

SOUTH AFRICA / JUDGMENT

Johan Theron Makelaars CC and Another v Chairperson for Office of Ombud and Others (72880/2019) [2024] ZAGPPHC 1361 (24 December 2024)

[2024] ZAGPPHC 1361

COURT

North Gauteng High Court, Pretoria

BEFORE

K La M Manamela

CASE / FILE NUMBER

72880/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO: 72880 /2019

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

24

December 2024

Date

K. La M Manamela

In

the matter between:

JOHAN
THERON MAKELAARS CC
First
Applicant
JOHAN
GEORGE THERON
Second
Applicant
and
THE
CHAIRPERSON FOR OFFICE OF THE OMBUD
First
Respondent
FOR
FINANCIAL SERVICES PROVIDERS
THE
CHAIRPERSON FOR THE FINANCIAL
Second
Respondent
SERVICES
TRIBUNAL
DANIEL
JOHANNES POTGIETER
Third
Respondent
ELIZABETH
GERTRUIDA POTGIETER
Fourth
Respondent
FSP
NETWORK (PTY) LTD T/A UNLISTED SECURITIES
SOUTH
AFRICA (In Liquidation)
Fifth
Respondent
DATE
OF JUDGMENT: This judgment is issued by the Judge whose name is
reflected herein and is submitted electronically to the parties/their
legal representatives
by email. The judgment is further uploaded to
the electronic file of this matter on Caselines by the Judge's
secretary. The
date of the judgment is deemed to be 24 December 2024.

JUDGMENT

Khashane Manamela, AJ

Introduction

- [1] Mr Johan George Theron ('Mr Theron'), the second applicant, is a financial services provider and a member of the close corporation Johan Theron Makelaars CC ('Theron Makelaars'), the first applicant. Theron Makelaars is also a financial services provider in terms of section 8[1] of the Financial Advisory and Intermediary Services Act 37 of 2002 ('the FAIS Act').[2] Both Mr Theron and Theron Makelaars (jointly, 'the applicants') conduct business from offices situated in Rustenburg, North West Province or did so at all material times.
- [2] The applicants approached this Court by way of a Rule 53 judicial review. The review is premised on the provisions of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). They complain that specific administrative decisions and orders by the first respondent, the Chairperson for Office of the Ombud for Financial Services Providers ('the Ombud')[3] and the second respondent, the Chairperson for the Financial Services Tribunal ('the Tribunal') [4] materially and adversely affect their rights and legitimate expectations as they are tainted with substantive and procedural unfairness. The applicants seek in terms of this review that the impugned decisions and orders be reviewed and set aside.
- [3] The impugned decisions and orders emanate from complaints lodged by Mr Daniel Jacobus Potgieter ('Mr Potgieter'), the third respondent, and Ms Elizabeth Gertruida Potgieter ('Mrs Potgieter'), the fourth respondent, with the Ombud regarding financial services rendered to them by the applicants linked to investments they made into a company called Sharemax Investments (Pty) Ltd (in liquidation) ('Sharemax'). Mr Potgieter and Mrs Potgieter (jointly, 'the Potgieters') are married to each other in community of property. Evident from the citation of parties above is FSP Network (Pty) Ltd trading as Unlisted Securities South Africa ('USSA'), cited as the fifth respondent. USSA is a company in liquidation which was licensed by the Financial Services Board ('the FSB')[5] and is linked to Sharemax and also had involvement with the services offered by the applicants. But, no relief is sought against USSA.
- [4] The application was initially opposed by the Ombud, but eventually the opposition was withdrawn with an accompanying tender as to costs. The Tribunal and the Potgieters delivered notices to abide the decision of this Court. Henceforth, reference to the respondents, collectively, would exclude USSA as it also had played no active role since the complaints against the applicants were lodged with the Ombud or the legal proceedings were commenced in this Court.

- [5] The matter came before me on a special allocation by the Deputy Judge President on 08 August 2024. Ms EA Lourens appeared for the applicants. Due to what is stated in the preceding paragraph there was no appearance on behalf of any of the respondents. This judgment was then reserved, but regrettably due to the high volume of papers and issues involved, it took longer than initially anticipated to hand down this judgment. The judgment, gratefully, benefitted from the comprehensive written submissions by Ms Lourens for the applicants, including the post-hearing supplementary submissions, filed at the instance of the Court on 16 August 2024.

Brief background

General

- [6] Due to the fact that the application ultimately proceeded on an unopposed basis the facts in the background of this matter are undisputed. But any view to the contrary by any of the respondents, particularly the Potgieters, as appearing from the material relied upon by the applicants will be highlighted.
- [7] Mr Theron was previously employed by Old Mutual as an area manager. This was from 1985 to February 2007. He left Old Mutual for Pinnacle Brokerage (i.e. Quickstep 212 and 213 (Pty) Ltd) during 2007. He provided financial services under supervision in the capacity of a 'representative',[6] as envisaged in section 1 of the FAIS Act. In September 2007, he established and started operating under the name and style of Theron Makelaars.

Mr Theron and Theron Makelaars, as financial services providers (generally)

- [8] Theron Makelaars was registered as a financial services provider ('FSP')[7] around March 2008. The licence issued to Theron Makelaars - at the time - was limited to specified financial services under section 8[8] of the FAIS Act. The financial services to be rendered did not involve property syndications (i.e. categories 1.8 and 1.10 products). This means Theron Makelaars could only render property syndication services in the capacity of 'a representative'[9] of the principal licence holder, namely, USSA or Sharemax. The latter, as the principal, accepted responsibility for those services

rendered within the scope of the mandate given to Theron Makelaars. USSA's mandate to act as principal had been approved by the FSB.

- [9] Sharemax or USSA had been registered and issued with FSP licence in terms of section 8 of the FAIS Act (and preceding legislation) since September 2005. USSA and its representatives solicited investments in accordance with duly registered prospectuses approved by the Registrar of Companies (now 'the Companies and Intellectual Property Commission').[10] Further, the Sharemax property syndication was authorised and approved by the FSB, the Public Property Syndication Association and the South African Property Owners Association. According to the applicants, it was generally accepted that the information in the prospectus was considered legally compliant by these authorities.

The Potgieters are introduced to the applicants

- [10] Mr Theron says in March 2008 he was introduced to Mr Potgieter by one Ms Daleen Oosthuizen ('Ms Oosthuizen'), a consultant and regional manager of Sharemax in the North West Province. Mr Potgieter was introduced as an existing Sharemax investor who sought to reinvest a Sharemax investment first made in April 2002. The prior investment in the amount of R112 000 had been facilitated by Mr Stefan Swanepoel, a broker. It was in respect of the Sharemax project, Centurion Clubview. The monies were originally matured investment by Mr Potgieter with Sanlam. The Sharemax Centurion Clubview investment has matured as the building had been sold. The Potgieters required assistance in reinvesting of their funds.
- [11] According to Ms Oosthuizen the Potgieters had informed her that Mr Swanepoel's involvement as a Sharemax broker was only limited to the Centurion Clubview Property. Mr Potgieter wanted broker or FSP services to reinvest his funds into Zambezi Retail Park, a new product of Sharemax. Pinnacle Brokers did not assist the Potgieters despite being contacted to facilitate reinvestment. Consequently, Mr Theron met with the Potgieters on 12 March 2008 to assist with the reinvestment into Sharemax. He did so as an appointed representative of USSA (Sharemax). This was the first time the applicants acted as representatives in respect of Sharemax products. Ms Oosthuizen also attended the meeting.

