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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 46293/15

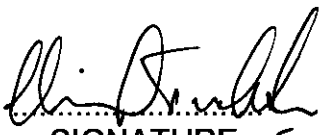
In the matter between:

22/2/2017

OMBUD FOR FINANCIAL SERVICES PROVIDERS

Applicant

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
	20/02/17 DATE	 SIGNATURE

LTC HARMS NO

First Respondent

SHAREMAX INVESTMENTS (PTY) LIMITED

Second Respondent

GERHARDUS ROSSOUW GOOSEN

Third Respondent

JOHANNES WILLEM BOTHA

Fourth Respondent

DOMINIQUE HAESE

Fifth Respondent

ANDRÉ DANIEL BRAND

Sixth Respondent

JUDGMENT

Tuchten J:

- 1 The case before me began as a review by the applicant to set aside
a decision of an appeal panel ("the Panel") constituted under the

Financial Services Board Act,¹ upholding appeals against determinations of the applicant. The applicant is the Ombud under the Financial Advisory and Intermediate Services Act (FAISA).² The applicant thus sought to review a decision made on appeal setting aside (in part) the applicant's own decision.

2 In the present case, the first respondent, the chair of the Panel, submitted the record which had served before the Panel but otherwise abided the decision of the court. The second respondent took no part in the proceedings. The third respondent delivered a notice stating that he supported the arguments of the respondents in their answering affidavits but did not appear at the hearing. The fourth to sixth respondents opposed the review and filed papers and each appeared to argue the matter through counsel. For convenience, I shall refer to the respondents collectively as such unless the context requires otherwise. For a proper appreciation of how the present proceedings arose, I must give some background.

3 Section 20 of FAISA creates the office of the Ombud for Financial Services Providers (the Office). The functions of the Office are performed by the Ombud for Financial Services Providers. The

¹ 97 of 1990

² 37 of 2002.

present Ombud is the applicant. The objective of the Ombud is to consider and dispose of *complaints*, a term which is defined in FAISA, in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances, with due regard to the contractual arrangement or other legal relationship between the complainant and any other party to the complaint and the provisions of FAISA.³

4 *Complaint* is defined⁴ to mean

subject to section 26 (1) (a) (iii),⁵ a specific complaint relating to a financial service rendered by a financial services provider or representative to the complainant on or after the date of commencement of this Act, and in which complaint it is alleged that the provider or representative-

- (a) has contravened or failed to comply with a provision of this Act and that as a result thereof the complainant has suffered or is likely to suffer financial prejudice or damage;
- (b) has wilfully or negligently rendered a financial service to the complainant which has caused prejudice or damage to the complainant or which is likely to result in such prejudice or damage; or
- (c) has treated the complainant unfairly.

³ Section 20(3). All references in this judgment to statutory provisions are to those in FAISA unless otherwise stated.

⁴ Section 1

⁵ My emphasis

- 5 Section 26 confers powers on the *Board* to make rules in respect of different categories of complaints or investigations by the Ombud. The Board is that created under the Financial Services Board Act which provides for the establishment of a board to supervise compliance with laws regulating financial institutions and the provision of financial services and connected matters. Of relevance for present purposes are ss 26(1)(a)(iii) and (iv).
- 6 Section 26(1)(a)(iii) empowers the Board to make rules regarding
- the type of complaint justiciable by the Ombud, including a complaint relating to a financial service rendered by a person not authorised as a financial services provider or a person acting on behalf of such first-mentioned person.
- 7 Section 26((1)(a)(iv) empowers the Board to make rules regarding the rights of a complainant to submit a complaint to the Ombud.
- 8 A set of Rules on Proceedings of the Office of the Ombud for Financial Services Providers (the Rules) duly came into force.⁶ Rule 4 provides, under the heading "Type of Complaint to be submitted to the Office", amongst other things that the complaint must fall within the ambit of FAISA and the Rules and, in rule 4(a)(ii):

⁶ The Rules were promulgated by GN 1453 in GG 24079 dated 15 November 2002 and were amended in 2004.

the person against whom the complaint is made must be subject to the provisions of the Act (hereafter referred to as "the respondent").

