

SOUTH AFRICA / JUDGMENT

Risk and Another v Ombud for Financial Services and Others (38791/2011) [2012] ZAGPPHC 199 (7 September 2012)

[2012] ZAGPPHC 199

COURT

North Gauteng High Court, Pretoria

BEFORE

S.A.M Baqwa

CASE / FILE NUMBER

38791/2011

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REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG, PRETORIA)

Case

no: 38791/2011

DATE:07/09/2012

In

the matter between:

RISK,
DEEB
RAYMOND.....FIRST
APPLICANT
D
RISK INSURANCE
CONSULTANTS.....SECOND
APPLICANT
And
THE
OMBUD FOR FINANCIAL
SERVICES.....FIRST
RESPONDENT
PROVIDERS
STELLA
MATHAMELA.....SECOND
RESPONDENT
MINISTER
OF

FINANCE.....THIRD
 RESPONDENT
 ELISE
 BARNES.....FOURTH
 RESPONDENT
 JANET
 ANNE
 BUJOK.....FIFTH
 RESPONDENT
 LIONEL
 WALTER
 OLDACRE.....SIXTH
 RESPONDENT
 CATHERINE
 MARIE
 OLDACRE.....SEVENTH
 RESPONDENT
 GILLIAN
 MARBEL
 ORPENEIGHTH
 RESPONDENT
 MARGERY
 ISOBEL MARY
 SALMOND.....NINTH
 RESPONDENT
 MARGARET
 POSGATE.....
 TENTH RESPONDENT
 CAMILLO
 MICHEL
 FLOREELEVENTH
 RESPONDENT

JUDGMENT

BAQWA J

[1] This is an application by way of notice of motion regarding the process and proceedings which the Financial Services Ombudsman

applies in her investigations and which devolve upon the institution in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS).

[2] The practitioners in terms of FAIS are referred to as Financial Services Providers (FSPs) and they have to be registered to execute their trade in terms of the FAIS Act. The applicants herein are FSPs which are so registered.

- [3] Any complaint against FSPs in terms of the services rendered has to be lodged, processed, investigated and a decision made in connection therewith with the Financial Services Ombudsman.
- [4] The first respondent is Ombud for Financial Services and the second respondent is her deputy.
- [5] The third respondent is the Minister of Finance who is the minister charged with the implementation and administration of FAIS.
- [6] Fourth to the eleventh respondents are the complainants who have lodged complaints against the applicants with the first respondent

with regard to the services rendered to them by the applicants

The issues to be decided

- [7] The main issue concerns the determination of whether section 27(3)(c) of the FAIS Act confers the applicants with the right to demand that the first respondent decline to deal with complaints lodged against them and refer those to this court.
- [8] The second issue is whether the section imposes a duty on the first respondent to refer the complaints to this court.
- [9] Further, the applicants seek reviewing and setting aside as ultra vires and/or unconstitutional the decision of the first respondent

dismissing their demand that she declines to deal with the complaints that were lodged against them by the fourth to the eleventh

respondents and that the court orders that the complaints be dealt with by a court.

- [10] Alternatively the applicants seek that the first respondent's decision not to convene a hearing before determining the complaints

be set aside and that first respondent convene a hearing after developing certain procedural safeguards.

- [11] In the alternative the applicants seek the declaration of Section 27(5)(a) to be unconstitutional if the Section vests the first respondent with unfettered discretion not to allow hearings, legal representations and trial.
- [12] Finally, and in the event of these prayers being granted, the applicants ask for the setting aside and a declaration of invalidity

of any determination made by the first respondent relating to complaints lodged by the fourth to eleventh respondents relating to the investments in the Villa and Zambesi Property Syndication Schemes.

The law

[13] Upon the enactment of the FAIS Act the legislature provided that complaints lodged with the Ombud would be dealt with by the Ombud. It however vested the Ombud with the power to refer certain complaints to the courts. This power is to be found in Section 27(3)(c) which provides as follows:

"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".

[14] The investigative powers of the first respondent are further defined in section 27(5)(a) which provides as follows:

1 The Ombud-

(a) May, in investigating or determining an officially received complaint, follow and implement any procedure which the Ombud deems

appropriate, and may allow any party the right to legal representation".

The

facts

[15] The fourth to the eleventh respondents invested various sum of money in the Villa and Zambesi Syndication Scheme which subsequently

faltered. They had made the investments on the basis of financial advice given by the applicants. When the investments failed to

produce the desired outcome, the fourth to the eleventh respondents lodged complaints against the applicants with the first respondent.