The applicants, the Potgieters and investment options

- [12] The following is said to have occurred at the first meeting between the Potgieters and Mr Theron, accompanied by Ms Oosthuizen:
- (a) the Potgieters were furnished with documents, whose content was explained to them, by Mr Theron and Ms Oosthuizen; (b) Ms Oosthuizen and Mr Theron advised the Potgieters of the representative role of the applicants on behalf of USSA; (c) the risks associated with property syndication investments were explained; (d) Mr Theron provided the Potgieters with different low risk investment options more suitable to their needs, including Sanlam as a safer option; (e) the Potgieters were advised to carefully consider the options, including not to reinvest the R112 000 in Sharemax.
- [13] On 13 March 2008 the Potgieters appointed the applicants as their FSP, but as representative of USSA. The applicants were authorised to access the Potgieters' 'life and risk portfolio' to assess their most suitable investment options.
- [14] I have to say a little more on Mr Potgieter's prior investment of R112 000 in Sharemax Centurion Clubview scheme. The investment spanned a period of six years from April 2002 to April 2008. During this period Mr Potgieter received interest income from the investment of between 10% and 12% per annum. This stopped when the Clubview Shopping Centre was completed and sold. The return or benefit (i.e. interest received) from the investment of R112 000 was around R80 500.

The applicants' advice and the Potgieters' choice of Sharemax investment products

- [15] The Potgieters made it clear – from the initial meeting with Mr Theron on 13 March 2008 - that they were satisfied with the interest income or return on investment and sought to re-invest their money only with Sharemax. No other investment options, including those from Sanlam, were to be considered. The Potgieters told Mr Theron of their bad experiences with Sanlam from an earlier investment. They confirmed their due consideration of the inherent risks of the Sharemax property syndication investment. They had prior experience and found the benefits satisfactory. They also appreciated that the Zambezi investment differed with the Clubview investment as the former was a development as opposed to an existing building.
- [16] Subsequently, the Potgieters made the following investments in Sharemax Zambezi and Sharemax the Villa: (a) on 25 March 2008 in an amount of R121 000 (i.e. the initial amount of R112 000 together with interest accrued); (b) on 02 September 2008 in an amount of R50 000 in the name of their grandson Kean Potgieter, despite concerns expressed by Mr Theron regarding their capability to sustain themselves financially after making the investment; (c) 02 September 2008 in an amount of R200 000 in the name of Mrs Potgieter;
- (d) on 12 November 2008 in an amount of R200 000 in the name of Mr Potgieter; (e) in April 2009 in two investments of R150 000 each in the names of Mr Potgieter and Mrs Potgieter, respectively; (f) on 04 March 2010 in two, further, investments of R150 000 each in the names of Mrs Potgieter and Mr Potgieter, respectively.[11]
- [17] The applicants say they subjected the Potgieters to financial risk assessment with every investment made. For example, when the Potgieters indicated that they intend investing the R50 000 in September 2008 the Potgieters were required by the applicants to furnish proof of affordability and sustainability. The Potgieters furnished information regarding a R1 million held in their ABSA bank account. The Potgieters were made aware of the contents of the prospectus and USSA disclosure documentation, with them signing and confirming the contents thereof as correct. In turn, the applicants would be satisfied that the Potgieters made informed decisions. As the investment type did not require a full needs analysis, the Potgieters were made aware of the provisions of section 8(4)[12] of the General Code of Conduct for Authorised Financial Services Providers and Representatives ('the Code')[13] to ensure that they appreciated the risks they were undertaking.
- [18] During the course of making these investments the applicants - due to the concerns regarding the vast amounts of capital and interest continuously invested by the Potgieters in Sharemax - suggested to them to mitigate the risk by depositing the interest earned from the investment into a separate savings account with Nedbank, as opposed to reinvesting all funds derived from the investment. The Potgieters agreed to the suggestion. This was after the November 2008 investment. But the Potgieters cancelled the Nedbank arrangement in April 2009 without involving the applicants. They, instead, opened an ABSA cheque account for the same purpose.

Complaints by the Potgieters lodged with the Ombud against the applicants, and response by the applicants

First complaint of August/October 2012

- [19] Around 27 August 2012, the Potgieters lodged their first complaint with the Ombud. The applicants received a notice of same from the Ombud on 08 October 2012. It related to the following investments:
- (a) the investment made on 25 March 2008 in the amount R121 000 (i.r.o. Zambezi); (b) the investment made on 02 September 2008 in the amount R50 000 (i.r.o. Zambezi);
 - (c) the investment made on 12 November 2008 in the amount R200 000 (i.r.o. Zambezi); (d) the investment made on 02 April 2009 in the amount R150 000 (i.r.o. the Villa); (e) the investment made on 02 April 2009 in the amount R150 000 (i.r.o. the Villa). These investments do not seem to fully correspond with those stated above, but nothing turns on this.[14]
- [20] The first complaint appears to have been supplemented through an email of 17 October 2012 by the Potgieters in response to questions posed by the Ombud, including the following: (a) the Potgieters were introduced to Sharemax by Ms Linda Heynecke, a secretary to Mr Theron; (b) the Potgieters previously invested only with Sanlam before they invested with Sharemax; (c) they do not have a record of any of the events or communications regarding the reinvestment process from Sanlam to Sharemax or otherwise, and (d) they have no proof of where the Sanlam policy was paid into.
- [21] A separate complaint was lodged by Mrs Potgieter. The notice of the complaint was directed to Theron Makelaars to provide specified documentation.
- [22] The applicants furnished, around 20 November 2012, a substantive reply which included signed documents relating to the financial services rendered to the Potgieters in respect of the Sharemax investments. Thereafter, a period of approximately two and half years passed without the applicants hearing anything from the office of the Ombud or any of the respondents, until they received the second complaint in June 2015.

Second complaint of 10 June 2015

- [23] The second complaint was received by the applicants around 10 June 2015. This was in the form of a notice in terms of section 27(4)[15] of the FAIS Act.

Third complaint of 30 June 2015

- [24] The applicants received the third complaint around 30 June 2015 from the Ombud. It was exactly the same as the second complaint received on 10 June 2015. The applicants furnished a response on 30 June 2015, which was supplemented in September 2015.

Applicants' response

[25] The applicants, as stated above, furnished what they consider a comprehensive response to the complaint(s) stated above. They raised a number of grounds against the complaint(s).

Substantive and procedural unfairness

[26] The applicants requested that the complaint be determined by a Court of law, alternatively that the Ombud afford them an opportunity to participate in a hearing which would include the following: (a) properly particularised allegations made against them and with them granted the right of reply; (b) evidence adduced under oath; (c) the right to cross-examine witnesses; (d) authority to call expert witnesses on the risk, business model and viability of the property syndication, and (e) legal argument prior to the Ombud making a final decision or determination.