- 9 The Rules prescribe in significant detail what is required of a "respondent" as identified in rule 4(a)(ii). For example, such a respondent is specifically subject to obligations in relation to the complaint.⁷ Both the complainant and "any other party to the complaint", which I read as a reference to such a respondent, are expected to give their fullest cooperation to the disposal of the complaint within a reasonable time.
- 10 Two persons, Mrs Siegrist and Mrs Bekker, were aggrieved by the conduct of financial services providers with whom they respectively had a commercial relationship. They submitted complaints to the Office. Their complaints were presented by the completion and submission of a form (the complaint form) bearing the name and logo of the Office. It is a fair inference that the complaint form must have been developed by the Ombud to enable the typical lay complainant to provide the Ombud with the information she would need to deal with the complaint.

- 11 Section B of the complaint form invites the complainant in terms to submit details of the person against whom she is complaining, including the name ("of person or company"), address and phone and fax numbers. Section B also invites the complainant to give the Ombud details of the person with whom the complainant dealt when she was buying the product.
- 12 In both cases, the complainant provided particulars of the persons against whom they were complaining. The persons against whom Mrs Siegrist and Bekker complained were, respectively, CJ Botha and AE Carter-Smith.
- 13 Section 27 prescribes what the Ombud must do when a complaint is submitted to her. She must first establish that there had been compliance with the Rules⁸ and if not, act in accordance with the Rules.⁹ If a submitted complaint complies with the Rules, she must officially receive it if it qualifies as a complaint.¹⁰ Unless a complaint so officially received is one identified in s 27(3),¹¹ the Ombud must

⁸ Section 27(1)(a).

⁹ Section 27(1)(b).

¹⁰ Section 27(1)(c)

¹¹ The complaints of Mesdames Siegrist and Bekker did not fall to be dealt with under s 27(3).

then proceed to investigate it. But, under s 27(4), the Ombud “must not proceed to investigate” a complaint officially received unless the Ombud

- (a) has in writing informed every other interested party to the complaint of the receipt thereof;
- (b) is satisfied that all interested parties have been provided with such particulars as will enable the parties to respond thereto; and
- (c) has provided all interested parties the opportunity to submit a response to the complaint.

14 The applicant decided to act under s 27(4). She sent notices to the second to sixth respondents. The notice to the fourth respondent, emailed to him on 21 November 2012, is representative of the notices sent to these respondents. It read:

Attention:

Johannes Willem Botha - Director of Sharemax Zambezi Retail Park Holdings Limited (Reg. No 2006/028220/06) formerly known as Brookfield Holdings 21 Ltd.

Our reference: FAIS 0039 11/12 GP 1 - Mrs G>E>J> Siegrist - Zambezi Retail Park Holdings Prospectuses 2 and 4 (email 7 of 8)

**NOTICE IN TERMS OF SECTION 27 OF THE FINANCIAL
ADVISORY AND INTERMEDIATE SERVICES ACT 37 OF
2002**

As you know, this Office received numerous complaints with regard to Sharemax. These include the attached complaint forwarded to Sharemax during 2011 and 2012.

We request that you respond to the following:

1. The broker in question, Mr CJ Botha was one of FSP Network's t/a USSA ('USSA') Section 13 representatives under supervision. It appears from our investigation that USSA is an extension of Sharemax, set up to create a broker network to market Sharemax investments.
2. Kindly address us on why the directors of Sharemax Zambezi Retail Park Holdings Limited should not along with USSA be held responsible in terms of Section 13 of the FAIS Act for the advice given to complainant to invest in Zambezi (prospectuses 2 and 4).
3. Kindly advise as to how investors such as the complainant were paid interest of 12% whilst Zambezi and the Villa were not generating any income.

For the sake of completeness and transparency, we attach the complaint and the responses received from the following entities/persons: Mr CJ Botha, the Key Individuals of Sharemax and FSP Network.

Once our investigation has been concluded, the matter may be referred to the Ombud in terms of Section 28 of the FAIS Act for a determination.

May we please have your response by close of business 28 November 2012.

