



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT
OF APPEAL**

FROM: The Registrar, Supreme Court of Appeal
DATE: 30 April 2021
STATUS: Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

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

The Supreme Court of Appeal (the SCA) today upheld an appeal against an order of the Gauteng Division of the High Court, Pretoria (Thlapi J) (the high court) dismissing a review of determinations made by the Ombud for Financial Services (the Ombud).

In 2015, several complaints were lodged with the Ombud (established in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act)) against Impact Financial Consultants CC (Impact Consultants) and its principal member, Mr Calitz (the applicants). The applicants were authorised financial services providers as provided by the FAIS Act.

The complaints arose in consequence of the collapse of an investment scheme involving Abante Capital (Pty) Ltd (Abante Capital) and the Relative Value Arbitrage Fund Trust (the RVAF Trust). In 2012 allegations of fraud perpetrated by Mr Pretorius, a key figure in Abante Capital, were reported in the financial press. Following the death of Mr Pretorius and the liquidation of Abante Capital and the RVAF Trust, fraudulent conduct was established in relation to the investment scheme.

The complainants alleged that Mr Calitz, and by extension Impact Consultants, had negligently breached the duties imposed upon financial advisors by the FAIS Act and the General Code of Conduct for Financial Advisors and Representatives (the Code) enacted in terms of the FAIS Act. It was alleged that Mr Calitz had, inter alia, failed to undertake a due diligence assessment of the RVAF Trust and had negligently advised his clients to invest in a high risk and illegal scheme. This had resulted in the complainants suffering substantial losses.

The Ombud upheld the complaints and ordered Impact Consultants and Mr Calitz to pay compensation to each of the complainants. The Ombud refused leave to appeal against these orders, as did the chairperson of the appeal board of the Financial Services Board. The applicants then brought a review application in the high court alleging, inter alia, that the Ombud did not enjoy jurisdiction and had failed to consider that the losses suffered by the complainants were as a consequence of fraud on the part of Mr Pretorius and not negligence on the part of Impact Consultants or Mr Calitz. They alleged that the Ombud had committed an error of law in respect of the bias upon which liability is determined in terms of the FAIS Act.

The high court dismissed the review application and refused leave to appeal. The applicants filed an application for leave to appeal with the SCA. The SCA ordered that the application be referred for oral argument and that the parties also address the merits of the appeal.

The SCA found that the Ombud is required to establish the nature of the investment made upon the advice of the advisory in order to determine whether it falls within the ambit of a financial product as defined by the FAIS Act. This is a foundational factual enquiry which enables the Ombud to decide upon the exercise of its jurisdiction to determine the complaint and to order any remedial compensation which may flow from such determination. In this instance the Ombud had failed to do so, notwithstanding the investigative powers conferred by the FAIS Act.

The SCA therefore found that the high court ought to have found that the Ombud had committed a reviewable error and set aside the determinations. In the light of the absence of a factual basis upon which to determine the nature of the investment and therefore the Ombud's jurisdiction, no purpose would be served by allowing an appeal to the Financial Services Board. The SCA therefore granted the applicants leave to appeal and upheld the appeal. It set aside the determinations made by the Ombud and referred the complaints back to the Ombud for investigation and determination in accordance with the FAIS Act. The court ordered the Ombud to pay the costs of the application before the high court and the cost of appeal.