Prescription

[27] The issue of prescription was raised on the basis that the majority of the Sharemax investments were made in 2008 and 2009, which was more than three years before the Potgieters lodged their complaints with the Ombud in October 2012.[16] Thus, it is contended by the applicants that, the majority of the claims have prescribed in terms of section 27(3)(a)(i)[17] of the FAIS Act.

Bias or reasonable apprehension of bias

[28] The applicants say that they raised material concerns regarding the public statements by the Ombud of the extreme dislike it harboured of property syndications. The concerns also were with regard to the lack of procedural fairness in that the Ombud was perceived to be not acting from a position of impartiality by investigating the matter, establishing the facts, applying facts to the law and then adjudicating on the whole process.

Due Diligence

[29] The applicants say that they performed a due diligence exercise to the best of their ability in respect of the proposed Sharemax investments.[18] Additional security or safety to the clients of the applicants was provided by the involvement of a registered and professional compliance company known as Masthead retained by the applicants to oversee and ensure proper compliance with financial services legislation at all times at the applicants' own cost.

Factual dispute

[30] The applicants dealt with – what they consider - glaring factual disputes relating to obvious discrepancies between the version presented and substantiated by them and that of the Potgieters. There is no need to repeat the details thereof here.

Negligence and causality

- [31] The applicants dispute that there is negligence on their part and that the principles of legal and factual causation have been correctly applied to attribute any form of liability unto them.
- [32] It is the applicants' case that the legality and commercial viability of the Sharemax property syndication scheme were yet to be determined at that stage. Before then, the issue of liability of the financial service providers involved could not have been competent. Also that the intervention by the South African Reserve Bank was the cause of any loss which may have been suffered by the Potgieters, and not due to any breach of duty on the part of the applicants, for example, by having failed to explain the risks of the investment to them.
- [33] After the applicants had delivered the aforementioned supplementary response, they did not hear from the Ombud or the Potgieters, again, for about seven months, until the complaints resumed.

Fourth complaint of 13 May 2016

- [34] On 13 May 2016, the applicants received another notice from the Ombud in terms of section 27(4) of the FAIS Act. This notice was also exactly the same as the previous two notices, although it incorrectly referred to one HO Van Niekerk, as the complainant. The applicants say this manifests 'copy and paste' approach by the Ombud. The applicants, through the attorneys, responded to the notice on 30 May 2016.
- [35] The applicants raised the following issues in the response to the Ombud: (a) that, the Potgieters, married in community of property, could not lodge two separate complaints as they share a communal estate; (b) that, without the aforesaid 'splitting' of the claims the total amount invested by the Potgieters exceeds the monetary jurisdiction of the Ombud and, thus, the Ombud lacks jurisdiction to adjudicate the claims unless the applicants consent thereto; (c) the numerous notices received from the Ombud since 2015, and (d) urging that, the Ombud consider the applicants' response of 17 September 2015, referred to above.
- [36] There was again some silence for a year and a half from the Ombud.

Fifth complaint of 05 October 2017

- [37] On 05 October 2017, the applicants received another notice in terms of section 27(4) of the FAIS Act. This time the notice differed from the four earlier notices. The notice required that the response heed the provisions of sections 2,[19] 7[20] and 8[21] of the Code.
- [38] The applicants say that they comprehensively addressed the eight issues raised in the notice in terms of their response of 18 October 2017.

First recommendation in terms of section 27(5)(c) of the FAIS Act of March 2018

- [39] On 20 March 2018, the Ombud issued a recommendation in terms of section 27(5)(c)[22] of the FAIS Act and made the following findings:

[39.1] the applicants' responses and information provided clearly show them as being out of their depth for recommending the Sharemax investments to the Potgieters, despite warnings in the prospectuses;

[39.2] the applicants' advice was negligent and in violation of the duty under section 2[23] of the Code. The applicants, therefore, could not advise the Potgieters appropriately, in contravention of sections 3(1)(a)(i)-(iii)[24] and 8(1)(a) to (c)[25] of the Code;

[39.3] the applicants were not absolved from complying with the Code, even if in their view they considered the Potgieters familiar with property syndication investments from a previous investment with Sharemax through another broker and the Potgieters insisting on reinvesting in Sharemax;

[39.4] the applicants' duty under the Code required of the applicants to appropriately advise the Potgieters, by informing them that their persistence to invest in Sharemax is contrary to their advice in terms of suitability, as required by section 8(4)(b)[26] of the Code;

[39.5] a FSP has a duty in terms of section 9 (read with section 8(1)-(2)) of the Code to ensure an investor is enabled to make an informed decision by identifying a suitable product to match a client's risk profile and circumstances from the information obtained by the FSP from the client, and retain records of the aforesaid; and

[39.6] no needs analysis was done as available documents suggest that: (a) only the Sharemax's product was considered;

(b) the Potgieters would not be interested in a Sanlam product due to bad previous experience; (c) nothing of significance explains why the Potgieters' needs could only be addressed by means of a property syndication investment, save for the likely good return from Sharemax product for the Potgieters.

[40] The Ombud concluded on the basis of what appears above that the applicants failed to give appropriate advice to the Potgieters and apprise them of the risks involved in the Sharemax investment in violation of section 7(1)[27] of the Code.

[41] Consequently, the applicants were ruled to have violated section 8 (1) (a) to (d), section 8(4) (b), section 2, section 3 (1) (a) and section 7 (1) of the Code. This, the Ombud ruled, means the applicants breached their agreement with the Potgieters due to failure to provide suitable advice and that the applicants have caused the Potgieters' loss.

[42] The Ombud recommended that: (a) the applicants be directed to pay R671 000 to Mr Potgieter and R500 000 to Mrs Potgieter, and (b) the Potgieters, upon receipt of full payment cede all their rights and title to the investments to the applicants. The latter part of the recommendation was made, despite the ongoing administration in the winding-up of the Sharemax scheme, it is pointed out by the applicants.

- [43] The applicants reacted to the recommendations by the Ombud on 29 March 2018, advising the Ombud of their non-acceptance of the Recommendation.

Determination in terms of section 28(1) of the FAIS Act

- [44] On 19 September 2018, the Ombud issued a final determination based on the Recommendation.
- [45] The Determination was to the effect that the complaint of inappropriate advice is upheld and that a sufficient link exists between the inappropriate advice rendered and the loss suffered by the Potgieters.

