

IN THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

Case No: FAB12/2017

In the matter between:

J C MOSTERT

Appellant

and

L LANDMAN

Respondent

JUDGMENT

Appeal Panel : AT Ncongwane SC (Chair),
N Dongwana, and
G Madlanga (members)

INTRODUCTION:

[1] The appellant appeals against the determination made by the Financial Advisory and Intermediary Services Ombud (“the Ombud”) in terms of the Financial Advisory Intermediary Services Act No 32 of 2002 (“the FAIS Act”). The Ombud handed down her determination on the 5th of May 2016 by upholding the complaint by the respondent and directing the appellant to pay the respondent an amount of R650 000.00 with interest. This

order was made by the Ombud after having found that the appellant caused the respondent's loss and this she established from what she referred to as the "*uncontroverted version of the respondent*" placed before her by the respondent and no version had been placed before her by the appellant.

- [2] Before us is Mr Bielderman who appears on behalf of the appellant and the respondent, Mrs Landman, appears in person, and the submissions made by her, apart from mentioning that she made various attempts to contact the appellant prior to her submitting the complaint to the Ombud, but, such attempts bore no fruits, do not deal much with the issues that formed the subject matter of the appeal, in particular, the special defence raised by the appellant on the lack of justiciability of the complaint by the Ombud due to prescription.

THE FACTS

- [3] The respondent Mrs Landman, a 65 year old widow and pensioner, sought advice from the appellant on how best

she could manage the proceeds of her late husband's life savings / pension. Her husband had passed away and she required assistance from the appellant as to how to invest such proceeds. The appeal record indicates that the appellant is an authorised Financial Service Provider ("the FSP") and is registered in terms of the FAIS Act under the license issued on the 22/12/2004. He, at all material times dealt with the respondent.

- [4] On the strength of the advice the respondent received from the appellant and the assurances that came with such advice, respondent made an investment into the (now notorious) Sharemax Zambezi Retail Park Holdings Ltd in the amount of R650 000.00. It appears that this was on the 06th of May 2008. In a nutshell, the respondent's complaint was that the appellant had persuaded her to invest her pension in Sharemax. The appellant held himself out as an "expert" in these investments, and the respondent relied on him and trusted his advice. As a result of the appellant's advice, respondent invested her pension monies which she has now lost. The investment was made as a result of the

appellant's poor advice which failed to take into account the high risk involved in the Sharemax investment. Respondent claims that the appellant's advice was flawed as the risk involving Sharemax was not suitable to her circumstances.

THE ISSUES

[5] The appeal turns on two material issues namely:

[5.1] That the Ombud is debarred from investigating the complainant's complaint due to prescription of the complaint and if so, the determination by the Ombud should be set aside and the complaint be dismissed on the grounds that it has prescribed; and

[5.2] Whether the Ombud's failure to consider the two extensive responses submitted by the appellant to the Ombud should result in the appeal being upheld, the determination being set aside and whether the matter be referred back to the Ombud

for proper investigation, taking into account inter alia the responses submitted by the appellant.

JURISDICTION / PRESCRIPTION ISSUE

[6] The powers of the Ombud and her jurisdiction are clearly prescribed by the FAIS Act and the Rules. In terms of section 20 (3) of the FAIS Act, the objective of the Ombud is to consider and dispose off complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all 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 the FAIS Act. When discharging her functions and dealing with complaints in terms of sections 27 and 28, the Ombud acts independently and impartially. The office of the Ombud is created by the FAIS Act and it is thus a creature of statute. It is trite that creatures of statute can only operate within the ambit / or power of the Act that creates the institutions. In this vein, the appellant contends that the Ombud can only officially receive a complaint if the requirements of section 27

(1)(a) and (b) have been complied with. Before dealing with the appellant's contentions in detail, it may be useful to consider the steps that were taken by the respondent and the procedure followed by her in submitting her complaint to the office of the Ombud.

