IN THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

In the consolidated hearing of cases FAIS 00039/11-12/GP1 and FAIS 06661/10-11/WC1

**Between**

SHAREMAX INVESTMENTS (PTY) LTD

(in business rescue) 1st Appellant

GERHARDUS ROSSOUW GOOSEN 2nd Appellant

JOHANNES WILLEM BOTHA 3rd Appellant

DOMINIQUE HAESE 4th Appellant

ANDRÉ DANIEL BRAND 5th Appellant

on the one hand, and on the other

GERBRECHT ELIZABETH J SIEGRIST

Respondent in case FAIS 00039/11-12/GP1

and

JACQUELINE BEKKER

Respondent in case FAIS 06661/10-11/WC1

APPEAL PANEL:

Justice LTC Harms (chair) and Messrs Jay Pema and Luckyboy Makhubela

APPEARANCES:

Adv LJ van Tonder SC for Sharemax, instructed by Natalie Lubbe & Associates Inc.

Mr GR Goosen in person.

Adv C Puckrin SC and E Muller for Botha, instructed by Potgieter Marais Attorneys.

Adv JJ Brett SC and D Mahon for Haese instructed by Faber Goertz Ellis Austen Inc.

Mr W van Zyl of Van Zyl Inc for Brand.

Adv VR Ngalwana SC, S Shangisa and N Mbelle for the Ombud instructed by Ramushu Mashile Twala Inc.

HEARING: 30 March 2015

# JUDGMENT

## INTRODUCTION

[1] This judgment deals with two appeals which were consolidated for the sake of convenience. The appeals are directed against determinations made by the Financial Advisory and Intermediary Services Ombud (the 'FAIS Ombud' or 'Ombud') in terms of the Financial Advisory and Intermediary Services Act 39 of 2002 ('the FAIS Act'). The appellants in both cases are the same but the respondents, Mrs Siegrist and Mrs Bekker, are complainants who had submitted independently related complaints to the Ombud.

[2] The Ombud refused the appellants' applications for leave to appeal in the Siegrist matter but the former chair of the appeal board granted leave to appeal.[1] When the appellants subsequently applied for leave in Bekker, the Ombud refused leave in spite of the fact that leave had been granted on the same grounds. The explanation given was that the

[1] Counsel for the Ombud submitted that the first appellant was not properly before this tribunal since it had not applied for leave to appeal from the Ombud before applying for leave from the Chair. The submission was factually incorrect.

determination in the Bekker matter had brought forth new facts and she refused leave because 'the facts are different'. In fact, her determination dealt with the appellants in five paragraphs ([103] to [108]) out of 116 paragraphs. And, as she said, she found them liable 'for the reasons set out in Siegrist'. There is not a single fact in the Bekker determination that conceivably could have affected the legal issues which were raised in the Siegrist matter and which form the subject-matter of this appeal.

[3] Applications for leave to appeal may be irritating to the decision-maker who believes in the correctness of her or his judgment but they should nevertheless be dealt with dispassionately. In the event leave was granted by the deputy chair in Bekker.

[4] Directives were issued which required a preliminary hearing to determine issues of law which could be dispositive of the appeals. In due course further issues were added to that list. The appeals were consolidated because although the facts in the two cases differ slightly the preliminary legal issues are the same. Abbreviated records were prepared in consequence of the limited scope of the appeal. The parties were permitted to add documents from the main record to the truncated record.

[5] The issues at this stage are essentially these: (a) the jurisdiction of the Ombud against a party who was not cited as 'wrongdoer' by a complainant, i.e., whether the procedure adopted in relation to the appellants was legally competent and procedurally fair and (b) the effect of the sanctioning of a scheme arrangement on a 'complaint'.

[6] This judgment is not concerned with the correctness or otherwise of the findings of fact contained in the Ombud's determinations such as that the appellants had deceived the public or that the investment scheme was a Ponzi scheme. It is limited to legal issues that go

to the heart of the functions and jurisdiction of the Ombud. The personal circumstances of the two respondents, as unfortunate as they are, can accordingly not play a role in the outcome of this appeal.

THE PARTIES:

[7] All the appellants, save for the second appellant who appeared in person, were represented by counsel. The respondents were not represented but Mrs Bekker filed submissions on her own behalf of which we took note. These do not, however, deal with the legal issues that form the subject matter of this appeal.

