

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 48799/19

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO
_____	_____
DATE	SIGNATURE

In the matter between:

KOCH AND KRUGER BROKERS CC

First Applicant

DEON KRUGER

Second Applicant

and

THE FINANCIAL SECTOR CONDUCT AUTHORITY

First Respondent

THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

Second Respondent

HER LADYSHIP MRS JUSTICE OF APPEAL;

YVONNE MOKGORO N.O

Third Respondent

THE FINANCIAL SERVICES TRIBUNAL

Fourth Respondent

GEORGE BABEN

Fourth Respondent

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 e-mail and by uploading it to the electronic file of this matter on Caselines. The date and time for hand-down is deemed to be 10:00 am on 30 May 2024.

Summary: Is a determination of an ombudsman or a refusal to permit an appeal and or reconsideration by the Chairperson of the Tribunal an administrative action within the contemplation of the Promotion of Administrative Justice Act, 2000 (PAJA)? A determination is regarded as a civil judgment and is only challengeable by way of an appeal after leave to do so has been granted. When the Chairperson of the Tribunal refuses permission to allow an appeal and or reconsideration, an exercise of a statutory function of an investigative nature is involved. Such an exercise of a statutory function is impugnable through a legality judicial review pathway. The applicant having disavowed the legality judicial review pathway ought to be non-suited. Held: (1) The application for review is dismissed. Held: (2) The applicant is to pay the costs on a party and party scale B.

JUDGMENT

MOSHOANA J

Introduction

[1] The present dispute has travelled the wrong path all the way to the Constitutional Court only for the applicants to be told that they left the present application festering in the High Court. Five years later, the applicants are back at the departure station. Not certain whether they are fatigued or reinvigorated and

ready to travel the same route again. It is again unfortunate to have observed that the applicants directed the bulk of their case to a destination they never reached. It remains a promised land for them.

[2] Simply put, the applicants are yearning for a seat at the Tribunal for a reconsideration application. Yet they argued a case before me as if they are already at the Canaan land. At the Tribunal, should they reach there someday, the applicants will be able to argue all the points they ever so fervently argued before me. The two days of motion Court was consumed by what should be argued at the Tribunal should the gates of Canaan land be opened for them. It remains the statutory function of the Tribunal to determine issues like causation and all related accoutrements as and when reconsidering the determination of the Ombud. The role of this Court, based on the application launched by the applicants, is to first determine whether, it is faced with administrative actions within the meaning of the legislation invoked by the applicants.

[3] The exacting task of declaring an action to be an administrative action remains that of a Court seized with an application launched in terms of section 6(1) of PAJA. Performing that task, exacting as it is, paves a way for a Court to command authority to adjudicate an application launched in terms of section 6(1). Differently put, if the action concerned does not meet the definitional requirements of an administrative action, such an action cannot be impugned using the judicial review powers contemplated in section 6(1) of PAJA. The present application agitates the question whether (a) the process leading to the determination; (b) the determination issued by the second respondent, the Ombud for Financial Service Providers (Ombud); or (c) a refusal to permit leave to appeal a determination amount to administrative actions or not. Should all of these questions be answered in the negative, *cadit quaesto* for both applicants before me.

[4] These applicants had pinned their colours to the mast. Thiers is a PAJA judicial review pathway and nothing else. They have at the tail end thrown interdictory reliefs in the mix. The life of those reliefs is entirely dependent on the

success of the PAJA review. It suffices to mention at this embryonic stage of the judgment that in the present constitutional order there exists two judicial review pathways. Stemming deep from section 33(1) of the Constitution arises the PAJA judicial review pathway. Also stemming from section 1(c) of the Constitution, arises the legality judicial review pathway. PAJA judicial review pathway is available only for administrative actions, whilst a legality judicial review pathway is available for all exercise of public or statutory powers which are not administrative in nature.

Pertinent background facts to the present application

[5] It is common cause that the fifth and sixth respondents (hereafter collectively referred to as the Babens) entered into a mandate agreement with Mr. Deon Kruger (Kruger) for him to source a low to medium risk investment for them to invest in. Mr Kruger is a registered Financial Service Provider (FSP). In April 2008 and September 2009 respectively, the Babens invested a total of R780 000.00 into Sharemax (the Villa) and Sharemax (Zambesi) property syndication investments. This, they did after an engagement with Mr Kruger who had offered to invest their money in a public property syndication scheme known as Sharemax. It later turned out to the Babens that the Sharemax investments were in fact high-risk investments contrary to the mandate given to Mr Kruger to invest in low-risk investment. The Babens considered this to be a breach of their mandate to Mr Kruger, which breach led to them being unable to access their invested funds and ultimately lost them.