- [7] Mrs Landman submitted a formal complaint with the Ombud on the 12th of February 2012¹. The facts point to the fact that her written complaint was inadvertently posted to the Ombud For Long Term Insurance who in turn, sent it to the Ombud for Financial Services Providers. The letter by the Ombud For Long Term Insurance forwarding the complain to the Ombud, is dated the 12th of February 2013, prompting the appellant to argue that the letter of complaint written by the respondent contains the date of the 12th of February 2013 and not February 2012. It is common cause that whether its February 2012 or 2013, the submission of the complaint still met the provisions of section 27 (3) (a) as the act or commission complained of occurred within

¹ A statement detailing the complaint is on page 4 to page 8 of the record written in Afrikaans, translated to English from page 9 to page 12. Both the original statements and the translation reflect the date of 12 February 2012.

the period of three years before the date of the receipt of the complaint by the office of the Ombud. The complaint was formulated in accordance with the terms of the definition of 'complaint' as referred to in section 1 of the FAIS Act in that, the complaint which is subject to section 26 (1) (a)(iv) relates to the terms of the Act that had been contravened or were not complied with relative to the financial service rendered by a Financial Service Provider or representative, to the respondent and as such, the respondent suffered or was likely to suffer financial harm as the financial service provider wilfully or negligently rendered the financial service to the respondent. She asserts that she was treated unfairly and this caused prejudice and damage to her. Her plea is that she be assisted that the capital amount she paid over to Sharemax be repaid by the appellant plus interests, since at her age of 63 years old she can no longer find a job.

- [8] In terms of rule 11(d) the Ombud may take such steps as deemed expedient to advise the public on the existence of the office, the procedure for submitting a complaint to the office, or on any other aspect

concerning the office in order to facilitate the submission or disposal of complaints. Rule 5 (e), being part of the set of rules made by the Board in terms of section 26 of the FAIS Act, directs that the complaint must be submitted in writing and the Ombud may receive a complaint in any other manner which conveys the complaint in comprehensive form. As stated, the respondent submitted her written complaint and the Ombud received the complaint on the 12th of February 2013.

- [9] In terms of rule 6 (c), any '*respondent*' must be informed of the complaint submitted to the office to the extent necessary to respond thereto fully. In the context of the rules, the person against whom the complaint is made is regarded as '*the respondent*' and for a complaint to be justiciable it must be against an identified respondent. In terms of rule 5 (b) and (c), before submitting a complaint, the complainant '*must*' endeavour to resolve the complaint with the '*respondent*' and on submitting a complaint to the office, the complainant must satisfy the Ombud of having endeavoured to resolve the complaint with the '*respondent*', and must produce the final

response (if any) of the *'respondent'* as well as the complainant's reasons for disagreeing with the final response.

[10] Mr Bielderman made a spirited argument that prior to the Ombud being able to officially receive the complaint, the provisions of section 27(1) (a) to (c) must be complied with². His submission is that section 27 (1) is peremptory due to, the word ('must'), thus, it must be complied with by the Ombud, failing which the complaint cannot be *'officially received'*.³In his Heads of Argument, the appellant submits that a proper interpretation of Section 27 (1) of the FAIS Act, the Ombud is obliged to enquire from the complainant (the respondent in casu) whether she has attempted to resolve the complaint with the appellant and if not, direct the respondent to make such

² **Receipt of complaints, prescription jurisdiction and investigation**

(1) On submission of a complaint to the office, the Ombud must –

- (a) determine whether the requirements of the rules contemplated in Section 26 (1) (a)(iv) had been complied with,
- (b) in the case of none compliance, act in accordance with the rules made under that section, and
- (c) otherwise officially receive the complaint if it qualifies as a complaint.

³ **'Official receipt'** of a complain has important consequences, namely it suspends the running of prescription, and it vests the Ombud with jurisdiction to proceed with an investigation

an attempt. The Ombud, so the argument goes, failed to adhere to the peremptory provisions of section 27 (1)(a) and (b) as read with rule 5(a) ,(b) and (d) and also rule 4(a)(iv)⁴.

