



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable

Case no: 781/2020

In the matter between:

**THE OMBUD FOR FINANCIAL
SERVICES PROVIDERS**

APPELLANT

and

CS BROKERS CC

FIRST RESPONDENT

EMILE STORM

SECOND RESPONDENT

**HIS LORDSHIP MR JUSTICE OF
APPEAL RETIRED, L T C HARMS N O**

THIRD RESPONDENT

Z MABHOZA N O

FOURTH RESPONDENT

G MADLANGA N O

FIFTH RESPONDENT

J B WALLACE

SIXTH RESPONDENT

Neutral citation: *Ombud for Financial Services Providers v CS Brokers CC and Others* (Case no 781/2020) [2021] ZASCA 117 (17 September 2021)

Coram: PONNAN, MATHOPO, MOLEMELA, MBATHA and GORVEN JJA

Heard: 2 September 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 17 September 2021.

Summary: Review – Financial Advisory and Intermediary Services Act – application under s 27(3) for hearing of oral evidence or referral to court – Ombud's discretion – no discretion exercised at all – decision not to allow application reviewable.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Fabricius J, sitting as court of first instance):

The appeal is dismissed with costs, such costs to include the costs of two counsel, wherever so employed.

JUDGMENT

Gorven JA (Ponnan, Mathopo, Molemela and Mbatha JJA concurring)

[1] On 19 November 2009, the sixth respondent on appeal, Mr J B Wallace (Mr Wallace), invested a sum of R730 000 with a company known as Sharemax; R600 000 of this was money entrusted to Mr Wallace by his mother, a pensioner based in the United Kingdom, to invest on her behalf. The balance came from his own funds. At the time, one Mr Marais was his financial advisor. Mr Marais informed Mr Wallace that he was unable to advise him on an investment with Sharemax and referred him to the second appellant (Mr Storm). Mr Storm functioned as an authorised representative of the first appellant, CS Brokers CC (CS Brokers). I shall refer to them jointly as CS Brokers unless it is necessary to distinguish them. CS Brokers was an authorised Financial Services Provider under the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS).

[2] Mr Wallace, Mr Marais and Mr Storm met more than once. The investment in Sharemax resulted from these meetings. Sharemax offered a number of investments which were essentially property syndications. Some of the funds of Mr Wallace and his mother were placed in the Villa Development and the balance in the Zambezi Development. Each had its own prospectus. There are differing versions as to how this came about. In her determination, the appellant, the Ombud for Financial Services Providers appointed under FAIS (the Ombud), noted that there was a factual dispute as to whether either Mr Storm or Mr Marais had advised Mr Wallace to invest in Sharemax. She notes that Mr Storm and Mr Marais said that Mr Wallace had already decided to do so prior to meeting Mr Storm. These disputes, of course, go to the heart of the claim of Mr Wallace. CS Brokers points to other factual disputes in addition to those noted by the Ombud.

[3] Despite Mr Wallace expecting income from the investments, by September 2010, no income had been received. Mr Wallace approached Mr Storm and alleged that Mr Storm assured him that the capital was safe, but that there had been a delay in income due to internal problems. On 9 November 2010, Mr Wallace wrote to Mr Storm requesting the return of the capital amount invested. A meeting took place on 19 November 2010 but no money was forthcoming. Mr Wallace then lodged a complaint with the Ombud. The complaint was supported by an unsworn statement and responded to by CS Brokers in like manner.

[4] The complaint was laid with the Ombud on 10 December 2010. She posed certain questions to CS Brokers, to which she received a response. On 9 May 2011, CS Brokers applied to the Ombud under s 27(3) of FAIS to hold

a hearing or to refer the complaint to a court. The motivation was that it was a matter requiring oral evidence and cross-examination to resolve factual disputes as well as expert evidence. On 11 May 2011, the Ombud in effect refused that application. She went on to deal with the matter on the material before her. Some five years later, on 26 April 2016, the Ombud made a determination. She ordered CS Brokers to pay Mr Wallace the sum of R730 000 along with interest. CS Brokers applied to the Ombud for leave to appeal, which was refused.

[5] CS Brokers then applied to the Chair of the Appeal Board under s 26B(12) of the Financial Services Board Act 97 of 1990 (the Board Act). Such an application is one to allow further oral and written evidence or factual information and documentation not made available to the Ombud prior to the making of the decision against which the appeal was lodged. The members of the Appeal Board (the Board) are the third, fourth and fifth respondents in this appeal. The Chair dismissed that application. CS Brokers then applied to the Board for leave to appeal against the determination of the Ombud and were granted leave to appeal on limited grounds, namely:

- ‘1. Was Mrs Wallace a ‘complainant’ as defined in sec 1 of the FAIS Act and if not, was the Ombud entitled to make an order in respect of her loss?
2. Does the Plascon-Evans rule apply in inquisitorial investigations – and in that context did the Ombud in deciding the disputes of fact use her inquisitorial powers or did she decide the factual disputes on the counter-allegations only?
3. Did the Ombud conflate the risk profiles of the three different investors?
4. Was the advice at the time it was given negligent taking into account the extent to which the risks were indicated? In this regard are the reasons of the Ombud in her determination and her dismissal of the leave to appeal the same or materially different?