[6] Disenchanted by this alleged breach, during December 2012, the Babens lodged a complaint with the office of the Ombud. It became common cause that indeed Sharemax was a high risk investment. However, Mr Kruger contends that before the Babens could decide to invest in Sharemax, he provided them with the prospectus which demonstrated that Sharemax was such a high risk investment. Thus, on Mr Kruger's version, the Babens invested with full knowledge of the risks attendant to the investments they chose. It was also common cause that the Reserve Bank of South Africa, intervened and Sharemax ceased to repay all the investors around September 2010. It further became common cause that before the Reserve Bank "pulled the plug" as it were, the Babens were receiving their returns on investments. I pause to mention that it was this fact that sent the parties into

wonderland, since the applicants took a view that the damages ultimately suffered by the Babens was caused by the pulling of the plug (*actus novus intervenis*).

[7] Upon receipt of the complaint of the Babens, the Ombud was satisfied that the complaint met the jurisdictional requirements outlined in the enabling legislation and proceeded to investigate it. Briefly, the procedure followed by the Ombud to investigate the complaint was to amongst other things communicate in writing with the Babens and Mr Kruger. On 11 January 2013, the Ombud availed the complaint to Mr Kruger as required by the applicable Rules. On 8 February 2013, Mr Kruger furnished his response to the complaint. On 20 February 2013, the Babens replied to the response of Mr Kruger. It is common cause that between 22 February 2013 up to and including 3 June 2016, certain correspondence passed between the Ombud and the Babens to the exclusion of Mr Kruger. To this a lamentation of non-compliance with the *audi alteram partem* principle germinated. Ultimately, on 28 February 2018, the Ombud made his recommendation on the solution to the complaint known to the parties.

[8] As required by the enabling legislation, Mr Kruger rejected the recommendation, which was to repay the Babens the amount of R780 000, and he furnished his reasons why the recommendation was not acceptable to him. Mr Kruger furnished his response to the recommendation on 13 April 2018 and 10 May 2018 respectively. On 12 October 2018, as authorised by the enabling legislation, the Ombud made a final determination on the complaint. Aggrieved by the determination, on 9 November 2018, Mr Kruger exercised his statutory rights to apply for leave to appeal the determination. I pause to mention that it later became the same Mr Kruger who bitterly complained about what he termed an *institutional bias*. On 20 November 2018, the Ombud refused to grant the application for leave to appeal.

[9] Chagrined thereby, on 19 December 2018, Mr Kruger escalated his anguish and sought permission to appeal from the Chairperson of the Financial Services Tribunal (FST). On 12 April 2019, the Chairperson refused to grant permission to

appeal. On or about 10 July 2021, Koch and Kruger CC launched the present application. Given the view this Court takes in due course; it is apposite to regurgitate the prayers in the notice of motion which remained unamended to the last day of the hearing of this application. Those are:

- i That the failure of the second respondent to adopt a fair process in the investigation of the complaint lodged by the fifth and sixth respondent against the applicants be reviewed and set aside;
- ii That the failure of the second respondent to identify each and every issue on which the second respondent intended to make a finding against the applicants during the course of the investigation, leading to the second respondent's determination, be reviewed and the whole process followed by the second respondent be set aside;
- iii That the failure by the second respondent to investigate the matter and establish acceptable evidence, including expert evidence/opinion as to the requirements of a reasonable financial service provider ("FSP"), in the same circumstances as the applicants, be reviewed and set aside;
- iv To review and set aside the determination of the second respondent dated 12 October 2018 (*the determination*), in terms whereof the complaint lodged by the fifth and sixth respondents against the applicants was upheld and the applicants ordered:-
 1. To pay the fifth respondent the amount of R330,000.00;
 2. To pay the fifth respondent interest on the amount of R330,000.00, at the rate of 10% per annum from the date of the determination to date of final payment;
 3. To pay the sixth respondent the amount R550,000.00;
 4. To pay the sixth respondent interest on the amount of R550,000.00 at the rate of 10% per annum from the date of determination to date of final payment.
- v That the fifth and sixth respondents' complaint against the applicants lodged with the second respondent is dismissed.

