IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 62044/2015

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

In the matter between:

JACOB LODEWYK WEIHMANN N.O. APPLICANT
(as the curator at litem for Jacob Johannes van Zyl)
and

THE OMBUD APPOINTED IN TERMS OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, ACT 37 OF 2002 FIRST RESPONDENT

CHAIRPERSON OF THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD SECOND RESPONDENT

PJJ RAUCH THIRD RESPONDENT

JUDGMENT

BASSON J

THE PARTIES

[1] The applicant in this matter is Mr. Jacob Johannes van Zyl (hereinafter referred to as the patient). After suffering a stroke during August 2016, the patient has since been incapable of conducting his own affairs. Mr. Jacob Lodewyk Weihmann was duly appointed by the court as the *curator ad litem* for the patient.

[2] The first respondent is the Financial Advisory and Intermediary Services Ombud (the Ombud) appointed in terms of the Financial Advisory and Intermediary Services Act[1] (the FAIS Act).

[3] The second respondent is the Chairperson of the Appeal Board of the Financial Services Board (the chairperson). The third respondent is Mr. Paul James Joseph Rauch (Rauch) who invested a substantial amount of money in the Spitzkop project (described in more detail hereinbelow).

[4] Only Rauch is opposing this review application. Although the Ombud filed a notice of intention to oppose, no answering affidavit has been filed. The second respondent filed a notice to abide.

WHAT GAVE RISE TO THIS DISPUTE?

[5] During 2007 to 2009 a group of companies existed referred to as the "Blue Zone Group". This group's business was to promote investments in property syndication schemes. One of the schemes was the Spitzkop Village (Pty) Ltd (Spitzkop or Spitzkop project). This scheme concerned the development of a farm within the

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[1] 37 of 2002.

platinum belt near Rustenburg and was to be developed into a township where erven would have been established and which would have been sold off to third parties at a profit to the shareholders of the company. The patient was one of the directors of Spitzkop. The other directors were Mr. Hendrik Christoffel Lambrecht (the managing director who was also in charge of the finances of the company and who had the sole signing powers of the bank accounts of the company); Mr. Du Randt van Zyl (the director – marketing and sales); Mr. Izak Jacobus Marthinus van Niekerk (the director – legal compliance) and Mr. Herman Bester (the financial director as well as the company's secretary). These individuals were also the directors of Blue Zone Property Investments (Pty) Ltd which was the promotor of the development.

[6] Spitzkop was liquidated on the 21st of August 2009 and Blue Zone was liquidated on the 17th of November 2009.

COMPLAINT WITH THE OMBUD

[7] Rauch lodged a complaint with the Ombud on 18 September 2009 in terms of the FAIS Act. In his complaint, Rauch explains that he knew one Mr. Peter Wildman (Wildman) since the late 80's when Wildman joined Standard Bank as a Financial Advisor. Wildman resigned from Standard Bank and joined the Blue Zone group as a broker and suggested that Rauch look at an investment in the Blue Zone group. Rauch eventually invested an amount of R 720 000.00 in Spitzkop.

[8] In the complaint form, the name of the person against which the complaint was lodge was stated as Blue Zone and the name of the person who the complainant dealt with was stated to be Wildman. Rauch further stated in the complaint that "*I would expect the full amount of R 720 000.00 to be paid by the Blue Zone Group and/or the directors".*

[9] Rauch alleged that he was only provided with a Blue Zone group overview document and that he never received a so-called disclosure document from Spitzkop. He stated that had he seen the disclosure document and had the opportunity to read it, he would not have invested any monies in the Spitzkop project.

[10] Rauch arranged for a meeting with the patient which meeting took place approximately 20 months after he had invested money in the Spitzkop project. Rauch then lodged the complaint. Wildman passed away soon after the complaint was lodged.

THE DISCLOSURE DOCUMENT

[11] The disclosure document is central to this dispute as well as the question whether or not Rauch had sight of the document. This document, *inter alia*, states that the directors of Blue Zone had instructed an attorneys firm which specialises in commercial transactions to draft a full disclosure document which was submitted to their accountants. The document was thereafter submitted to the compulsory FSB authorised and appointed compliance officers of Blue Zone.

[12] Brokers were trained to furnish interested investors with a full disclosure document and to explain to the investors the details of the said document.

[13] The FSB appointed compliance officers certified that the disclosure document complied with the requirements published under Notice 459 of 2006 by the Department of Trade and Industry.

[14] A person who was interested in investing in the Spitzkop project had to apply to the directors of the company to be approved as an investor prior to becoming an investor in the Spitzkop company.

[15] As part of the application to become an investor an applicant signs a declaration that he or she has personally received the complete disclosure document prior to completing the application form.

