IN THE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG HIGH COURT DIVISION, PRETORIA

4/11/16

Case number: 50027/2014

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

4/11/2016
DATE

SIGNATURE

RISK, DEEB RAYMOND	1st Applicant
D RISK INSURANCE CONSULTANTS CC	2nd Applicant

and

MR HMS MSIMANG N.O	
(in his capacity as chair of an appeal board)	1st Respondent
THE OMBUD FOR FINANCIAL	
SERVICE PROVIDERS	2nd Respondent
BUJOK, JANET ANNE	3rd Respondent
OLDACRE, LIONEL WALTER	4th Respondent
OLDACRE, CATHERINE MARIE	5th Respondent

JUDGMENT

MNGQIBISA-THUSI, J:

[1] The relief sought by the applicants in the notice of motion is the following:

1.1 that the applicants be exempted in terms of section 7(2)(c) of the promotion of Administrative Justice Act 3 of 2000 ("PAJA") from the obligation, such as may be, to exhaust the process pending before an appeal board that was constituted in terms of the Financial Services Board Act 97 of 1990 ("FSB Act") and is presided over by the first respondent before reviewing the first respondent's administrative action, viz the decision referred to in the next paragraph, and that it be declared that it is in the interest of justice to exempt the applicants as aforesaid.

1.2 That the first respondent's decision that was conveyed to the applicants on 17 June 2014 dismissing the applicants' application to submit further evidence be reviewed and set aside.

1.3 That the first respondent be directed to consider the said application on the merits thereof.

1.4 That the first respondent be directed to remit the matter to the Ombud for Financial Services providers in the event that the said application is granted.

1.5 That, in the alternative to the previous paragraph, the first respondent be directed to give reasons for his dismissal of the said application.

1.6 That the first respondent be ordered to pay the costs of this application.

[2] The first applicant is a registered financial services provider ("FSP") (operating through the second applicant) in terms of the Financial Advisory and Intermediary Service Act[1] ("the FAIS Act"). Hereinafter the applicants will be referred to as 'the applicant'.

[1] Act 37 of 2002.

[3] The first respondent is the Chairperson of the Appeal Board ("the appeal board") created in terms of section 26(A)(1) of the Financial Services Board Act[2] ("FSB Act"). In terms of the FSB Act, the appeal board may:

> "(a) confirm, set aside or vary the decision under appeal, and order that any such decision of the appeal board be given effect to; or
> (b) remit the matter for reconsideration by the decision-maker concerned in accordance with such directions, if any, as the appeal board may determine"[3].

[4] The second respondent is the Ombud for Financial Services Providers[4] ("the Ombud") who is responsible, *inter alia*, for investigating and making determinations on complaints lodged against FSPs by clients.

[5] The third to fifth respondents, Ms Janet Anne Bujok; Mr Lionel Walter Oldacre and Mrs Catherine Marie Oldacre ("the complainants") are complainants who have lodged complaints with the Ombud against the applicant regarding certain investment advice received from the applicant.

[6] The Chair of the appeal board is not opposing this application. Even though no relief is sought against the Ombud, the Ombud is, however, opposing the application. No relief is sought also against the complainants.

[7] Between September 2010 and March 2011, the complainants lodged complaints with the Ombud against the applicant. The basis of their complaints was that on the advice of the applicant they had invested monies in the Sharemax Scheme known as 'The Villa' and 'Zambezi' Property Syndication Schemes, which scheme later failed. It was the complainants' contention that the applicant did not provide them with fair, honest and appropriate advise having their best interests in mind and that the advice given was not the product of due skill, care and diligence.

[8] The Ombud invited the applicant to respond to the complaints[5]. In response to the invitation, on 22 November 2010 the applicant responded by making an

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[2] Act 97 of 1990.
[3] Section 26B(15) of the FSB Act.
[4] Appointed in terms of section 21(1) of the FAIS Act.

application to the Ombud in terms of section 27(3)(c)[6] of the FAIS Act requesting the Ombud to decline determining the complaints[7] and rather to refer the matters for determination to the High Court in view of alleged existing disputes of fact in order for oral evidence to be led. It was the applicant's view that the Ombud would not be in a position to resolve the alleged existing disputes of fact since she applied equity and not the law.

[9] It is common cause that when the Ombud deals with complaints received, she does not hold formal hearings before making a determination. In terms of section 20(3)[8] read with section 20(4)[9] and 27(5)(a)[10] of the FAIS Act the Ombud is vested with the power to decide on complaints in a 'procedurally fair, informal, economical and expeditious manner' and may use any procedure she deems appropriate, as long as she acts independently and impartially.