5. Would a reasonable FSP have reasonable grounds at the time of the advice to suspect that the Sharemax scheme was a Ponzi scheme?
6. Did the Ombud rely on ex post facts for her conclusion?
7. Was the loss reasonably foreseeable at the time of the advice?

After considering the record of the Ombud and forming its own view, the Board dismissed the appeal against the Ombud's determination in respect of CS Brokers.

[6] This prompted an application by CS Brokers to the Gauteng Division of the High Court, Pretoria (the high court), to review and set aside a range of decisions. By the time the matter was argued, the following relief was sought:

‘1. The decision by the First Respondent, alternatively the failure by the First Respondent to make a decision not to grant the application brought by the Applicants in terms of Section 27(3)(c) of the Financial Advisory & Intermediary Services Act 37 of 2002, to decline to entertain the complaint, is reviewed, set aside and substituted with the following decision: *“This office declines to entertain the complaint in terms of Section 27(3)(c) in that it would be more appropriate for the complaint to be dealt with by a Court or through any other available dispute resolution process”*.

2. All actions of the First, Second, Third and Fourth Respondents, following upon the First Respondent's aforesaid impugned decision are as a consequence of the setting aside of that decision, also set aside.

3. It is recorded that should the Fifth Respondent institute action against the Applicants, based on the facts contained in his complaint to the First Respondent, the Applicants undertake not to raise prescription as a Plea, subject to such action being instituted within a 6 (six) month period of the date of this order.

4. The First Respondent is ordered to pay the costs of the Applicants.’

[7] The matter was heard by Fabricius J, whose order, properly construed as agreed by the parties, reviewed and set aside all of the decisions of the

Ombud and the Board. These included: the refusal of the application under s 27(3); the determination by the Ombud; the refusal of the Chair of the Board of the application under s 26B(12) of the Board Act; and the dismissal of the appeal by the Board. The Ombud then applied for leave to appeal, which was refused. The appeal is before us as a result of this Court granting leave. As was the case in the high court, the third to sixth respondents take no part in the appeal.

[8] The parties agreed that the appeal stands or falls on whether the high court should have granted the following order:

‘1. The decision by the First Respondent, to decline to entertain the complaint in terms of s 27(3)(c) of the FAIS Act, is reviewed, set aside and substituted with the following decision: *“This office declines to entertain the complaint in terms of Section 27(3)(c) in that it would be more appropriate for the complaint to be dealt with by a Court or through any other available dispute resolution process.”*’

The basis of the appeal is the submission that the Ombud properly exercised her discretion when she refused the application in terms of s 27(3) of FAIS. In argument, this was posed by the parties as the sole issue to be decided by this Court.

[9] A brief synopsis of the relevant legislation will assist. Section 20 of FAIS created the office of the Ombud, whose functions are to be performed by the Ombud. Sections 20(3) and (4) set out the objective of the Ombud as follows:

‘(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 –

(a) the contractual arrangement or other legal relationship between the complainant and any other party to the complaint; and

(b) the provisions of this Act.

(4) When dealing with complaints in terms of sections 27 and 28 the Ombud is independent and must be impartial.’

[10] The Ombud was thus created as a mechanism for the speedy resolution of disputes, which would otherwise be dealt with in court. A complainant has an election to either utilise the Ombud or approach a court. Financial Services Providers have no such election. They must meet the claim in whichever forum is selected by the complainant. The powers of the Ombud are akin to those of a court as seen in s 28. The relevant parts are contained in ss 28(1) and 28(5).

Section 28(1), provides:

‘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;

(ii) a direction may be issued that the authorised financial services provider, representative or other party concerned take such steps in relation to the complaint as the Ombud deems appropriate and just;

(iii) the Ombud may make any other order which a Court may make.’

and s 28(5), which provides:

‘A determination –

(a) or a final decision of the board of appeal, as the case may be, is regarded as a civil judgment of a Court, had the matter in question been heard by a Court, and must be so noted by the clerk or registrar, as the case may be, of that Court;

(b) is only appealable to the board of appeal –

(i) with the leave of the Ombud after taking into consideration –

(aa) the complexity of the matter; or

(bb) the reasonable likelihood that the board of appeal may reach a different conclusion; or

(ii) if the Ombud refuses leave to appeal, with the permission of the chairperson of the board of appeal.’