Alternative to the relief sought in paragraphs 1 to 5 (i to v) above:

- vi To review and set aside the decision of the third respondent in her official capacity as Chairperson of the Financial Services Tribunal dated 12 April 2019 in terms whereof the applicants' Application for Leave to Appeal (reconsideration), in accordance with the provisions of section 28(5)(b)(i) and (ii) of the Financial Advisory and Intermediary Services Act 37 of 2002 ("the FAIS Act") as read with section 230 of the Financial Sector Regulation Act 9 of 2017 ("the FSR Act") was refused and the applicants be granted Leave to Appeal (permission for reconsideration) in terms of Section 230 of the FSR Act;
- vii That the second respondent be interdicted and restrained from taking any step under 28(5) of the FAIS Act, to cause the execution of the second respondent's determination referred to in prayer 4 above;
- viii That the fifth and sixth respondents, be interdicted from taking any steps to execute the said determination, pending the finalisation of this application;
- ix That the second respondents be ordered to pay the costs of the applicants;
- x That such respondent as may oppose this application, be ordered to pay the costs thereof;
- xi That further or alternative relief be granted to the applicants.

[10] In addition to the above prayers, the applicants called upon the respondents to show cause why the impugned decisions should not be reviewed and set aside. The applicants also called upon the relevant respondents to comply with Rule 53(1) (b) of the Uniform Rules. It suffices to mention that the applicants attacked the investigation process as well as the decisions born out of that process. In short, the impugn is against the; (a) whole investigative process; (b) determination; (c) and refusal to permit them leave to appeal the determination. The interdictory reliefs are a *sequelae* of the successful impugn.

[11] The present application served as a special allocation before the honourable Mr Justice Mabuse. Before Mabuse J, counsel for both parties advised the Court that an agreement was reached that the issue of causation ought to be determined separately¹. Indeed, the present application proceeded on that basis. The separated question was whether the loss suffered by the Babens was caused by the breach of agreement occasioned by the applicants or by the intervention of the South African Reserve Bank. On 03 November 2021 and in a written judgment, Mabuse J answered the separated question by finding that the loss is attributed to the breach of contract by the applicants.

[12] The applicants were aggrieved and applied for leave to appeal the unfavourable judgment. Mabuse J, on 22 February 2022, in a written judgment refused leave to appeal. The applicants were refused leave to appeal by the Supreme Court of Appeal and the Constitutional Court. The Constitutional Court took a view, correctly, so I add, that the case before this Court was not an action for damages but a PAJA review. The Constitutional Court remarked that the parties will proceed with the review without any delay and Mabuse J was not suited to hear the review. Ultimately, the review application was allocated to me as a special motion which was heard over a period of two days.

Analysis

[13] In an instance where a Court deals with a matter involving the Ombud's actions, the entry point is the legislation that begets the Ombud. On 15 November 2002, the Parliament of the Republic of South Africa, enacted into law, the Financial Advisory and Intermediary Services Act (FAISA)². In its preamble, it is stated that the FAISA exists to regulate the rendering of certain financial advisory and intermediary services to clients; to repeal or amend certain laws; and to provide for matters incidental thereto. The present motion involves the rendering of financial advisory services. In terms of section 1 of FAISA, a financial service by a financial service provider means, amongst others, furnishing of advice. In order to place into proper

¹ It was mentioned to Mabuse J that this will truncate the proceedings. Probably this was mentioned tongue in cheek because the truncation is yet to be witnessed.

² Act No 37 of 2002 as amended.

context, the nature of the functions performed by the Ombud and ultimately consider how those functions may be impugned by a judicial review, it is of great assistance to first consider the technical meaning afforded to the word 'complaint'.

[14] In terms of section 1 of FAISA, a

“Complaint means, subject to section 26(1)(a)(iii), a specific complaint relating to a financial service rendered by financial services provider or representative to the complainant ..., and in which complaint it is alleged that the provider or representative-

- (a)
- (b) 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;
- (c) 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
- (d) Has treated the complainant unfairly.” (Own emphasis.)

[15] In simple terms, the Babens complained that the applicants, in breach of their mandate, furnished them with a wrong advice in relation to the Sharemax investments. Their gripe, without any hesitation, meets the definitional requirements of a complaint set out in section 1 above. Before considering the pertinent question as to what does the FAISA dictates should happen to the complaint, it is apposite to consider the important provisions of section 20 of FAISA. The provisions of section 20 of FAISA clearly states that:

- “(1) there is an office to be known as the Office of the Ombud for Financial Services Providers.
- (2) . . .
- (3) 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
- (4) When dealing with complaints in terms of section 27 and 28 the Ombud is independent and must be impartial.” (Own emphasis.)

