IN THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

Case FAB 8/2016

In the appeal of

J & G FINANCIAL SERVICE ASSURANCE BROKERS (PTY) LTD	First appellant
JAMES WRIGHT	Second Appellant
and	
ROBERT LUDOLF PRIGGE	Respondent
THE OMBUD FOR FINANCIAL SERVICE PROVIDERS	Amicus

Coram: LTC Harms (chair), Adv N K Nxumalo and Adv W Ndinisa

For the appellants: Mr P Bielderman

For the respondent: In person

For the Ombud: Adv DC Mpofu SC and Adv SC Shangisa

Hearing: 2 June 2017

Summary: FAIS Ombud – procedures – bias – liability of FSP on breach of Code

JUDGMENT

INTRODUCTION

1. This an appeal against an order issued by the Ombud for Financial Service Providers in which the appellants were ordered to pay to the respondent, the complainant, the amount of R 500 000 jointly and severally. In addition the appellants have to pay interest at the statutory rate from the date of the order which was 24 June 2016. It was finally ordered that the complainant must upon receipt of payment cede his right to any further claims to the appellants.
2. The first appellant, J & G Financial Services Assurance Brokers (Pty) Ltd, is a licensed financial service provider, and the second appellant, Mr James Wright, is a key individual and representative of the former. They were the financial service providers of the complainant, Dr Robert Prigge.
3. The Ombud appeared at the request of the Appeal Board to provide argument particularly in respect of the procedural issues raised and the assistance of the Ombud's counsel is appreciated.
4. The determination was made by the Ombud in terms of section 28 of the Financial Advisory and Intermediary Services Act 37 of 2002 and the appeal is in terms of section 39 of the same Act.
5. The basis of the determination was that the appellants, acting as the complainant's financial service providers, were negligent and acted in breach of the applicable Code in advising the complainant to invest the sum of R500 000, which he had inherited and held in an Absa Money Market account, in a property syndication, Highveld Syndication

22 Ltd, which had been promoted by PIC Syndications (Pty) Ltd, a member of the Picvest group.

6. A determination is only appealable to this Board of Appeal with leave of the Ombud after taking into consideration the complexity of the matter or the reasonable likelihood that this Board may reach a different conclusion. If the Ombud refuses leave the chairperson of the Board of Appeal may on the same grounds grant leave to appeal.
7. In this case the Ombud refused leave to appeal on the ground that there was no reasonable likelihood that the appeal would be upheld but she did not consider the other leg of the enquiry namely whether the matter is complex. Both issues have to be considered. Leave was eventually granted by the deputy chair of this Board.

THE OBJECTIVE OF THE OMBUD

8. It is in view of the argument, which is often presented, necessary to have regard to the provisions of the Act that relate to the objective of the Ombud and the procedure which has to be followed during an investigation.
9. In terms of section 20(3), the objective 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 the contractual arrangement or other legal relationship between the complainant and the other party to the complaint and the provisions of the Act.
10. We would first like to refer to the requirement of expedition. The complainant laid his complaint on 30 August 2011. The Ombud sent the prescribed rule 6(b) notice to the

appellants on 5 September 2011. The appellants responded within five weeks with a statement and annexes of more than 40 pages.

11. A new notice was sent about three years later in which the Ombud informed the appellants that the provisions of section 27 (4) apply and required a statement from them, notifying them that should they fail to respond the matter will be investigated and determined without their version. The appellants answered immediately by referring back to the previous answer.

12. One can only deduce from this that letters are sent by the office of the Ombud without reference to what is contained in the file. And one can question why it took three years for any action whatsoever. This is not an example of an expeditious determination of the dispute between the parties and is unfortunately not atypical of matters that reach the Deputy Chair or the Appeal Board. It may be added that it took another year for the determination to be made and yet another before the appeal could be heard.

13. It is not known why the Ombud is unable to deal with matters expeditiously but one can gather from the file that much time and effort is spent on side issues and one knows from experience that the determinations are not concise and to the point.

14. The response to the application for leave to appeal was not dealt with dispassionately but defensively and with an *ad hominem* attack on the legal representative. That is for a public functionary inappropriate and in any event unnecessary even if the application for leave is in part provocative as it was in this case.

15. The response to such an application need not deal with anything but new matter that was not clearly dealt with in the determination. It is not necessary to argue or reargue

the case. If the original reasons do not pass muster the new ones will seldom make up for any lacunae.