[10] On 22 June 2011 the Ombud responded to the applicant's request and informed him that he had not provided her with the necessary documentary evidence showing that they have complied with the FAIS Act and the General Code of Conduct for Authorised Financial Services Providers and Representatives ("the Code of Conduct"). As appears from the Ombud's answering affidavit, compliance would entail the applicant providing her with a copy of the record of advice and a copy of the risk profile and financial needs analysis.

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[5] In terms of S27(4)(c) of the FAIS Act provides that on receipt of a complaint, the Ombud must not proceed to investigate a complaint officially received before providing all interested parties the opportunity to submit a response to the complainant.

[6] Section 27(3)(c) of the FAIS Act provides that: "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".

[8] Section 20(3) provides that: "The objective of the Ombud is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances, with due regard to- (a) the contractual arrangement or other legal arrangement between the complainant and any other party to the complainant; and (b) the provisions of this Act".

[9] Section 20(4) reads as follows: "When dealing with complaints in terms of sections 27 and 28 the Ombud is independent and must be impartial".

[10] Section 27(5) provides that: "The Ombud 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 to legal representation".

[11] Further the Ombud advised the applicant that he had failed to 'properly advise the complainants of the risks involved in investing in property syndication and without evidence of having conducted due diligence on the properties involved'. The Ombud again invited the applicant to provide the necessary documentation.

[12] On 30 June 2011 the applicant's attorneys wrote a letter to the Ombud informing her that the applicant would not be responding to her letter of 2 June 2011 and reserved his right to respond to her letter in contemplated legal proceedings.

[13] Aggrieved by the Ombud's refusal to decline determining the dispute and to refer it to court, the applicant launched review proceedings in terms of Rule 53 of the Uniform Rules of Court in the High Court before Judge Baqwa.[11] The applicant alleged that the Ombud's decision to decline referring the matter to court violated his rights as contained in section 34 of the Constitution[12].

[14] The main issues which the reviewing court had to determine was whether the Ombud had properly exercised the discretion conferred on her by section 27(3)(c) of the FAIS Act.

[15] Before the decision by Judge Baqwa was handed down, the Ombud made a determination in favour of the complainants.

[16] Judge Baqwa dismissed, with costs, the applicant's review application. In dismissing the application, the court stated that:

> "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 (Ombud).

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[11] Under case number 38791/2011.

[12] Section 34 of the Constitution provides that: "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, where appropriate, another independent and impartial tribunal or forum".

[17] The court went further and concluded that the applicant should have taken the Ombud's decision through the existing internal appeal process, which process allowed for further evidence to be presented. In this regard the court relied on the decision in *Nichol & Another v Registrar of Pension Funds & Others*[13] where the Supreme Court of Appeal stated that:

> "[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".

[18] Judge Baqwa further held that by failing to appeal the Ombud's determination, the applicant has not, contrary to the provisions of section 7(2) (c) of the Promotion of Administrative Justice Act[14] ("PAJA"), exhausted all available internal remedies before launching the review proceedings; and has not shown any exceptional circumstances entitling them to be exempted from exhausting the available internal remedies and that it would be in the interest of justice that exemption be granted[15].

[19] Furthermore, the reviewing court held that section 27(3)(c) does not confer on the applicant any right to demand of the Ombud to forgo her powers to adjudicate on complaints lodged with her office in that she is empowered to use any process she deems appropriate in order to resolve complaints in a fair and expeditious manner[16].

[20] The applicant did not appeal Judge Baqwa's judgment and order.

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[13] 2008 (1) SA 383 (SCA).
[14] Act 3 of 2000 which provides in section 7(2) that a court cannot entertain a review of an administrative action unless the applicant has exhausted all available internal remedied.
[15] *Nichol (supra) at [15]* and *City of Cape Town v Reader* 2009 (1) SA 555 (SCA).
[16] Paragraphs 38-39 of the judgment.

[21] The applicant lodged an appeal with the appeal board in terms of section 26(1)[17] of the FSB Act read with section 39[18] of the FAIS Act against the determination made by the Ombud. Furthermore, the applicant applied to the chair of the appeal board in terms of section 26B(12) of the FSB Act to augment the appeal record.