[8] The Ombud is not a party to the appeal but took part at the request of the former chair in terms of the Financial Advisory and Intermediary Services Act Regulations reg 12 (j). Counsel who appeared on her behalf informed us that they were not here to defend her determination but, more or less, to act as friends of the Appeal Board. Their contribution is appreciated.

[9] The respondents, Mrs Siegrist and Mrs Bekker (the 'complainants'), invested independently in Sharemax Zambezi Retail Park Holdings Ltd ('Zambezi Holdings'). They had made use of and depended on financial advisers in doing so. In the case of Mrs Siegrist it was Mr CJ Botha of CJ Botha Financial Services (a one-man firm), while Mrs Bekker utilised the services of Mr Eddie Carter-Smith.

[10] The complainants registered complaints against their respective financial advisers with the FAIS Ombud. The Ombud, under circumstances which will be dealt with in some detail, made her determinations in the two cases against the two advisers by ordering them

to repay the capital value of the investments made in Zambezi Holdings with interest. In both instances she held the present appellants jointly and severally liable with the advisers.

[11] The first appellant, Sharemax Investments (Pty) Ltd ('Sharemax'), was according to an organogram contained in the Ombud's determination, the holding company of Zambezi Holdings. It is important to emphasise that the determinations of the Ombud related to Sharemax and not to Zambezi Holdings.

[12] The Ombud, on her own initiative, 'joined' Sharemax because it was, she said, the product provider and promotor of the investments in question. Sharemax is under business rescue but this does not affect the matter by virtue of sec 133(1)(f) of the Companies Act which provides that –

> 'During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except—
>
> > (f) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.'

[13] The second appellant, Mr Goosen, was 'joined' by the Ombud as a director and compliance officer of Sharemax and FSP Network (Pty) Ltd (also known as USSA) and as the key individual in USSA because, she said, USSA was nothing more than an extension of Sharemax. USSA does not feature in this appeal because it was liquidated. The third appellant, Mr JW Botha (Willie Botha), was also 'joined' by the Ombud in his capacity as a

director of Sharemax. The same applies to the fourth, Ms Haese, and the fifth, Mr Brand. Ms Haese was in addition joined because she was a key individual and representative of Sharemax. (The terms 'compliance officer', 'representative' and 'key individual' are defined in sec 1 of the FAIS Act.)

[14] The Ombud justified her joinder because she considered that the appellants were 'interested parties' (as intended by sec 27 (4)) and that a notice under this provision made the recipient a 'respondent' against whom a determination may be made.

FUNCTIONS OF THE OMBUD:

[15] Before dealing with the particulars of the FAIS Act and regulations – where the Ombud's jurisdiction and powers are prescribed – it may be useful to make some broad remarks about the Ombud's functions. Speaking generally about the position of an ombud or ombudsman Nienaber and Reinecke in 12(2) *Lawsa* 'Insurance Part 2' para 344 stated the following:

> 'The concept of an ombudsman, a public functionary duly appointed to intercede on behalf of ordinary citizens aggrieved by acts of wrongdoing, dereliction of duty or abuse of power within the sphere of public administration, was, for the modern world, a Scandinavian invention. The concept soon evolved into a phenomenon extending territorially far beyond Scandinavia and incrementally far beyond public administration to reach virtually every walk of financial and commercial life.
>
> As arbitration has certain advantages over litigation, so an ombudsman scheme has advantages over both litigation and arbitration. The most important of these are:

greater accessibility for complainants; no cost implications for the complainant in lodging a complaint; no obligation on the parties to obtain and pay for legal representation; a process that is more informal and less daunting for the parties; an inquisitorial as opposed to an adversarial approach; less rigidity in the rules of evidence and procedure; fewer delays in bringing matters to conclusion and, if the scheme allows for it, an equity jurisdiction that allows the ombudsman greater flexibility in arriving at a pre-eminently just solution.'

[16] In terms of sec 20(3) of the FAIS Act, the objective of the FAIS 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 the contractual arrangement or other legal relationship between the complainant and any other party to the complaint; and the provisions of the Act. In other words, the function is to settle complaints and not to 'police' financial service providers; that is the function of the Registrar.

[17] The requirement of procedural fairness, which applies to the FAIS Ombud, is based in the Constitution and is fleshed out in the Promotion of Administrative Justice Act 3 of 2000, more particularly in sec 3(2)(b):

'In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5.'

