CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 229/22

In the matter between

KOCH & KRUGER BROKERS CC	First Applicant
DEON KRUGER	Second Applicant
and	
THE FINANCIAL SECTOR CONDUCT AUTHORITY	First Respondent
THE OMBUD FOR FINANCIAL SERVICES PROVIDERS	Second Respondent
JUSTICE YVONNE MOKGORO N.O.	Third Respondent
THE FINANCIAL SERVICES TRIBUNAL	Fourth Respondent
GEORGE BABEN	Fifth Respondent
LUCILLE MIRIAM BABEN	Sixth Respondent

Neutral Citation:	*Koch & Kruger Brokers CC and Another v Financial Sector Conduct Authority and Others* [2023] ZACC 27
Coram:	Zondo CJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Mathopo J, Potterill AJ, Rogers J and Van Zyl AJ
Judgment:	Rogers J (unanimous)
Decided on:	15 August 2023
Summary:	Section 34 of Bill of Rights — separated issue — High Court allegedly straying beyond separated issue — separated issue misconceived

ORDER

On appeal from the High Court of South Africa, Gauteng Division, Pretoria:

1. Leave to appeal is refused.
2. The applicants are ordered to pay, jointly and severally, any costs incurred by the fifth and sixth respondents in making written submissions in response to this Court's directions dated 17 April 2023.

JUDGMENT

ROGERS J (Zondo CJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Mathopo J, Potterill AJ, and Van Zyl AJ concurring):

[1] This is an application for leave to appeal a judgment of the High Court of South Africa, Gauteng Division, Pretoria (Mabuse J). The High Court's judgment was on a separated issue. Litigants and courts must always carefully consider whether it is convenient to adjudicate a separated issue. If it is, the parties must formulate the separated issue precisely. Judges must apply their minds to the parties' proposal and satisfy themselves that the separation is convenient and that the issue has been properly defined. The issue thus defined should be recorded in an order made by the Court in terms of rule 33(4) of the Uniform Rules.[1] The parties and the Court should

[1] Rule 33(4) states:

> "If, in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such

also be clear on what relief will follow if the separated issue is decided one way or the other. Despite judicial warnings on these matters,[2] they continue to be ignored. The present case, which we are deciding on written submissions without an oral hearing, is an object lesson in what can go wrong.

[2] In August 2008 and September 2009, the fifth and sixth respondents, Mr George Baben and his wife, Mrs Lucille Baben, invested R780 000 in two property syndication schemes via Sharemax Investment (Pty) Ltd (Sharemax). They did so on the advice of the second applicant, Mr Deon Kruger, who conducts business as a financial adviser through the first applicant, Koch & Kruger Brokers CC. The Babens were to receive monthly interest, which they did until August 2010. In September 2010, the South African Reserve Bank (SARB), which considered Sharemax's operations to be unlawful, instructed Sharemax to stop accepting further money and to repay all existing investors. Monthly payments ceased and the property syndication schemes collapsed. The Babens, an elderly retired couple, are among the many people who lost money in Sharemax.

> question has been disposed of and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately."

[2] For three recent examples, see *Osman Tyres and Spares CC v ADT Security (Pty) Ltd* [2020] ZASCA 33; [2020] 3 All SA 73 (SCA) at paras 12-3, *Petropulos v Dias* [2020] ZASCA 53; 2020 (5) SA 63 (SCA); [2020] 3 All SA 358 (SCA) at paras 67-9 and *Iveco South Africa (Pty) Ltd v Centurion Bus Manufacturers (Pty) Ltd* [2020] ZASCA 58 at paras 25-31. The Supreme Court has frequently quoted the following passage from Nugent JA's judgment in *Denel (Pty) Ltd v Vorster* [2004] ZASCA 4 at para 3:

> "Before turning to the substance of the appeal it is appropriate to make a few remarks about separating issues. Rule 33(4) of the Uniform Rules – which entitles a court to try issues separately in appropriate circumstances – is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked even though at first sight they might appear to be discrete. And even where the issues are discrete the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately. But where the trial court is satisfied that it is proper to make such an order – and in all cases it must be so satisfied before it does so – it is the duty of that court to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid confusion. The ambit of terms like the 'merits' and the 'quantum' is often thought by all the parties to be self-evident at the outset of a trial but in my experience it is only in the simplest of cases that the initial consensus survives. Both when making rulings in terms of rule 33(4) and when issuing its orders a trial court should ensure that the issues are circumscribed with clarity and precision."