[11] Mr Bielderman submitted that the complaint therefore never qualified as a justiciable complaint and the Ombud's office was not vested with the jurisdiction to investigate the complaint. These contentions were made due to the reason that the record does not show that the complainant had first brought the complaint to the respondent's attention, in order to afford the respondent the opportunity to resolve same before referring it to the

⁴ Rule 5 provides as follows:
"Rights of complainants in connection with complaints- (a) The complainant must qualify as such in terms of the Act and these Rules, (b) Before submitting a complaint to the office, the complainant must endeavour to resolve the complaint with the respondent, (c) The complainant has six months after receipt of the final response of the respondent or after such response was due, to submit a complaint to the office, (d) On submitting a complaint to the office, the complainant must (as emphasised) satisfy the Ombud of having endeavoured to resolve the complaint with the respondent, and must produce the final response (if any) of the the respondent as well as the complainant's reasons for disagreeing with final response"

Rule 4(a) (iv): Type of complaint justiciable by the Ombud –

"(a) For a complaint to be submitted to the office: (i) ..., (ii)...., (iii) ..., (iv) The respondent must have failed to address the complaint satisfactorily within six weeks of its receipt."

Ombud's office. The consequence of this, as contended by the appellant's representative, is that the claim was not justiciable, it could not be officially received by the office and as such it did not interrupt the running of prescription. Should the Ombud or the respondent now endeavour to comply with the provisions of rule 4 and 5, the provisions of section 27(3) (a) (i) and (ii) will apply and the claim will have prescribed, thus excluding Ombud's jurisdiction.

- [12] In our view, the analysis of the objective and purpose of the provisions in the FAIS Act and the rules relating to the procedure for submitting of complaints to the Ombud's office does not support the proposition the appellant seems to advance, principally where the Ombud act in accordance with the provisions of section 27 (1) (b) of FAIS Act and the rules and proceeding to investigate the respondent's complaint which she officially received.

THE FAIS ACT, THE RULES AND THE "COMPLAINT"

[13] The FAIS Ombud's duty to consider and dispose off complaints is stated in Section 20 (3) of the FAIS Act. On receipt of a complaint, the Ombud must determine whether certain prerequisites laid down in the rules have been complied with and if they have she must *'...officially receive the complaint if it qualifies as a complaint'* (Section 27 (1) (c)). In terms of Section 27 (3) she must decline to investigate if the complaint is lodged more than three years from occurrence of the act or omission and in other instances that are not of relevance for this appeal.

[14] It is common cause that the respondent did not comply with the rule 5 (b) and rule 5 (d). In such a case, the Ombud must act in accordance with the other provisions of the rules and *'otherwise'* officially receive the complaint if *'it qualifies as a complaint'* (sec 27 (1) (c) our own emphasis). It is not in dispute that the respondent's complaint falls within the ambit of the Act and the rules and that the appellant is subject to the

rules, the conduct complained of having occurred when the rules were in force. (rule 4 (a)(l) (ii)(iii)). The Ombud **'must'** act in accordance with the rules, in that, the appellant **'must'** be informed of the complaint submitted to the Ombud's office and must respond thereto to the extent necessary.) (rule 6 (c))

[15] Section 27 (4) is important and is also couched in peremptory terms in that :

'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.'

Once these provisions have been complied with, the Ombud proceeds to investigate and determine the *'officially received complaint'* and in this regard the

Ombud may follow and implement any procedure which the Ombud deems appropriate (section 27 (5)).

- [16] In our view, the meaning to be assigned to the words 'otherwise' in section 27 (c) is undoubtedly of significant importance. The dictionary meaning of the phrase 'otherwise' is – adverb – means 'in another way', 'by other means', 'differently', 'in another case', 'in other circumstances', 'if not', else, 'in other respects'⁵. In Webster dictionary, the word is defined as 'under different circumstances' when used as an adjective.⁶ The authorities have interpreted the word 'otherwise' as a word of wide generality⁷ and should therefore, not be construed as to limit applicability of the provisions of the section to matters falling within the formal requirements of the rules where the complaint qualifies as a complaint.

⁵ The new shorter Oxford English Dictionary, on Historical Principles, by Lesley Brown, (2) N - Z

⁶ Webster's 3rd New International Dictionary

⁷ The word 'otherwise' was considered in **S v Ndaba 1965 (1) SA 131 (N)** in connection with places from which prisoners might escape. See also **Zeel v Brakpan Municipality 1945 TPD 41. (S 11 of Act 73 of 1968)**

See **Prudential Shippers SA Ltd v Tempest Clothing Company (Pty) Ltd 1976 (2) SA 856 (W)**. Not to be construed 'eiusdem generis': **PMB Amateur Wineders v Pietersburg City Council 1981 (2) SA 129 (N)**.

