IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

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

23/9/19
DATE

SIGNATURE

Case No: 99788/15

In the matter between:

ANDRIES PETRUS NEL Applicant

and

A T NCONGWANE First Respondent
J PEMA Second Respondent
L MSKHUBELA Third Respondent
SUSAN MELLET Fourth Respondent
JACOBUS JOHANNES MELLET Fifth Respondent

JUDGMENT

D S FOURIE, J:

[1] This is an application for an order reviewing and setting aside the order of the first, second and third respondents dated 9 September 2015. The application is opposed by the fourth and fifth respondents.

[2] The applicant is an estate agent conducting business in the name of Du-Nel Properties in Lydenburg. The first respondent has been joined in his capacity as chairperson of the Appeal Board of the Financial Services Board, duly appointed as such in terms of the Financial Services Board Act, No 97 of 1990 ("the FSB act"). The second and third respondents have been joined in their capacities as members of the said Appeal Board. The fourth and fifth respondents are members of the public who filed complaints against the applicant at the office of the Ombud for Financial Services Providers regarding a lost investment totalling R360 000.00.

BACKGROUND

[3] The facts of this matter are to a large extent common cause. According to the complaints filed by the Mellets (fourth and fifth respondents) they were approached by a broker Mr Andries Nel (the applicant) during December 2005 with regard to an *"unbelievably profitable investment opportunity"*. After numerous telephone calls by Nel the Mellets agreed on a date to meet with him.

[4] During their first meeting Nel was accompanied by Mr Louis Baartman. They advised the Mellets to invest with PropDotCom. This would be an investment for five years and interest would be paid monthly. After a period of five years the capital would be paid back plus additional growth. Nel informed them that his wife had the same investment and that her investment was highly successful as her interest accrued to 17%. The Mellets accepted the proposal and invested a total amount of R360 000.00 with PropDotCom.

[5] During the period March 2006 to January 2007 the Mellets received no feedback from Nel or PropDotCom due to the fact that the monthly linked loan repayments were duly made and they had no reason to suspect that there were any problems or irregularities. However, during August 2007 the monthly linked loan payments ceased. Nel was contacted and requested to give an explanation. His response was that there *"are some minor issues to be sorted out"* but assured them that they had no reason to be concerned. Thereafter they only received about three sporadic linked loan repayments whilst Nel repeatedly assured them that there was no reason to be concerned.

[6] During June 2008 the Mellets decided to make further enquiries. A certain Damascio provided them with correspondence, minutes and other relevant information about their investment which had all been forwarded to Nel. They then realised that according to these documents the investment entity found itself in a financial crisis, notwithstanding Nel's assurances that their investment was safe. They contacted Nel who informed them that he was no longer involved, but again he gave them the assurance that their investment was safe. However, on 20 October 2009 they received correspondence from a certain Griesel indicating the mismanagement of investors' money. The Mellets then lodged a complaint against Nel at the office of the Ombud for Financial Services Providers stating that they had lost their investment and requesting assistance to recover it.

[7] The complaint was then referred to Nel. On 30 August 2010 he filed his reply. According to him he was a representative of Uniprop. All agreements were entered into between the Mellets and Uniprop. All payments were made to

this entity. He was only a representative marketing the Uniprop product which resulted in a number of shares being sold. He was never involved in any decision-making with regard to the business of this entity. He is no longer involved in the marketing of these products and *"is no longer empowered to provide any financial information or advice"*. In his reply to the Mellets' statement Nel did not put in issue any of the allegations made by them.

[8] During May 2011 the Ombud made determinations in terms of the provisions of section 28(1) of the Financial and Intermediary Services Act, No 37 of 2002 ("the FAIS Act"). In terms of these determinations Nel was ordered to pay the Mellets the total amount of R360 000.00 plus interest at the rate of 15,5% per annum calculated from 1 October 2008 to date of final payment. Nel then decided to lodge an appeal against the determinations of the Ombud. After leave was granted and on 15 July 2015 the appeal was heard by the Appeal Board established in terms of section 26A of the FSB Act (first, second and third respondents). Both Nel and the Mellets had legal representation. On 9 September 2015 the Appeal Board handed down a judgment in terms whereof the appeal was dismissed with costs. That order is the subject-matter of this review application.