16. The problem, as happened in this case, is that the response may be completely off-beam. (In a previous appeal findings in the response were in direct conflict with some in the determination.) The complainant by way of example mentioned in his initial complaint that he received his shares in the scheme about six months after the investment. The appellants in their answer pointed out that the complainant received the prospectus at the time when the advice was given and that he acknowledged in writing that he had received the prospectus.

17. In response to the appellant's statement the complainant informed the Ombud that he had only received the prospectus at the time he received the shares. He said nothing more. This version was not put to the appellants. And in the determination the Ombud did not make any finding in this regard.

18. However in the Ombud's response to the application for leave to appeal it was said that the acknowledgement that the complainant received the prospectus "conveniently" appears a number of times and that the complainant merely signed these documents on instructions of the appellants. This is far-fetched. The complainant never made the allegation that that he had signed the documents on the instruction of the appellants. The Ombud could not make a finding on the probabilities that the complainant's version as to when he received the prospectus was to be accepted considering that he is an educated person who knowingly admitted receipt of the prospectus at the time.

19. It is contrary to fairness and natural justice to make a factual finding on an allegation that was never put to the appellants.

BIAS

20. Matters like this (there are other instances) add fuel to the allegation that the Ombud is biased against financial service providers and sees her role as champion of disappointed clients.
21. The Act requires her to deal with complaints impartially (section 20(4)) and whether or not she does so depends on the facts of each case.
22. Incorrect factual findings are not in themselves proof of bias but may be proof of inexperience, lack of attention or of human error.
23. This Board dealt with the functions of the Ombud and found that she misunderstood the functions of the office in *Sharemax Investments (Pty) Ltd and Others / Gerbrecht Elizabeth J Siegrist & Jacqueline Bekker* (10 April 2015). The Ombud was dissatisfied with this decision, wrote letters to complainants (including the present complainant) about her dissatisfaction, and sought to review it, unsuccessfully. She has, unfortunately, to live with this decision unless and until it is set aside by an appropriate forum.
24. In the recent judgment of this Board, *JSE Limited and 4 Africa Exchange (Pty) Ltd v Registrar of Security Services and ZAR X (Pty) Ltd*, the powers of the Board were discussed with reference to the judgment in *Registrar of Pension Funds v Howie NO and Others* [2015] ZASCA 203; [2016] 1 All SA 694 (SCA). It was also held that this Board is not a court with powers of review:

"The Appeal Board is not a review 'court' as defined in the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). Reviews are concerned with process; appeals with result. But that does not necessarily mean that review grounds may not overlap with appeal grounds. This is especially the position where a flawed process impacts on the result, for example, where the Registrar omitted to have regard to a jurisdictional fact."

25. Bias that does not impact on the result is not such an overlapping ground. We are accordingly bound to consider whether the decision was right or wrong and – to restate the obvious – not whether the reasons were correct or incorrect: a decision may be correct for the wrong reasons and vice versa.

PROCEDURE

26. It will be recalled that section 20(3) requires the Ombud 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. Section 27(5)(a) adds that the Ombud, in investigating or determining a complaint, may implement any procedure the Ombud deems appropriate. She may also apply the provisions of the Commissions Act to interrogate persons and call for discovery (section 27(5)(d)). That is a matter for her discretion which must be exercised in the context of the facts of each case.

27. The Ombud, like the Public Protector, is not a court of law. [1] What may be required in terms of court rules is not necessarily required in an inquisitorial administrative

[1] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC).

procedure. As was said in *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* [2001] ZACC 9; 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 – dealing with court procedures – the right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts are obliged to ensure that the proceedings before them are always fair. However, rules of courts are not an exclusive standard of reasonableness. There is no reason why legislation should not provide for other reasonable ways of providing a fair hearing. "The approach that the Rules of the High Courts are the benchmark of fairness is simply incorrect."

28. It may be useful to be reminded of the following dictum of Colman J in *Heatherdale Farms (Pty) Ltd v Deputy Min of Agriculture* [1980] 3 All SA 1, 1980 (3) SA 476 (T):

> 'It is clear on the authorities that a person who is entitled to the benefit of the *audi alteram partem* rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing, or allowed representation by an attorney or counsel; he need not be given an opportunity to cross-examine; and he is not entitled to discovery of documents. But on the other hand (and for this no authority is needed) a mere pretence of giving the person concerned a hearing would clearly not be a compliance with the Rule. For in my view will it suffice if he is given such a right to make representations as in the circumstances does not constitute a fair and adequate opportunity of meeting the case against him.'