In *Zeeli v Brakpan City Council* 1945 TPD 41 where the words *or otherwise* are used in a Bylaw.... which provides, "*no person shall organise, hold, assist or be concerned with any collection of money in the public interest, whether for charitable objects or otherwise...*" the court held that the words '*or otherwise*' are not, on the *ejusdem generis* principle, limited to objects akin to charitable objects but must be given the meaning of any object other than a charitable object so that a political object would be included. We therefore conclude that non-compliance by the complainant with rule 5 (b) does not render the lodging of a complaint a nullity, if the complaint qualifies as a complaint. With the use of the word '*otherwise*' in section 27 (c), the legislature intended to give general discretionary powers to the Ombud and the word *otherwise* should not be construed in any limited sense as meaning or only referring to the condition provided for in rule 5(b) amongst others. The non-compliance with rule 5 (b) is therefore not automatically fatal to other peremptory provisions in the rules obliging the Ombud, having '*officially received*' the complaint to have it referred to the '*respondent*'.

[17] We firmly believe that the object of rule 5 (b) is to afford the complainant an opportunity to informally resolve the complaint with the respondent. In other words, it is to keep the process informal, to keep emotions, influence out of it, and to allow frank discussions of the complaint with the view to come to some sort of a resolution. This cannot justify an understanding that after the complaint is officially received, the door will be closed for a negotiated resolution of the complaint. In the exercise of her general discretionary powers, therefore, the Ombud officially received the complainant's complaint and prescription did not apply. As soon as the Ombud officially received the complaint, the running of prescription was interrupted. The Ombud concluded that there was substantial compliance with the rules and the non-compliance in issue is not an absolute bar to receiving the complaint as this is permissible since it was the question of '*substance over form*'. We agree, and this disposes off the appellant's contentions on this point. In this regard, we refer to authorities relied on by Mr Bielderman supporting the proposition that successful reliance on a "substance over form" argument to overcome the peremptory requirement, the court has to be satisfied, firstly what the object or purpose of the statute/provision is and, on the facts of the

particular matter, that such purpose has notwithstanding the failure, been achieved.⁸

**FAILURE BY THE OMBUD TO CONSIDER APPELLANT'S
RESPONSES TO THE RESPONDENT'S COMPLAINT**

[18] The Ombud is obliged to recognise the appellant's constitutional rights to a fair process and she is obliged to investigate the complaint in an objective and impartial manner. When granting the appellant's leave to appeal, the Ombud concedes that her finding that the appellant had failed to submit his version against the allegations contained in the complaint and further, that he has not bothered to provide reasons for failing to respond to the complaint, was wrong in all material respects. There was therefore merit in the ground of appeal that the appellant was treated unfairly as his response was not considered by her due to what she referred to as an administrative error in her office. She became aware of this administrative error after a full investigation was carried

⁸ See *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 SCA at page 659 para 13
See also *Nkisimane & Others v Santam Insurance Company Limited* 1978 (2) SA 430 (A) at 431 (A) to (B)

out in her office, pursuant to the appellant deposing in an affidavit supporting the application for leave to appeal that he submitted his response to the complaint and corroborated this statement by furnishing proof. Upon receipt of the appellant's affidavit, a full investigation was conducted and it was discovered that there was a different file that was misplaced that had the appellant's response in it. As a result of that administrative error, the response was not placed before the Ombud when the determination was made. It therefore follows that the response filed by appellant has to be considered before a final determination is made and the Ombud concedes that her determination cannot stand.

[19] In his heads of argument, Mr Bielderman submits that the approach adopted by the Ombud, in the present matter, and the fact that she issued a determination without even having her file with her where the "*fruits*" of her investigation should be contained, is in total contrast to the Ombud's obligation as set out in the FAIS Act and the Constitution and the Promotion of the Administrative Justice Act No 3 of 2000. To this submission, we agree.