THE DETERMINATION OF THE OMBUD

[9] The Ombud made two determinations, one with regard to Ms Mellett (fourth respondent) and the other with regard to Mr Mellett (fifth respondent). The collective effect thereof is that Nel was ordered to pay the Mellets the total amount of R360 000.00 plus interest at the rate of 15,5% per annum calculated

from 1 October 2008 to date of final payment. Both judgments are similar and will therefore be treated as one.

[10] The Ombud accepted that Nel was an authorised financial service provider with licence No 14277. The Ombud took into account the background facts, the complaint and Nel's response thereto.

[11] The issues have been formulated as follows:

> *"51.1 Did respondent's conduct whilst rendering the financial service violate the provision of the FAIS Act, specifically, the duty on providers of financial services to act with due skill, care and diligence and in the interests of clients and the integrity of the financial services industry when rendering services to clients;*
>
> *51.2 If it is found that the respondent did render the financial service negligently and/or failed to comply with the FAIS Act, whether such failure caused the complainants' loss; and*
>
> *51.3 I shall confine myself in this determination to some of the more pertinent breaches."*

[12] It is stated in the determination that, although Nel was a licensed financial service provider and therefore *"subject to the provisions of the FAIS Code"*, he was not authorised to sell the product in question as he was restricted to certain financial services. Reference is made to qualifications of representatives and duties of licensed service providers as referred to in section 13 of the FAIS Act. Having taken into account this and other concerns, the Ombud then concluded that:

(a) Nel had failed to make an independent and objective assessment of the relevant company products;

(b) Nel had no Record of Advice;

(c) Nel could not provide proof that he did a due diligence research on the entities concerned to ensure that the Mellets' funds were invested in a safe investment;

(d) the Mellets were dependent on Nel for professional and sound advice on the appropriate investment he needed to make;

(e) there is no indication that Nel conducted the necessary needs and risk analysis of the Mellets;

(f) Nel invested the Mellett's money into entities which was a high risk investment;

(g) Nel was not qualified to deal in unlisted shares and securities, nor was he licensed to do so;

(h) Nel breached various provisions of the FAIS Act and is therefore liable to the Mellets.

JUDGMENT OF THE APPEAL BOARD

[13] Nel's appeal was dismissed with costs to be taxed on a High Court scale. As a starting point it was pointed out that the correctness or otherwise of

the Ombud's decisions *"is what merits the attention of this appeal panel"*. The Appeal Board was also of the view that *"if the appeal panel, after examining the evidence in the appeal record and heard submissions from the parties, concludes that the evidence justifies the orders made by the Ombud, the appeal panel will have to dismiss the appeal, even if it disagrees with some of the Ombud's findings or reasoning."*

[14] After having taken into account the version of the Mellets as well as that of Nel, the Appeal Board also considered the submissions put forward by both counsel. In his heads of argument and during the hearing Nel's counsel submitted that he had never been issued with a licence to act as a financial service provider and therefore Nel is not bound by the FAIS Act or the Code of Conduct promulgated in terms of the said Act. Taking into account the two scenarios of Nel's involvement in rendering a financial service to the Mellets, i.e. whether as a licensed or unlicensed financial service provider or representative, the board was of the view that Nel would still be required to comply *"with the requirement of a reasonable duty of care to the Mellets"* and must be equipped *"with requisite competence and knowledge"*.

[15] The contention that the Ombud did not have jurisdiction to entertain the complaints against Nel (by virtue of being not an authorised financial service provider) was also considered. The Appeal Board was of the view that the provisions of section 26(1)(a)(iii) of the FAIS Act authorised the Financial Services Board to make rules in respect of different categories of complaints, including a complaint relating to a financial service rendered by a person not authorised as a financial services provider. It was then pointed out that

Rule 4(d) specifically deals with this issue. The Appeal Board then went further and also concluded that the Ombud did not err in finding that Nel *"was bound by the code and failed to conduct himself in accordance with the code"*.

[16] It was then pointed out in its judgment that if the Appeal Board were to deal with the manner in which Nel provided the financial service in question, outside the domain of the FAIS Act and Code of Conduct as he contended, there would be *"no good reason to obviate applying principles of common law"*, including the common law duty of care. It was then concluded, according to the undisputed evidence, that Nel was negligent in his dealings with the Mellets in that his conduct deviated from that of a reasonable and prudent financial service provider. The Appeal Board then held that Nel should be *"liable for the financial services he rendered to the Mellets"*.