[3] In December 2012, the Babens lodged a complaint against the applicants with the second respondent, the Ombud for Financial Services Providers, who is appointed and functions in terms of Chapter VI of the Financial Advisory and Intermediary Services Act[3] (FAIS Act). The Babens alleged that the applicants had wrongly convinced them that the investment in Sharemax was sound and risk-free and that all regulatory requirements had been met; and that the applicants had not supplied them with documentation to enable them to study the property syndication schemes.

[4] In terms of section 27(5) of the FAIS Act, the Ombud may follow and implement any procedure he or she deems appropriate. In terms of section 28(1)(b), the Ombud may, in upholding a complaint, award the complainant "an amount as fair compensation for any financial prejudice or damage suffered". In the course of the Ombud's investigation, the applicants supplied information and documents to the Ombud in response to requests from the latter. No oral hearing took place.

[5] On 12 October 2018, the Ombud issued his determination. He upheld the Babens' complaint and awarded them compensation of R780 000 with interest at 10% per annum from the date of determination to date of payment. The Ombud found that the Babens never received the Sharemax prospectus; no financial needs analysis was done; the Sharemax product was unsuitable and high-risk; the applicants' advice that the investment would be safe had been materially flawed and negligent; and that the Babens' loss was of the type that flowed naturally from the applicants' breach of contract. The applicants contested, and still contest, all these findings, asserting that they ignore the detailed responses and documentation the applicants supplied to the Ombud.

[6] Section 219 of the Financial Sector Regulation Act[4] (FSR Act) permits a person who is aggrieved by a determination of the Ombud to apply to the fourth respondent,

[3] 37 of 2001.

[4] 9 of 2017.

the Financial Services Tribunal (Tribunal), for a reconsideration of the determination.[5] This is subject to section 28(5)(b) of the FAIS Act, which provides that an application for reconsideration may only be pursued with leave granted by the Ombud or, if the Ombud refuses leave, by the Chairperson of the Tribunal (Chairperson).[6] The Chairperson at the relevant time was the third respondent, retired Justice Yvonne Mokgoro.

[7] The applicants applied to the Ombud for leave to have the matter reconsidered by the Tribunal. The Ombud refused leave. They applied to the Chairperson for leave, which she refused in a decision delivered on 12 April 2019. According to the applicants, the Chairperson's decision noted that the issues she had considered were a complaint of bias against the Ombud, causation and the applicants' duty to the Babens, which was to ensure that they could make an informed decision, in particular with reference to the risks of the Sharemax product. The applicants complain that the Chairperson summarily concluded, without elaborating on these issues or providing reasons, that no basis existed to fault the Ombud's conclusions and that there was no reasonable prospect that the Tribunal would decide the matter differently.

[8] The applicants launched review proceedings in the High Court. They sought the review and setting aside of the Ombud's determination and a substituted decision dismissing the Babens' complaint. In the alternative, they sought the review and setting aside of the Chairperson's dismissal of their application for leave to pursue reconsideration in the Tribunal. The review application was based on various grounds set out in section 6 of the Promotion of Administrative Justice Act[7] (PAJA). The applicants summarise those grounds as being that the Ombud and the Chairperson were biased or reasonably suspected of bias; that their actions were procedurally

[5] Section 218 sets out the decisions which are subject to applications for reconsideration in terms of section 219. In terms of the definition of "decision" in section 218, these include a "decision of a statutory ombud in terms of a financial sector law in relation to a specific complaint by a person", and such an ombud is correspondingly defined as a "decision-maker". Section 20A of the FAIS Act provides that the scheme in relation to complaints set out in Part I of Chapter VI is a statutory ombud scheme for purposes of the FSR Act.

