

13.3 If the Registrar decides that a re-hearing is not warranted he will advise the applicant accordingly and inform him of the right of review under paragraph 15.2 and the common law.

14. **Review and Appeal**

15.1 There has been established an Appeal Board to hear -

- (a) applications for review, under paragraph 15.2; and
- (b) appeals against a determination by the Panel, under paragraph 15.3.

15.2 An application for review may be made by -

- (a) the intermediary or a participant, to the Chairman of the Appeal Board, on the grounds that the intermediary did not receive due notice in advance of the hearing or on the grounds that the Registrar ought to have been convinced as contemplated in 14.2; and if the Chairman so decides the matter shall be referred back to the Panel to be heard de novo or to be re-heard as in 14.2;
- (b) the intermediary or a participant, to the Appeal Board, on any other ground of material irregularity in which case the matter shall be dealt with as if it were an appeal and concluded as contemplated in 15.10.

15.3 An appeal -

15.3.1 may lie against

- (a) the determination to impose an S reference;
- (b) the failure of the Panel to determine any reduction in the 5 year duration of the S reference;

- (c) the length of the reduction, determined by the Panel, in the duration of the S reference;
- (d) the determination of the Panel after hearing new evidence.

15.3.2 may be lodged only by the intermediary.

- 14.4 There is no automatic right of appeal. Upon application by the intermediary, leave to appeal may be granted by the Chairman of the Appeal Board if he is convinced that there is a reasonable prospect of the appeal being successful. The Chairman may refer the matter to one or more senior legal advisers of a disinterested office for a recommendation regarding the granting of leave to appeal.
- 14.5 Application for leave to appeal must be in writing, contain details of the nature of the appeal and the reasons therefore, and reach the Registrar not later than 30 days after the date of the Panel determination. The Registrar will inform the participant concerned of the application for leave to appeal and will allow it 14 days to make written submissions in answer to the application.
- 14.6 The Registrar will send the application and submission of the participant to the Chairman within 7 days after receiving it, together with a full record of the proceedings. The Chairman must advise the Registrar of his decision within 14 days after receiving that application.
- 14.7 If leave to appeal is refused, the Registrar will inform both parties and that will be the end of the matter - subject only to the common law right of review.
- 14.8 If the Chairman grants leave to appeal, the Registrar will set a date for the hearing of the appeal (in consultation with the Chairman) and will advise the applicant and the other party accordingly.
- 14.9 The Appeal Board may decide the matter on the papers, or may call all interested parties to be heard by it. No new evidence may be introduced.
- 14.10 The Appeal Board, in determining the appeal, may substitute its own decision for that of the Panel in respect of the matter appealed against or may, in the case of a review under 15.2, refer the matter to the Panel to be heard *de novo*.
- 14.11 The decision of the Appeal Board will be sent immediately in brief written form, including reasons, to the Registrar who will advise the Panel and the applicant of the result.
- 14.12 If the Appeal Board's decision is to cancel the S reference, or to reduce its duration the Registrar must forthwith activate the decision by advice to the computer bureau.
- 14.13 If the S reference is cancelled, it will be removed entirely from the S reference register, and will not be substituted by an X reference.
- 14.14 If the S reference duration is reduced, the S reference register will provide for its substitution by an X reference after the relevant period expires.

15. The Appeal Board

- 15.1 The Appeal Board will consist of -

- (a) a Chairman appointed by the ASISA Life & Risk Board Committee, usually a person having legal training and at least 10 years legal experience;
- (b) two other persons appointed as necessary by the Registrar from a panel of nominees from intermediary associations referred to in paragraph 4.9.4, at least one of whom must be a senior member or former member of the SCIM (Standing Committee on Intermediary Affairs) of the former LOA.

15.2 One member (usually the Chairman) may be appointed from outside the ranks of ASISA, and any such outside member may be remunerated by ASISA.

15.3 There will be one Appeal Board for the whole of the Republic of South Africa, and the Board may sit where the Chairman deems appropriate, having regard to the interests of the parties.

16. Transitional Provisions

16.1 All S references imposed under the previous procedure shall remain valid and, subject to the following, shall not be amenable to reconsideration in terms of this new process.

16.2 If new evidence comes to light the procedure as set out in paragraph 14 is to be followed.

16.3 All existing S references will be removed, and be replaced by an X reference, at the end of 5 years after their imposition (or immediately if more than 5 years have already elapsed) without the originating participant having the right to object to the removal.

ANNEXURE A

S STANDARD REFERENCES: SUGGESTED CIRCUMSTANCES

An S Standard reference indicates that a person may no longer be employed selling long-term insurance products. It follows therefore that S reference recommendations must be made in instances where a person has demonstrated that he is not fit and proper to sell long-term insurance products. Whilst no complete list of such circumstances can be given, it is suggested that an S reference could be appropriate in the following circumstances:

1. Evidence of misrepresentation:
 - e.g. a. Giving inflated quotations to procure business.
 - b. Quoting incorrect details about products he is selling.
2. Evidence of dishonesty
 - e.g. a. Misappropriating any amount of money collected as premiums from the public.
 - b. Forging the signature of a client on proposal forms, cheques, etc.
 - c. Submission of fictitious business.
3. Dismissal due to personal behaviour which is detrimental to the long-term insurance industry.
4. Dismissal arising from any criminal conviction on being found guilty of theft, fraud, forgery or uttering a forged instrument, perjury, an offence under the Prevention of Corruption Act, 1958; the Drugs and Drug Trafficking Act, 1992; or any offence involving dishonesty.
5. Proof of serious falsification of information to secure an agency or broker contract:
 - e.g. a. Making serious false declarations when applying for a position.
 - b. Failing to reveal a past criminal record.
6. Placing business for a former intermediary on whom an S reference has been imposed.
7. Replacement of policies as defined in the ASISA Standard on Replacement where the intermediary was aware that a replacement was being effected, and where the replacement was clearly not in the interests of the client or was not disclosed in the proposal form.