[16] The first respondent called upon applicants to furnish her with responses to the complaints. In their responses, the applicants

simultaneously requested the first respondent to exercise her powers under section 27(3)(c) of the FAIS Act to refer the matters to court.

[17] In support of their request applicants submitted that there were disputes between the version of the fourth to eleventh respondents

regarding essential events which could not be properly adjudicated on documents and written submissions and thereby suggesting a need for oral evidence.

[18] The applicants further submitted that the first respondent's jurisdiction to apply "equity" as opposed to law in

resolving complaints would result in unjustifiable limitation of their rights of access to the courts under section 34 of the Constitution.

- [19] The first respondent responded on 21 April 2011 rejecting their request. She expressed the view that applicants were attempting to anticipate the decision of her office. She further cautioned them with reference to section 31 of FAIS Act. Section 31 deals with penalties which may be imposed for conduct considered to be contempt of court. The first respondent's letter also seemed to imply a criminal attempt to influence her determination of the complaints.
- [20] It was upon the first respondent's refusal to entertain the request by the applicants that the present application was launched.
- [21] The applicants did not seek to interdict the first respondent from determining any of the complaints lodged against them subsequent to the launch of the application, the first respondent refused to hold over the determination of the complaints pending the finalisation of this application and she proceeded to make two determinations of the complaints laid against the applicants by the fourth respondent, Ms Barnes.
- [22] The latter determination prompted applicants to proceed by way of urgent application to this court to interdict the determinations from being converted into civil judgments as provided for in section 28(5)(a) of FAIS Act.
- [23] The urgent application was settled by agreement between the parties upon the giving of an undertaking by the first respondent that until the hearing of this application, she would not take any steps to send any of the determinations she made in relation to the complaints to the Registrar of this court. The determination of the urgent application was consequently postponed to the hearing of this application
- [24] In the light of events which led to the urgent application, the applicants decided to amend their Notice of Motion. Instead of filing an objection to the proposed amendments, the first respondent filed a further affidavit dealing with her response to the amendment.
- [25] Primarily this application deals with the discretion which is conferred upon the first respondent by section 27(3)(c). What has to be determined is whether that discretion was properly exercised and whether there is any mandatory element in the provisions contained in section 27.
- [26] The applicants conceded that it is a trite feature of statutory interpretation that the use of word "may" tends to imply a permissive conferral of power. They however submit that there are cases in which the context in which the word is used may require to be interpreted to be obligatory as "shall". In casu they submit that section 27(3)(3) imposes a duty on the Ombud to refer matters to a court where reasonable grounds exists for such referral.
- [27] Applicants submit further that an interpretation which imposes such a duty on the first respondent is consistent with the provisions of section 34 of the Constitution.

[28] For clarity's sake, section 34 provided as follows;

"Acces to court

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or when appropriate, another independent and impartial tribunal or forum."

[29] In support of their submissions applicants suggest that the Ombud does not apply the principle of "audi alteram partem", that she does not allow legal representation and by implication no cross-examination and that her whole process is accordingly unfair and not in accordance with the provisions of section 34.

[30] On the other hand, the first, second and third respondent take a contrary view to the effect that first respondent's decisions are within the four corners of the law.

[31] First respondent submits that section 27(3){c} confers no right on the applicants to demand that the first respondent decline to deal with complaints that have been lodged against them nor does it confer a duty on the first respondent to refer such complaints to court

[32] First respondent submits that a court directive to the office of the Ombud would be tantamount to an usurpation of her functions. Further first respondent refutes the suggestion that her refusal is inconsistent with the applicant's rights under section 34 of the Constitution.

[33] I have considered the submissions by applicants counsel but I'm not persuaded that this application is well founded.

33.1. It is quite clear from a reading of section 34 (supra) that the section does not entitle the applicants to be sued in a court. On the other hand the section specifically makes provision for matters to be dealt with by an independent tribunal or forum such as the first respondent ,See Lufuno Mphaphuli and Assoc (Pty) Ltd v Andrews 2009(4) SA 529(CC).

33.2. Section 39 of FAIS ought to have been utilised by the applicants to protect their interests. The section provides as follows:

'Right of Appeal

39 Any person who feels aggrieved by any decision by the registrar or the Ombud under this Act which affects that person, may appeal to the board of appeal established by section 26(1) of the Financial Services Board Act, in respect of which appeal the said section 26 applies with the necessary changes."

