THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 856/2019

In the matter between:

IMPACT FINANCIAL CONSULTANTS CC	**FIRST APPLICANT**
MICHAL JOHANNES CALITZ	**SECOND APPLICANT**
and	
NOLUNTU NELLISA BAM N O	**FIRST RESPONDENT**
YVONNE MOKGORO N O	**SECOND RESPONDENT**
LORENDANA HANSEN	**THIRD RESPONDENT**
NATALINA NATALI	**FOURTH RESPONDENT**
HENDRIK FREDERICK DU PLESSIS	**FIFTH RESPONDENT**
ERNA ELIZABETH DU PLESSIS	**SIXTH RESPONDENT**
JOHANNES JACOBUS MATTHYS COETZEE	**SEVENTH RESPONDENT**
JEANRICH HEIN EHLERS	**EIGHTH RESPONDENT**
ROBERT WILLIAM WHITFIELD JONES	**NINTH RESPONDENT**
CAROLINA JOHANNA OLIVIER	**TENTH RESPONDENT**
ERIKA ELISE KRUGER	**ELEVENTH RESPONDENT**

MARTHA HENDRINA CARSTENS **TWELFTH RESPONDENT**

HENDRIK JOHANNES CARTENS **THIRTEENTH RESPONDENT**

ETTIENNE DU PREEZ VAN DER MERWE N.O. **FOURTEENTH RESPONDENT**

CRAIG STEWART INCH **FIFTEENTH RESPONDENT**

HENDRINA AMEDJE RAUTENBACH **SIXTEENTH RESPONDENT**

GARVITTE HERMAN LOMBARD **SEVENTEENTH RESPONDENT**

MARTHA CATHARINA JOOSTE **EIGHTEENTH RESPONDENT**

JOHANNES ENOCH HARTSHORNE **NINTEENTH RESPONDENT**

FIONA AVERY KING **TWENTIETH RESPONDENT**

Neutral citation: *Impact Financial Consultants CC and Another v Bam NO and Others* (Case no 856/2019) [2021] ZASCA 54 (30 April 2021)

Coram: NAVSA ADP and MAKGOKA and DLODLO JJA and GOOSEN and UNTERHALTER AJJA

Heard: 4 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 30 April 2021.

Summary: Ombud for Financial Services – Financial Advisory and Intermediary Services Act 37 of 2002 – the nature of the financial product to be identified before determination of complaint and possible compensation is directed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Tlhapi J, sitting as court of first instance):

1. Leave to appeal is granted with costs.
2. The appeal is upheld to the extent set out in the substituted order below.
3. The order of the high court is set aside and replaced by the following order:
   ‘(a) The decision of the second respondent to refuse leave to appeal to the Financial Services Appeal Board in case numbers FAB3/2015 to FAB20/2015 is hereby set aside.
   (b) The determinations of the first respondent under case numbers FAB3/2015 to FAB20/2015 are hereby set aside.
   (c) Each of the complaints lodged under case numbers FAB3/2015 to FAB20/2015 are referred back to the first respondent for determination in accordance with the provisions of the Financial Advisory and Intermediary Services Act 37 of 2002.
   (d) The first respondent is ordered to pay the costs of the application.’
4. The first respondent is ordered to pay the costs of the appeal, including the costs of the application for leave to appeal before the high court.

JUDGMENT

Goosen AJA (Navsa ADP and Makgoka and Dlodlo JJA and Unterhalter AJA concurring)

[1] This is an application for leave to appeal referred for oral argument by this Court in terms of section 17(2)(*d*) of the Superior Courts Act, 10 of 2013. The parties were directed to be prepared to address the court on the merits, if called upon to do so. We heard argument on the application for leave to appeal and on the merits. The Gauteng Division of the High Court, Pretoria (the high court) dismissed a review application (the review application) in which the applicants sought to set aside the dismissal of their application for leave to appeal by the second respondent.

[2] The central issue in this matter is whether the Ombud for Financial Services (the Ombud), established in terms of section 20 of the Financial Advisory and Intermediary Services Act, 37 of 2002 (the FAIS Act) committed a reviewable error in determining complaints lodged by each of the third to twentieth respondents in terms of s 27 of the FAIS Act. The detailed background culminating in the proceedings before us is set out hereafter.