In this regard section 20 (3) and (4) of the FAIS Act 37 of 2000 provides as follows:.....

"20(3) The objection of the Ombud is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances, with due regard to:

- (a) the contractual arrangement or other legal relationship between the complainant and any other party to the complainant ; and*
- (b) the provisions of this Act.*

"20(4) When dealing with complaints in terms of Section 27 and 28 the Ombud is independent and must be impartial"

[20] Section 3(2)(b) of the Promotion of Administrative Act 3 of 2000, provides as follows:-

"In order to give effect to the right to procedurally fair administrative action, an administrator, subject to sub-

section(4), must give a person referred to in sub-section(1) –

- (i) adequate notice of the nature and purpose of the proposed administrative action'*
- (ii) a reasonable opportunity to make representations;*
- (iii) a clear statement of the administrative action;*
- (iv) adequate notice of any right of review or internal appeal, where applicable, and*
- (v) adequate notice of the right to request reasons in terms of Section 5.⁹*

[21] The Constitution of the Republic of South Africa, provides as follows in section 34:

"Access to Courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public

⁹ See *Sharemax Investments (Pty) Ltd (and 4 others) v Gerbrecht Elizabeth Slegrist & Jacqueline Bekker*, FAIS000394/11-12/GP1 and FAIS06661/10-11/WC1 – The Honourable Harms J as Chairperson, March 2015

hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

[22] In total conflict with the aforesaid legal obligations of the Ombud, and in disregard of the appellant’s rights, the Ombud determined the complaint against the appellant under circumstances where:-

[22.1] The Ombud expanded and “fleshed out the complaint on behalf of the respondent, and ;

[22.2] The Ombud ignored detailed responses submitted by the appellant in October 2013 and August 2015.¹⁰ which responses enclosed compliance documentation and supporting documents which either negated the “expanded version” of the respondent or at least highlighted material factual disputes¹¹ which would first have had to be

¹⁰ Record 191 to 195 and Record 51 to 155

¹¹ Examples of factual dispute are – whether the appellant was licenced, whether the respondent was placed in a position to make an informed decision, whether the risk associated with the investment was explained to the respondent, whether the appellant guaranteed the investment and guaranteed that it was “safe”, whether the appellant persuaded the respondent to invest in Sharemax, whether the appellant held himself out as an “expert” (which of course affects

resolved by the Ombud before she could issue a determination against the appellant, holding the appellant liable.

[23] I have already stated that the Ombud has concluded in her ruling when granting the appellant leave to appeal that the response was not considered due to the administrative error and further states that such response contains submissions of fact and the law that are relevant to the issues in the complaint. There is no allegation made that the Ombud was *mala fide* when making the determination without considering the respondent's version. The error is therefore understandable. And we need not expand further on it as it is not an issue before us.

[24] Since the Ombud omitted to weigh herself in on all the relevant issues pertaining to the investigation of the complaint, to meet the objective and impartial requirement, before making a determination, the matter

the standards against which the appellant's conduct would be tested), whether the respondent was a pensioner and whether the investment was her only assets.

has to be remitted back to Ombud to discharge her functions in accordance with her powers falling within the FAIS Act and the rules, including all other relevant considerations. We are of the view that the issue of the determination of the complaint should be remitted to the Ombud for that office to reconsider and issue a fresh determination.

[25] As a result of our conclusion the appeal on the prescription issue cannot succeed and is dismissed, the following order is granted:-

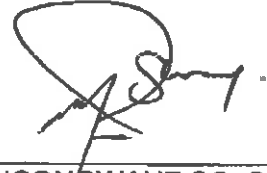
[25.1] The appeal is upheld;

[25.2] The determination made by the Ombud on the 5th of May 2016 is set aside;

[25.3] The matter is remitted back to the Ombud for further consideration;

[25.4] There is no order as to costs.

Dated the 25 January 2018 and signed on behalf of two panel members.

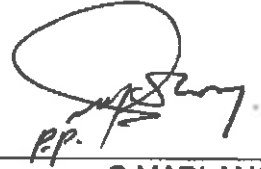


AT NCONGWANE SC, CHAIR



P.P.

N DONGWANA



P.P.

G MADLANGA