N.B. Where a full-time agent or an independent intermediary changes employers and thereafter embarks on a programme of replacing policies written with a former employer with policies written with a new employer, either office may institute S reference proceedings.
8. The obtaining (otherwise than directly from, and freely given to the intermediary by, the client) of medical or AIDS-risk life-style information relating to a client, or the disclosing of such information to a client or to any person other than an authorised employee of the insurer - except with the express written authority of the insurer.

Examples (which do not limit the generality of the above):

- (a) To obtain such information by exerting pressure on medical practitioners, or their staff, or staff of a member office;
- (b) By intercepting such information at the rooms of medical practitioners, or the offices or staff of a member office;
- (c) By opening envelopes or otherwise accessing material not expressly stated to be for viewing by the intermediary;
- (d) By obtaining such information from the ASISA Life Register.

ANNEXURE B

S REFERENCE : RECOMMENDATION TO THE REGISTRAR AT ASISA

1. Name of long terms insurance member :
2. Name and telephone number of contact person (who will represent the office at the Panel hearing):
3. Intermediary:
 - 3.1 Full Names:
 - 3.2 Date of birth:
 - 3.3 Identity number:
 - 3.4 Postal address:
 - 3.5 Telephone number:
 - 3.6 Date contract was entered into with intermediary:
 - 3.7 Date contract was terminated:
 - 3.8 Registered on the ASISA Intermediary Register:
4. Reasons for S recommendation (provide as much detail as possible regarding the conduct on which the S recommendation is based):
5. Supporting evidence attached: (please list and mark annexures accordingly).

Signed:

CHIEF EXECUTIVE / AUTHORISED SIGNATORY

Name: (printed)

ANNEXURE C

PARTICIPATING CORPORATE BROKERAGES			
NAME	TEL.NO.	FAX NO.	BOX NO. OR STREET ADDRESS OF HEAD OFFICE
Absa Insurance and Financial Advisers (Pty) Limited	(011)		
Absa Trust	(011) 480-5000	480-5236	223 AUCKLANDPARK
Alexander Forbes Executive Financial Consultants (Pty) Ltd	(011) 378-3000	378-4222	787240 JOHANNESBURG
Boland Bank PKS Bpk	(021) 8072911	807-2854	4 PAARL
First Bowring Insurance Brokers (Pty) Limited: Life Management Services	(011) 491-3911	838-2052	61787 MARSHALLTOWN
FPS Limited	(011) 377-5661	492-1078	290 JOHANNESBURG
M.I.B Employee Benefits (Pty) Limited	(031) 329-1111	293-2829	781521 RANDBURG
NBS Bank Limited	(011) 364-1111	364-2955	1744 DURBAN
Nedcor Bank Ltd Personal Financial Planning Division	(011) 630-7111	630-7391	1144 JOHANNESBURG
Saambou Brokers (Pty) Ltd	(012) 421-5000	365-1373	73481 LYNNWOODRIF
Standard Bank Financial Services	(011) 636-5805	636-1550	62696 MARSHALLTOWN
Syfrets Limited	(021) 488-2911	488-2320	206 CAPE TOWN
SAFSIA (South African Insurance Brokers Association)	(011) 833-2180	834-4028	62155 MARSHALLTOWN

DEBARMENT IN TERMS OF SECTION 14 OF THE FAIS



NB: PLEASE COMPLETE THE FORM IN FULL

1. Particulars of the debarring FSP

FSP Name : _____

FSP No : _____

2. Contact Person at debarring FSP

Initials :

Surname :

Cell phone number :

Telephone number :

E-mail address :

3. Contact details of debarring FSP

Physical address

Postal Code

Postal Address

Postal Code

Telephone number

Fax Number

Website Address

4. Particulars of the debarred representative

Title (Mr,Mrs,Ms)

Initials:

Surname:

I D no/ Passport no/
Registration no:

Telephone Number

E-mail address

5. Date on which the representative was debarred:

6. Indicate reasons for debarment:

6.1	Non-compliance with Fit and Proper Requirements	
	(a) Honesty and Integrity	
	(b) Competency	
6.2	Material contravention or non-compliance with provisions of the FAIS Act	

7. Attach all relevant documentation including, but not limited to-

- (i) evidence and information supporting the reasons for debarment;**
- (ii) a copy of the service contract or mandate between FSP and debarred representative;**
- (iii) transcript of disciplinary hearing; and**
- (iv) forensic/investigation report (if any).**

8. Was the representative notified of the debarment:

Date: _____

Signature