[6] The Tribunal's database on SAFLII includes ten reconsideration decisions of the Tribunal in determinations by the Ombud in favour of clients in Sharemax cases. In seven instances the brokers succeeded, in three they failed.

[7] 3 of 2000.

unfair; that their decisions were materially influenced by an error of law; that their decisions were taken for ulterior purposes; that irrelevant considerations were taken into account and relevant considerations ignored; that they took their decisions in bad faith and acted arbitrarily and capriciously; and that their decisions were unconstitutional and unlawful.

[9] In advance of the High Court hearing, counsel for the applicants approached counsel for the Ombud and the Babens with a proposal that the High Court be asked to determine, as a preliminary issue, whether the investigation by the Ombud of the Babens' complaint justified the Ombud's determination or the Chairperson's ruling that the applicants were the factual and legal cause of the Babens' loss. In their written submissions, the applicants say that it has not been possible to establish how the point in limine was formulated when orally conveyed to Mabuse J.

[10] In his judgment, Mabuse J recorded that he had been asked to determine "whether the loss suffered by the [Babens], under the circumstances set out in the overview, was caused by the breach of agreement occasioned by the applicants, as it was contended by the [Babens], or by the intervention of the [SARB], as it was contended by the applicants". The "overview" was set out thus in the preceding paragraph of the judgment:

> "Through the advice of the applicants, who acted in their capacities as the Financial Service Providers, the [Babens] invested their money in [Sharemax]. The money was used by Sharemax for the construction of The Villa Retail Park . . ., which was promoted by Sharemax. The [SARB] regarded such investments as taking deposits. It issued a directive in terms of which it ordered Sharemax to refund all the money Sharemax had received from investors to the investors. At the material of the directive *[sic]*, Sharemax did not have any money to pay back to the investors. It could therefore not refund the investors their money. The scheme collapsed and the [Babens] lost their investments."

[11] It appears from the applicants' submissions that they are content with this formulation of the separated issue. They submit, however, that it is clear from the

formulation that the separated issue was confined to causation and that, for purposes of determining that issue, the High Court was required to accept, without adjudicating, the Babens' version on breach of mandate. They contend that the applicants' alleged negligence would only have become an issue for adjudication if the High Court ruled that the SARB was not the cause of the Babens' loss.

[12] The matter was argued on 18 August 2021. The High Court delivered judgment on 3 November 2021.[8] Under a heading, "The intervention of the [SARB]", the Court recorded the applicants' contention that the Babens had lost their money because of the SARB's intervention. The applicants invoked *Symons N.O.*[9] in support of this contention, where Ploos van Amstel J found that the cause of the investor's loss had been the intervention of the SARB, not the breach by the financial adviser.

[13] The High Court continued that in its view the SARB's intervention was one of the risks which the applicants should have investigated. The applicants failed to thoroughly investigate Sharemax, which was taking deposits from investors. The applicants should have investigated whether Sharemax was entitled to do so. This included proof of registration in terms of section 11 of the Banks Act.[10] The High Court referred, in that regard, to another Sharemax case, *Oosthuizen*,[11] where the investor's case succeeded, and distinguished *Symons N.O.*

[14] The Babens, according to the High Court, were not given a chance to study documents and relied exclusively on the applicants' advice and representations. The probabilities were that the documents signed by the Babens were only given to them on the day they signed and without their having fully read and understood the documents. There was, said the High Court, a negligent failure by the applicants to carefully consider the risk profile of the Sharemax investment, in circumstances where the Babens required a low-risk investment.

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[8] *Koch & Kruger Brokers CC v Financial Sector Conduct Authority* [2021] ZAGPPHC 755.