The parties

[3] The first applicant, Impact Financial Consultants CC (Impact Consultants), is a registered financial services provider in which the second

applicant (Mr Calitz) holds a 90% membership interest. Mr Calitz is a duly registered financial services provider who rendered such services as a member of Impact Consultants.

[4] The first respondent is the duly appointed Ombud for Financial Services, appointed in terms of s 21 of the FAIS Act.[1] The second respondent is the chairperson of the appeal board of the Financial Services Board. The appeal board considers appeals from determinations made by the Ombud.[2] The third to twentieth respondents (hereafter the respondents) each lodged a complaint with the Ombud in relation to advice furnished to them by Mr Calitz to them regarding investments which each had made. The complaints were recorded by the Ombud under case numbers FAB3/2015 to FAB20/2015. The investments were made in the MAT Relative Value Arbitrage Fund, later named the Relative Value Arbitrage Fund Trust (the RVAF Trust). The RVAF Trust was controlled or managed by Abante Capital (Pty) Ltd (Abante Capital), an investment company controlled by Mr Herman Pretorius (Mr Pretorius). The complaints arose pursuant to the collapse and eventual liquidation of Abante Capital and the RVAF Trust, following the death of Mr Pretorius, who committed suicide in July 2012, subsequent to adverse press reports about fraud allegedly perpetrated by him, and significant losses incurred by Abante Capital.

[1] The first respondent was cited *nomine officio*. She has since been replaced by the current Ombud. The current Ombud participated in the proceedings before this court.

[2] See s 28(5)(*b*) of the FAIS Act read with s 26(1) of the Financial Services Board Act 97 of 1990. The Financial Services Board Act was repealed by the Financial Sector Regulation Act, 9 of 2017 which, in respect of the provisions relating to the appeal board, came into effect on 1 April 2018. The appeals process is now regulated by the latter Act.

The proceedings before the Ombud

[5] It is not in dispute that Mr Calitz furnished the respondents with advice regarding an investment in the RVAF Trust, which was described as a 'hedge fund' managed by Abante Capital. It is also not in dispute that each of the respondents invested funds as advised. Nor is it in dispute that, in consequence of the collapse and resulting liquidation of Abante Capital and the RVAF Trust, the respondents suffered capital losses on their investments.

[6] It was these losses which gave rise to the complaints lodged against Mr Calitz and Impact Consultants with the Ombud. The complaints were premised upon the allegation that Mr Calitz had negligently failed to comply with his obligations as a financial services provider, as set out in the General Code of Conduct for Authorised Financial Service Providers and Representatives (the Code)[3], published in terms of s 15 of the FAIS Act. It was alleged, inter alia, that Mr Calitz had failed: to undertake a due diligence assessment of the RVAF Trust and / or Abante Capital; to establish that the 'hedge fund' in which investments were made was not duly registered and regulated by the FAIS Act; to establish that the scheme of investment was an illegal scheme; to undertake a proper needs analysis in relation to each of the investors; to advise of the high risks associated with the investment; and had generally negligently failed to comply with his duties as a financial advisor. The respondents alleged that this negligent conduct had caused the respondents to suffer loss. They accordingly sought a compensatory award in terms of the FAIS Act.

[3] General Code of Conduct for Authorised Financial Services Providers and Representatives, Board Notice 80 of 2003, *GG* 25299, 8 August 2003.

[7] In answer to the complaints Mr Calitz raised several defences. He denied that he had rendered financial advisory services as a representative of Impact Consultants. He asserted that he had rendered such advice in his personal capacity as a registered financial services provider. He denied that he had failed in his duties in any manner. He stated that he was under no obligation to conduct a due diligence of the particular funds in which investments were to be made. His obligation, he asserted, extended only to a requirement that he undertake a due diligence assessment of the fund manager. In this instance that was Abante Capital. He alleged that: he had undertaken such due diligence assessment; he had satisfied himself that Abante Capital was a registered service provider; it was managed by competent and qualified personnel, including Mr Pretorius who was a highly respected fund manager; and that the returns on investment earned by the Abante Capital hedge fund were sustainable and in line with returns earned by similar funds. He alleged further that he had advised each of the respondents about the nature of the risks associated with such investments and that in many instances his clients had insisted on investing with the RVAF Trust. He stated that Abante Capital had on two occasions been the subject of investigation by the Financial Services Board and that no impropriety had been discovered. The nature and extent of the fraud perpetrated by Mr Pretorius upon investors was only discovered after his demise and upon the liquidation of Abante Capital.