29. Eventually, the fairness of the procedure adopted in a particular case will depend on the facts of the case and the nature of the disputes. The submission that a fair process requires at least a charge sheet, a statement of claim, a hearing where cross-examination may take place and legal representation is in principle and in the light of the provisions of the Act simply incorrect and is rejected.

30. The same applies to the submission that it is only possible to establish the correctness of an allegation through oral evidence. The submission repeatedly made is that the so-called *Plascon Evans*-rule should be followed by the Ombud, namely that if there are disputes of fact the objection should be dismissed. This is a perversion of the rule. In courts the rule applies to material disputes. In any event, the submission disregards the basis of the rule as applied in courts. It is based on the fact that if factual disputes are anticipated, a claimant has a choice either to proceed by way of action or by way of notice of motion. The procedural rights of the complainant in action proceedings cannot be emasculated by choosing the latter procedure: *Ngqumba v Staatspresident* 1988 (4) SA 224 (A).

31. This consideration does not apply in matters dealt with by the Ombud. The Act and rules prescribe the initiating procedure and it is not a matter of choice in the hands of the complainant.

32. The submission that probabilities cannot be decided on paper is also rejected. Obviously, if all a decision-maker has are two conflicting allegations that may not be possible. However, probabilities flow from other facts, not only the facts in dispute, and

from general experience, for instance the general practice in the industry. Probabilities can also be deduced from the nature of the answer or lack of answer to an allegation.

33. The record of advice plays in this regard an important role. Its function is not only to protect the client but more importantly the service provider because it may provide corroboration of what was done or not done.

THE FACTS OF THE CASE

34. We have dealt with the preceding issues at some length because they formed the crux of the appellants' argument and appear repeatedly – often in exactly the same generalised terms – in letters written to the Ombud, in applications for leave to appeal and in argument. But, as will be shown, the relevant facts in this case are fairly uncomplicated and uncontentious.

35. It will be recalled that the complainant held the money inherited in a money market account at one of the large financial institutions. He was concerned about the sufficiency of his provision for retirement and he wished to move the money to a better and secure investment which would provide him with capital growth.

36. The appellants advised him to invest in this property syndication. This meant that he had to move his money from one type of investment to another. This is what is known in the trade as a switch.

37. The Code[2] states in para 8(1)(d) that a provider other than a direct marketer, must, prior to providing a client with advice—

[2] BN 80 of 8 August 2003: General Code of Conduct for Authorised Financial Services Providers and Representatives.

"where the financial product ('the replacement product') is to replace an existing financial product wholly or partially ('the terminated product') held by the client, fully disclose to the client the actual and potential financial implications, costs and consequences of such a replacement, including, where applicable, full details of—

(i) fees and charges in respect of the replacement product compared to those in respect of the terminated product;

(ii) special terms and conditions, exclusions of liability, waiting periods, loadings, penalties, excesses, restrictions or circumstances in which benefits will not be provided, which may be applicable to the replacement product compared to those applicable to the terminated product;

(iii) in the case of an insurance product, the impact of age and health changes on the premium payable;

(iv) differences between the tax implications of the replacement product and the terminated product;

(v) material differences between the investment risk of the replacement product and the terminated product;

(vi) penalties or unrecovered expenses deductible or payable due to termination of the terminated product;

(vii) to what extent the replacement product is readily realisable or the relevant funds accessible, compared to the terminated product;

(viii) vested rights, minimum guaranteed benefits or other guarantees or benefits which will be lost as a result of the replacement; and

(ix) any incentive, remuneration, consideration, commission, fee or brokerages received, directly or indirectly, by the provider on the terminated product and any incentive, remuneration, consideration, commission, fee or brokerages payable, directly or indirectly, to the provider on the replacement product where the provider rendered financial services on both the terminated and replacement product."

38. It is common cause that the appellants did not comply with the provision. In particular, they did not "fully disclose to the client the actual and potential financial implications, costs and consequences of such a replacement" or "the material differences between the investment risk of the replacement product and the terminated product".

39. Dealing then with fairness of the procedure adopted, the Ombud specifically asked the appellants already on 18 June 2012 for proof of adherence to this provision of the Code. The letter was not answered. The appellants did however respond to the letter of the Ombud of 9 June 2015 where the issue was raised in more detail. The response did not address the issue at all and the Ombud was entitled to find, as she did, that the appellants did not comply with the provision.