[9] *Symons N.O. v Rob Roy Investments CC t/a Assetsure* [2018] ZAKZPHC 71; 2019 (4) SA 112 (KZP).

[10] 94 of 1990.

[11] *Oosthuizen v Castro* [2017] ZAFSHC 163; 2018 (2) SA 529 (FB); [2017] 4 All SA 876 (FB).

[15] Under a new heading, "The case for the [Babens]", the Court said that the Babens' case was based on an alleged contract with the applicants, the alleged breach of that contract and a contention that their damages flowed naturally from the breach. Because those damages flowed naturally, foreseeability was implied by law, and there had been no need for the Ombud to investigate whether Sharemax's complaint should have been anticipated or foreseen by the applicants. The crucial consideration was that the funds were placed in a high-risk investment.

[16] As against this, the High Court noted that the applicants argued that, until the SARB's intervention in September 2010, the Babens and all other investors had received their monthly interest. At the time the investments were made in 2008 and 2009, Mr Kruger could not foresee that the SARB would bring the whole Sharemax syndication scheme to a halt.

[17] The High Court concluded that "the applicants were negligent when they advised the Babens to invest their money in Sharemax" and that they "failed to exercise the degree of skill, care, and diligence which one is entitled to expect from a financial service provider". The substantive order made by the High Court was a "finding" that "the loss of investments suffered by the [Babens] is attributed to the breach of contract by the applicants".

[18] The applicants' applications for leave to appeal and reconsideration failed in the High Court and the Supreme Court of Appeal. Their application was filed in this Court on 17 August 2022. The Babens' attorneys notified the Registrar that, due to lack of funds, the Babens would abide this Court's decision. In other correspondence, the Babens' attorneys said that their clients were 81 and 74 years old, Mr Baben was seriously ill, they had been without their pension money for the last ten years and their reserves had been depleted.

[19] On 17 April 2023, the Chief Justice issued directions, calling for submissions on two broad questions: (a) the exact formulation of the separated issue which the High

Court was asked to decide and whether argument went beyond that issue; and (b) the relevance of the separated issue to the review application.[12] The Babens' legal representatives were invited but not required to file submissions. In the event, submissions were received from the applicants and from the Babens.

[20] The submissions show that the separated issue was never precisely defined. The Babens do not accept that the separated issue was defined in the terms initially proposed by the applicants in advance of the hearing. It appears that the High Court was not invited to make, and did not make, an order in terms of rule 33(4), instead acceding informally to a request to hear argument on a separated issue conveyed orally by counsel.

[21] According to the applicants' submissions, the question of negligence did not form part of the separated issue and was not argued. They complain that the High Court decided the issue of negligence without considering any of the evidential material put up in their affidavits and without hearing the applicants' counsel on that issue. In response to a question in this Court's directions as to what order should be made if this Court finds that the High Court strayed beyond the separated issue, the applicants contend that no further evidence is needed on the question of causation.

[12] The questions to be addressed were set out thus in the directions:

> "(a) In regard to the separated issue:
>
> (i) What was the exact formulation of the issue which the High Court was asked to determine in limine?
>
> (ii) Did that issue include the question whether the applicants breached their duties to the fifth and sixth respondents and in particular whether the applicants acted negligently?
>
> (iii) Was the question of breach of mandate and negligence fully argued as part of the in limine issue?
>
> (iv) If the question of breach of mandate and negligence were not part of the issue to be decided in limine, and if this Court were to grant leave to appeal, what would the appropriate order on appeal be?
>
> (b) The proceedings in the High Court took the form of a judicial review, in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 read with section 235 of the Financial Sector Regulation Act 9 of 2017, of decisions taken by the second and third respondents. That being so:
>
> (i) To what ground of review did the separated issue relate?
>
> (ii) Why would the High Court's own view on the merits of causation be decisive of any issue in the review?"

This Court can determine the issue and substitute the Ombud's decision with one dismissing the Babens' complaint.