[34] Upon a reading of section 39 it becomes patently clear that applicants have failed to exhaust internal remedies

34.1. Section 7(2) of PAJA provides'

"(a) Subject to paragraph (c) no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph(a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in court or a tribunal for judicial review in terms of this Act. (c) A court or tribunal may, in exceptional circumstances and on application by the person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."

34

2. In the case of *City of Cape Town v Reader* 2009(1) SA 555 (SCA) the SCA held in regard to section 7(2) of PAJA that the aggrieved

person's right of access to the courts or independent and impartial tribunals is denied until he or she has exhausted the internal

remedy. It was emphasised in that case that section 7(2) is couched in peremptory terms which oblige every reviewing court to decline to hear a review application brought under PAJA until the aggrieved party has exhausted internal remedies.

[35] In *Nichol and Another v Registrar of Pension Funds and Others* 2008(1) SA 383 (SCA)

the SCA held that a person seeking exemption under section 7(2)(c) of PAJA had to meet two requirements in their application to court;

35.1 They must demonstrate that there are exceptional circumstances which justify the exception; and

35.2 They must demonstrate that it is in the interest of justice that the exception be given;

35.3 The SCA held that "exceptional circumstances" are circumstances that are out of the ordinary and that render it inappropriate for the court to require the section 7(2)(c) applicant to pursue the available internal remedies.

[36] The FSB Board

In the *Nichol* decision (*supra*) the SCA commented on the powers of the FSB Board and on the quality of the hearing available to applicants

on appeal as follows:

"[20] The FSB Appeal Board, established in terms of section 26(1) of the FSB Act, is a specialised tribunal with a wide range of expertise available to it. It consists of three persons appointed by the Minister of Finance on the basis of their wide experience' and 'expert knowledge' of respectively, the law, financial institutions and financial services, and accountants and auditors profession.

[22]The appeal board conducts an appeal in the fullest sense-it is not restricted at all by the functionary's decision and has the power to conduct a complete rehearing, reconsideration and fresh determination of the entire matter that was before the functionary with or without new evidence or information".

[37] The applicants in their amended Notice of Motion included a prayer for exemption under section 7 (2)(c) of PAJA without pleading any special or exceptional circumstances to support the application for exemption.

37.1. They seek condonation for failure to exhaust internal remedies in their replying affidavit. This in itself was a failure to comply with a primary duty to make out a case for the relief sought in their founding affidavits.

In *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976(2) SA 701 (D) at 704 F-G

The principle applicable was stated as follows:

"In proceedings, by way of Notice of Motion the party seeking relief ought in his founding affidavit to disclose such facts as would, if true, justify the relief sought and which would, at the same time, sufficiently inform the other party of the case he was required to meet".

In this application applicants have not complied with this principle.

37.2. I have accordingly not found any exceptional circumstances to condone applicants' failure to exhaust internal remedies. Neither do I consider it to be in the interests of justice to exempt them from following the internal appeal process.

[38] The inquisitorial process

The effect of section 27(3)(c) (*supra*) is that first respondent retains jurisdiction over a complaint unless she, on reasonable grounds makes a determination that it should be dealt with by a court or any alternative dispute resolution process. It has been submitted and I accept that first respondent administers an institution which in terms of FAIS demands efficiency and economy and that this may indeed justify the lack of a public hearing in circumstances which may be resolved quickly and with minimal formality.

See: *The Queen (on the application of Heather Moor & Edgecomb) v Financial Ombudsman Office and Lodge* (2008) EWCA Civ 642 (11 June 2008)

The section confers neither a right on applicant to demand that the ombud declines her jurisdiction to deal with complaints nor does it confer a duty for her to do so. The section clearly confers a discretion on the first respondent. Any other interpretation would be tantamount to stripping her of her statutory powers in terms of FAIS Act. Absent a decision by the first respondent to refer the matter to a court, she retains jurisdiction. It is not the task, therefore, of the reviewing court to consider whether or not the decision by the first respondent is correct in law. That is a matter for the appeal board to decide.

[39] Section 27 is written in a language that clearly demonstrates the intention of the legislature.

39.1. Upon submission, the Ombud "must" determine whether there has been compliance with the rules and if so, officially receive the complaint (section 27(1)). The provision is peremptory.