[18] It follows by analogy from what was said in *City of Cape Town Municipality v South African Local Authorities Pension Fund and Another* [2013] ZASCA 175; 2014 (2) SA 365 (SCA) at [28] that the office of the Ombud is part of an overall scheme in which disputes about financial advisers that could otherwise only have been resolved through the court system are dealt with informally, cheaply and expeditiously. Disputes do not, accordingly, lose their legal character by being referred to the Ombud as 'complaints'. The Ombud, importantly, performs the same function which a court of law would perform had such court been seized of the matter; and the Ombud does not possess a general equitable jurisdiction (ibid at [27]) meaning that the Ombud cannot give a complainant more than that person's legal entitlement.

[19] It is therefore somewhat disturbing to note that the Ombud expressed the view that common-law principles have no place in proceedings before her. To the extent that a determination is based on the breach of a statutory duty, ordinary common-law principles apply (e.g. *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* [2003] 2 All SA 465 (SCA), 2003 (6) SA 13 (SCA)); to the extent that it is based on breach of contract or delict the appropriate common-law rules also apply. As will be indicated below, the determinations against the appellants were based on both a failure to comply with statutory

obligations and on common-law grounds and not on the basis that they had, generally speaking, been treated 'unfairly'.

[20] Because of the special nature of the office, the Ombud deals with matters inquisitorially. She not only investigates but also mediates and if necessary determines disputes by administrative fiat or monetary award which must, by virtue of sec 20(3), be related to the legal relationship between the parties. A determination (subject to the right of appeal and review) has the force of a court judgment and may be executed.

[21] The Ombud can only 'make the order which any court of law may make' provided it is in respect of a matter within her competence (*Joint Municipal Pension Fund and Another v Grobler and Others* [2007] ZASCA 49; [2007] 4 All SA 855 (SCA) at [27]).

[22] Counsel for the Ombud stressed that since her powers are inquisitorial and her procedure informal she ought not to be held strictly to the terms of the statute. A similar argument was rejected in *Special Investigating Unit v Nadasen* [2001] ZASCA 117; [2002] 2 All SA 170; 2002 (1) SA 605 (SCA) at [5] where in a comparable matter it was pointed out that any exercise of power by a non-judicial tribunal should be strictly in accordance with the statutory or other authority whereby it is created and that reliance upon a 'liberal' construction (meaning in the context of the argument 'executive-minded' or, in this case, pro Ombud) is misplaced:

> 'A tribunal under the Act, like a commission, has to stay within the boundaries set by the Act and its founding proclamation; it has no inherent jurisdiction and, since it trespasses on the field of the ordinary courts of the land, its jurisdiction should be interpreted strictly'.

THE NATURE OF THE APPEAL:

[23] Section 39 of the FAIS Act provides that any person who feels aggrieved by any decision by the Ombud under the Act which affects that person may appeal to the Board of Appeal established by sec 26 (1) of the Financial Services Board Act 97 of 1990 ('the FSB Act').

[24] In *Nichol and Another v Registrar of Pension Funds and Others* [2005] ZASCA 97 [2006] 1 All SA 589 (SCA), 2008 (1) SA 383 (SCA) the court pointed out that this Appeal Board is a specialist and independent tribunal as contemplated in sec 34 of the Constitution:

> 'It has very wide powers on appeal, including the power to confirm, set aside or vary the decision of the Registrar against which the appeal is brought; to refer the matter back for consideration or reconsideration by the Registrar in accordance with such directions as the Board may lay down; or to order that its own decisions be given effect to. In addition, it is empowered under section 26(2A) to grant interim relief by suspending the operation or execution of the decision appealed against and, under section 26(14), it can make an appropriate order as to costs.'

[25] So far so good. The Court added:

> 'The Appeal Board therefore conducts an appeal in the fullest sense – it is not restricted at all by the Registrar's decision and has the power to conduct a complete rehearing, reconsideration and fresh determination of the entire matter that was before the Registrar, with or without new evidence or information.'

This statement, often quoted (even in this appeal), is no longer applicable. 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. See *Potgieter v Howie NO and Others* [2013] ZAGPPHC 313; 2014 (3) SA 336 (GP).

SIEGRIST: THE FACTS

[26] Mrs Siegrist filed a formal complaint with the Ombud on 31 March 2011. The complaint was directed against Mr CJ Botha of CJ Botha Financial Services who acted as her financial adviser. (We emphasise the initials of Mr Botha because he is not the same person as the third appellant, Willie Botha, and the two are not related.) The complaint was formulated in the terms of the definition of 'complaint' in section 1 of the FAIS Act, namely that the terms of the Act had been contravened or were not complied with; financial services were wilfully or negligently rendered to her; she was treated unfairly; and she suffered harm. She requested that the capital that she had paid over to his firm should be repaid to her plus interest.