40. The appellants, rather pointedly, did not deal at all with the provision in the heads of argument although in the notice of appeal there is a cryptic statement that the provision did not apply to the facts of the case. Mr Bielderman during argument sought to justify non-compliance on the same ground. If we understand his argument it was to

the effect that the switch obligations arise only if the provider suggests a switch and not where the client requests advice about a switch. We reject the submission because it is in conflict with the rule and its purpose.

RELEVANCE OF NON-COMPLIANCE

41. The next issue to consider is whether the non-compliance of a provision of the Code can give rise to legal liability, whether in contract or delict.

42. The liability of a provider to a client is usually based on a breach of contract. The contract requires of a provider to give advice with the appropriate degree of skill and care, i.e., not negligently. Failure to do so, i.e., giving negligent investment advice, gives rise to liability if the advice was accepted and acted upon, that it was bad advice, and that it caused loss. And in deciding what is reasonable the Court will have regard to the general level of skill and diligence possessed and exercised at the time by *the members of the branch of the profession* to which the practitioner belongs.[3]

43. In the case of a provider under the Act more is required namely compliance with the provisions of the Code. Failure to comply with the code can be seen in two ways. The Code may be regarded as being impliedly part of the agreement between the provider and the client and its breach a breach of contract. The other approach is that failure of the statutory duty gives rise to delictual liability.

44. In both instances the breach must be the cause of the loss. We stress this point because the Ombud's reasons give the impression that any breach of the Code makes a provider liable for damages without due regard to this aspect of causation, namely did the failure

[3] *Durr v ABSA Bank Ltd* [1997] 3 All SA 1 (A) (1997 (3) SA 448) (SCA).

to comply with the Code cause acceptance of the advice. For instance, it is difficult to see how a failure to keep a proper record of advice could lead to a loss and liability. The advice may have been proper but not recorded. That does not mean that the provider is liable for a loss if an investment turns sour.

EFFECT OF NON-COMPLIANCE

45. The complainant was not informed that the prospectus had been closed, that the syndication did not hold any property, and that the money paid into the syndication's trust account was not safe but at the disposal of the syndication. He was told that his investment was protected by a buy-back agreement, something on its face completely valueless.
46. Although invited by the complainant to deny that they knew at the stage that there were problems with the syndication company, the appellants did not do so. They also did not place in issue the allegation that the promise was that the investment would double in five years – something corroborated by the record of advice.
47. We therefore conclude that the complainant would not have accepted the advice if the appellants had complied with clause 8(1)(d) of the Code. He was prepared to take a moderate risk, not a high risk.

LOSS

48. At the time of his complaint the complainant did not yet know as a fact that he had lost his investment and left it in the hands of the Ombud to determine. But he knew from a

newspaper article which he attached that the syndication did not own any property at that stage.

49. The appellants denied in strong terms in their 14 October 2011 letter that the complainant had suffered any loss but gave no facts. The appellants should have known the full facts not only because of their professional duties but also because the second appellant and his father allegedly also invested in the scheme. (This was said to the complainant at the time but not repeated.)

50. In the letter of 9 June 2015, the Ombud invited comments from the appellants and alleged that the company had failed and this may have resulted in the loss of the entire investment. The appellants failed to engage with this allegation and it can therefore be accepted as a fact.

51. In addition, although the appellants in their application for leave to appeal dealt with para 15 and 17 of the Ombud's determination they did not attack para 16:

> "It is a matter of fact that Pickvest withdrew the funds from the attorneys' trust account, prior to the transfer of the properties, paid it to the sellers and without reference to the investors, cancelled the sales agreements between the syndication company and various sellers. A company known as Orthotouch Limited, (Orthotouch) entered into an agreement with the sellers and the syndication companies in terms of which Orthotouch would buy the properties from the syndication companies. The latter companies were later placed under business rescue in terms of the Companies Act 71 of 2008. Thus, none of the

properties were ever transferred to the syndication companies, despite payment having been made.”

52. In our view the complainant lost his money at the time of the investment. The syndication was unlawful because the prospectus did not comply with the statutory disclosure and other requirements. In particular, the money was lost as an investment once it was paid in terms of an unlawful prospectus into the trust account of the attorneys of the syndication. The complainant may have a damages or enrichment claim against the attorneys or the syndication company to mitigate his damages but it was for the appellants to provide information as to the value and extent of such possible mitigation.
53. It follows that the appeal is dismissed and it becomes unnecessary to deal with the other submissions.

The appeal is dismissed.

Signed on behalf of the panel on 6 June 2017

LTC Harms (Chair)