[16] Rauch completed the application form and submitted it to the directors of Blue Zone. The applicant submitted that the directors of Blue Zone and of Spitzkop were brought under the impression by Rauch that he had received the full disclosure document prior to completing the application form.

[17] Potential investors are informed in the disclosure form that the investment is a high risk investment and that no assurances were given by the company or its directors about the future profitability of the company. Some examples of warnings related to the risks of the project appear in the disclosure document.

[18] As already pointed out, Rauch insists that he had not seen the disclosure document and that had he been afforded the opportunity to read it, he would not have invested monies in Spitzkop.

THE OMBUD'S DECISION REGARDING THE COMPLAINT

[19] On 23 May 2013, the Ombud upheld the complaint and held the patient jointly and severally liable with Mr. Lampbrecht for the loss suffered by Rauch and ordered them to repay the amount of R 720 000.00 together with interest to Rauch. Leave to appeal was refused by the Ombud. The applicant thereafter applied for leave to appeal.

LEAVE TO APPEAL

[20] The second respondent as per Judge CD Howie granted the patient leave to appeal against the decision (the Howie order).

[21] The appeal board heard the appeal brought by the patient on the 23rd of June 2015 and handed down its judgment on the 2nd of July 2015.

THE HOWIE ORDER

[22] Judge Howie granted leave to appeal to be decided on two grounds only: Firstly, whether the "procedure adopted which resulted in the Ombud's dealings with the applicants as responded before her – neither having been the person against which the complaint was lodged – was legally competent and, if so, whether it is fair." The order then directs the appeal body to have regard to various procedural issues listed in paragraphs 1.1 – 1.8 of the order. Secondly, whether it is legally competent for the Ombud to "*go beyond the established legal principles if it would be equitable to do so*".

[23] On a plain reading of the Howie order, it thus appears that leave to appeal was granted firstly in respect of specific procedural grounds taking into account that the complaint lodged was neither against the patient nor Mr. Lamprecht. Sub-paragraphs 1.1 – 1.8 further set out in more particularity what must be considered in deciding whether or not the procedure adopted was legally competent. In sub-paragraph 1.8 the appeal board is specifically directed to decide whether the appellants (the patient and Mr. Lampbrecht) "*should not have been alerted to the possible findings of criminal or delictual conduct eventually made against them and have been afforded the opportunity to offer an answer before those findings were made?".* The second ground is a legal question pertaining to the competence of the Ombud to go beyond *"established legal principles*".

THE PROCEDURE BEFORE AND THE JUDGMENT OF THE SECOND RESPONDENT

[24] Subsequent to having been afforded leave to appeal, the parties, in terms of the Rules, were required to file heads of argument. The applicant did so. Rauch filed heads of argument called "*Merits of the Matter*". The second respondent responded to Rauch's heads of argument and pointed out that Rauch may be under some misapprehension about the nature of the appeal:

> "Second, the Order of Judge Howie in granting leave to appeal is specific and the Appellant's heads in consequence deal only with issues set out in this Order. The points you raised in your heads are not covered by his Order and have not been addressed by the Appellant and they accordingly appear to be irrelevant for purposes of the Appeal."

JUDGMENT OF THE SECOND RESPONDENT

[25] The second respondent formulated the question before it as "*whether the Ombud was ultimately correct in holding the appellant liable. It needs to be stressed that the appeal is concerned with the correctness of the result and not necessarily the correctness of her reasoning*".[2]

[2] Ad para 10 of the judgment of the appeal board.

[26] The appeal board rejected the patient's (the appellant's) submission that (i) the complainant was not cited as a party to the complaint; (ii) the appellant was not informed that the Ombud intended holding him liable on the ground of fraud and that that was in breach of the *audi alteram partem* rule and; (iii) the Ombud was not entitled to pierce the corporate veil. Ultimately the second respondent seems to have dealt with the merits of the matter and not with the procedural aspects specifically set out in the Howie order. The only aspect pertinently dealt with by the second respondent relates to the land claim which had been lodged against the property during August 2007 in circumstances where this fact was known to the companies and the appellant a month prior to Rauch's investment application.

[27] The second respondent, in dismissing the appeal, held the applicant vicariously liable for the failings of the broker, Wildman, and, *inter alia,* held that the directors of the company ran the syndication scheme fraudulently and that they deliberately misled investors such as Rauch.

PROCEEDINGS BEFORE THIS COURT

[28] The applicant approached this court for an order setting aside both the judgment by the Ombud in which she upheld the complaint as well as the judgment by the chairperson in which the applicant's appeal was dismissed.