Application for leave to appeal in terms of section 28(5)(b) of the FAIS Act

- [46] In October 2018, the applicants launched an application for leave to appeal. The grounds predicated the application included: (a) that, there was lack of impartiality of the part of the Ombud, and (b) that, the Ombud erred in the investigation and prosecution of the complaints or matter leading to the determination.
- [47] The applicants contend that, where an administrator is the investigator, prosecutor, and adjudicator or decisionmaker (on whether to grant a party an audience to be heard) the process is inherently unfair, unlawful and in breach of constitutional rights under sections 33[28] and 34[29] of the Constitution of the Republic of South Africa, 1996 ('the Constitution') in respect of the party who is at the receiving end. For example, the administrative official who presided over the determination process was also the presiding officer in the appeal proceedings involving the applicants.
- [48] The applicants' appeal was premised on the following grounds: (a) failure by the Ombud to meet its statutory obligations under the FAIS Act, PAJA and the Constitution in failing to take into account relevant considerations and taking irrelevant considerations into account; (b) the Ombud disregarded undisputed facts completely including by failing to consider that the Potgieters received a prospectus on every investment made and confirmed that they understood the contents thereof which had been explained to them; (c) failure to observe rules of natural justice and a fair adjudication process. This failure tainted the entire investigation and subsequent determination of the matter.
- [49] On 21 November 2018, the appeal instituted by the applicants was dismissed. The grounds for the dismissal included that:
- (a) the application for leave to appeal was an abuse of process; (b) the prospectus does not explain the investments in plain language and, thus, impossible for a lay person to understand it; (c) the sale of business agreement, a crucial document, meant to be annexed to the prospectus was conveniently omitted and not made available to the FSPs and certainly not to the investors; (d) the issues regarding negligence and causation have been settled by the Tribunal in other matters and, thus, not requiring further attention;

- (e) ground regarding the lack of jurisdiction as the combined investment value of R800 000 is exceeded, was dismissed as unmeritorious, and (f) the ground bemoaning the non-disclosure of the information obtained in the investigation and prosecution of the complaint as breaching the audi alteram partem rule of natural justice was said not to 'be taken seriously'.
- [50] The applicants complain that the language used in the findings and commentary by the functionary of the Ombud was 'outright derogatory'. I agree. I will say more about this below.

Reconsideration in terms of section 28(5)(b) of the FAIS Act

- [51] Not to be discouraged, the applicants sought reconsideration in terms of section 28(5)(b)(i) (aa)[30] of the FAIS Act, read with section 230[31] of the Financial Sector Regulation Act 9 of 2017 ('the FSR Act').[32]
- [52] The matter served before retired Justice Mokgoro (now deceased) and she concluded that there is no reasonable likelihood that the Tribunal will decide the matter differently and, thus, dismissed the application.

Relief sought by the applicants

- [53] The applicants state that they have exhausted the internal remedies and have no option but to approach this Court for redress. They blame the preceding internal processes before the Ombud to have deprived them of effective and adequate remedy and their right to fair hearing.
- [54] In the notice of motion the applicants clearly set out the decisions and orders they seek to be reviewed and set aside. They also sought the costs of the application on the scale as between attorney and client against the respondents, which costs they require that they include all costs incurred by them defending the processes before the Ombud and the Tribunal.[33]
- [55] The applicants (in the founding affidavit) - additionally - sought declaratory relief that the internal remedies provided for in the FAIS Act and the FSR Act are inadequate and ineffective for purposes of resolving disputes of fact. This renders the internal remedies' regime to be in breach of the right to fair hearing and to be heard. It is important to reflect the legal framework within which the relief sought is located.

Applicable legal principles

- [56] Most of the legal principles implicated in this application are derived from the FAIS Act and the FSR Act. But as this is a judicial review of administration actions the provisions of PAJA and those of the Constitution also prominently feature.
- [57] Some of these principles have already been referred to above. The reflection of these legal principles under this part would facilitate the subsequent discussion and determination of the relevant issues in the application.

The Constitution

- [58] Section 33 of the Constitution enshrines the right to ‘administrative action – for everyone - that is lawful, reasonable and procedurally fair’. The provision required the enactment of national legislation to give effect to the rights therein and to provide for a review of administrative actions by a court or other appropriate independent and impartial tribunal. PAJA, whose provisions are dealt with below, is such legislation.
- [59] Section 34 of the Constitution guarantees right of access to courts for resolution of disputes ‘by the application of law decided in a fair public hearing before a court’ or by an appropriate independent and impartial tribunal or forum.

PAJA

- [60] This judicial review is primarily premised on the provisions of PAJA particularly section 6(2) dealing with a judicial review of administrative actions.[34]

The FAIS Act

- [61] The preamble to the FAIS Act partly reads as follows: ‘[t]o regulate the rendering of certain financial advisory and intermediary services to clients...’
- [62] Sections 20 provides for the establishment of the Ombud and states that the ‘objective of the Ombud is to consider and dispose of complaints under [the FAIS Act], and complaints for which the Adjudicator is designated in terms of section 211 of the [FSR Act], in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances’.[35]
- [63] The following provisions (as stated only in their material part) of the FAIS Act are pertinent for current purposes:

[63.1] Section 1, for the following meaning of ‘representative’:

any person, including a person employed or mandated by such first-mentioned person, who renders a financial service to a client for or on behalf of a financial services provider, in terms of conditions of employment or any other mandate ...

[63.2] Section 8(4)(a):

- (a) Where an application is granted, the registrar may impose such conditions and restrictions on the exercise of the authority granted by the licence, and to be included in the licence, as are necessary, having regard to—
- (i) ...;
- (ii) the category of financial services which the applicant could appropriately render or wishes to render;

(iii) the category of financial services providers in which the applicant is classified for the purposes of this Act; and

(iv) the category or subcategory of financial products in respect of which the applicant could appropriately render or wishes to render financial services.

[63.3] Section 27:

(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) have been complied with;
- (b) in the case of any non-compliance, act in accordance with the rules made under that section; and
- (c) otherwise officially receive the complaint if it qualifies as a complaint.

(2) Official receipt of a complaint by the Ombud suspends the running of prescription in terms of the Prescription Act, 1969 (Act No. 68 of 1969), for the period after such receipt of the complaint until the complaint has either been withdrawn, or determined by the Ombud or the board of appeal, as the case may be.

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

(a) (i) The Ombud must decline to investigate any complaint which relates to an act or omission which occurred on or after the date of commencement of this Act but on a date more than three years before the date of receipt of such complaint by the Office.

(ii) Where the complainant was unaware of the occurrence of the act or omission contemplated in subparagraph (i), the period of three years commences on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.

(b) ...

(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.

(4) 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.
- (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;
 - (b) must, in the first instance, explore any reasonable prospect of resolving a complaint by a conciliated settlement acceptable to all parties;
 - (c) may, in order to resolve a complaint speedily by conciliation, make a recommendation to the parties, requiring them to confirm whether or not they accept the recommendation and, where the recommendation is not accepted by a party, requiring that party to give reasons for not accepting it ...;
 - (d) may, in a manner that the Ombud deems appropriate, delineate the functions of investigation and determination between various functionaries of the Office;
 - (e) may, on terms specified by the Ombud, mandate any person or tribunal to perform any of the functions referred to in paragraph
- (d).
- (6) For the purposes of any investigation or determination by the Ombud, the provisions of the Commissions Act, 1947 (Act No. 8 of 1947), regarding the summoning and examination of persons and the administering of oaths or affirmations to them, the calling for the production of books, documents and objects, and offences by witnesses, apply with the necessary changes.