GROUNDS OF REVIEW

[17] Nel states in his founding affidavit that this is an application in terms of the provisions of the Promotion of Administrative Justice Act, No 3 of 2000 ("PAJA") and, more in particular, in terms of section 6 thereof. It is then contended that the Ombud does not have the authority and/or power to apply any other law than that stated in the FAIS Act, read with any appropriate rules and/or regulations and/or codes of conduct promulgated in terms of the said Act. According to Nel the Appeal Board simply ignored the Ombud's findings in regard to the alleged contravention of the FAIS Act and Code of Conduct, and applied the common law, including the common law of duty of care. This, according to the affidavit, amounts to a *"substitution by the Appeal Board of the*

Ombud's determinations with one of its own". It is then pointed out that in terms of the provisions of section 26(B)(15) of the FSB Act, the Appeal Board cannot substitute the Ombud's determinations with one of its own.

[18] It is also stated in the founding affidavit that Nel had never been issued with a licence under section 8 of the FAIS Act and it therefore should follow, according to Nel, that he was never an authorised financial services provider. He is therefore not bound by the said Code of Conduct. It is also contended that the Appeal Board adopted three different approaches to make a decision on appeal. First, by stating that the Ombud did not err in finding that Nel was bound by the said Code of Conduct. Second, by applying the principles of the common law and finally also applying *"criminal law"*. Finally, it is alleged that the Appeal Board did not act *bona fide* and/or impartial and/or that the board were materially influenced by an error of law and/or not acting in the interests of justice. Reference is also made to an application to submit further evidence which was not allowed by the Appeal Board.

[19] In Court counsel for Nel confined his argument only to the provisions of section 6(2)(a)(i) of PAJA insofar as a ground of review is concerned. The essence of his argument is that Nel was not an authorised financial services provider and therefore not subject to the Code of Conduct. He also contended that the Appeal Board was not authorised to embark on other legal principles, such as the common law, duty of care and unlawful conduct or the criminal law and by doing so the board exceeded its statutory powers. There is, according to this argument, no express provision in the FAIS Act that the Ombud (or the Appeal Board) may apply any other law than stated in the said Act. It was also

submitted that by doing so, the board attempted to substitute its own decision in place of that of the Ombud. In support of this argument counsel for Nel relied on the decision in *Potgieter & Another v Howie & Others* 2014 (3) SA 335 (GP) and more particularly the dictum contained in paragraphs 35 and 36 thereof.

[20] Counsel for the Mellets contended that the facts in the *Potgieter* case are clearly distinguishable from the facts in the present matter and therefore the dictum in paragraph 36 is not applicable. She also submitted that the Appeal Board was indeed required to apply the common law as it is rationally impossible for either the Ombud or the Appeal Board to carry out their functions by trying to apply the FAIS Act in a *"legal vacuum"*. Finally, it was argued that there is nothing to suggest that any reviewable misdirection occurred.

STATUTORY FRAMEWORK

THE FAIS ACT

[21] According to the long title of the FAIS Act the purpose thereof is to regulate the rendering of certain financial advisory and intermediary services to clients and to provide for matters incidental thereto. Chapter II (sections 7 to 12) deals with authorisation of financial services providers. In terms of section 7(1) no person may act or offer to act as a financial services provider unless such a person has been issued with a licence under section 8. It also provides that a person may not act or offer to act as a representative, unless such person has been appointed as a representative of an authorised financial services provider under section 13. Section 15 provides for the publication of codes of conduct by

notice in the Gazette which will, upon publication thereof, become binding on all authorised financial services providers and representatives.

[22] Part 1 of Chapter VI (sections 20 to 32) provides for enforcement. Section 20 deals with the office of the Ombud. Sub-section (3) provides as follows:

> *"The objective of the Ombud is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances, with due regard to –*
>
> *(a) the contractual arrangement or other legal relationship between the complainant and any other party to the complaint; and*
>
> *(b) the provisions of this Act".*

[23] The appointment of the Ombud is dealt with in section 21. In terms of sub-section (1) thereof the board must appoint as Ombud a person *"qualified in law"* and who possesses adequate knowledge of the rendering of financial services. It may also appoint as Deputy Ombud one or more persons having the same qualification as that required for the Ombud.

[24] Section 26 sets out the powers of the Financial Services Board. In terms thereof the board may make rules regarding, *inter alia,* a complaint relating to a financial service rendered by a person *"not authorised as a financial services provider"* or a person acting on behalf of such first-mentioned person.