[22] Section 26B(12) reads as follows:

> "(a) Despite the provisions of subsection (11)[19] the chairperson of a board designated to hear an appeal may on application by-
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> (i) the appellant concerned, and on good cause shown, allow further oral and written evidence or factual information and documentation not made available to the decision-maker prior to the making of the decision against which the appeal is lodged;
> (ii) ....
>
> (b) If further oral and written evidence or factual information and documentation is allowed into the record on appeal under paragraph (a) (i), the matter must revert to the decision-maker concerned for reconsideration and the appeal is deferred pending the final decision of the decision-maker.
> (c) If after the decision-maker concerned has made a final decision as contemplated in paragraph (b), the appellant continues with the appeal by giving written notice to the secretary the record on appeal must include the further oral evidence, properly transcribed written evidence or factual information and documentation allowed, and further reasons or documentation submitted by the decision-maker concerned".

[23] In his application for further evidence to be presented, the applicant averred that in making her determination the Ombud did not have the applicant's full response to the complaints lodged and if he is not allowed to augment the appeal record, he would be prejudiced in that the appeal board, when determining the appeal, would only have at its disposal the incomplete

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[17] Section 26(1) of the FSB Act reads as follows: "A person who is aggrieved by a decision of a decision-maker may, subject to the provisions of another law, appeal against that decision to the appeal board in accordance with the provisions of this Act or such other law".

[18] Section 39 of the FAIS Act provides that: "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".

[19] Section 26B(11) of the FSB Act provides that: "Subject to the provisions of subsection (12) no oral or written evidence or factual information and documentation, other than what was made available to the decision-maker, may be submitted to the board by a party to the appeal".

response which served before the Ombud when she made her determination. Further that the refusal to allow further evidence to be presented on appeal, would be prejudicial to the applicant if one takes into account the amounts claimed and the number of claims against him. Furthermore, the applicant alleged that the Ombud was biased against property syndicates.

[24] The Chair of the appeal board refused dismissed the application to augment the appeal record. In refusing to allow the applicant to augment the appeal record, the Chair of the appeal board stated that:

> "[13] In paragraph 4.4 of the grounds of appeal the Applicants state the following:-
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> '4.4 Given the intemperate language used in both Ombud's determinations and her rejection of the Application for leave to Appeal. It is clear that the Ombud is not independent and impartial, but that the Ombud is partial to the Respondent'.
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> [14] If it is the attitude of the Applicants that the Ombud is impartial and not independent then it is inconceivable that the matter should be referred back to the Ombud for adjudication.
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> [15] In the judgment granting leave to appeal and in the judgment of Baqwa J reference was made to the matter of *Nichol and Another v Registrar of Pension Funds and Others 2008 91) SA 383 (SCA)* where the Court stated:
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> > "[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.
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> [16] It appears that the Ombud conceded this fact in the matter before Baqwa J. The Appeal Board is empowered in terms of the Act to hear new evidence. I have no doubt that the Appeal Board will consider the introduction of new evidence in this matter should it be necessary to do so.
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> [17] This matter has been outstanding for some time and the parties want to see it finalized. It is not in the interest of the parties that it must be

permitted to be delayed any longer. The issues raised in the Appeal are broad and should serve before the Appeal Board".

[25] The Ombud's determination was, however, not executed after the parties reached agreement that execution would be suspended until the finalisation of the current review proceedings. As a result of this agreement this matter seized to be urgent.

[26] On the issue of exemption from exhausting internal remedies, it was argued on behalf of the applicant that the Ombud has misconstrued her functions in that she is under the impression that she only applies equity and not the law hence her denial of the existence of disputes of facts and her refusal to decline determining the complaints. It is the applicant's contention that in order for the Ombud to find liability, she also needs to deal with legal principles, for instance, causation. Furthermore, it was argued that despite the provisions of Section 7(2) of PAJA, the need to exhaust internal remedies was not absolute. The court could still grant an exemption in the interest of justice. In this regard counsel for the applicant relied on *Koyabe and Others v Minister for Home affairs and Others (Lawyers for Human Rights as amicus curiae)*[20] where the constitutional Court stated that:

> "What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile".

[27] On behalf of the Ombud it was submitted that it was unnecessary for the applicant to have launched this application. Instead the applicant should have allowed the appeal process to take its course and if the decision is unfavourable to him, he could still bring an application for the review and setting aside of the appeal board's decision. Furthermore, it was argued that

[20] 2010 (4) SA 327 (CC) at [39].

in order to be exempted from exhausting internal remedies, one needs to show that exceptional circumstances exist, which the applicant as found by Judge Baqwa had not done. It is the Ombud's contention that the application to be exempted was incompetent in view of the fact that Judge Baqwa had already ruled on the issue and the applicant did not appeal his judgment.