[63.4] Section 28:

- (1) 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.

- (2) (a) A monetary award may provide for the amount payable to bear interest at a rate and as from a date determined by the Ombud.
- (b) The Board may by rule determine—
- ...
- (iii) the granting of costs, including costs against a complainant in favour of the Office or the respondent if in the opinion of the Ombud—
- (aa) the conduct of the complainant was improper or unreasonable; or
- (bb) the complainant was responsible for an unreasonable delay in the finalisation of the relevant investigation:
- Provided that an amount payable under a cost award bears interest at a rate and as from a date determined by the Ombud.
- (3) Any award of interest by the Ombud in terms of subsection
- (2) may not exceed the rate which a Court would have been entitled to award, had the matter been heard by a Court.
- (4) (a) The Ombud must reduce a determination to writing, including all the reasons therefor, sign the determination, and send copies thereof to the registrar and all parties concerned with the complaint ...
- (5) A determination—
- (a) ...
- (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.

The FSR Act

- [64] Section 219 of the FSR Act provides for the establishment of the Financial Services Tribunal ('the Tribunal') and provides that the Tribunal performs functions conferred on it by the FSR Act and 'specific financial sector laws'.
- [65] Section 230 of the FSR Act provides for reconsideration of decisions by the Tribunal and reads as follows in the material part:

-
- (1) (a) A person aggrieved by a decision may apply to the Tribunal for a reconsideration of the decision by the Tribunal in accordance with this Part.
- (b) A reconsideration of a decision in terms of this Part constitutes an internal remedy as contemplated in section 7 (2) of the Promotion of Administrative Justice Act.
- (1) A provider must prior to providing a client with advice—
- (a) obtain from the client such information regarding the client's needs and objectives, financial situation, risk profile and financial product knowledge and experience as is necessary for the provider to provide the client with appropriate advice, which advice takes into account—
- (i) the client's ability to financially bear any costs or risks associated with the financial product;
- (ii) the extent to which the client has the necessary experience and knowledge in order to understand the risks involved in the transaction; and
- (iii) ...
- (b) conduct an analysis, for purposes of the advice, based on the information obtained;
- (c) identify the financial product or products that will be appropriate to the client's risk profile and financial needs, subject to the limitations imposed on the provider under the Act or any contractual arrangement; and
- (cA) where as a result of limitations referred to in paragraph
- (c) the provider is not able to identify a financial product or products that will be appropriate to the client's needs and objectives,
- financial situation, risk profile and product knowledge and experience, the provider must make this clear to the client, decline
- to recommend a product or transaction and suggest to the client that they should seek advice from another appropriately authorised
- provider;
- (2) The provider must take reasonable steps to ensure that the client understands the advice and that the client is in a position to make an informed decision.
- (3) ...
- (4) (a) In performing the analysis referred to in subsection
- (1) (b) a provider may, in determining the extent of the client information necessary to provide appropriate advice, take into account—
- (i) any specific objectives or needs of the client that the client has explicitly requested the provider to focus on, or not to focus on, in performing the analysis;

(ii) any specific objectives or needs of the client that the client and the provider have explicitly agreed to focus on or not to focus on in performing the analysis;

(iii) applicable surrounding circumstances that make it clear that the analysis can reasonably be expected by the client to focus only on specific objectives or specific needs of the client;

(iv) the fact that the client has explicitly declined to provide any information requested by the provider.

(4) (b) Where an analysis referred to in subsection

(1) (b) is performed in any of the circumstances referred to in subsection

(4) (a), the provider must alert the client as soon as reasonably possible that—

(i) there may be limitations on the appropriateness of the advice provided in light of such circumstances; and

(ii) the client should take particular care to consider on its own whether the advice is appropriate considering the client's objectives, financial situation and particular needs, particularly any aspects of such objectives, situation or needs that were not considered in light of the aforementioned circumstances.

(4) (c) Where a client elects to conclude a transaction that differs from that recommended by the provider, or otherwise elects not to follow the advice furnished, or elects to receive more limited information or advice than the provider is able to provide, the provider must alert the client as soon as reasonably possible of the clear existence of any risk to the client, and must advise the client to take particular care to consider whether any product selected is appropriate to the client's needs, objectives and circumstances.

Grounds of review and issues for determination

[67] This judicial review is primarily premised on the provisions of section 6(2) of PAJA, referred to above.[36]

[68] Below follows determination of the issues arising from the relief tabulated in the notice of motion and what appears above.

[69] No doubt, there will be other issues, not necessarily specified in the notice of motion or appearing above which may seep into the discussion of the specified issues or rubrics. Also, overlaps and necessary repetition are unavoidable.

Lack of jurisdiction

[70] It is logical to start with the issue of the alleged lack of jurisdiction on the part of the Ombud. The Tribunal is prohibited to investigate and adjudicate over matters where the quantum exceeds R800 000,00.[37] This amount represented the maximum amount the Ombud could award in damages.

[71] The applicants say that the Ombud lacked jurisdiction to entertain the claim instituted by the Potgieters, collectively in the amount of R1 171 000. They argue that as the Potgieters are married in community of property they could not lodge separate complaints. The Ombud's view is that the complaints concern separate claims within the monetary jurisdictional limit. I agree with the Ombud, for a different reason. There is no provision in the Matrimonial Property Act 88 of 1984 which precludes spouses married in community of property to act separately including in litigation, save that in some instances consent of the one spouse to the other is required.[38] From that angle there was no impediment for the part of the Potgieters to lodge separate complaints.

[72] The applicants argue that the majority of the claims had prescribed in terms of section 27(3)(a)(i)[39] of the FAIS Act as some of the investments by the Potgieters were made in the years 2008 and 2009. The aforesaid provision is peremptory in requiring that the Ombud 'must decline to investigate any complaint which relates to an act or omission which

occurred ... on a date more than three years before the date of receipt of such complaint'.[40] The three-year prescription 'period commences on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first'.[41] The Ombud did not make formal finding on the issue of prescription. The applicants describes this as an error in law.

[73] I agree with the applicants that prescription ought to have been taken into consideration by the Ombud at the admittance stage of the complaints. But, unless all claims in the complaints would have prescribed by the time the complaints were lodged, then the Ombud would have been entitled to investigate. The essence of the complaint about the investment is the same (i.e. the Potgieters allege that they were not advised appropriately). In terms of this logic the prescription issue would have been only material for purposes of the award to be made, as prescribed claims would have been outside of the ambit of the Ombud's investigation. There is no need to make a final ruling on this issue as its essence is trumped by the other issues in the determination, considered next.

Disputes of fact

[74] The applicants point to existence of dispute of fact in the papers exchanged between them and the Potgieters during the investigation and adjudication of the complaints. The examples cited by the applicants include that:

- (a) the date on coming into being of the contractual relationship between the applicants and Potgieters; (b) the terms of engagement and motivation for concluding the investment; (c) the fact that the Potgieters invested with Sharemax since 2002 through the assistance of another broker; the recommendation of the Sanlam option; (d) the absence of a sufficient link between the applicants' alleged negligence, legal causation and alleged liability, and (e) the applicants' compliance with sections 2, 7, 8 and 9 of the Code.