[27] In her preceding letter to CJ Botha, she alleged that he and/or his firm had contravened or not complied with the provisions of the Act and that she thereby suffered or might suffer loss. She proceeded to set out in great detail the different failings of C J Botha. He had namely advised her to invest (by means of shares and linked investments) in one of the Sharemax companies as a result of which she invested R580 000.00. The group of companies ran into financial difficulties and she did not receive the promised return and she had reason to believe that her investment was no longer secure. As a pensioner she had insisted that the money be invested where the capital would be safe and an income of 10% guaranteed. In addition there had to be 4% capital growth.

[28] Being dissatisfied with the lack of progress in the office, she and daughter telephoned repeatedly and on 17 October 2011, she wrote a letter confirming the conversations. She pointed out that, according to the Ombud, it was necessary to wait until the Sharemax litigation (more about later) was over 'before the Ombud can act against Mr [CJ] Botha, as Mr Botha is not responsible for the decline of Sharemax and as the Ombud regards the complaint as being against three entities namely Mr [CJ] Botha, the FSB [Financial Services Board?] and Sharemax'. She proceeded to confirm in particular the following:

> 'My daughter did in fact, during your conversation with her on 14 June 2011, take note of the fact that the Ombud did not regard Botha Financial Services as a stand-alone entity, and that the Ombud would have to wait for the finding against Sharemax. However, my daughter confirmed to me that she emphasised that we did not lay a complaint against Sharemax, neither for their advice and/or lack thereof, nor because of the fact that Sharemax's company could no longer afford the monthly

payments to the investors. She emphasised that the advice from Botha Financial Services, on the strength of which the monetary investments were made at Sharemax, did not comply with the standards as required by FAIS.'

[29] She concluded by stating that she was still of the opinion that the advice of Mr CJ Botha within the framework of his own financial services and as owner of Botha Financial Services had been inappropriate in respect of the investment and also because he had emphasised to her that should anything go wrong with the investment he had sufficient insurance to meet his clients' needs. She felt that he did not advise her correctly and that the Ombud should be able to act against him in person.

[30] The 'Sharemax litigation' referred to was an application under sec 311 of the Companies Act, 1973, launched by Zambezi Holdings and another for the acceptance of a scheme of arrangement, which was eventually sanctioned by the High Court on 20 January 2012. The complainant was allocated 580 000 fully paid up exchangeable debentures of R1.00 each in the stead of her shares and linked investment in the company. In other words, for each R1.00 invested initially she received a debenture of the same nominal value.

[31] Having sent a 'section 27' (presumably the reference is to sec 27 (4)) notice to CJ Botha on receipt of the initial complaint, the Ombud followed this up with a second notice on 22 December 2011. In this CJ Botha was notified that the Ombud's office had proceeded to investigate the matter and that it had noted from his earlier detailed response number of issues, all relating to his personal conduct based on the complaint by the complainant. He responded by 18 January 2012.

[32] The Ombud made her determination on 29 January 2013. She upheld the complaint and she ordered the 'respondents' jointly and severally to pay to the complainant the amount of R580 000 plus interest. Upon payment an undefined 'share' certificate had to be tendered by the complainant to the respondents. The respondents, for purposes of the determination, apart from C J Botha, were the appellants and USSA.

BEKKER: THE FACTS

[33] The facts in this instance are less detailed. The complainant invested R490 000.00 in what she called Sharemax (in fact Zambezi Holdings) and her financial adviser was Carter-Smith. She wrote a letter to the Ombud on 12 October 2010, but inadvertently posted it to the Ombudsman for Long-term Insurance who in turn sent the letter to the Ombud.

[34] In the letter she complained about the fact that Carter-Smith had given her bad advice and that she, as an old-age pensioner, was now in dire straits. Apart from her complaint about the bad advice she added the following:

> 'I believe that Sharemax personnel gave false information to my financial adviser which led him to advise me to invest in the company. Prior to this he had always given me fairly good advice.'

[35] It would appear that the Ombud then provided the complainant with a registration form which she subsequently completed and signed on 25 January 2011. In the complaint registration form she, however, indicated that the person against whom she was complaining was Carter-Smith. Her complaint was that she had signed for a low risk investment and that she had expected that the money would be safe and she was so

assured by him. In the event the investment was a high-risk investment and she felt that she had lost everything, and she claimed a refund of the amount paid. She had paid in two instalments: as to this first of R190 000.00 her case was that the risk was greater than she had agreed to; and as to the second she alleged that she was unduly influenced to invest R300 000.00. She did not complain about 'Sharemax'.