39.2. Section 27(3)(a) provides that the Ombud "must" decline a prescribed complaint. This subsection is equally peremptory.

39

3. Equally section 27(3)(b) states that the Ombud "must" decline a complaint pending before a court.

39

4. On the contrary the Ombud "may" follow any procedure she considers appropriate including allowing representation. She is not obliged to do so. (section 27(5)(a))

39

5. The Ombud "may" delegate some of her investigative and adjudicative functions, (section 27(5)(d))

39.6. Similarly she "may" consider it appropriate on reasonable grounds to refer a complaint to a court or other dispute resolution forum, (section 27(3)(c))

The applicants contend that the word "may" must in this context be interpreted to mean "shall". This would be clearly an extraordinary interpretation which as demonstrated above cannot but distort the intention of the legislature and lead to an absurdity.

The constitutional challenge

[40] The applicants contend that section 27(3)(c) imposes a duty on the first respondent to decline to deal with complaints that have been lodged against them. If this court should find that this section imposes no such duty they contend this court should construe section 29(5)(a) as imposing a duty on the first respondent to convene a trial before determining complaints and order her to develop "procedural safeguards" proposed by them. If the outcome of the application of section 27(5)(a) is not convening of a trial, then they want section 27(5)(a) to be declared constitutionally invalid.

Section 27(5)(a) provides as follows;

"(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."

[41] The challenge faced by the applicants is that they cannot pedal two canoes at once

In *Brummer v Minister for Social Development and Others* 2009(6) SA 323 (CC) at para 32

The Constitutional Court pronounced as follows.

"A litigant should not be allowed to blow hot and cold. It is impermissible for a litigant to ask a court to apply the provisions

of a statute and, if this yields adverse results, then to ask the court to declare the statute unconstitutional. It is however,

permissible, to urge a court to adopt a particular construction of a statute, and, if it should find that the statute is incapable of the construction contended that the provision is unconstitutional."

In this case the applicants want this to apply section 27(5)(a) and only in the event its application not favouring them to declare it to be unconstitutional. This can clearly not be allowed.

[42] The applicants face a further challenge in the principle that in constitutional matters, a court should not decide a constitutional

issue unless it is "necessary" to do so. This "principle of avoidance" was laid down by the Constitutional Court in *Zantsi v Council of State, Ciskei and Others* 1995(4) SA 615(CC).

In that matter, then Chaskalson P said the following:

"It is only where it is necessary for the purpose of disposing of the appeal, or where it is in the interest of justice to do so, that the constitutional issue should be dealt with first by this court. It will only be necessary for this to be done where the appeal cannot be disposed of without the constitutional issue being decided; and it will only be in the interest of justice for a constitutional issue to be decided first, where there are compelling reasons that this should be done..... , in view of the far reaching implications attaching to constitutional decisions, it is a rule which should ordinarily be adhered to by this and all other South African courts before whom constitutional issues are raised "

[43] In this case I am of the view that the applicants have failed to identify a constitutional issue that would require to be dealt with as a priority as enunciated by Chaskalson P (as he then was) in the *Zantsi* decision (*supra*). The intention of the legislature in framing section 27(5) (a) of the FAIS Act as it presently stands is clear. It was to permit the Ombud institution a measure of flexibility when dealing with complaints. This means that depending on the circumstances and facts of each complaint, the Ombud may adopt procedures which are akin to that of a court hearing.

[44] The constitutional challenge is therefore either poorly formulated or simply does not arise.

[45] In the result: Having considered the conspectus of facts, submissions and the law, I have come to the conclusion that the following is an appropriate order:

45.1. The application is dismissed with costs.

45.2. Costs to include the costs of two counsel in respect of first, second and third respondents.

S.A.M BAQWA

(JUDGE OF THE HIGH COURT)

Legal representatives for applicant: Bieldemans Inc

Counsel for applicant: Adv P Louw S.C

.....Adv K Hofmeyer

Legal representatives for first respondent: Ramushu Mashile Twala Inc
Counsel for first respondent: Adv V Ngalwana

.....Adv N Mbelle

Legal representatives for second respondent: Ramushu Mashile Twala Inc
Counsel for first respondent: Adv V Ngalwana

Legal representatives for the third respondent: The State Attorney
Counsel for the third respondent: Adv J Gauntlett S.C

.....:.....Adv K Pillay

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