- [75] They applicants say that the matter ought to have been transferred to the High Court for resolution of dispute of fact through oral evidence and mechanism of cross examination of witnesses. The refusal of the referral breached the statutory and common law rights of the applicants, including the rights to just administrative action and to access the courts under sections 33 and 34 of the Constitution, respectively. It amounted to procedural unfairness one of the grounds of a PAJA review.[42]
- [76] I do not think that once a decision is made by an administrator, despite existence of what is considered by a party to be a dispute of fact, it would serve any purpose to assert the existence of such dispute of fact. What remains for consideration should be whether the allegation has been established.
- [77] As for a referral to the High Court for resolution of a possible dispute of fact, the legislature probably foresaw this when it equipped the Ombud - for 'purposes of any investigation or determination by the Ombud' with the powers in terms of the provisions of the Commissions Act No 8 of 1947, 'regarding the summoning and examination of persons and the administering of oaths or affirmations to them, the calling for the production of books, documents and objects, and offences by witnesses, apply with the necessary changes'.[43] I consider these powers sufficient to deal with the impugned factual situation. Perhaps, the complaint or enquiry ought to be whether the powers were used or reasonably used.

Wrong party sued

- [78] The applicants say they rendered the impugned financial services 'for and on behalf of Sharemax through the company USSA in terms of a contract concluded in terms of the provisions of section 13[44] of the FAIS Act, in the capacity of appointed representatives of USSA. Therefore, the applicants have been incorrectly hauled before

the Ombud. As representatives or agents they are not liable for any damages or losses arising from the financial services in terms of the FAIS Act and the common law of agency. USSA is said to have collapsed with Sharemax and liquidated.

- [79] I do not agree that a 'representative' is shielded from an investigation and/or determination by the Ombud simply by virtue of acting in that capacity. This, among others, is borne by the definition of the word 'complaint' in section 1 and use of the word in section 26(1)(a)(iii) of the FAIS Act which caters for financial service rendered by 'a financial services provider or representative', and financial services rendered by 'a person not authorised as a financial services provider or a person acting on behalf of such

first-mentioned person', respectively.

- [80] The issue of agency or representative capacity, if established, would feature when it comes to the sanction or determination of liability, but does not preclude the discipline or scrutiny of the professional conduct of the involved representative. Therefore, I will revert to this when I deal with the reimbursement and cession ordered by the Ombud, next.

Reimbursement of the monies invested by the Potgieters and cession of their investment agreements to the applicants

- [81] The applicants seek that the Ombud's recommendation (subsequently issued as a final determination) that they pay R671 000 to Mr Potgieter and R500 000 to Mrs Potgieter with interest be reviewed and set aside.[45] The determination also included that the Potgieters once paid in full should cede their rights and interests in the Sharemax investments to the applicants.
- [82] The applicants' criticism of the latter part of the recommendation or determination is on the basis that it is not feasible in the light of ongoing administration in the winding-up of the Sharemax scheme. It is also submitted that the Ombud prematurely decided the issue, other than the overall lack of powers to order the applicants to take cession of a right in respect of an agreement to which they are not a party, and that an order forcing a party to contract and take cession of the right of another is not enforceable in law. The Ombud acted ultra vires and the administrative action taken arbitrarily or capriciously, the applicants conclude.[46]
- [83] I agree. There is no proof that the funds in the investments have been lost and to what extent, due to the on-going administration or liquidation process relating to Sharemax. Also, the issue of whether the loss, once established, was due to the financial services offered by the applicants ought to form part of the determination. The role of the South African Reserve Bank appears not to have been considered in this regard. There is no doubt that the Ombud erred in this regard and, thus, the impugned decisions will be set aside.

Negligence and causation

- [84] The applicants argue that there is no causal link between the conduct complained of by the Potgieters and the losses allegedly suffered by the Potgieters. They say so on the basis of the agency argument dealt with above and also that any loss was exclusively as a result of the intervention by the South African Reserve Bank and not any breach of duty on the part of the applicants.[47] I think that the issue of cause of the loss warranted consideration of all relevant issues and the outcome of the relevant Sharemax

processes, otherwise the decision taken would be liable to be reviewed and set aside.

Subjecting the applicants to the Financial Sector Conduct Authority Enforcement Department

- [85] The Ombud also directed that the applicants be subjected to the Financial Sector Conduct Authority Enforcement Department for consideration in respect of breaches of the FAIS Act and the Code. The applicants say this order should also be reviewed and set aside. I disagree.
- [86] A process to scrutinise the professional conduct of the applicants by a lawful authority cannot be halted without more, especially when the nature and extent of the process is still unknown. Besides, the applicants would surely be granted an opportunity to address whatever concern they may have if and when such process ensues. This Court would refuse to intervene at this stage.

The Ombud's recommendation in terms of section 27(5) of the FAIS Act

[87] The applicants are also dissatisfied with the Ombud's Recommendation in terms of section 27(5) of the FAIS Act made by the Ombud on 20 March 2018.[48] The recommendation made a number of findings, as stated above, including that the applicants' advice was negligent and in

violation of the duty under section 2[49] of the Code, and that no needs analysis was done, but only the Sharemax's product was considered.[50] I will deal with this below.

The Ombud's Determination upholding the complaint by the Potgieters against the applicants; Ombud's response to the applicants' Application for Leave to Appeal and the Tribunal's ruling by the late retired Justice Mokgoro

[88] The applicants have sought that this Court also review and set aside the following: (a) the Ombud's final determination made on 19 September 2018 in terms of which the complaint(s) by the Potgieters against the applicants was/were upheld;[51]

(b) the Ombud's response to the applicants' Application for Leave to Appeal,[52] and

(c) the Tribunal's ruling by the late retired Justice Mokgoro on 09 April 2019.[53] These are the decisions taken in the matter regarding the outcome of the investigation and adjudication of the complaints.

[89] The reasons or grounds for the dissatisfaction of the applicants with the above decisions include consideration of the following principles: (a) bias as envisaged in section 6(2)(a)(iii) of PAJA;[54] (b) irrelevant considerations were taken into account and relevant considerations were not considered for purposes of the decisions or actions (i.e. section 6(2)(e)(iii) of PAJA);[55] errors of law (i.e. section 6(2)(a)(iii) of PAJA);[56] and lack of administrative fairness and justice, by among others depriving the applicants of application of the rules of natural

justice.[57] These principles inextricably form part of the determination to be made in this matter and do not have to be discussed separately.

Declaratory order of inadequacy of the internal remedies under the FAIS Act and FSR Act

[90] This Court has also been urged – although this does not form part of the direct relief sought by the applicants[58]

- to declare that the internal remedies provided for in the FAIS Act and the FSR Act are inadequate and ineffective for purposes of resolving disputes of fact. This issue has already been compressively addressed above.[59] Therefore, no declaration would follow in this regard.