- 15 The applicant's case was that these notices were sent out because she regarded the recipients as interested parties. Counsel for the applicant submitted that the term *interested party* means someone

with a real and substantial legal interest in the complaint. If that interpretation is correct, I do not see why the respondent recipients of the notices should have any such interest in the complaint against the persons named in the complaints.

- 16 Furthermore, it appears from the notice that although s 27 requires the Ombud to conduct investigations pursuant to complaints, she had not done so; instead, officials in her Office did so.¹² She could only have done so on the instructions of the applicant and pursuant to powers vested in her as Ombud. This appears to have conflicted with the provisions of s 27(4)(a) which provides that the Ombud may not *proceed* with the investigation until notice has been given. But for reasons which follow, I need not decide these matters.
- 17 The respondents served with the notices responded to them and raised, amongst other things, issues relating to the applicant's jurisdiction. But the applicant persevered with her investigation and proceeded to issue determinations in relation to both complaints. The determination of Mrs Siegrist's complaint was dated 30 January 2013. The determination of Mrs Bekker's complaint was dated 16 May 2013. The determinations were made under s 27, which reads, in relevant part:

¹² See the second last paragraph of the quoted notice: ... *referred* to the Ombud ..."

- (1) The Ombud must in any case where a matter has not been settled or a recommendation referred to in section 27 (5) (c) has not been accepted by all parties concerned, make a final determination, which may include-
 - (a) the dismissal of the complaint; or
 - (b) the upholding of the complaint, wholly or partially, in which case-
 - (i) the complainant may be awarded an amount as fair compensation for any financial prejudice or damage suffered.

18 In her determinations, the applicant upheld the complaints and ordered a number of persons she described as respondents to pay a sum in compensation to the complainants. In each case those ordered to pay compensation were the person against whom the complaint was made (ie CJ Botha in the complaint of Mrs Siegrist and AE Carter-Smith in the complaint of Mrs Bekker) and also the second to sixth respondents as well as a company called FSP Network (Pty) Ltd.

19 Section 30A of the Financial Services Board Act establishes an appeal board to hear appeals from "decision-makers" as defined in the Financial Services Board Act. The applicant is such a decision-maker. Rule 12 of the Rules provides for a party against whom the Ombud has made a determination to apply to the Ombud for leave to appeal. The second to sixth respondents applied for such leave in

relation to both determinations. The applicant refused leave. The second to sixth respondents then applied for leave to appeal under rule 12(e). The appeal board then granted leave and consolidated the two appeals as they concerned similar issues of fact and law.

- 20 The appeal board then issued a directive calling upon the parties to deal with certain preliminary issues. The merits of the two appeals were then postponed, pending the outcome of the adjudication of the preliminary issues which had been identified. These issues came before the Panel which was chaired by the first respondent.
- 21 These issues included, in essence, whether the Ombud had jurisdiction in relation to a party who had not been a person identified in the complaint as the person against whom the complaint was made¹³ and whether the procedure adopted in relation to the appellants was legally competent and procedurally fair.
- 22 Rule 12(j) provides that the Ombud does not take part in the appeal unless requested by the "board of appeal". In the present case, the applicant took part in the appeal at the request of the former chair of the appeal board. At the hearing, her counsel said that she was there

¹³

The Panel put it like this in para 5 of its judgment: "... the jurisdiction of the Ombud against a party who was not cited as a "wrongdoer" by a complainant, i.e. whether the procedure adopted in relation to the appellants was legally competent ..."

... not to defend her determination but, more or less, to act as friends of the Appeal Board.¹⁴

- 23 The Panel handed down a written judgment signed by the members of the Panel on 10 April 2015. In its judgment, the Panel concluded that the Ombud should not have joined the second to sixth respondents as parties to the complaint. It was not, thus the Panel, legally competent for the applicant to have done so.¹⁵ As to the fairness issue, the Panel concluded that the notices did not forewarn the second to sixth respondents of the factual findings which the applicant intended to make, especially those relating to, *inter alia*, allegations of fraud and the existence of a pyramid (Ponzi) scheme; these respondents, therefore, had not been treated fairly.¹⁶
- 24 The Panel proceeded to uphold the appeals and set aside the determinations and consequent orders against the second to sixth respondents. There was no order as to costs.

¹⁴ Para 8 of the judgment of the Panel.