[8] Mr Calitz accordingly denied that he was negligent in any respect or that any negligence that was established, had caused the losses suffered by the respondents. The losses, he asserted, were occasioned by the fraud perpetrated by Mr Pretorius and that such fraud could not have been detected by a due diligence assessment which he (Mr Calitz) was required to undertake.

[9] Mr Calitz also raised a further defence, namely that the financial product in respect of which he had furnished advice was not a 'financial product' as defined by the FAIS Act and accordingly that the 'advice' he had furnished was not regulated by the FAIS Act. The Ombud, so he contended, accordingly lacked jurisdiction to determine the complaints against him and Impact Consultants.

The determinations by the Ombud

[10] The first determination made against Impact Consultants and Mr Calitz was in respect of the complaint lodged by the fifteenth respondent, Dr Inch (the Inch Determination). Thereafter the Ombud determined all the other complaints, essentially upon the basis set out in the Inch Determination. Reference will accordingly only be made to the Inch Determination as reflecting the findings of and reasoning adopted by the Ombud.

[11] The Ombud found that Mr Calitz, acting on behalf of Impact Consultants, had failed to conduct a needs analysis in terms of s 8 of the Code[4] from which it could be determined whether the selected investment product was likely to satisfy the investor's needs. The Ombud was critical of Mr Calitz's advice to place the greater part of the savings into a high risk investment, without any thought as to diversification. The Ombud held that in breach of sections 4 and 5 of the Code, Mr Calitz had failed to make proper disclosure by not providing full details of what they were investing in and with whom they were dealing. It was also found that Mr Calitz had failed to maintain a record of the advice that

[4] Ibid.

was required to explain what range of financial products had been considered as being appropriate to meet his client's needs.

[12] The Ombud also found that Mr Calitz had failed to comply with Part III, s 4 and Part IV, s 5 of the Code. Regarding the latter provision, it was found that insufficient details were provided to ensure that the client knew and had access to full details of the relevant product supplier. As to the former provision, it was found that, on the documentation supplied by Mr Calitz, all that could be ascertained was that his client was investing capital in a limited partnership, styled the 'Relative Value Arbitrage Fund *En Commandite* Partnership'. Neither the nature of this partnership, nor the rationale for this contractual relationship, it was found, were explained to the client.

[13] In regard to the conduct of a due diligence assessment, Mr Calitz alleged that he conducted such assessment of Abante Capital. The Ombud dismissed this defence 'as an afterthought', noting that there was no reference to Abante Capital in the disclosure documents. The Ombud found that since the RVAF Trust was promoted as a hedge fund, and since the RVAF Trust directly accepted clients' funds and accounted for them, the RVAF Trust in fact provided intermediary services on a discretionary basis. It therefore fell within the definition of a hedge fund financial services provider, as provided by Board Notice 89 of 2007, issued by the Registrar of Financial Services Providers. Based upon this, the Code of Conduct for Discretionary Financial Services Providers[5] applied. Section 8A(4) of this Code requires that a hedge fund financial services provider must obtain a written mandate from a client which

[5] Code of Conduct for Administrative and Discretionary FSP's Amendment Notice, Board Notice 89 of 2007, GG 30228.

confirms that the client approves the investment objectives, guidelines and trading philosophy of the hedge fund financial services provider. No evidence was provided that established compliance with this requirement or that Abante Capital had concluded such mandate with the RVAF Trust.

[14] The Ombud concluded that the complainant (in this instance Dr Inch) was not adequately apprised of the risks associated with an investment in a hedge fund. In relation to the fact that the RVAF Trust was not registered, the Ombud found that proper due diligence would have disclosed this fact. It did not avail Mr Calitz to rely on the fact that the FSB had not established any impropriety on the part of Abante Capital or Mr Pretorius.

[15] The upshot of these findings was that the Ombud concluded that Mr Calitz had negligently breached the statutory duties owed to his clients. This negligent conduct had resulted in the investments being placed in the RVAF Trust and the subsequent losses incurred. Impact Consultants and Mr Calitz were accordingly found to be jointly and severally liable for the losses incurred.