[25] Determinations by the Ombud are dealt with in section 28. In terms of sub-section (1) thereof the Ombud may make a final determination, *"which may include"*, the dismissal of the complaint or the upholding thereof, wholly or partially, in which case the complainant may be awarded an amount as fair compensation for any financial prejudice or damage suffered. The Ombud may also make *"any other order"* which a Court may make.

[26] Rules on proceedings of the office of the Ombud were published under Board Notice No 81 in the Gazette of 8 August 2003. In terms of Rule 4(d) the Ombud may also entertain a complaint relating to a financial service rendered by a person *"not authorised as a financial services provider"* or by a person acting on behalf of such person.

THE FSB ACT

[27] According to the long title the purpose of this Act is to provide for the establishment of a board to supervise compliance with laws regulating financial institutions and the provision of financial services. Section 26 regulates appeals against a decision of a decision-maker. It provides that 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.

[28] Section 26A provides for the establishment of an Appeal Board. Sub-section (2) thereof provides that the Appeal Board consists of as many members as the Minister considers necessary, including at least two advocates or attorneys with a minimum of ten years experience or Judges, and at least four persons who, in the opinion of the Minister, have experience and expert

knowledge of the financial services industry. Sub-section (5)(a) stipulates that the Appeal Board must be chaired by a Judge who has been discharged from active service or an advocate or attorney referred to in sub-section (2)(a) (with a minimum of ten years experience).

[29] Section 26B regulates appeal proceedings. Sub-section (8) provides that any party to an appeal may be represented by a legal representative and sub-section (10) stipulates that an appeal is decided on the written evidence, factual information and documentation submitted to the decision-maker before the decision was taken, which is the subject of the appeal.

[30] Section 26B(15) sets out the powers of the Appeal Board. It provides that the Appeal Board may confirm, set aside or vary *"the decision under appeal"* and order that any such decision of the Appeal Board be given effect to, or remit the matter for reconsideration by the decision-maker concerned in accordance with such directions, if any, as the Appeal Board may determine.

DISCUSSION

[31] The applicant applies for an order reviewing and setting aside the order of the Appeal Board. When considering this application, the proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. It would have to include a consideration of whether the irregularity or non-compliance was material or, put differently, egregious (*Allpay Consolidated v Chief Executive Officer, SASSA* 2014 (1) SA 604 (CC) par 28 and *SANRAL v Cape Town City* 2017 (1) SA 468 (SCA) par 81).

[32] The applicant relies on the provisions of section 6(2)(a)(i) of PAJA. It provides that a Court has the power to review an administrative action if the administrator who took it *"was not authorised to do so by the empowering provision"*. In this regard it has been contended that the Appeal Board erred in two respects. First, it simply ignored the Ombud's findings with regard to the alleged contravention of the FAIS Act (and Code of Conduct) and instead applied the common law. According to this argument the Appeal Board was not authorised to embark on other legal principles of the common law, save for those stated in the FAIS Act or Financial Services Board Act. Second, this conduct of the Appeal Board amounts to a *"substitution by the Appeal Board of the Ombud's determinations with one of its own"*. According to this submission the Appeal Board cannot substitute the Ombud's determinations with one of its own. In support of this argument reference was made to the decision in *Potgieter & Another v Howie & Others*, *supra*, paragraphs 35 and 36 thereof.

[33] In its judgment the Appeal Board pointed out that if it were to deal with the manner in which Nel provided the financial services in question, outside the domain of the FAIS Act and Code of Conduct as he contended, there would be *"no good reason to obviate applying principles of common law"*. Does this amount to an irregularity? As pointed out above, section 21(1) of the FAIS Act requires that the Ombud must be a person *"qualified in law"*. Furthermore, the Financial Services Board Act stipulates in section 26A(2) that the Appeal Board must consist of at least two advocates or attorneys with a minimum of ten years experience or even two Judges. Section 26B(8) provides that any party to an appeal may be represented by *"a legal representative"*. These provisions, taken

together, clearly imply that the Ombud as well as at least two members of the Appeal Board must be able to understand and apply legal principles.

[34] It is important to point out that in terms of section 20(3) of the FAIS Act, the objective of the Ombud is to consider and dispose of complaints in a procedurally fair and informal manner, with due regard to *"the contractual arrangement or other legal relationship"* between the parties concerned. Consideration of this *"contractual arrangement or other legal relationship"* may, without any doubt, involve the application of legal principles, not stipulated in the said Act, including that of the common law. If one has regard to the issues as formulated by the Ombud (par 11 above) it is quite evident that the Ombud also had in mind to apply certain principles of the common law. If the Ombud is by implication authorised to do so, why would the Appeal Board, taking into account the provisions of the FSB Act, not also be authorised to do so? There is no provision in the FSB Act which indicates a different intention. On the contrary, it appears to be implicit in both Acts.