[11] The procedure for the Ombud to deal with complaints is set out in s 27. Of relevance is s 27(3)(c) of FAIS, which provides:

‘(3) The following jurisdictional provisions apply to the Ombud in respect of the investigation of complaints:

...

(c) The Ombud may on reasonable grounds determine that it is more appropriate that the complaint be dealt with by a Court or through any other available dispute resolution process, and decline to entertain the complaint.’

and s 27(5)(a), which provides:

‘(5) The Ombud –

(a) may, in investigating or determining an officially received complaint, follow and implement any procedure (including mediation) which the Ombud deems appropriate, and may allow any party the right of legal representation.’

[12] It can thus be seen that the Ombud is granted extensive substantive powers. It was correctly conceded in argument by the Ombud that these are akin to quasi-judicial powers rather than purely administrative ones. A determination is regarded as a civil judgment of a court. In addition, the Ombud is accorded a discretion as to the appropriate procedure. This includes

a discretion under s 27(3)(c) to decline to entertain the complaint on the basis that a court, or some other dispute resolution forum, is the more appropriate forum to decide the complaint. In addition, the procedural discretion allows the Ombud to receive oral evidence, among other options.

[13] As indicated, the matter turns on whether the Ombud properly exercised her discretion in dealing with the application of CS Brokers under s 27(3). It requested her to decline to decide the matter and to refer it to court, alternatively to hear oral evidence on the basis that factual disputes existed which could only be resolved by following that procedure.

[14] There was much debate before us as to the nature of the discretion to be exercised by the Ombud. This also occupied the high court. The Ombud submitted that she had a broad discretion as to procedure and had properly exercised her discretion against hearing oral evidence or declining to deal with the matter on the basis that it should be dealt with by a court. CS Brokers, on the other hand, contended that the discretion was one which was required to be exercised judicially. Interesting though that debate may be, in my view it does not arise in the present matter and need not detain us. That is because this matter turns on the facts.

[15] As indicated, the application under s 27(3) was dated 9 May 2011, in which the attorneys representing CS Brokers requested that the Ombud hold a hearing or defer to the court in respect of the complaint. On 11 May 2011,

the Ombud responded by letter, saying simply: ‘this Office does not hold hearings’.¹

[16] During argument, counsel for the Ombud readily conceded that the application required a specific ruling along with reasons. The reason given for not holding a hearing with oral evidence is simply that the Ombud does not do so. The response is one which clearly indicates that no discretion at all was exercised on the application. Instead, a predetermined policy was applied, without reference to the specific issues in the matter before her. This when the Ombud is invested with a wide range of procedural options which can be tailored to different situations and complaints. This does not constitute an improper exercise of her discretion but an approach which, as the Board put it in the appeal determination, ‘disregards her statutory obligation to exercise her discretion’. With this statement, I can find no fault.

[17] In argument, the Ombud referred to the final determination to attempt to demonstrate that reasons were given. What is said in the determination is: ‘Storm’s attorneys criticize this office for not holding hearings to resolve “material factual disputes”. This office does not have a policy that prohibits the holding of hearings. Where it is appropriate, a hearing will be held. In this case there are no material disputes of fact that require such a hearing.’

This clearly contradicts the refusal at the time on the basis that ‘this Office does not hold hearings’. It is the latter statement by which the Ombud

¹ The full response was: ‘Your application that the matters involving your clients be referred to court is inappropriate as that is the decision of the Ombud. We add that there is nothing distinguishing the matters involving your clients to the hundreds of matters handled by this office. Once again, this Office does not hold hearings’.

responded to the application. In any event, the reasons given in the determination do not address the factual disputes noted by the Ombud herself which go to the heart of the claim of Mr Wallace. It suffices to say that it is difficult to discern which factors weighed and occupied her mind when she gave her decision. To say that there were no material disputes of fact when the parties disagreed whether Mr Wallace had already decided to invest in Sharemax when he met with Mr Storm simply beggars belief.

[18] It is therefore unnecessary to address the manner in which the discretion of the Ombud should be exercised and the test for interference with it on review. If no discretion is exercised, when the Ombud was indeed vested with a discretion, that has to be the end of the matter. As was agreed by the parties before us, the entire appeal turns on this single issue. It is clear in these circumstances that the appeal must fail.

[19] In the result, the appeal is dismissed with costs, such costs to include the costs of two counsel, wherever so employed.

T R GORVEN
JUDGE OF APPEAL

Appearances

For appellant: S Shangisa SC (heads prepared by V Ngalwana SC and S Shangisa SC)

Instructed by: Ramushu Mashile Twala Incorporated, Sandton.
Claude Reid Inc Attorneys, Bloemfontein.

For First and Second respondents: P F Louw SC (with him E Van As)

Instructed by: Bieldermand Incorporated, Sandton.
Honey Attorneys, Bloemfontein.