The applications for leave to appeal before the Ombud and the second respondent

[16] Applications for leave to appeal against each of the determinations were made to the Ombud in terms of s 28(5)(*i*) of the FAIS Act. The applications were prosecuted on the basis that the Ombud erred in finding that Mr Calitz and by extension Impact Consultants had negligently breached the statutory duties imposed by the FAIS Act and the Code. It was contended that even if such breach was established and that it was found that Impact Consultants and Mr

Calitz had been negligent, it had not been established that such negligence had caused the loss suffered. The cause of the loss was the fraudulent conduct of Mr Pretorius. In the circumstances, Mr Calitz could not reasonably have foreseen fraudulent conduct on the part of Mr Pretorius. It was argued that liability was not established.

[17] The Ombud dismissed the applications for leave to appeal. She found that there was no reasonable prospect that her factual findings would be overturned. She held that reliance upon common law concepts such as causation and foreseeability of harm did not apply in the context of statutory provisions enacted to protect the clients of financial services providers. In effect, the Ombud found that once it was established that a financial services provider had negligently breached their statutory duties and a client has suffered loss, liability and compensation must follow.

[18] Aggrieved with the refusal of leave to appeal, an application for leave to appeal was directed to the chairperson of the appeal board, in terms of s 28 (5)(*b*)(ii). To facilitate the conduct of those proceedings a request was directed to consolidate the applications of each of the respondents.

[19] The second respondent granted the consolidation and dismissed the applications for leave to appeal, holding that, having regard to the record in each matter and the reasoning of the Ombud, there was no prospect of success on appeal.

The review application

[20] The dismissal of the applications for leave to appeal by the second respondent resulted in a review application launched in the high court, in which the applicants sought an order reviewing and setting aside such dismissal. They sought an order granting such leave, alternatively an order reviewing and setting aside the determinations made by the Ombud in respect of the complaints lodged by the respondents.

[21] The applicants contended that the Ombud had committed an error of law inasmuch as she had found that liability followed on the finding of negligence without considering whether the impugned conduct was the cause of such loss. Upon receipt of the record filed in terms of rule 53 of the Uniform Rules of Court, the applicants supplemented their grounds of review to include the following:

(a) that the Ombud had no jurisdiction to entertain the complaints since the investors had invested in the Relative Value Arbitrage Fund *En Commandite* Partnership, which is not a financial product as defined by the FAIS Act;

(b) that the provisions of s 27(3)(*c*) ought to have been invoked by the Ombud to refer the dispute for determination by a court in the light of the disputes;

(c) that the Code does not provide for civil liability by reason only of a breach thereof; and

(d) that the appeal board has in a similar matter ruled that the product was not a financial product as defined by the FAIS Act and, accordingly, that the Ombud did not enjoy jurisdiction in respect of such complaint.

[22] The high court did not address the challenge to the jurisdiction of the Ombud. It set out the contentions of the parties in some detail but did not identify all the issues to be adjudicated in relation to the grounds of review. In relation to the applicants' reliance upon the failure to consider causation as a separate element of liability, framed as an error of law, the high court was not persuaded that the applicants had established the materiality of such error, even on the assumption that the error was established. The high court appears to have accepted the basis upon which the Ombud determined liability as being the correct basis.

[23] The following is recorded in the judgment:

'In the answering affidavit the first respondent states that it is not correct that she determined that liability followed automatically from a transgression of the Code: "*I submit that I made the findings against the Applicant which cumulatively point to his wrong advice and negligence as the cause of the complainant's loss…..the Applicant's negligent failure to establish the nature of the entity or product (RVAF) he invested in.*"'(Emphasis in original text).

[24] The high court went on to find as follows:

'The first respondent denies that how she dealt with the matter constitutes an error of law. As I see it, the standard of service that the applicants are held to is what is provided for in the Code, and nothing more and it is not only the transgressions that she relied upon as constituting liability *but the cumulative effect of all the transgressions, as having given rise to liability*.' (Emphasis added.)

[25] In coming to this finding, the high court did not consider whether, properly considered, liability for the negligent breach of the provisions of the FAIS Act and the Code arises strictly upon such breach or, upon the

establishment of a causal link – both factual and legal – between the culpable conduct and the loss suffered. The court considered that there was no error of law in relation to the refusal of leave to appeal and consequently did not embark on an analysis of the specific grounds of review raised by Calitz.

[26] The review application was dismissed with costs. The high court subsequently refused leave to appeal against its order.