[16] To have an objective means to have something towards which an effort is directed. In terms of section 21(1)(a) and (b), an Ombud and a deputy ombud means a person(s) qualified in law and who possesses adequate knowledge of rendering of financial services. Therefore, an Ombud directs his or her efforts, applying his or her qualities and adequate knowledge, towards considering and disposing of complaints. The Act prescribes how the Ombud should carefully think about and disposing of a complaint. The Ombud must do so in a (a) procedurally fair manner; (b) informally; (c) economically; and (d) expeditiously. The Ombud when considering and disposing of the complaint would have as beacons (i) the contractual or legal relationship; and (ii) the provisions of the Act. Accordingly, if any of the actions of the Ombud during that exercise of considering and disposing of, contravenes the contractual or legal relationship arrangements or the provisions of the Act such actions are invalid in law.

[17] The requirements of procedural fairness contemplated in section 20(3) are outlined in section 27 read with section 28. Section 27 makes it perspicuous that the Ombud performs functions that are investigative in nature. Once an Ombud receives a complaint, the Ombud must first establish the existence of the jurisdictional requirements and if the complaint meets those jurisdictional requirements, then the Ombud must investigate it. Much was made during argument that given the disputes of facts and application of causation principles, the Ombud was not suitable to investigate the complaint by the Babens and ought to have invoked section 27(3)(c) powers. Although given the view I take at the end, nothing much turns on this.

[18] However, since this was argued before me, it is helpful to briefly state that primarily, the duty to investigate complaints statutorily lie with the Ombud. The Babens could have opted to institute a damages claim in the High Court or Magistrates Court. Since they opted to invoke the investigative powers of the Ombud, section 27(1) obligates the Ombud to otherwise officially receive the complaint if it qualifies as a complaint. The Ombud must decline to investigate a

complaint if it has become prescribed and unenforceable in law; and where the complaint is already in the hands of a Court. The Ombud's discretion to refer a complaint to a Court or any other available dispute resolution process and decline to entertain it is not an unfettered one. The Ombud may only do so by determining on reasonable grounds that it is more appropriate that the complaint be dealt with by a Court.

[19] Absent reasonable grounds, the Ombud may not simply avoid his or her statutory duty to investigate. As to what reasonable grounds mean, such shall be determined on a case by case basis. There cannot be a one size fits all. Additionally, appropriateness is a factor, which again will depend on a case by case. For the legislature, as decreed in section 21, an Ombud must be a person qualified in law and who possesses adequate knowledge of rendering of financial services. With such qualification and specialised knowledge, the Ombud cannot pass its statutory responsibilities to a Court without any reasonable grounds and appropriateness. The legislature deemed it appropriate to insert an adjective before appropriate, which implies that ordinary appropriate does not apply. It must be a greater appropriate. In my view, the discretion to decline and pass the buck as it were to a Court, does not lie with a Court but it lies with the Ombud.

[20] Where the Ombud chooses not to exercise a discretion to pass the buck as it were, I do not believe that it is appropriate for a Court to make such a choice for the Ombud and or compel by way of an order the Ombud to exercise that discretion³. As it shall be demonstrated later in this judgment Innes ACJ had already set a tone as to what a Court should do where a functionary has to exercise a statutory discretion. For these reasons, I remain doubtful that the order made by Fabricius J in *CS Brokers and another v The Ombud for Financial Services and others (CS Brokers)*⁴ to the effect that the Ombud be obliged to exercise a statutory

³ See para 12 of *CS Brokers and another v The Ombud for Financial Services and others*, unreported judgment of the Supreme Court of Appeal, Case number 781/2020 (17 September 2021); *Risk and Another v Ombud for Financial Services and Others*, unreported judgment of the Gauteng Division of High Court, Pretoria, Case No 38791/2011(September 2012) para 13 and 38.

⁴ *CS Brokers and another v The Ombud for Financial Services and others*, unreported judgment of the Gauteng Division of High Court, Pretoria, Case number 53770/2017 (28 February 2020).

discretion by way of a Court order is correct in law. This Court is acutely aware that the Supreme Court of Appeal in *Ombud for Financial Services Providers v CS Brokers CC and Others (CS Brokers SCA)*⁵ did not upset the order of Fabricius J. However, what arrested the attention of the SCA was the question whether the Ombud properly exercised her discretion when she refused the application in terms of section 27(3).