[28] As correctly pointed out by counsel for the Ombud, I am of the view that the application for an exemption is incompetent in that the issue is re judicata having been dealt with by Judge Baqwa in dismissing it. The applicant did not appeal that judgment. There is no reason why the applicant did not furnish the Ombud with the information she requested during the investigation of the complaints. Even if the Ombud would have found against him with the requested information, it was still open to the applicant in terms of the FSB Act processes for them to take the Ombud's determination on appeal before the appeal board and to apply for further relevant evidence which was not before the Ombud at the time she made a determination, to be allowed. I am therefore satisfied that the applicant has not shown the existence of exceptional circumstances to justify being exempted from exhausting the internal remedies.

[29] The main issue to be determined is whether the decision of the Chair of the appeal board should be reviewed and set aside.

[30] It was it was submitted on behalf of the applicant that he was not given the opportunity to place all relevant information before the Ombud made her determination. It is applicant's contention that there are factual disputes which could be resolved by evidence. It is further the applicant's contention that, in view of the dismissal by the Chair of the appeal board of his application for further evidence to be presented, the appeal board would in effect determine the appeal based on the incomplete response provided by the applicant to the Ombud. As a result, the pursuit of the appeal has been rendered nugatory in that the appeal process is not a rehearing of the matter. In this regard the applicant relies on what was said in the appeal board judgment in *Sharemax*

(Pty) Ltd and Others v Siegrist and Bekker.[21] In reference to the *Nichol* matter (*supra*), Judge Harms stated that:

> "The Act was amended since this judgment by the introduction of sec 26B. An appeal to the Board is no longer 'an appeal in the fullest sense' since it has to be decided on the written evidence, factual information and documentation which had been submitted to the decision-maker in connection with the matter, which is the subject of the appeal (sub-sec (10)). Furthermore, the powers on appeal are circumscribed by sub-sec (15): The appeal board may only (a) confirm, set aside or vary the decision under appeal, and order that any such decision of the appeal board be given effect to; or (b) remit the matter for reconsideration by the decision-maker concerned in accordance with such directions, if any, as the appeal board may determine".

[31] It was further submitted on behalf of the applicant that the Chair of the appeal board has committed a gross irregularity in that in coming to the decision to dismiss the application for further evidence, the Chair failed to fulfil his obligations. It is contended that the Chair misconstrued his functions by taking into account irrelevant considerations, namely, that it was inconceivable to allow further evidence to be presented which would necessitate the matter being remitted to the Ombud who was perceived to be biased by the applicant[22]. It was further submitted that the reason given by the Chair for denying the further evidence was not rationally connected to the purpose for which it was taken. Furthermore it was submitted that the Chair's decision was irrational in that it was not one which a reasonable decision maker could take with the evidence before him[23]. It was argued that given by Chair of the appeal board's irrational decision, the refusal to allow the applicant to augment the appeal record was therefore not reasonable and in breach of the first applicant's rights to procedurally fair and lawful administrative action under section 33(1) of the Constitution and was a violation of the applicant's right under section 34 of the Constitution.

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[21] Consolidated cases FAIS 00039/11-12/GP1 and FAIS 06661/10-11/WC1 handed down on 10 April 2015 at [25].
[22] Section 6(2)(c)(iii) of PAJA.
[23] Section 6(2)(f)(ii)(cc) of the PAJA.

[32] On behalf of the Ombud it was argued, based on the *Nichol* judgment (*supra*), that the appeal hearing was a complete rehearing of the matter and the applicant would have been given an opportunity to introduce further evidence which would have been taken into account when a decision was made.

[33] It was submitted on behalf of the Ombud that the application was unnecessary in that at the hearing of the appeal, it was still open for the applicant to present evidence which was not before the Ombud as the appeal process in terms of the FSB Act has correctly been described in both the *Nicholl* judgment and in Judge Baqwa's judgment as being an appeal in the wide sense. It was submitted that nothing stops the appeal board from entertaining further evidence if it was necessary to do so. Further it was the contention of the Ombud that it was premature for the applicant to have applied to the Chair of the appeal board for further evidence to be heard as the appropriate stage for such application was when the appeal hearing has commenced. It was further argued that the applicant had not suffered any prejudice as the board could still allow for further evidence.