The proceedings before this Court

[27] Before this Court, the issue was whether leave to appeal ought to be granted to the applicants and, if so, what relief should follow. The appellants framed the question for adjudication as follows: whether upon the facts it could be found that the Ombud enjoyed jurisdiction to determine the complaints lodged by the respondents. As I have detailed, the Ombud made no definitive finding that she had jurisdiction. The Ombud proceeded upon the assumption that she enjoyed such jurisdiction. The high court similarly did not make a finding that the Ombud had jurisdiction, notwithstanding that the issue was squarely raised. For reasons that will become apparent the principal question is whether the Ombud established the foundational facts upon which a determination could be based. And consequentially whether that constituted a reviewable error.

The statutory scheme

[28] The purpose of the FAIS Act is to provide assurance to consumers of financial services and financial products that those who render such services are subject to effective regulation and control. These broad objects and purposes are achieved by establishing a system of licencing and governance to which

providers of financial and intermediary services are subject.[6] The FAIS Act (in conjunction with allied and related legislation) does so by establishing standards, in the form of Codes of Conduct which service providers are required to meet.[7] Enforcement of these provisions is achieved by various mechanisms[8], including the establishment of an Ombud clothed with the power to investigate and adjudicate disputes and to provide remedies for regulatory non-compliance.

[29] The office of the Ombud is established in terms of s 20 of the FAIS Act. Section 20(3) outlines the objectives as follows:

(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.[9]

[6] Section 7 of the FAIS Act provides that a financial services provider is not authorized to offer such services unless they have been issued with a license to do so by the Financial Services Board in terms of s 8 of the FAIS Act. In terms of s 8 the Registrar is required to establish 'fit and proper' requirements to be met by applicants for authorization.

[7] Section 15 of the FAIS Act permits the registrar to publish codes of conduct to regulate the conduct of service providers. Such codes of conduct must comply with a set of principles set out in s 16.

[8] Section 9 allows for the withdrawal or suspension of a licence under specified conditions.

[9] This is how s 20(3) read at the time that the Ombud was engaged with this matter. The section was subsequently amended by s 290 of the Financial Sector Regulations Act, 9 of 2017 (the FSR Act), which commenced on 1 April 2018, read with Schedule 4 to the FSR Act. There is no substantive difference between the provisions. The new subsection now reads as follows:

'(3) The objective of the Ombud is to consider and dispose of complaints under this Act, and complaints for which the Adjudicator is designated in terms of section 211 of the Financial Sector Regulation Act, 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 and the Financial Sector Regulation Act.'

[30] Section 27 of the FAIS Act provides for the receipt of complaints, matters dealing with prescription, the jurisdiction of the Ombud and its powers of investigation. The relevant portions of the section read as follows:

'(1) On submission of a complaint to the Office, the Ombud must—

(*a*) determine whether the requirements of the rules contemplated in section 26 (1) (*a*) (iv) have been complied with;

(*b*) in the case of any non-compliance, act in accordance with the rules made under that section; and

(*c*) otherwise officially receive the complaint if it qualifies as a complaint.

(2) ….

(3) The following jurisdictional provisions apply to the Ombud in respect of the investigation of complaints:

(*a*)(i) The Ombud must decline to investigate any complaint which relates to an act or omission which occurred on or after the date of commencement of this Act but on a date more than three years before the date of receipt of such complaint by the Office.

(ii) Where the complainant was unaware of the occurrence of the act or omission contemplated in subparagraph (i), the period of three years commences on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.

(*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.

(*c*) The Ombud may on reasonable grounds determine that it is more appropriate that the complaint be dealt with by a Court or through any other available dispute resolution process, and decline to entertain the complaint.

(4) ….

(5) ….

(6) For the purposes of any investigation or determination by the Ombud, the provisions of the Commissions Act, 1947 (Act No. 8 of 1947), regarding the summoning and examination of persons and the administering of oaths or affirmations to them, the calling for the production of books, documents and objects, and offences by witnesses, apply with the necessary changes.'

[31] Section 27(1)(*c*) requires, in addition to consideration of compliance with the procedural requirements for the submission of a complaint, that the Ombud consider the substantive nature of the complaint. A 'complaint' is defined in s 1,

'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;

(*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;'.

[32] Section 26(1)(*a*)(iii) provides that the Board may make rules regarding- 'the type of complaint justiciable by the Ombud, including a complaint relating to a financial service rendered by a person not authorised as a financial services provider or a person acting on behalf of such first-mentioned person'.