[36] She, eventually, became by virtue of the sanctioned scheme of arrangement entitled to 490 000 exchangeable debentures with a nominal value of R1.00 each in the place of her shares and her linked investment. But as always, there is no indication of their intrinsic value.

[37] The Ombud made a determination on 16 May 2013 against the Carter-Smith and the appellants for payment of the full amount in terms identical to those in Siegrist.

[38] Her determination in both matters can, we believe, be summarised as follows. The financial advisers provided financial services. In doing so they committed breaches of the Act and Code. In particular, the investment in Sharemax (meaning Zambezi Holdings) was inappropriate for the profile and needs of the complainants. The advisers acted as representatives of USSA. USSA was an authorised financial services provider. USSA in particular was in breach of sec 13(2)(b) of the FAIS Act in having failed to take the steps that were reasonable in the circumstances to ensure that the representatives complied with any applicable code of conduct as well as with other applicable laws on conduct of business. USSA and Sharemax (meaning the first appellant) were 'joined at the hip'. Zambezi Holdings issued a false and misleading prospectus and the investment scheme set out therein was a Ponzi scheme. Zambezi Holdings in turn was controlled by the first appellant, which was also

an authorised financial services provider, in cahoots with Zambezi Holdings, misled the public. Individuals cannot hide behind the corporate veil. As a result of the breaches of the Act and Code, and as a result of the fraud by Sharemax, the complainants lost their capital and anticipated income invested in Zambezi Holdings.

THE FAIS ACT AND 'COMPLAINTS'

[39] As mentioned, the objective of the FAIS Ombud is to consider and dispose of 'complaints' (sec 20(3) of the FAIS Act). On receipt of a 'complaint', the Ombud must determine whether certain pre-requisites laid down in the rules have been complied with and if they have she must 'officially receive the complaint if it qualifies as a complaint' (sec 27(1)(c)). She must decline to investigate certain complaints (sec 27(3)).

[40] Section 27(4) is important for the present case. Like the preceding provisions it is peremptory ('must'):

> 'The Ombud must not proceed to investigate a complaint officially received, unless the Ombud[2]—
>
> (*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

[2] The appellants did not press the argument that the reference to the Ombud is one to the Ombud personally or a deputy Ombud as defined in sec 1. To make sense, the definition must be limited to judicial and quasi-judicial functions. The Ombud may obviously mandate the office to perform administrative functions under sec 27. See sec 27(5).

(*c*) has provided all interested parties the opportunity to submit a response to the complaint.'[3]

Once this has been complied with the Ombud proceeds to investigate and determine the 'officially received complaint' and in this regard the Ombud may follow and implement any procedure which the Ombud deems appropriate (sec 27(5)).

[41] Her final determination may include the dismissal or upholding of the 'complaint', wholly or partially, and in the latter case a complainant may be awarded an amount as fair compensation for any financial prejudice or damage suffered (sec 28(1)). 'Fair compensation' obviously cannot exceed the financial prejudice or damage suffered.

[42] This brings one to the definition of 'complaint' in sec 1:

> **'complaint'** means, subject to section 26 (1) (*a*) (iii), a specific complaint relating to a financial service rendered by a financial services provider or representative to the complainant on or after the date of commencement of this Act, and in which complaint it is alleged that the provider or representative—
>
> > (*a*) has contravened or failed to comply with a provision of this Act and that as a result thereof the complainant has suffered or is likely to suffer financial prejudice or damage;

[3] The appellants also did not further the spurious argument that 'interested parties' who had been given the opportunity to submit a response under sec 27(4)(c) may not be subjected to the inquisitorial provisions of sec 27(6).

(*b*) has wilfully or negligently rendered a financial service to the complainant which has caused prejudice or damage to the complainant or which is likely to result in such prejudice or damage; or

(*c*) has treated the complainant unfairly.'

[43] To paraphrase for present purposes: (i) there must be a 'specific' complaint (ii) relating to a financial service (iii) rendered to the complainant (iv) by a provider or representative (as defined) and (v) the complaint must allege that act or omission of the mentioned provider or representative falls under paras (a) to (c).