[34] The Ombud's view that the appeal board can hear further evidence in terms of sections 26B (12) and 26B (13) is not entirely correct. The prerequisite for the appeal board to hear further evidence is that the Chair has to have granted leave to the applicant to present such further evidence. From the wording of the two subsections it is clear that the discretion whether or not to allow for further evidence lies with the Chair. The Chair and not the appeal board has to make a decision whether further evidence is allowed or not. In this matter, the Chair has dismissed the application for further evidence. The effect of such a decision is that in accordance with section 26B (10)[24] read with section 26B (11) of the FSB Act the appeal board will only deal with what was before the Ombud.

[35] The reasons given by the Chairman do not appear to relate to the decision made. As a result an inference of illegality can be drawn. The reasons are

[24] Section 26B (10) of the FSB Act provides that: "An appeal is decided on the evidence submitted to the decision-maker before the decision which is the subject of the appeal was taken."

based on a wrong premise that because the applicant perceives the Ombud to be biased, the peremptory provisions of section 26B(12) that in the event that further evidence is allowed, the matter should be referred back to the Ombud for reconsideration, need not be complied with. As correctly pointed out by counsel for the applicant, the applicant's perception of biasness on the part of the Ombud is an irrelevant consideration in determining whether or not further evidence should be allowed. The necessary question in an application for further evidence to be allowed is whether the applicant has shown good cause for the evidence to be allowed. The chair of the appeal board has not made a finding that the applicant has not shown good cause as required by section 26B(12) in order for further evidence to be allowed. What the Chair of the appeal board's decision seems to convey is that there is no need for an application for further evidence to be adduced since the appeal board would if necessary hear further evidence. However, in terms of section 26B(12)(b) read with section 26B(15) of the FSB Act the Ombud is vested with the power to reconsider an application and when her decision is appealed, the appeal board has to either confirm, set aside, vary or remit the matter for reconsideration by the decision-maker[25]. Furthermore, in his judgment, the Chair of the board of appeal does not even allude to the submissions made on behalf of the applicant about the relevance of the further evidence sought to be adduced, to show that they were considered.

[36] In *Herholdt v Nedbank Ltd*[26] the Supreme Court of Appeal clarified the test in *Sidumo*[27] as follows:

> "[25] For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2) (a) (ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one a reasonable arbitrator could not reach on all the material before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves

[25] *Potgieter v Howie NO and Others* 2014 (3) SA 336 (GP).
[26] [2013] 1 BLLR 1074 (SCA) at para 25.
[27] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC); [2007] 12 BLLR 1097 (CC)

sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."

[37] I am therefore of the view that the reasons given by the Chair for dismissing the application are not rational in that they are not consonant with the purpose they were meant to achieve. In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others*[28] the court held that:

> "[85] It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.
> [86] The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."

[38] I am also of the view that in his response to the applicant's attorney request for reasons for the dismissal of the application, the Chair of the board of appeal in reality gave no reasons, the effect of which is that the decision was taken for the wrong reasons[29].

[39] Where there is an irregularity in quasi-judicial proceedings, a court will normally not interfere with the decision of the tribunal unless it is convinced

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[28] 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 at paras [85] and [86].
[29] Section 5(3) of PAJA provides that: "If an administrator fails to furnish adequate reasons for an administrative action, it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason".

that the complaining party will be prejudiced. I am [30]of the view that the failure by the Chair of the appeal board to provide reasons for not allowing further evidence in the appeal, is prejudicial to the applicant since the appeal will be decided without such evidence.

[40] In its notice of motion the applicant sought costs in the event of opposition. However, during the hearing counsel for the applicant submitted that the applicant would not be seeking a costs order.

[41] Accordingly the following order is made:

1. The application to be exempted from exhausting internal remedies is dismissed.
2. The decision by the first respondent dated 17 June 2014 is reviewed and set aside.
3. The matter is remitted to the first respondent for reconsideration.
4. In the event that the application on reconsideration is dismissed, the first respondent is directed to provide reasons for the decision.
5. Each party to pay its own costs.

NP MNGQIBISA-THUSI
Judge of the High Court

Appearances:

For the Applicants: Adv Louw SC
Instructed by: Bieldermans Inc
For the Second Respondent: Adv V Ngalwane SC
Instructed by: Ramushu Mashile Twala Inc

[30] *Rajah & Rajah (Pty) Ltd & Others v Ventersdorp Municipality & Others* 1961 (4) SA 402 at 407-408.