[21] I pause to comment that in *CS Brokers SCA* there was gratuitous reference to an application in terms of section 27(3). In my view, the section does not contemplate an application of any form. The discretion resides only with the Ombud and he or she requires no application to prompt him or her to exercise the discretion⁶. On the facts of *CS Brokers* as recorded in the written judgment of Fabricius J, it is apparent that Attorney Bieldermands is the one who on 19 July 2011 addressed “an application to the Ombud in terms of section 27(3)(c)”. It is unclear as to whether a formal application was made or was it only a letter addressed. However, it is clear from the facts as narrated that as at 17 March 2011, the Ombud was already dealing with the complaint. As such when the application came on 19 July 2011, the Ombud had already made a decision to investigate. In other words, the Ombud did not find reasonable grounds or greater appropriateness to refer the matter to Court. It would then appear that that which was dubbed an application was more of a request for the Ombud to revert back to the initial stages when at that stage she had commenced the investigation and had passed the section 27(3)(c) stage. Such a request is, in my view, inappropriate.

[22] That said, it seems from the SCA’s point of view that, the application placed under the rubric of section 27(3)(c) was one made on 9 May 2011 which requested the holding of a hearing or defer to Court. The Ombud simply responded on 11 May 2011 that the Ombud does not hold hearings. Therefore, it is not surprising that the SCA took a view that there was no exercise of discretion involved

⁵ *CS Brokers and another v The Ombud for Financial Services and others*, unreported judgment of the Supreme Court of Appeal, Case number 781/2020 (17 September 2021).

⁶ See paras 31-33 of *Risk*.

and on that singular basis, the appeal failed. Therefore, it can never be so that that *CS Brokers SCA* is an authority for the proposition that a party can compel the Ombud to defer to Court even if no reasonable grounds and greater appropriateness exists. In my judgment, I do not consider myself bound by the judgment of Fabricius J because, in my respectful view, the order compelling the Ombud to exercise a discretion to defer to Court is wrong in law. The SCA decidedly declined to address the manner in which the discretion of the Ombud should be exercised and the test for interference with it on review.

[23] Section 27(5) outlines the available options to the Ombud when investigating a complaint⁷. The Ombud has a wide choice to make, which may include, mediation, conciliation and making of recommendations. Of significance and pertinence in the present motion is the determinative powers that may arise from the investigative process. The relevant parts of section 28 provides as follows:

“(1) The Ombud must in any case where a matter has not been settled or a recommendation referred to in section 27(5)(c) has not been accepted by all parties concerned, make a final determination, which may include –

(a) ...

(b) the upholding of the complaint, wholly or partially, in which case –

(i) the complainant may be awarded an amount as fair compensation for any financial prejudice or damage suffered;

(ii) ...

(iii) the Ombud may make any other order which a Court may make.”

[24] In terms of section 28(5) a determination is regarded as a civil judgment of a Court and is only appealable to the board of appeal with the leave of

⁷ The SCA in the *CS Brokers SCA* matter confirmed at paragraph 12 that extensive substantive powers availed to the Ombud are akin to quasi-judicial powers rather than purely administrative ones.

the Ombud. Should the Ombud refuse leave, leave must be sought from the Chairperson of the board of appeal. The appeal board was a board established in terms of section 26 (1) of the repealed Financial Services Board Act (FSBA)⁸. In terms of section 290 of the FSRA read with schedule 4 thereof, the FSBA was repealed in its entirety. In terms of section 299 of the FSRA, an appeal contemplated in section 28(5) of FAISA now lies with the Chairperson of the Financial Services Tribunal (FST). In terms of section 220(4) and (5) of the FSRA, the Minister must appoint the Chairperson of the FST whose functions are spelled out in subsection (5) (a) and (b). The only function inherited from the FAISA is the one contemplated in section 28(5)(b)(ii) which is to grant permission to appeal. Sections 230 - 234 of the FSRA regulates reconsideration proceedings. It is apparent from there that there must be proceedings which are not bound by the rules of evidence and the orders that may be made by the FST are to (a) set the decision aside and remit; or (b) some other kind of decisions contemplated in section 234(1)(b)(i)-(iii); or (c) dismiss the application for reconsideration. Once the orders contemplated in section 234 are made and a party to those proceedings is dissatisfied the available remedy for such a party is to institute proceedings of judicial review in terms of PAJA or any applicable law.

Is a determination reviewable under PAJA?

[25] In terms of section 28(1) of FAISA, the determination by the Ombud is final in nature, and is regarded as a civil judgment of a Court, which is only appealable with the leave of the Ombud or if refused of the Chairperson of the FST. PAJA only applies to decisions of an administrative nature. Certainly a determination remains final if not set aside on appeal. Section 1(ee) of PAJA excludes the judicial functions from the purview of an administrative action. In other words, a civil judgment does not constitute an administrative action and therefore, it is not reviewable under section 6(1) of PAJA. As defined in section 1 of PAJA, the administrative action must be one that has external legal effect. The applicants seek to attack the whole process leading to the determination. In other words, the process undertaken under section 27 of the FAISA. There can be no doubt that the process itself is investigative in nature. Even in an instance where the Ombud emerges with a

⁸ Act 97 of 1990.

recommendation, such a recommendation is not to be imposed onto the disputants. A party not accepting the recommendation is only required to give reasons why. Clearly no adverse or external effect is capable of arising in that regard. The Constitutional Court in *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hydro-Tech Systems (Pty) Ltd (Viking)*⁹ aptly stated the following:

“[38] ... 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. (Own emphasis.)