THE PARTIES AGAINST WHOM THE COMPLAINTS WERE LAID

[44] The question is accordingly whether there was a 'specific' complaint relating to a financial service rendered to Siegrist or Bekker by one of the appellants falling under (a) to (c). The answer, in the negative, is not in doubt.

[45] The heads submitted on behalf of the Ombud were in this regard contradictory. It was first stated that the Siegrist complaint was against CJ Botha and not against any of the Sharemax companies (#32.1); that her complaint was 'essentially that CJ Botha (counsels' underlining) had contravened' the FAIS Act (#32.4); that she had lodged her claim against CJ Botha (35); and that the subject of her complaint was acts or omissions by CJ Botha falling under (a) to (c) (#44). An about-turn then followed where it was stated that her claim was against CJ Botha and the appellants (#39).

[46] A similar contradiction is to be found in the Ombud's counsel's heads concerning the Bekker claim. It was first said, correctly, that her claim was against Carter-Smith and that the

facts clearly demonstrated that (#29). Also, that the subject of the investigation in the 'complaint' was the doings of Carter-Smith in his dealings with Mrs Bekker (#41). But elsewhere it was said that her claim 'as conceived by' the Ombud was also against the appellants (#36).

[47] To overcome the difficulty that no complaint had been laid against the appellants, counsel relied on the right of the Ombud to 'join' an interested party and make a determination against that party in spite of the fact, as the Ombud's counsel submitted in another context, that the 'subject of the investigation' (in the words of sec 27(3)(b)) by the Ombud was (a) contraventions by the two financial service providers of the FAIS Act, (b) wilful or negligent rendering of financial advice by them, and (c) unfair treatment by them.

THE RIGHT TO JOIN

[48] The terms of sec 27(4) have already been quoted. The Ombud's approach has been that by giving anyone a notice under this provision, that person becomes a party to the proceedings and respondent and that, consequently, the Ombud may make a determination against that person. Her counsel disagreed. They submitted in their heads that '[s]ection 27(4) does not empower the Fais Ombud to constitute recipients of the information in s 27(4) into respondents.' During oral argument counsel could not identify any other source of the power.

[49] There is nothing explicit in the provision which gives the Ombud a right to join a person through notice. As to necessary implication, the problem is that a sec 27(4) notice must be issued before the Ombud 'proceeds' with the investigation. This can only mean that the identity of the interested party or parties must appear from the complaint. An

interested party need not be a person against whom a complaint has been laid. In addition, the object of notice is spelt out in sec 27(4)(c), namely to provide 'all interested parties the opportunity to submit a response to the complaint'. The 'complaint' is the complaint as defined – i.e., the complaint as submitted – and not the Ombud's complaint. There was nothing in the complaints as filed which called for a response from the appellants.

[50] In addition there are the Rules which derive their power from section 26(1). The Financial Services Board may make rules regarding 'the type of complaint justiciable by the Ombud'; the right of complainants in connection with 'complaints'; and the rights and duties of a financial service provider or representative against whom a complaint had been lodged 'on receipt of any complaint'.

[51] According to the rules, the person against whom a complaint is made is regarded as 'the respondent' and for a complaint to be justiciable it must be against an (identified) respondent. Before submitting a complaint, the complainant 'must' endeavour to resolve the 'complaint' with the 'respondent'. The 'respondent' must be informed of the 'complaint submitted to the Office' (not any other complaint or one conceived by the Ombud).

[52] There is simply no scope within the Rules for the Ombud to determine without reference to the complaint as filed as to who should be a respondent.

[53] In the light of this conclusion it becomes unnecessary to deal with the content of the notices save to say that they did not forewarn the appellants of the factual findings the Ombud intended to make, especially those relating to the prospectus, fraud and the Ponzi scheme. This was a serious breach of the requirements of fair administrative action and any court would on review have set aside the determinations on this ground alone (*Motswai v*

*Road Accident Fund* [2014] ZASCA 104; 2014 (6) SA 360 (SCA); [2014] 4 All SA 286 (SCA); *Potgieter v Howie NO and Others* [2013] ZAGPPHC 313; 2014 (3) SA 336 (GP)). It is also a basic principle of simple justice that one may not direct a party's attention in one direction (in this case the formal complaints to which they had to respond pursuant to sec 27(4)) and then deal with the case on a completely different basis. Compare *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); [2009] 2 All SA 243 (SCA).