[29] The applicant submitted that, in the event the chairperson's decision to dismiss the patient's appeal is set aside, it would follow that the Ombud's decision that the patient should repay the investment will have to be reconsidered either by the chairperson if the appeal is referred back to the chairperson or by the court if the court decides to exercise its discretion, having regard to the facts of the case, to take the decision of the patient's appeal itself. In this regard the applicant submitted that, having regard to the peculiar facts of this matter, this court should exercise its discretion and replace the decision of the Ombud.

CONSIDERATION OF THE PRESENT MATTER

[30] I have already referred to the fact that leave to appeal was granted on very specific grounds and that the appeal board was (*inter alia*) specifically required to consider what is contained in paragraph 1.8 of the Howie order.

[31] Despite the specificity of the Howie order, the second respondent did not deal with those questions. More specifically, the chairperson did not consider paragraph 1.8 of the Howie order where the question was referred to the appeal board whether the applicant should have been alerted to the possible findings of criminal or delictual conduct and whether the applicant had been afforded the opportunity to offer an answer before those findings were made. Although the patient was forewarned in a letter dated 29 March 2012 that he might be held personally liable for the loss suffered by Rauch and, although he did respond thereto, there is no indication on the papers that he was forewarned that an adverse finding of fraud or dishonesty may possibly be made against him. This, in my view, constitutes a serious breach of the requirements of procedural fairness. The court was referred to a similar matter in *Sharemax Investments (Pty) Ltd (and 4 Others) v Gerbrecht Elizabeth J Siegrist and Another*,[3] where the appeal board in that matter held as follows:

> "[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 Ombud intended to make, especially those relating to the prospectus, fraud and the Ponzi scheme. This was a serious breach of the requirements of the administrative action and any court would on review have set aside the determination of this ground alone…. It is also basic principle of simple justice that one may not direct a party's attention in one direction (in this case a formal complaint to which they had to respond pursuant to sec 27(4) and then deal with the case on a completely different basis…."

[32] This was exactly the argument that was raised before the second respondent. Yet, the second respondent upheld a finding of fraud even though the *audi alteram partem* principle was not adhered to.

[33] The matter of *Jacobus Johannes van Zyl v Sydney Perumal Naidoo*[4] (hereinafter referred to as the *Naidoo* matter) is in point. In that matter Mr. Naidoo (Naidoo) lodged a complaint with the first respondent against the patient and other directors of Blue Zone. Leave to appeal was similarly granted on limited grounds.

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[3] FAIS 00039/11-12GP1 and FAIS 06661/10-11/WC1 dated 10 April 2015.
[4] Case FAB 2/2015 dated 29 October 2015.

One of the grounds advanced was that the appellant in that matter was not informed by the Ombud that he was in jeopardy as the Ombud intended to make findings against him, *inter alia*, relating to fraud. In that matter the Ombud similarly held the applicant personally liable. The appeal board, with reference to the judgement in *Sharemax*, upheld the appeal and held that the failure to forewarn the appellant (the present patient), constituted a serious breach of the requirements of fair administrative action and pointed out that "*any court would on review have set aside the determinations on this ground alone*".

[34] The principle of affording a person the right to *audi alteram partem* before an adverse finding is made is not a novel principle and has been endorsed in numerous judgments. Suffice to refer to a few examples. In *Nortje and Another v Minister of Correctional Services and Others*[5] the court reviewed an set aside a decision to limit privileges of prisoners without affording them *audi alteram partem*:

> "[14] Daarteenoor is uitdruklik namens respondente toegegee dat nakoming van die *audi*-reël 'n voorvereiste was vir die geldigheid van Venter se gewraakte besluit. Hierdie toegewing is na my oordeel tereg en billik gemaak. Dit beteken uiteraard nie dat elke gevangene wat oorgeplaas word van een afdeling van 'n gevangenis na 'n ander of van een gevangenis na 'n ander gevangenis geregtig sal wees op 'n aanhoring nie. Elke geval moet op sy eie feite beoordeel word. Volgens art 33 van die Grondwet van die Republiek van Suid-Afrika 108 van 1996, het elke persoon die reg op administratiewe optrede wat prosedureel billik is. Ten spyte van die veranderde konstitusionele bedeling wat deur die aanvaarding van die Grondwet teweeggebring is, is die beginsels van die gemenereg steeds rigtinggewend oor wat in 'n bepaalde geval prosedureel billik sal wees … Die formulering van die gemeenregtelike beginsels in die verband is te vinde byvoorbeeld in *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A) op 758D - E en *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) op 10G - I. Hiervolgens vind die audi-reël toepassing waar die administratiewe besluit 'n persoon tot so 'n mate kan benadeel dat die besluit, ooreenkomstig die persoon se gebillikte verwagting ('legitimate expectation'), nie geneem sal word sonder om hom aan te hoor nie. Dit staan vas dat Venter se besluit 'n ingrypende

[5] 2001 (3) SA 472 (SCA).