[26] The above finding was made by the Constitutional Court when seeking to establish whether PAJA was applicable in that case. Similarly, in this case, fortified by *Viking*, this Court takes a view that the process leading to the determination is incapable of affecting rights in the manner contemplated in section 1 of PAJA in defining what an administrative action is. Given that the process does not qualify to be an administrative action, it follows that in the circumstances section 6(1) of PAJA judicial review pathway, is unavailable.

[27] However, this Court is prepared to accept that in reaching the final determination, the process under section 27 certainly amount to an exercise of statutory powers and may be reviewable under the principle of legality¹⁰. A legality review concerns itself with two issues; namely lawfulness and rationality. In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others (Pharmaceutical)*¹¹ the following was said:

“It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be

⁹ *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hydro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC).

¹⁰ See *Auditor-General of SA v MEC for Economic Opportunities, Western Cape and another* 2022 (5) SA 44 (SCA) and *Smith v Alberta (Ombudsman)* 2003 ABQB 488 (CanLII).

¹¹ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000(3) BCLR 241 para 85.

rationality related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.”

[28] Mercifully before me is a PAJA review as opposed to a legality review. I am thus constrained by the principles developed in the cases outlined below.

[29] In *Director of Hospital Services v Mistry*¹², the Appellate Division, then the apex Court, stated the law as follows:

“When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is... and as been said in many other cases ... an applicant must stand or fall by his petition and the facts alleged therein and that although sometimes it is permissible to supplement allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny.” (Own emphasis)

[30] In *Minister of Safety and Security v Slabbert*¹³, the learned Mhlantha JA, as she then was, aptly stated the following:

“The purpose of pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at trial. It is equally not permissible for a trial court to have recourse to issues falling outside the pleadings when deciding the case.” (Own emphasis.)

¹² *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636B.

¹³ *Minister of Safety and Security v Slabbert* 2010 (2) All SA 474 (SCA).

[31] More recently, the Supreme Court of Appeal reverberated similar sentiments in *De Nysschen v Government Employees' Pension Fund and others*¹⁴. The learned Dambuzza JA, writing for the majority, competently stated the law thus:

"[16] ... Once the interdictory relief was granted, that should have been the end of the matter.

[17] The court erred in granting the further, unsolicited order for payment against the appellant. Apart from the fact that no such order had been sought by the Department, the issue of the (re)payment of the benefit was not necessary for determination of the mandatory interdict. Both this Court and the Constitutional Court have repeatedly expressed the principle that the dispute between parties is defined in the pleadings before court. Courts may, on their own accord raise issues of law that emerge fully from the record where consideration of those issues is necessary for the decision of the case. In this case, the foundation for the relief sought by the appellant was the Department's refusal to submit her exit documents to the GEPF. The Department's defence was that, its refusal to submit the documents were justified given the appellant's obligation to pay to it the pension benefit paid to her. The issue fell to be determined solely on the pleadings and evidence rather than on the interests of justice basis advanced by the high court.

[18] As it was submitted on behalf of the appellant, if the Department intended to claim, in these proceedings, repayment of a debt due to it, it was incumbent upon it to set out a properly pleaded claim, and the relief sought. It failed to do so despite a number of invitations extended to it by the appellant. It merely contended that the appellant was indebted to it. It was improper for the high court to grant relief that had not been sought. The appeal must therefore succeed."¹⁵ (Own emphasis)

[32] Paragraph 14 of the founding affidavit of the applicants pin their colours to the mast. Mr Kruger testified as follows:

¹⁴ *De Nysschen v Government Employees' Pension Fund and others* 2024 (4) BLLR 349 (SCA).

¹⁵ See also *Bliss Brands (Pty) Ltd v Advertising Regulatory Board NPC and others* 2023 (10) BCLR 1153 (CC).

“14 This is an application to judicially review and set aside the determination and/or decisions of the second and third respondents in accordance with the provisions of section 6 of the PAJA as read with Section 235 of the FSR Act.”