Conclusion and costs

[91] First, the applicants impute bias on the part of the Ombud and/or the Tribunal when they took the impugned administrative actions.[60] One or both of these administrators may have publicly declared its 'extreme dislike' of property syndications, considered in some instances the applicants' litigious efforts an abuse of its processes, avoided addressing some of the issues or even passed flippant remarks, but I could not find evidence of bias or reasonable basis to suspect existence of bias. Secondly, the applicants say that the Ombud and/or Tribunal did not comply with mandatory and material procedures prescribed in empowering provision and/or is/are guilty of procedural unfairness.[61] I understand the aforesaid to refer to both substantive and procedural unfairness. This is overarching. The direct and indirect views already expressed are applicable in this regard. The final rulings still to be made would also shed more light on the Court's

views in this regard. Thirdly, the applicants complained that the impugned actions were materially influenced by an error of law.[62] Prime examples in this regard are the prescription and agency issues, on which I have already concluded.[63] The fourth PAJA ground of review relied upon by the applicants that the impugned actions were taken based on irrelevant considerations or without regard to relevant considerations, is also all embracing.[64] The views expressed or implicated above would suffice. Then, the applicants say that the exercise of power or performance of the

functions (as statutorily authorised) by the Ombud and/or the Tribunal when making the impugned administrative actions was unreasonable.[65] My views on the other issues are applicable, but I do not get anything particularly applicable to this provision. Therefore, considering all these the applicants have been substantially successful in this judicial review and most of the decisions or orders would be set aside.

[92] The applicants asked for punitive costs (i.e. on the scale as between attorney and client) to be ordered against the Ombud and the Potgieters (the latter without opposing this application). Further from what appears above, the applicants say that the punitive cost order is deserved as the administrative actions were unlawful and constituted a gross abuse of public power. The Court's specific attention is further drawn to the withdrawal of complaints based on the same allegations against other respondents between October 2012 and October 2017 and the prejudice suffered by the applicants, as well as impact of the process on the health of Mr Theron and his family. The Court is not unmindful of the impact of the process on those involved including Mr Theron and the Potgieters. But, I do not agree a punitive costs order is justified.

[93] I have made several findings above against the respondents, as the order to be made below would confirm in some respect, but there is nothing in the conduct of the respondents warranting that they be punished by an order of the sort urged upon by the applicants. I will order party and party costs against the Ombud at scale C. The issues in the matter justify the latter scale. This in itself is punitive enough for an administrator such as the Ombud. There will be no costs order against the Potgieters who have wisely chosen to abide the outcome of these proceedings and do not appear to have done more than lodging the complaints with

the Ombud. Nothing warrants a costs order against them.

- [94] The applicants have also sought the costs order to include costs incurred by the applicants in defending the processes before the Ombud and the Tribunal. I requested Ms Lourens, for the applicants, to furnish supplementary written submissions on this issue after the hearing. I am grateful for the material filed.
- [95] It is argued, among others, that the issue of costs could not be dealt with before the Tribunal due to the refusal of leave and reconsideration. Also, that Rule 73 of the Consolidated Rules of the Tribunal empowers the chairperson dealing with applications for reconsideration - in exceptional circumstances - to make an appropriate costs order, envisaged in section 234(2) [66] of the FSR Act. Counsel for the applicants argue that such an order has been recently granted by the Tribunal in the matter of Shuping and Shuping v Financial Services Conduct Authority.[67] It is further argued that the 'unsubstantiated complaints' against the applicants in terms of the repeated complaints above without any basis in fact or in law, among others, constitute exceptional circumstances. But I conclude that there is no evidence of exceptional circumstances in this matter. Therefore, to the extent that this would have been justified before the Tribunal, I will not make any order as to the costs incurred for the activities before the Ombud and the Tribunal. My views regarding a punitive cost order, above, are applicable here. Also, I do not consider it to be in the interests of justice to make such an award. The costs order to be granted would reasonably suffice.
- [96] The draft order filed by the applicants' legal representatives also include a prayer for the condonation application instituted by the Ombud to be dismissed. But the application was not argued before me. In fact, it had been withdrawn by the Ombud as far back as February 2023 with a tender of the costs of application. A dismissal of same is impossible. The tender also included for costs of the review application. But the order to be made regarding the latter application would extend up to the hearing of same.

Order

- [97] In the result, I make an order in the following terms:
1. that, the following orders are reviewed and set aside:
 - 1.1 the order by the first respondent directing the applicants to reimburse the third and fourth respondents in the amount of amount of R671 000 and R500 000, respectively, together with interest on the aforesaid amounts, and
 - 1.2 the order by the first respondent directing the applicants to take cession of the third and fourth respondents' rights acquired through agreements concluded with Sharemax Investments (Pty) Ltd (in liquidation) in respect of any future claims to their investments.
 2. that, the following decisions are reviewed and set aside:

2.1 the recommendation in terms of section 27(5) of the Financial Advisory and Intermediary Services Act 37 of 2002 made by the first respondent on or about 20 March 2018;

2.2 the determination issued on or about 19 September 2018 by the first respondent, upholding the complaint by the third and fourth respondents against the applicants;

2.3 the first respondent's response to the applicants' application for leave to appeal terms of section 28(5)b)(i)(aa) and (bb) of the Financial Advisory and Intermediary Services Act 37 of 2002, and

2.4 the ruling of the second respondent, made by the chairperson, dated 9 April 2019.

3. that, the review and setting aside of the order by the first respondent directing the applicants to be subjected to the Financial Sector Conduct Authority Enforcement Department for consideration in respect of breaches of the Financial Advisory and Intermediary Services Act 37 of 2002 and the General Code of Conduct for Authorised Financial Services Providers and Representatives, is refused.
4. that, the first respondent is liable to pay costs of this application on a party and party scale, which costs shall include costs of the condonation application and costs of counsel scale C.

Khashane La M. Manamela

Acting Judge of the High Court

Date of Hearing: 08 August 2024

Date of Last Written Submissions: 16 August 2024

Date of Judgment: 24 December 2024

Appearances:

For the Applicants: Applicants' Attorneys: Ms EA Lourens FH Munyai Inc Attorneys,
Johannesburg For the Respondents: No appearance

- [1] Par [63.2] below for a reading of s 8(4)(a) of the Financial Advisory and Intermediary Services Act 37 of 2002.
- [2] 'Financial services provider' is defined in s 1 of the FAIS Act as 'any person, other than a representative, who as a regular feature of the business of such person - (a) furnishes advice; or (b) furnishes advice and renders any intermediary service; or (c) renders an intermediary service'.
- [3] Par [62] below.
- [4] Par [64] below.
- [5] FSB was replaced by the Prudential Authority and the Financial Sector Conduct Authority in terms of the Financial Sector Regulation Act 9 of 2017 which commenced on 01 April 2018.