[22] According to the Babens, the separated issue incorporated the question of negligence in the context of the Babens' allegation of a breach of contract. They submit that the issue of breach of duty of care and negligence are inextricably linked to the question of foreseeability. They contend that their damages flowed naturally from the breach. They say that the question of breach of mandate and negligence were fully argued. If, however, this Court decides otherwise, the matter should be remitted to the High Court to determine the question of negligence.

[23] In their founding papers in this Court, the applicants invoke our constitutional and general jurisdiction. They say that, by dealing with the whole case instead of the separated issue, the High Court violated the applicants' right in terms of section 34 of the Bill of Rights to have a dispute resolved by the application of law in a fair public hearing. They also complain that, to the extent that the High Court was entitled to go into the question of negligence, the High Court failed to apply binding legal principles to the facts in answering that question, again violating their section 34 rights. They also assert that there is an arguable point of law of general public importance arising from the conflict which now exists between the High Court's judgment in the present case and *Symons N.O.*

[24] Jurisdiction is determined by an applicant's pleaded case. I am satisfied that the complaint that the High Court strayed beyond the separated issue and thereby violated the applicants' section 34 rights engages our constitutional jurisdiction. As to the High Court's alleged failure to apply binding legal principles, closer analysis shows that the applicants' real complaint is that the evidence did not justify the High Court's finding, having regard in particular to the absence of expert evidence. Such a complaint does not without more clothe this Court with jurisdiction.[13] The applicants do not point to any legal principles which were misstated by the High Court.

[13] *Loureiro v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) at para 33; *Booysen v Minister of Safety and Security* [2018] ZACC 18; 2018 (6) SA 1 (CC); 2018 (9)

[25] The differing conclusions reached in this case and *Symons N.O.* do not point to the existence of an arguable point of law. Even prior to the High Court's judgment in the present case, there existed differing outcomes in Sharemax litigation, including the judgments in *Oosthuizen* (where the investor succeeded) and *Symons N.O.* (where the investor failed). *Oosthuizen* and *Symons N.O.* were actions for damages. Unsurprisingly, the judgments, whether right or wrong, were based on the differing evidence adduced in the two cases. To the extent that the merits of the Babens' claim are relevant to the review proceedings, those merits turn on the evidence adduced on affidavit in the High Court.

[26] Although in one respect the pleaded section 34 case engages our jurisdiction, the Court must still decide whether it is in the interests of justice to grant leave to appeal. Prospects of success are relevant but are not the only consideration.

[27] The lack of precision in the formulation of the separated issue was most unsatisfactory. No definitive contemporaneous written recordal of it exists. The parties appear to be content, however, to accept the High Court's formulation: Was the Babens' loss occasioned by the applicants' alleged breach of contract or by the intervention of the SARB? I am willing to accept that this formulation required the High Court to assume, without deciding, that the Babens' version relating to the alleged breach was correct. Although the Babens submit in this Court that breach of mandate and negligence were argued, they accept the High Court's formulation. If breach of mandate and negligence were argued, therefore, it was presumably with a view to explaining to the High Court what the Babens' version was, so that this version would form the assumed basis on which to decide the causation issue.

[28] The High Court's judgment contains passages which could be read as adjudicating the questions of breach of mandate and negligence. However, having regard to the way in which the High Court framed the separated issue and formulated

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BCLR 1029 (CC) at para 50 and *University of Johannesburg v Auckland Park Theological Seminar* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) at para 49.

its finding in the order, the binding part of the judgment must be regarded as confined to the question of causation. Other "findings" by the High Court should be understood as explaining the Babens' version on breach and negligence, a version which had to be assumed correct for purposes of causation.

[29] However, this is all by the way, because the separation on which the parties and the High Court embarked was utterly misconceived. I pass over the question whether a separation of issues is permissible in motion proceedings.[14] Assuming that a separation was procedurally permissible, the parties in the High Court seem to have overlooked that the case was a review directed at decisions of the Ombud and the Chairperson, not an action for damages by the Babens against the applicants. Even in an action for damages, I doubt that a separation would have been appropriate, because there were contested facts about the mandate, the interactions between the Babens and Mr Kruger, the legality of the Sharemax product and its riskiness. Findings on those contested matters could be expected to have a bearing on whether the SARB's action was an intervening event breaking the chain of causation between the alleged negligent advice and the Babens' loss.