[33] For completeness sake section 6(1) of PAJA provides that any person may institute proceedings in a Court or a tribunal for the judicial review of an administrative action. The applicants are not launching a legality review. In fact, Mr Geyer, who ably appeared on behalf of the applicants, firstly disagreed with a proposition that there are two judicial review pathways. After consideration of the authorities the bench directed his attention to he made a *volte face* and specifically disavowed any legality review being launched and or contemplated by the applicants. Accordingly, this court takes a view that a determination does not amount to an administrative action. It is so that a determination is a product of an investigative process as opposed to an administrative process. It has been held that the Ombud performs quasi-judicial process and not administrative process. As already indicated, section 6(1) only applies to administrative actions.

Is the refusal to permit leave to appeal an administrative action?

[34] On 22 August 2017, Parliament enacted the Financial Sector Regulation Act (FSRA)¹⁶. In the preamble of FSRA, one of the purpose of its existence was to establish the Financial Services Tribunal (FST) as an independent tribunal and to confer on it powers to reconsider decisions by amongst others the Ombud Council. Section 219 of the FSRA establishes the FST with the purpose to reconsider decisions as defined in section 218. In terms of section 218(d), a decision of a statutory Ombud in terms of a financial sector law in relation to a specific complaint by a person constitutes a decision to be reconsidered by the FST. In terms of section 28(5)(b)(i) (aa) and (bb) of FAISA, in determining whether leave to appeal must be granted the Ombud must consider (a) the complexity of the matter; or (b) the reasonable likelihood that the board of appeal (now the FST) may reach a different conclusion. It is clear that in the absence of the complexity and the reasonable likelihood, the Chairperson of the FST is endowed with a statutory

¹⁶ Act no 9 of 2017 as amended.

discretion to refuse permission for leave to appeal. Some 112 years ago the erudite Innes ACJ in *Shidiack v Union Government (Minister of Interior)*¹⁷ had the following to say, which was accepted in the *Pharmaceutical* case:

“Now is settled law that where a matter is left to the discretion or determination of a public officer, and where his discretion has been *bona fide* exercised or his judgment *bona fide* expressed, the Court will not interfere with the result. Not being a judicial functionary, no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own.”

[35] The applicants seek to rely on section 235 of the FSR in order to utilise PAJA. The section does not only avail PAJA it also avails a legality judicial review pathway. However as pointed out the applicants chose PAJA they must be saddled with all the hurdles PAJA places on its pathway. Before I specifically consider the question whether the refusal by the Chairperson of the FST constitutes an administrative action, it is apposite to consider whether section 235 has in mind the function performed by the Chairperson of the FST in this regard. It is clear from section 28(5)(b)(ii) of FAISA that the designated function is to give permission to appeal. That function is not a function contemplated in section 235. Section 235 reads as follows:

“Any party to proceedings on application for reconsideration of a decision who is dissatisfied with an order of the Tribunal may institute proceedings for a judicial review of the order in terms the Promotion of Administrative Justice Act or any applicable law.”(Own emphasis.)

[36] First of all, this right of review is available to a party to the proceedings. In terms of section 230, a person aggrieved by a decision has to apply for reconsideration within 60 days of being notified of a decision. The decision must be one contemplated in section 218. Section 232 outlines the procedure in the

¹⁷ 1912 AD 642 at 651

proceedings for a reconsideration of a decision. Of significance, section 234 defines the Tribunal orders. Conspicuously absent is a decision to refuse permission to appeal. In terms of section 220, a Tribunal is constituted by at least two persons who are retired judges, or are persons with suitable expertise and experience in law and at least two other persons with experience or expert knowledge of financial products, financial services, financial instruments, market infrastructure or the financial system. Section 224 contemplates that when a Tribunal consider an application for reconsideration, a panel of three, being the presiding member and two other panellists on the list must be constituted.

[37] The applicants failed to reach a stage where an impugn of the Ombud's decision would be reconsidered by the Tribunal. Therefore, they were never at any stage parties to proceedings on application for reconsideration of a decision. Axiomatically, there was no order of the Tribunal made against them to enable institution of judicial review in terms of PAJA. The decision of the Chairperson of the FST is not a panel decision, thus not a Tribunal order. It is indeed the case that when the late retired Madam Justice of the Constitutional Court, Yvonne Mokgoro considered the permission to appeal, she exercised statutory powers emanating from section 28(5) of FAISA. Therefore, that exercise of what is clearly a public power is constrained by the rule of law and the rule against arbitrariness. Unfortunately for the applicants they chose a PAJA judicial review pathway, when it does not avail to them.

