

**THE FINANCIAL SERVICES TRIBUNAL**

CASE NO.:FAB23/2018

FAIS OMBUD REF: FAIS 09229/10-11/KZN1

In the matter of

MIDCOAST FINANCIAL SERVICES (PTY) LTD

First Applicant

BRUCE EARL GRIFFITS

Second Applicant

and

ESTATE LATE JOHN MICHAEL O'GRADY

Respondent

THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

Second Respondent

**SUMMARY:** THE REQUIREMENT OF PROCEDURAL FAIRNESS- FAILURE TO OBSERVE *AUDI ALTERAM PARTEM* RULE IS FATAL

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**JUDGEMENT**

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- 1 The Applicants appeal against a Determination of The Ombud for Financial Services Providers (hereinafter referred to as the **Ombud**) against the Applicants issued by the Ombud in terms of Section 28(1) of the Financial Advisory and Intermediary Services Act, Act no. 37 of 2002 (hereinafter referred to as the **Act**) on the 16<sup>th</sup> February.
- 2 Leave to Appeal was granted by the Deputy Chairperson Judge Harms limited to procedural issues raised in paragraphs 13 to 15 of application for Leave to Appeal.
- 3 The issues raised in paragraphs 13 to 15 relate to matters of procedural fairness and can be summarised as follows:
  - 3.1 On the 19<sup>th</sup> September 2016 the office of the Ombud issued a notice in terms of Section 27(4) of the Act against the Applicant in respect of a complaint of the First Respondent.
  - 3.2 The notice was sent to the Applicant and copied to the Applicant's then attorney of record Bieldermands Inc.
  - 3.3 On the 5<sup>th</sup> October 2016 the Applicant's attorneys sent a letter to the office of the Ombud enclosing a comprehensive response to the notice in terms of Section 27(4) of the Act.
  - 3.4 On the 23<sup>rd</sup> November 2017 the office of the Ombud issued Recommendations in terms of Section 27(5)(c) of the Act which Recommendations were sent to the Applicant at the e-mail address [bgriffiths@midcoast.co.za](mailto:bgriffiths@midcoast.co.za). The Recommendations advised the Applicant the following:
    - 3.4.1 That the FAIS Ombud recommends that the Respondent pays the complainant's loss in the amount of R500 000.00.

- 3.4.2 Invited the Applicants to respond to the Recommendations within 10(ten) days with cogent reasons failing which the Recommendations will become Final Determination in terms of Section 28(1) of the FAIS Act.
- 3.5 The Ombud's letter of the 23<sup>rd</sup> November 2017 was sent to the Applicants using a wrong e-mail address and it never reached the Applicant. The letter was not sent to the Applicants' attorneys at all notwithstanding that they had placed themselves on record as the Applicants' attorneys and responded to the Ombud's Determination.
- 3.6 On the 16<sup>th</sup> February 2018 the office of the Ombud issued a Determination in terms of Section 28(1) of the Act to be read in conjunction with the recommendations in terms of Section 27(6)(c) which upheld the complaint and ordered the Applicants to jointly and severally pay the Respondent the sum of R500 000.00 the one paying the other to be absolved.
- 3.7 The Section 28(1) Determination was sent to the Applicant's attorneys of record who immediately upon receipt thereof brought an application for leave to appeal in terms of Section 28(5)(b)(1)(aa) and (bb) in the office of the Ombud.
- 3.8 The office of the Ombud dismissed the Application for Leave to Appeal on the basis that the Applicants had not suffered any prejudice. The Ombud stated that the response of the Applicants to the Recommendations would have in any event been the same as the response that was given by the Applicants on the 26<sup>th</sup> April 2011 when the Applicants responded to the original complaint.
- 3.9 It is clear in this matter that there was an oversight at the Ombud's office in that the Applicants were never given the opportunity to respond to the Recommendation. The Determination was never sent to the Applicants' attorneys of record. At the hearing of this matter Mr Alves, who was manager who drafted the Recommendation, conceded that there was an oversight at the Ombud's office.

3.10 The Applicants should have been permitted to respond to the Recommendations. Section 20 of the FAIS Act provides the following:

*"Section 20(3)*

*(3) The objective of the Ombud is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious matter and by reference to what is equitable in all circumstances..."*

3.11 In the matter between Sharemax Investments (Pty) Ltd (and 4 others) v Gerbrecht Elizabeth J Siegrist and Jacqueline Bekker ref 066/10-11/WC1 the Appeal Board of the Financial Services Board per Justice Harms stated the following:

*"[17] The requirement of procedural fairness, which applies to the FAIS Ombud, is based in the Constitution and is fleshed out in the Promotion of Administrative Justice Act 3 of 2000, more particularly in sec 3(2)(b):*

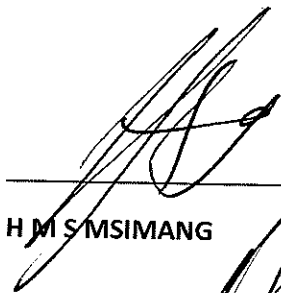
*'In order to give effect to the right to procedural fairness administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-*

- (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"*

3.12 It is clear that there was procedural unfairness in this matter and that the Applicants were denied the right to be heard as required by the *audi alteram partem* rule. The right to respond to the Recommendations is sacrosanct and failure by the office of the Ombud to observe such right to the Applicants is fatal and the Determination in terms of Section 28(1) of the Act dated the 16<sup>th</sup> February 2018 must fail.

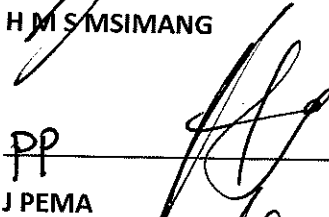
3.13 In the result, the following order is made:

- 1 The appeal is upheld
- 2 The Determination in terms of Section 28(1) of the Act dated the 16<sup>th</sup> February 2018 be and is hereby set aside.
- 3 The matter is referred back to the Office of the Ombud.
- 4 The Applicants are permitted to respond to the Recommendations.
- 5 No order for costs.



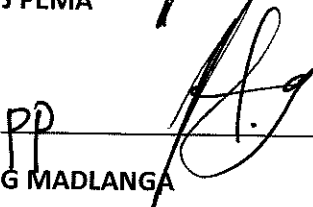
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H M S MSIMANG



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PP  
J PEMA



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PP  
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