[33] The following definition which appears in s 1 of the FAIS Act is significant. 'Advice' (as it bears upon the present matter) is defined to mean,

'…any recommendation, guidance or proposal of a financial nature furnished, by any means or medium, to any client or group of clients—

(a) in respect of the purchase of any financial product; or

(b) in respect of the investment in any *financial product'*.

(Emphasis added)

[34] A financial product, in turn, is defined to mean,

'*(a)* securities and instruments, including—

(i) shares in a company other than a "share block company" as defined in the Share Blocks Control Act, 1980 (Act No. 59 of 1980);

(ii) debentures and securitised debt;

(iii) any money-market instrument;

(iv) any warrant, certificate, and other instrument acknowledging, conferring or creating rights to subscribe to, acquire, dispose of, or convert securities and instruments referred to in subparagraphs (i), (ii) and (iii);

(v) any "securities" as defined in section 1 of the Financial Markets Act, 2012 (Act No. 19 of 2012);[10]

(b) a participatory interest in one or more collective investment schemes;

(c) a long-term or a short-term insurance contract or policy, referred to in the Long-term Insurance Act, 1998 (Act No. 52 of 1998), and the Short-term Insurance Act, 1998 (Act No. 53 of 1998), respectively;

(d) a benefit provided by—

(i) a pension fund organisation as defined in section 1 (1) of the Pension Funds Act, 1956 (Act No. 24 of 1956), to the members of the organisation by virtue of membership; or

(ii) a friendly society referred to in the Friendly Societies Act, 1956 (Act No. 25 of 1956), to the members of the society by virtue of membership;

(e) a foreign currency denominated investment instrument, including a foreign currency deposit;

(f) a deposit as defined in section 1 (1) of the Banks Act, 1990 (Act No. 94 of 1990);

(g) a health service benefit provided by a medical scheme as defined in section 1 (1) of the Medical Schemes Act, 1998 (Act No. 131 of 1998);

(*g*A) an investment, subscription, contribution, or commitment in an alternative investment fund;[11]

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[10] Sub-para *(v)* substituted by s 175*(d)* of Act No. 45 of 2013, i e after the complaints arose but at a time when the complaints were being determined by the Ombud.

[11] This is a pending amendment: Paragraph (*g*A) to be inserted by s 290 read with Sch. 4 of Act No. 9 of 2017 with effect from a date determined by the Minister by notice in the Gazette – date not determined.

(h) any other product similar in nature to any financial product referred to in paragraphs *(a)* to *(g)*, inclusive, declared by the registrar by notice in the Gazette to be a financial product for the purposes of this Act;[12]

(i) any combined product containing one or more of the financial products referred to in paragraphs *(a)* to *(h)*, inclusive;

(j) any financial product issued by any foreign product supplier and which in nature and character is essentially similar or corresponding to a financial product referred to in paragraph *(a)* to *(i)*, inclusive;'[13]

A reviewable error

[35] As noted earlier, the Ombud did not deal with the challenge to her jurisdiction, namely that the financial product in which the investment was promoted, was not a financial product as defined by the FAIS Act. The difficulty extends further than this.

[36] The respondents identified the financial product in which they were advised to invest as being a 'hedge fund'. Mr Calitz, in his answer to the complaints, admitted that what was promoted was an investment in the RVAF Trust, apparently being a hedge fund managed by Abante Capital. The documents disclosed during the investigation indicated that the respondents had invested in what was designated as the RVAF *En Commandite* Partnership. They had accordingly, so Mr Calitz maintained, become partners in a limited partnership and the returns earned by them were profits earned by the limited partnership.

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[12] Paragraph *(h)* substituted by s 175*(e)* of Act No. 45 of 2013, i.e. after the complaint in this matter arose but at a stage when the Ombud was called upon to determine the complaint.

[13] Paragraph *(j)* substituted by s. 290 read with Sch. 4 of Act No. 9 of 2017 with effect from a date determined by the Minister by notice in the Gazette: 1 April, 2018 (Government Notice No. 169 in Government Gazette 41549 of 29 March, 2018). This is after the determination of the complaints by the Ombud.

[37] In its determinations the Ombud treated the investment as an investment in a 'hedge fund'. It also treated the RVAF Trust as a discretionary financial services provider which invested in a hedge fund. The Ombud however, recognised that the true nature of the investment was not explained and was not known or understood by the respondents. Indeed, the Ombud found that Mr Calitz did not understand the nature of the financial product in which the investment was made.