- [6] Par [63.1] below for the meaning of ‘representative’ in terms of s 1 of the FAIS Act.
- [7] Footnote 2 above for the definition of ‘financial services provider’.
- [8] Par [63.2] below for a reading of s 8 of the FAIS Act in the material respect.
- [9] Footnote 7 above.
- [10] Section 1, read with s 185 of the Companies Act 71 of 2008.
- [11] Par
- [19] below for investments listed in the complaints by the Potgieters.
- [12] Par [66] below on section 8 of the Code.
- [13] The Code was made in terms of s 15 of the FAIS Act.
- [14] Par
- [16] above.
- [15] Par [63.3] below for a reading of s 27 dealing with receipt of complaints, prescription, jurisdiction and investigation.
- [16] Par
- [19] above.
- [17] Par [63.3] below on the provisions of s 27(3)(a)(i) of the FAIS Act.
- [18] The applicants say their due diligence exercise included consideration of the following factors: (a) Sharemax was licensed by the FSB; (b) existence of legally compliant registered prospectus from the company; (c) whether the promised returns on the investment were too high in the context and the nature of the proposed investment; (d) whether company receiving the investment is reputable and properly registered with CIPC; (e) the repute and trustworthiness of the directors and people behind the company, including whether they were fit and proper in the eyes of the FSB; (f) appointment of statutory auditor; (g) whether the promoters of the investment (i.e. Sharemax) had an established track record; (h) performance of the company over the years as set out in its prospectus;
- (k) no reported fault with the projects by the South African Reserve Bank.
- [19] Section 2 of the Code provides for the general duty of an FSP as follows: ‘[a] provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry.’

[20] Section 7(1) of the Code reads as follows in the material part: ‘... a provider, must - (a) provide a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to a client, and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision; (b) whenever reasonable and appropriate, provide to the client any material contractual information and any material illustrations,

projections or forecasts in the possession of the provider; (c) in particular, at the earliest reasonable opportunity, provide, where applicable, full and appropriate information ...’

[21] Par [66] below for a reading of section 8 of the Code.

[22] Par [63.3] below for a reading of s 27(5) of the FAIS Act.

[23] Footnote 19 above.

[24] Sections 3(1)(a)(i)-(iii) of the Code reads as follows: (1) When a provider renders a financial service - (a) representations made and information provided to a client by the provider - (i) must be factually correct; (ii) must be provided in plain language, avoid uncertainty or confusion and not be misleading; (iii) must be adequate and appropriate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed level of knowledge of the client’.

[25] Par [66] below for a reading of s 8 of the Code.

[26] Ibid.

[27] Footnote 21 above for a reading of s 7(1) of the Code.

[28] Par [58] below on the provision.

[29] Par [59] below on the provision.

[30] Par [63.4] below for a reading of s 28 of the FAIS Act.

[31] Par [65] below for a reading of s 230 of the FSR Act.

[32] The preamble to the FSR Act mentions that the Prudential Authority and the Financial Sector Conduct Authority are established.

[33] Notice of Motion, CaseLines 003-1 to 003-3.

[34] Section 6(2) of PAJA reads in the material part: ‘A court or tribunal has the power to judicially review an administrative action if- (a) the administrator who took it- ... (iii) was biased or reasonably suspected of bias; (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with; (c) the action was procedurally unfair; (d) the action was materially influenced by an error of law; (e) the action was taken - (i) for a reason not authorised by the empowering provision; (ii) for an ulterior purpose or motive; (iii) because irrelevant considerations were taken into account

or relevant considerations were not considered; ... (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the

administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function ...’

[35] Section 20(3) of the FAIS Act.

[36] Footnote 34 above.

[37] The maximum amount the FAIS Ombud could award for financial prejudice or damage was increased from R800 000 to R3 500 000 in the Ombud Council Rules for the Ombud for Financial Services No.1 of 2024 published on the Ombud’s website on 01 July 2024.

[38] Section 17 of the Matrimonial Property Act 88 of 1984 on litigation by or against spouses.

[39] Par [63.3] above for a reading of s 27 of the FAIS Act.

[40] Ibid.

[41] Section 27(3)(a)(ii) of the FAIS Act, quoted in par [63.3] above.

[42] Section 6(2)(c) of PAJA, quoted under par [67] above. *Jaihai v Financial Services Tribunal and another* (3416/2022)

[2023] ZAGPPHC 697; [2023] 4 All SA 404 (GP) (17 August 2023) [52]-[54].

[43] Section 27(6) of the FAIS Act.

[44] Section 13 of the FAIS Act deals with qualifications of representatives and duties of authorised financial services providers.

[45] Par [42] above.

[46] Section 6(2)(e)(vi) of PAJA.

[47] *Symons N.O and Another v Rob Roy Investments CC t/a Assetsure* (4827/2013) [2018] ZAKZPHC 71; 2019 (4) SA 112 (KZP) (10 December

2018) [58].

[48] Pars [39]-[42] above.

[49] Footnote 19 above.

[50] Par [39.6] above.

[51] Pars [44]-[45] above.

[52] Pars [46]-[50] above.

[53] Pars [51]-[52] above.

[54] Section 6(2)(a)(iii) of PAJA, quoted in par [60] above. The applicants relied on the decisions in *Hamata & Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others* 2000 (4) SA 621 (C) [67]; *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014(6) SA 592 (CC) [30] to advance their argument that: (i) the Ombud publicly declared ‘extreme dislike’ of property

syndications; (ii) there was lack of impartiality; (iii) the application for leave to appeal was labelled an abuse of the process; (iv) the issues of negligence and causation were stated as having being settled by the Tribunal in other matters without addressing the issues in their matter, and (v) breach of the audi alteram partem rule by stating that it was not worthy of being taken seriously.

[55] Section 6(2)(e)(iii) of PAJA, quoted in par [60] above. See further par [72] above.

[56] Section 6(2)(a)(iii) of PAJA, quoted in par [60] above. See *Road Accident Fund v Shabangu and another* [2004] 2 All SA 356 (SCA) [9]. See further pars [78]-[80] above.

[57] *Jaihai v Financial Services Tribunal and another* [2023] 4 All SA 404 (GP). [57] *Muzikayifani Andrias Gamede v The Public Protector* 2019 (1) SA 491 (GP) [59].

[57] *Jaihai v Financial Services Tribunal and another* [2023] 4 All SA 404 (GP).

[57] *Muzikayifani Andrias Gamede v The Public Protector* 2019 (1) SA 491 (GP) [59].

[58] Par [55] above.

[59] Pars [74]-[77] above.

[60] Section 6(2)(a)(iii) of PAJA. See pars [28] and [78] above, the latter particularly at footnote 54.

[61] Section 6(2)(b)-(c) of PAJA. See, generally, par [75] above.

[62] Section 6(2)(d) of PAJA. See pars [72]-[73] above.

[63] Pars [73], [78]-[80] above.

[64] Section 6(2)(e)(iii) of PAJA. See pars [72], [78] above.

[65] Section 6(2)(e)(iii) of PAJA. See pars [72], [78] above.

[66] Section 234(2) of the FSR Act reads: ‘[t]he Tribunal may, in exceptional circumstances, make an order that a party to proceedings on an application for reconsideration of a decision pay some or all of the costs reasonably and properly incurred by the other party in connection with the proceedings.’

[67] *Shuping and Shuping v Financial Services Conduct Authority*, Case No A30/2023 (22 March 2024) [57].

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