[35] Both Acts contain jurisdictional (with regard to power) and procedural limitations (for instance, sections 26 and 28 as well as the Rules on Proceedings of the FAIS Act and section 26B(10) and (15) of the FSB Act). However, the common law is part of the national law of South Africa. It does not appear that these two Acts contain a codification or limitation of common law principles, or a prohibition thereof. Put differently, common law principles as part of the substantive law should not be confused with Jurisdictional limitations or Procedural Directives. The former (common law) is intended to be applied within the confines of the latter, otherwise the application these Acts will take place in a

"legal vacuum" as pointed out by counsel for the Mellets. The argument for the applicant in this regard is therefore without any merit.

[36] I now turn to consider the submission that the conduct of the Appeal Board amounts to a *"substitution by the Appeal Board of the Ombud's determinations with one of its own"*. In Potgieter & Another v Howie & Others, *supra*, paragraphs 35 and 36 it was pointed out that:

> *"In this context it bears mentioning that there are numerous statutes in our law where the Legislature grants an appeal body the power to substitute its own decision in place of the decision-maker's. In that regard the power is bestowed on the appeal body expressly and not tacitly or by implication ... It is therefore logical to accept that the absence of an express provision empowering the appeal board with the jurisdiction to substitute its own decision in place of the decision of the JSE is an indication that the appeal board cannot assume such powers on its own. The appeal board could therefore not substitute its own decision in place of the decision appealed against. Put another way, s 26B(15) does not empower the appeal board to reconsider the matter. It is left to the original decision-maker (the JSE) to reconsider the matter. To that end, the board may exercise the power of remittal."*

[37] This dictum must be understood within the context of the full judgment. In that matter the JSE found the applicants to be in breach of s 5.69 of the listing requirements and fined them R5 million each. The decisions of the appeal board included a decision upholding the appeal and setting aside the decisions of the JSE. Further, the appeal board made a decision to substitute different findings in place of those which had been set aside and to impose a penalty on each of the applicants of R3 million. It was found by the appeal board that the applicants had breached s 5.69, read with s 5.82, of the listing requirements, whereas the

JSE charged and found the applicants guilty of contravening the provisions of s 5.69, without any reference to s 5.82 of the listing requirements.

[38] Having regard to the facts in the *Potgieter* matter, it is clear that the appeal board not only upheld the appeal, but went further to substitute different findings in place of those which had been set aside. In the matter before me the Appeal Board dismissed the appeal without substituting its own decision in place of that of the Ombud. Furthermore, in terms of s 26B(15) of the FSB Act the Appeal Board is empowered to, *inter alia*, confirm the decision under appeal. The decision of the Appeal Board to dismiss the appeal means that the determination of the Ombud (that Nel must compensate the Mellets) remains in place. In the matter before me the Appeal Board did not, as in the case of *Potgieter v Howie*, substitute its own decision in place of that of the Ombud. The argument for the applicant in this regard is therefore without any merit.

[39] As indicated above, the applicant has also alleged (in his founding affidavit) that the Appeal Board did not act *bona fide* and/or impartial and/or that it was materially influenced by an error of law and/or not acting in the interests of justice. This is a bald statement not substantiated by any facts. Counsel for the applicant also did not advance any argument in this regard. There is, in my view, no merit in this ground of review.

[40] Finally, Nel also points out in his founding affidavit that he applied for permission to put further evidence before the Appeal Board (or to refer it to the Ombud) which was not allowed. His attempt to do so not only came about five years after he had been given the opportunity to reply fully to the Mellets' complaint, but also after the appeal proceedings had already been finalized. His

explanation in this regard is, to say the least, unconvincing. On the contrary, one gets the impression that this is a strategy to further delay the finalization of these proceedings. Not only is there no merit in this ground of review, but this conduct also calls for a robust approach to indicate that an abuse of this nature should not be allowed.

[41] Taking into account all the above considerations, I am not convinced it has been demonstrated that any irregularity, justifying a review in terms of PAJA, was committed by the Appeal Board.

ORDER: The application is dismissed with costs.

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA 20/9/19