[54] Particular reference should in this regard be made to the piercing of the corporate veil. Although requested before the hearing for argument on the issue, counsel for the Ombud refrained from making any submissions in this regard. As mentioned earlier, the determinations against some of the appellants were and had to be based on the piercing of the corporate veil because, as the Ombud's counsel emphasised in another context, they were not financial service providers. It was so spelt out in great detail in the Siegrist determination and the Bekker determination stated explicitly that the same reasoning applied to that case. In her refusal of leave to appeal in the Bekker case, however, the Ombud denied that she had relied on piercing. This is patently incorrect. In any event, the Ombud is not entitled to change her reasons for a determination when dealing with an application for leave to appeal.

[55] In her piercing she referred to a number of authorities but failed to have regard to sec 20(9) of the Companies Act, 2008. That provision on the face of it gives the right to pierce corporate veils to courts and not to tribunals. Furthermore, a finding justifying piercing requires a prescribed order and cannot simply be made during the course of a judgment especially without notice. In particular, the Ombud failed to declare that

Sharemax is to be deemed not to be a juristic person in respect of any right, obligation or liability of Sharemax or of another person specified in the declaration.

SECTION 311 SCHEME OF ARRANGEMENT AND SECTION 27 (3) (b) OF THE FAIS ACT:

[56] The remaining questions which have been referred in terms of the original directive are

(a) whether the complainants' claims were included within the ambit of the application in terms of sec 311 of the Companies Act 61 of 1973?

(b) whether that application constituted 'proceedings' referred to in sec 27(3)(b) of the FAIS Act and, if so, whether the Ombud had jurisdiction to investigate and determine the complaint?

[57] A related question, flowing from some of the heads of argument, was later put to the parties:

(c) Does acceptance of a compromise in terms of section 311 amount to a compromise/novation of a debt, and if so, if a complainant compromises a debt, does the Ombud become *functus officio* in relation to the complaint about the original debt?

Reference has already been made to a scheme of arrangement which was sanctioned by the High Court.

[58] The three questions became in the light of the earlier findings moot but for future guidance some aspects can be highlighted since the matter was fully argued. It is convenient to begin with the provisions of sec 27(3)(b) of the FAIS Act:

> 'The following jurisdictional provisions apply to the Ombud in respect of the investigation of complaints:
>
> > (*b*) (i) The Ombud must decline to investigate any complaint if, before the date of official receipt of the complaint, proceedings have been instituted by the complainant in any Court in respect of a matter which would constitute the subject of the investigation.
> >
> > (ii) Where any proceedings contemplated in subparagraph (i) are instituted during any investigation by the Ombud, such investigation must not be proceeded with.'

[59] The argument of Mr Goosen and Adv Puckrin was that the Ombud had no jurisdiction to investigate the complainants' complaints once sec 311 proceedings were instituted. The answer to the submission depends on two cumulative jurisdictional requirements namely that (a) 'proceedings [must] have been instituted by the complainant in any Court' and they (b) must have been 'in respect of a matter which would constitute the subject of the investigation'.

[60] As to point (a): it is necessary to reiterate that the investments were in Zambezi Holdings but that the Ombud's determinations were against the first appellant, a different corporate entity; that the applicants in the sec 311 application was Zambezi Holdings and

another; and that the scheme of arrangement was between Zambezi Holdings and its creditors. Sharemax was not involved; nor were the complainants. This in simple terms means that the complainants did not 'institute' any possibly relevant court proceedings; it was Zambezi Holdings.

[61] To overcome this hurdle, Mr Goosen argued that the directors of Zambezi Holdings acted on behalf of the complainants in instituting the sec 311 proceedings and Mr Puckrin submitted that the board of directors not only acted on behalf of the shareholders but intentionally included each complainant as party in the proceedings 'as if she [had] instituted the proceedings herself.'

[62] The argument was bolstered with reference to *City of Cape Town Municipality v South African Local Authorities Pension Fund and Another.* It was this: although the complainants did not institute the proceedings themselves there is such an identity of interest between the applicants and the complainants that the requirement that the complainants must have instituted the proceedings themselves should be 'relaxed' (more correctly, ignored) as was done in the mentioned judgment where extended tests applicable in lis pendens and res judicata were used.

[63] These contentions have no merit. The Act is clear: the 'proceedings [must] have been instituted by the complainant'. They were not. They were instituted by a debtor while the complainants were creditors. The purpose of the application was to place the creditors before a Hobson's choice between two dead horses – either a liquidation dividend or debentures, either with debatable value. The complainants became parties, not to the proceedings but to the arrangement, long after the proceedings had been instituted. It is

rather cynical to suggest that there is an identity of interest between a debtor (in this case, Zambezi Holdings) and its creditors (the complainants).