¹⁵ Para 52 of the judgment of the Panel.

¹⁶ Para 53 of the judgment of the Panel.

25 By notice of motion dated 18 June 2015, the applicant applied to review, correct and set aside the decision of the Panel. I must quote the relief sought in the notice of motion quite extensively. Prayers 1 to 4 read:

- 1 Declaring that
 - 1.1 the first respondent's decision was materially affected by error of law in that he misconstrued the provisions of [FAISA] dealing with the powers and functions of the Ombud;
 - 1.2 the first respondent failed to take into account relevant considerations pertaining to the underlying objective and purpose of the Office of the Ombud as set out in [FAISA]. Specifically, the panel chair failed to have due and proper regard to (1) the equity jurisdiction vested in the Ombud; (2) the Ombud's investigative powers; and (3) the inquisitorial powers vested in the Ombud;
 - 1.3 the first respondent's decision is not rationally connected to the purpose of the empowering provisions of [FAISA]; and
 - 1.4 the first respondent's decision is not rationally connected to the information that was placed before him.
- 2 Reviewing, correcting and setting aside the decision of the first respondent;
- 3 Directing that the matter is remitted to the Appeal Board, differently constituted, for a hearing on the merits of the appeal that was lodged by the second to sixth respondents.
- 4 Directing that the hearing of the appeal on the merits be held within six (6) weeks or such other expedited period after the Order of this Court as this Court may consider reasonable.

- 25 The founding affidavit in support of the relief sought makes the case that the judgment of the Panel conflicts with a decision of a panel in the case of *Moore and others v Black*¹⁷ composed of persons different to those who were on the Panel of which the first respondent was the chair. She makes the point that she as Ombud is as a result confronted with uncertainty as to her powers and functions. She makes it plain, as is her right, that she favours the interpretation of the panel in *Moore and Others v Black*.
- 26 In *Moore and Others v Black*, Moore was a broker and the person against whom the complaint was directed by the complainant. The panel found that the claimant's loss was caused by the supervening fraud of the directors of a concern which the judgment calls Blue Zone. Blue Zone, however, was at the time the judgment was delivered (12 November 2014) in liquidation and the Ombud had apparently not even purported to cite its erstwhile directors as parties in the proceedings which led to the appeal. This, the panel in *Moore and Others v Black* pronounced, could not absolve them of their liability.¹⁸ The panel in *Moore and Others v Black* proceeded to hold both Moore and a person only identified in the judgment as Van Zyl and as a director of Blue Zone, liable jointly and severally with Moore

¹⁷ FAIS case no. 0110-10/11 WC1

¹⁸ Paragraph 55 in the judgment of the panel in *Moore and Others v Black*.

to pay the claimant R100 000. It appears from the applicant's founding affidavit that a review in *Moore and Others v Black* is pending. I shall thus refrain from commenting on the judgment in *Moore and Others v Black* except to say that if my impression is correct, that Van Zyl was neither a person against whom the complaint was directed nor a party to the complaint or to the appeal, then the ultimate conclusion in regard to Van Zyl's liability is quite startling.

- 27 Regardless of the merits of the judgment in *Moore and Others v Black*, I have some sympathy for the applicant's situation. It is troublesome for a court or tribunal to have conflicting decisions on a point affecting its functions from a higher court or tribunal with appellate jurisdiction. But that is the way of the legal world. Judicial and quasi-judicial officers have different approaches and views and in our legal system it is not always possible to resolve such a conflict swiftly. Sometimes one simply has to wait for the right case to reach a court with sufficient stature in the hierarchy of judicial authority to settle the matter. This is because there is no right to equality of outcomes.¹⁹

¹⁹

For an extreme example of this situation, see *Van der Walt v Metcash Trading Ltd* 2002 4 SA 317 CC.