[30] I repeat, though, that the case before the High Court was not an action for damages but a PAJA review. The submissions in this Court suggest that the parties remain confused as to how the separated issue was relevant to the grounds of review. At the risk of stating the obvious, the Ombud had the statutory jurisdiction, and thus the statutory duty, to determine the Babens' complaint. Both the Babens and the applicants were entitled to a proper adjudication of the complaint by the Ombud. Provided, however, that the Ombud determined the complaint without committing a review irregularity, the Ombud's determination on the merits was binding, subject only to reconsideration by the Tribunal. The complaint required the Ombud to determine whether the applicants breached their mandate and whether the Babens'

[14] This was questioned in one of the judgments in *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation* [2019] ZACC 41; 2020 (1) SA 327 (CC); 2020 (1) BCLR 1 (CC) at para 77, on the basis that rule 33(4) only applies to actions.

loss was attributable to that breach. It was the Ombud's finding on these matters that was definitive.

[31] The applicants would be entitled to argue, in the High Court, that the Ombud's finding on these matters should be set aside because of one or more review irregularities. They could argue, for example, that the Ombud's determination on negligence or causation ignored the applicants' evidence or was vitiated by error of law. If such a review succeeded, the matter would – absent exceptional circumstances – be remitted to the Ombud for determination afresh, because the statutory scheme is for the Ombud, not the High Court, to determine the merits of the complaint.

[32] It follows that a finding by the High Court that an assumed breach of contract by the applicants did or did not cause the Babens' loss would be irrelevant, because it is not the High Court's opinion on that question that matters. If the High Court concluded, as it did, that the loss was caused by the applicants' assumed breach, but if the Ombud did not reach a proper decision on that question, the High Court's view could not save the Ombud's determination from being impeached on review. Conversely, if the High Court found, in accordance with the applicants' contentions, that their assumed breach did not cause the Babens loss, that would not lead to the conclusion that the Ombud's determination should be set aside on review. This is all elementary, and flows from an appreciation that it was the Ombud, not the High Court, that was vested with the power to determine the merits of the complaint.

[33] So here we are, nearly two years after the misconceived preliminary issue was argued, and all the parties have to show for it is a judgment which does not resolve any ground of review. I am doubtful that the High Court's judgment can be deployed in any useful way in determining the review. All the issues in the review still remain to be argued and determined.

[34] In the circumstances, it is self-evidently not in the interests of justice to grant leave to appeal, even if the applicants had reasonable prospects of showing that the High Court's determination on the causation issue was wrong, a matter on which I

express no opinion. Our decision on the causation issue would be no more useful in the review proceedings than the High Court's.

[35] Although the High Court should never have been asked (and should never have agreed) to decide the separated issue, the applicants were the parties who made the proposal, and both sides misguidedly agreed to ask the High Court to decide it. I do not think that justice requires us, in the circumstances, to set aside the High Court's judgment. If the judgment has proved to be a costly irrelevancy, the applicants have only themselves to blame.

[36] It follows that the application for leave to appeal must be refused. To the extent that the Babens have incurred costs in responding to the Court's request for submissions, the applicants must pay those costs. I trust that the parties will now proceed without delay to argue the review in the High Court. The matter would not have to return to Mabuse J; it will be for the Judge-President to allocate the review for hearing.

Order

[37] The following order is made:

1. Leave to appeal is refused.
2. The applicants are ordered to pay, jointly and severally, any costs incurred by the fifth and sixth respondents in making written submissions in response to this Court's directions dated 17 April 2023.

For the Applicants:	HF Geyer instructed by Bieldermans Incorporated
For the Fifth and Sixth Respondents:	Cronje, De Waal Skosana Incorporated