[38] What is apparent from a reading of the complaints and the record, is that although the product was described as a 'hedge fund' the true nature of the investment product and indeed, if it was an investment product at all, remained unknown. That being so, it was not possible to ascertain whether the investment that was the subject of the compliant was a financial product as defined in the FAIS Act. And if not, what consequences, if any, this would have for the Ombud exercising jurisdiction to entertain the complaint. It is common ground that hedge funds were not included in the definition of a financial product in the FAIS Act at the time that the complaints arose.

[39] The failure to determine the nature of the financial product which was the subject of the advice furnished by Mr Calitz, constituted a fundamental error on the part of the Ombud. It is not known, nor were any steps taken to ascertain, whether the funds were in fact placed in any investment product at all or invested in a hedge fund or merely siphoned off by Mr Pretorius. That ought to have been ascertained. It also ought to have been ascertained whether Mr Calitz had taken steps to determine the destination of the invested funds. Absent a proper determination of the nature of the financial product and without

establishing what is referred to earlier in this and the preceding paragraphs, the Ombud was not entitled to conclude her adjudication and to finalise the complaints lodged in terms of s 27 of the FAIS Act. The Ombud enjoys extensive powers of investigation in terms of s 27(6), the exercise of which would have permitted the Ombud to ascertain facts relevant to the issues identified above, which relate to jurisdiction and remedy for a complainant, if any. This she failed to do. That was what the high court ought to have concluded was a reviewable error, necessitating a remittal.

[40] It is necessary to deal briefly with two aspects which arose in argument before us. The first concerns the judgment of this Court in *Atwealth (Pty) Ltd and Others v Kernick and Others* (*Atwealth*).[14] The second concerns the approach of the Ombud to the application of principles of the common law.

[41] The *Atwealth* matter concerned a claim for damages against a financial services provider who was alleged to have furnished advice in breach of legal duties owed to a client. The legal duties alleged to have been breached were those set out in the FAIS Act and in the General Code of Conduct for Financial Services Providers promulgated under the FAIS Act. The investment product which was promoted was an investment in the RVAF Trust Fund operated by Abante Capital, ie the same 'product' promoted in the present matter. The judgment in *Atwealth* was relied upon by counsel for the applicants, as authority for the proposition that the advice relating to the RVAF Trust was not advice in relation to a financial product as defined by the FAIS Act. In this regard reference was made to a passage in the judgment where Davis AJA records that:

[14] *Atwealth and Others v Kernick and Others* [2019] ZASCA 27 (SCA); [2019] 2 All SA 629 (SCA); 2019 (4) SA 420 (SCA).

'Central to appellants' case was whether Ms Moolman provided advice to the Kernicks and, if so, whether this advice, failed to comply with Ms Moolman's legal duties and caused the Kernicks to invest in ill-fated products. Before the court *a quo* and again in this Court, Counsel for both parties focussed their arguments on whether Ms Moolman breached the provisions of the FAIS Act read together with the General Code of Conduct for Authorised Financial Service Providers and Representatives (the "Code"). *There was some debate before us in regard to the applicability of these provisions as hedge funds were not regulated by the Financial Services Board until 1 April 2015, when they were declared to be collective investment schemes in terms of section 63 of the Collective Investment Schemes Control Act 45 of 2002*.'[15]

(Emphasis added.)

[42] Based on this passage, it was asserted that the RVAF Trust Fund was not, at the time of the Ombud's determination, a financial product within the meaning of that term as defined and, therefore, the Ombud lacked jurisdiction.

[43] The passage, however, is not authority for such proposition. It merely records that hedge funds were only defined to be collective investment schemes in 2015 and thereby came within the ambit of the definition of a financial product in the FAIS Act. The court in *Atwealth* was not called upon to decide whether the product was indeed a hedge fund and that the provisions of the FAIS Act accordingly did not apply. The claim in *Atwealth* was premised upon the breach of common law legal duties owed by a financial advisor to their client. The provisions of the FAIS Act were pleaded as reflecting the legal duties of the financial advisor.

[15] Ibid para 25.

[44] This Court equally did not decide that financial advice provided in respect of any financial product (whether or not it is one as defined by the FAIS Act) renders a financial advisor subject to the enforcement mechanisms provided by the FAIS Act. In the first instance the court made no such finding. Secondly, it was called upon to decide issues of wrongfulness and fault to establish liability in the context of the pleaded case. It is in this context that the following passage in the judgment should be understood.