[38] In refusing permission to appeal, the late Madam Justice was not performing functions of an administrative nature. The function is *quasi-judicial* in nature. The function is similar in nature to the powers contemplated in section 17(2) (f) of the Superior Courts Act where the President of the Supreme Court of Appeal may in exceptional circumstances whether of his or her own accord or on application refer the decision to refuse leave to appeal to the Court for reconsideration and if necessary variation. The Supreme Court of Appeal under the hand of Van der Merwe JA writing for the majority in *Auditor-General of SA v MEC for Economic*

*Opportunities, Western Cape and Another*¹⁸, dealing with the question whether PAJA was applicable, stated that where the function does not involve actions of an administrative nature, such functions do not constitute administrative action in terms of PAJA. Such non-administrative actions are subject to review under the principles that stem from the rule of law.

[39] Even if this Court is tempted to consider a legality review under the rubric of “further and alternative relief” in refusing permission, the late Madam Justice was beaconsed by (a) the complexity of the matter and (b) the reasonable likelihood of reaching a different conclusion requirement. Thus, having been beaconsed by those requirements, it can never be said that her decision is tainted by any irrationality. Her decision is related to the purpose of the power she exercised. Nevertheless, Coetzee J in *Johannesburg City Council v Bruma Thirty Two (Pty) Ltd*¹⁹ aptly stated the law with regard to the “further and alternative relief” prayer, as follows:

“The prayer for alternative relief is to my mind, in modern practice, redundant and mere verbiage. Whatever the Court can validly be asked to order on papers as framed, can still be asked without its presence. It does not enlarge in any way “terms of the express claim”.

[40] In *Mgoqi v City of Cape Town*²⁰, Van Zyl J cautioned against allowing the relief to be pushed through the heads of argument while the same is not in the notice of motion or the founding affidavit. The case pleaded by the applicants do not justify any order contemplated in a legality review. The bulwark of the applicants’ case against the decision of the Madam Justice occur in paragraphs 88-90 of the founding affidavit. Therein the applicants allege that the Madam Justice (i) failed to furnish reasons for the ruling; (ii) she took into account irrelevant considerations when making the ruling; (iii) she unduly placed reliance on previous applications and

¹⁸ *Auditor-General of SA v MEC for Economic Opportunities, Western Cape and Another* 2022 (5) SA 44 (SCA).

¹⁹ *Johannesburg City Council v Bruma Thirty Two (Pty) Ltd* 1984 (4) SA 87 (T) at 93E-F.

²⁰ *Mgoqi v City of Cape Town* 2006 (4) SA 355 (C).

appeals; and; (iv) failure to consider the facts. These unsubstantiated allegations do not justify any finding of irrationality on the part of the Madam Justice. In her impugned ruling, the Madam Justice took a view that the application for the reconsideration of the determination is not a complex matter and that there are no reasonable prospects that the Tribunal would decide the matter differently from the Ombud's determination. By so doing, the Madam Justice exercised the statutory powers appropiated to her.

Conclusion

[41] In summary, the applicants sought to impugn the process leading to the determination. That process has no direct external legal effect as such not reviewable under the provisions of PAJA. Additionally, the applicants sought to impugn the determination. The determination is regarded as a civil judgment and not an administrative action reviewable under PAJA. The applicants also impugned the ruling of refusing permission to appeal. That function is not administrative in nature and is not challengeable under PAJA. It does constitute an exercise of public power reviewable under the legality judicial review pathway. The applicants unwaveringly disavowed a claim for a legality review. With regard to the interdictory reliefs, these were not pressed on with any vigour before me. Nevertheless, they could only avail to the applicants if they successfully challenged the determination. In the circumstances, the applicants stand to fail in their quest for review. The PAJA review application falls to be dismissed. What then remains is the issue of costs.

Costs

[42] Undoubtedly, the normal rule of costs following the results find application in this instance. This is not a case where the *Biowatch* principle may be invoked. Mr Swart who appeared for the Babens submitted that the Babens are not seeking a punitive cost order but a party and party costs. Regard been had to the fact that this motion was argued over a two-day period, it is appropriate to award costs at scale B.

Order

[42] For all the above reasons, I make the following order:

1. The application is dismissed.
2. The applicants are to jointly and severally pay the costs of this application on a party and party scale to be taxed or settled on scale B, the one paying absolving the other.

COURT

GN MOSHOANA
JUDGE OF THE HIGH
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For Applicants: Mr H F
Geyer

Instructed by: Bieldermans Inc, Parkwood

For Respondent: Mr D D
Swart

Instructed by: Cronje, De Waal-Skhosana
Inc

Date of the hearing: 15-16 May 2024

Date of judgment: 30 May 2024