- 28 This consideration was raised by the respondents. In one of a number of preliminary points, they contended that the applicant had no standing to review a decision on appeal from her own determination. This point, and all the others taken by the respondents, were resisted by the applicant with some vigour.
- 29 Shortly before the case was due to start before me, the respondents submitted supplementary heads of argument in which counsel drew my attention to the decision of the SCA in *Registrar of Pension Funds v Howie NO and Others*.²⁰ In that case the Registrar adopted an adversarial position toward the Appeal Board. The dispute was not between the Registrar and an outside party aggrieved by the Registrar's decision. It was held that the registrar did not have standing in this situation.
- 30 The present position is indistinguishable from that in *Howie NO's* case. The applicant seeks in the notice of motion to overturn a decision on appeal partially reversing her own decision as decision-maker of first instance. She has manifestly sought to do so under the provisions of PAJA.²¹ I therefore conclude that the respondents' point is well taken

²⁰ [2016] 1 All SA 694 SCA

²¹ The Promotion of Administrative Justice Act, 3 of 2000.

and that the applicant has no standing to review the decision of the Panel.

- 31 Alive to this difficulty, counsel for the applicant stated in open court that the applicant would no longer pursue prayer 2 of the notice of motion, but was persisting in prayers 1, 3 and 4. The review was therefore abandoned. As to the remaining relief sought, the argument, not previously made, was that the High Court has the power under s 21(1)(c) of the Superior Courts Act:²²

in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

- 32 Counsel for the applicant submitted that this discretionary power should be invoked to issue the declaratory orders sought in prayer 1 and to send the case back to the appeal board differently constituted (presumably as consequential relief) in terms of prayers 3 and 4.

- 33 The court in *Howie NO* was astute to restrict the ambit of its conclusion which, the court said,²³ related only to a narrow area where the Registrar disagreed with a decision of the appeal board overturning one of her decisions. I shall therefore assume, without deciding the point, in favour of the applicant that the applicant could approach the court for a declaration of her rights, powers and obligations under s 21(1). The question is whether it would be appropriate to do so in the present proceedings before me. In my view, it would not.
- 34 The application before me was designed as adversarial review proceedings. The clear purpose of the application was to overturn the decision of the Panel and to clear the way for the obtaining of an order from the appeal board upholding the applicant's original decision. The notice of motion did not identify the specific areas in which the applicant was experiencing difficulties in the performance of her functions. An application for a declaration in this regard would have to be preceded by notice to the participants in the financial services industry.²⁴ Any declaratory order would thus in the present proceedings have to be made in the form of a rule identifying specific concerns of the applicant and inviting interested parties to put their views before the court. This procedure would be unjustifiably unwieldy. If the applicant

²³ Para 25

²⁴ Often called stakeholders in modern parlance.

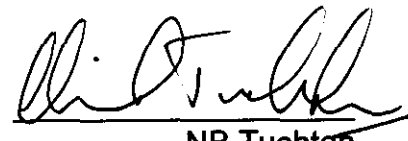
is so minded, she can bring an application for declaratory orders shorn of its adversarial element, on proper notice and with precise identification of the relief sought.

35 I therefore decline to exercise in the applicant's favour the discretion conferred on the court in relation to declaratory orders.

36 There remains the question of costs. In submitting that costs should not follow the result, counsel for the applicants submitted that the second to sixth respondents had acted inappropriately in raising preliminary issues and in placing before this court the entire record of the proceedings before the Panel. I have found for the respondents on one of the very preliminary issues raised by them and I cannot find that the other preliminary points are without merit. The argument before me was not prolonged by any preliminary point without substance. The record, I was informed, was placed before the this court by the first respondent. Costs must therefore follow the result. Costs of both senior and junior counsel are justified by the importance and complexity of the case.

37 I make the following order:

- 1 The application is dismissed.
- 2 The applicant must pay the costs of the fourth to sixth respondents, including the costs consequent upon the employment, where such was the case, of both senior and junior counsel.



NB Tuchten
Judge of the High Court
20 February 2017

For the applicant:

Adv V Ngalwana SC, Adv S Shangisa and Adv M Mbelle
Instructed by Ramushu Mashile Twala Inc
Sandton

For the fourth respondent:

Adv CE Puckrin SC and Adv E Muller
Instructed by Potgieter Marais
Pretoria

For the fifth respondent:

Adv JJ Brett SC and Adv D Mahon
Instructed by Faber Goertz Ellis Austin
Bryanston

For the sixth respondent:

Adv L Balanco
Instructed by Van Zyl's Inc
Centurion