'Ms Moolman's Counsel contended that she had merely given the Kernicks objective information about particular financial products and, at best for them, no more than advice on the procedures for concluding an investment transaction. In Counsel's submission this did not constitute "advice" as defined in the FAIS Act. Furthermore, he contended that the Kernicks had invested in a hedge fund, which was structured as an *en commandite* partnership. He submitted that a hedge fund or a partnership of this particular kind did not constitute a "financial product" as defined in terms of the relevant law as it existed in 2009 and therefore, whatever Ms Moolman might have told the Kernicks, it could not have constituted "advice" for the purposes of the FAIS Act read together with the Code. The difficulty with these contentions was that, even if they had merit, on a careful parsing of the language of the FAIS Act, the presentation by Ms Moolman constituted, in ordinary parlance, the giving of financial advice, at least in the form of product information, to the Kernicks. It was advice on which they clearly intended to rely and on which they were entitled to rely, coming as it did from a professional financial advisor from whom they had sought that advice.'[16]

[45] That brings me to the second issue, namely the Ombud's approach to the application of common law principles in the determination of a complaint. As indicated earlier in this judgment, in response to the application for leave to appeal to the board of appeal the Ombud suggested that common law principles

[16] Ibid para 30

of delictual liability do not apply. She took the view that the statutory scheme establishes liability upon a breach of the FAIS Act and the Code. This view is emphatic, insufficiently reasoned and requires further exploration. We need however express no definitive view on this. Section 28, which deals with determinations, is rather widely worded, and provides that fair compensation may be awarded for financial prejudice or damage suffered.[17] Furthermore a 'complaint', as indicated above, is widely defined in the FAIS Act as is advice. In addition, the objectives of the Ombud as set out in s 20 must also be taken into account. Why, one might rightly enquire, should a registered financial advisor, be dealt with less punitively for providing advice beyond the products recognised and regulated under the FAIS Act, when such an advisor has breached both common law duties echoed in the statutory provisions. Be that as it may, it is foundationally necessary to establish the true nature of the investments complained about before any final conclusions are reached, including in relation to questions related to compensation.

Remedy

[46] It follows from what is set out above that the applicants are entitled to relief before this Court, both in relation to the application for leave to appeal

[17] The relevant portion of s 28 of the FAIS Act reads 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*) the dismissal of the complaint; or
(*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) a direction may be issued that the authorised financial services provider, representative or other party concerned take such steps in relation to the complaint as the Ombud deems appropriate and just;
(iii) the Ombud may make any other order which a Court may make.'

and in relation to the merits of the appeal, on the circumscribed basis presaged above.

[47] In the light of the finding that it is necessary for the Ombud to determine her jurisdiction in respect of the complaints on the basis of facts, no purpose would be served by permitting an appeal to the appeal board. Instead, the only appropriate remedy is to set aside the determinations made by the Ombud and to refer each of the complaints back to the Ombud for investigation and determination in accordance with the guidance provided in this judgment. All the issues identified above require full exploration and further evidence and full debate.

[48] In respect of costs, the second respondent abided the decision of this Court. There is no compelling reason why, in respect of the Ombud, the costs should not follow the result.

[49] In the result the following order is made:

1. Leave to appeal is granted with costs.
2. The appeal is upheld to the extent set out in the substituted order below.
3. The order of the high court is set aside and replaced by the following order:

   ‘(a) The decision of the second respondent to refuse leave to appeal to the Financial Services Appeal Board in case numbers FAB3/2015 to FAB20/2015 is hereby set aside.

   (b) The determinations of the first respondent under case numbers FAB3/2015 to FAB20/2015 are hereby set aside.

(c) Each of the complaints lodged under case numbers FAB3/2015 to FAB20/2015 are referred back to the first respondent for determination in accordance with the provisions of the Financial Advisory and Intermediary Services Act 37 of 2002.

(d) The first respondent is ordered to pay the costs of the application.'

4. The first respondent is ordered to pay the costs of the appeal, including the costs of the application for leave to appeal before the high court.

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G. GOOSEN

ACTING JUDGE OF APPEAL

Appearances

For applicants:	M Daling
Instructed by:	Laas & Scholtz Inc., Cape Town
	c/o Webbers, Bloemfontein
For first respondent:	S L Shangisa and B B Mkhize
Instructed by:	Kgokong Nameng Tumagole Inc., Johannesburg
	c/o Lovius Block, Bloemfontein.