[64] We therefore conclude that the sec 311 application did not constitute proceedings referred to in sec 27(3)(b) and that the institution of those proceedings by Zambezi Holdings did not oust the jurisdiction of the Ombud to investigate and determine the complaints. It is accordingly unnecessary to consider the other jurisdictional (b) requirement mentioned.

THE EFFECT AND SCOPE OF THE SECTION 311 COMPROMISE:

[65] This brings us to final question in this context: Were these debts compromised or novated (i.e. replaced) by debentures when the court sanctioned the compromise in terms of section 311? An arrangement duly sanctioned under section 311 is in the nature of a novation. All creditors are bound by its terms, whether or not they voted in favour of it, and not even a court can release a party from its effect. This means that a creditor is precluded from enforcing a prior claim against the company. This much is trite.

[66] Before dealing with the argument on behalf of the appellants it is necessary to mention matters raised on behalf of the FAIS Ombud. It was said that there was no evidence that the complainants voluntarily participated in the scheme of arrangement, voted in favour of the scheme or that the debentures had been issued to them. The correctness of these allegations makes no difference to the conclusion. Any claim against Zambezi Holdings became the subject matter of the scheme of arrangement as sanctioned by the court and it does not matter whether a creditor participated and voted for or against its acceptance or whether (in this case) the debentures were in fact delivered to them.

[67] Another point raised on behalf of the Ombud was that since the determination post-dated the effective date of the scheme of arrangement the claims arose after the effective date because they arose as a result of the Ombud's determination. This argument confuses and conflates a cause of action and a judgment or determination. The cause of action or complaint had to exist before a complaint could have been laid with the Ombud and that was before the date of the sanctioning by the court.

[68] The Ombud in her refusal of leave in the Bekker matter pointed out that the complainants had not received any financial relief since the arrangement had been sanctioned. This is an irrelevant consideration. She also said that the compromise did not and could not compromise fraudulent conduct on the part of the individual appellants. As mentioned, as long as a compromise is not set aside – fraud could be a ground – it stands. In any event, it was not the fraud that was compromised; the claims were compromised.

[69] Adv van Tonder and Adv Brett argued the matter in more or less identical terms. They submitted as follows: The complainants have forfeited, waived or compromised their claims that form the subject of the determinations by accepting a replacement for their respective investments. Implicit in this scheme was the complaint about the investment. The acceptance of the scheme resulted in the substitution of the grounds for the complaint with new and different rights. In the premises their claims were included within the ambit of the sec 311 application; the subject matter of the complaints no longer exist; and the complainants' have compromised the respective claims by participating in the scheme of arrangement which resulted in the cancellation and substitution of their erstwhile investments into a new investment. In the result, no conduct on the part of the appellants

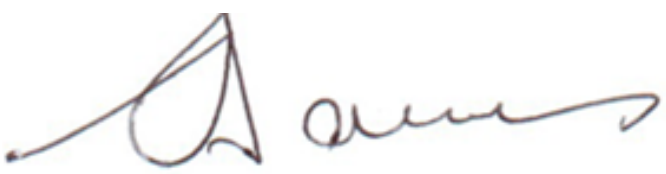
was causally connected to any loss or financial prejudice alleged to have been sustained by the complainants.

[70] This argument cannot be accepted because it is based on a false premise namely that the complaint about the investment was 'implicit' in the scheme. There is also much confusion about what the complaint or claim was as is apparent from what has been said above. To cut to the bone: the complainants' claims were, rightly or wrongly but factually, against their service providers for inappropriate advice. Whether they had misconceived the nature of their claim or remedy does not matter. They did not suggest that they had any claim against Zambezi Holdings. Their claims as submitted to the Ombud were not explicitly or implicitly part of the scheme of arrangement. And even if one considers the approach of the Ombud that they had a cause of action based on fraud, we are satisfied that the alleged fraud did not feature in the sec 311 application.

[80] Consequently, although a complaint may in principle be compromised under sec 311, it did not happen in these instances.

ORDER

1. The appeals are upheld.
2. The determinations and consequent orders made against the appellants in cases FAIS 00039/11-12/GP1 (Siegrist) and FAIS 06661/10-11/WC1 (Bekker) are set aside.
3. There is no order as to costs.



Signed on behalf of the panel by the panel chair at Pretoria on 10 April 2015.