> inkorting teweeggebring het van die voorregte en vergunnings wat appellante tot op daardie stadium geniet het. In die omstandighede het appellante die gebillikte verwagting gehad dat so 'n besluit nie geneem sou word nie tensy hulle die geleentheid tot aanhoring gebied is.
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> …
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> [17] Dit is duidelik uit die gesag dat daar nie 'n universeel geldende stel vereistes vir die nakoming van die audi-reël bestaan nie. Inteendeel is die *audi*-reël weens die tallose situasies waarin dit aanwending vind juis so buigsaam en aanpasbaar dat die vereistes vir die nakoming daarvan nie losgemaak kan word van die konteks waarin dit toepassing vind nie. Die toetssteen wat aangewend word by beantwoording van die vraag of die audi-reël in 'n bepaalde geval nagekom is, hang ten nouste saam met die grondbeginsel van die reël. Hierdie grondbeginsel word soos volg beskryf deur Corbett HR in *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) op 231G - H:
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> > 'The *audi* principle is but one facet, albeit an important one, of the general requirement of natural justice that in the circumstances postulated the public official or body concerned must act fairly. . . . The duty to act fairly, however, is concerned only with the manner in which the decisions are taken: it does not relate to whether the decision itself is fair or not.'"

[35] See also the judgment of the Constitutional Court in *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another*[6] where the principles were confirmed as follows:

> "[37] PAJA defines administrative action as a decision or failure to take a decision that adversely affects the rights of any person, which has a direct, external legal effect. This includes 'action that has the capacity to affect legal rights'. Whether or not administrative action, which would make PAJA applicable, has been taken cannot be determined in the abstract. Regard must always be had to the facts of each case.
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> [38] Detecting a reasonable possibility of a fraudulent misrepresentation of facts, as in this case, could hardly be said to constitute an administrative action. It is what the organ of State decides to do and actually does with the information it has become

[6] 2011 (1) SA 327 (CC).

aware of which could potentially trigger the applicability of PAJA. It is unlikely that a decision to investigate and the process of investigation, which excludes a determination of culpability, could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect."

[36] The Ombud found that the directors of Spitzkop (of which the applicant was a director) *"ran the syndication scheme fraudulently and they deliberately misled investors such as the respondent. The disclosure document in terms of which the investment was marketed contained factual inaccuracies and misleading information. Where there is fraud or dishonesty a court (and also the Ombud) is entitled to pierce the corporate veil and hold the directors personally accountable*".[7] This finding undoubtedly, to use the words of the court in *Viking*, "*could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect*". As such, the failure to grant the applicant *audi alteram partem* in this regard is a serious breach of the principles of *the audi alteram partem* rule. A court is thus entitled to set aside the determination on this ground alone.

[37] The decision to dismiss the applicant's appeal and order the applicant to repay to Rauch the amount of his investment with interest thereon is set aside. The matter is remitted to the second respondent for a re-hearing of the appeal in terms of the order of Judge Howie dated 14 January 2015.

[38] The applicant submitted that, should the court uphold the review, the court should exercise its discretion to substitute the order with an appropriate order. I am of the view that it would be inappropriate to do so. The applicant has not shown the existence of exceptional circumstances in line with the judgment of the Constitutional Court in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*.[8] In that matter the Constitutional Court emphasized that, when a court is called upon to exercise the discretion conferred upon it to grant or refuse an order of substitution, it must bear in mind the separation of powers principle and afford the necessary deference to the administrator whose decision is sought to be reviewed.

[7] Judgment para 6.
[8] 2015 (5) SA 245 (CC).

[39] I am in agreement with the principle that a court should afford the necessary deference to the administrator or decision-maker as they are in the best position to make a decision. In the present circumstances I am not persuaded that I am in a better position than the decision-maker.

[40] Regarding costs, although Rauch has opposed this application, I exercise my discretion not to order him to pay the costs of this application and find that it would be unfair in these circumstances to order him to pay costs.

ORDER

[41] In the event the following order is made:

(i) The decision to dismiss the applicant's appeal and order him to repay the third respondent the amount of his investment with interest thereon is set aside.

(ii) The matter is remitted to the second respondent for a re-hearing of the appeal in terms of the order of Judge Howie dated 14 January 2015.

(iii) No order as to costs.

A.C. BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA
Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 3 June 2021.

APPEARANCES

For the Applicant:	MR. VAN RIJN
Instructing attorneys:	VAN ZYL LE ROUX INC
For the Third Respondent:	MR. RAUCH IN PERSON
Date of hearing:	25 May 2021
Date of judgment:	3 June 2021