

RULES ON PROCEEDINGS OF THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS, 2003

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[with effect from 30 September 2004 *]

as amended by

BN 100 in GG 26844 of 29 September 2004

The Financial Services Board has under section 26 of the Financial Advisory and Intermediary Services Act, 2002 (Act 37 of 2002), and after consultation with the Advisory Committee on Financial Services Providers, made the Rules on Proceedings of the Office of the Ombud for Financial Services Providers, set out in the Schedule hereto.

This Notice is called the Notice on Rules on proceedings of the Office of the Ombud for Financial Services Providers, 2003, and comes into operation on the date determined by the Minister of Finance in terms of section 7(1) of the said Act.

J VAN ROOYEN

Registrar of Financial Services Providers

SCHEDULE

1 Definitions and application

(a) In these Rules, 'the Act' means the Financial Advisory and Intermediary Services Act, 2002 (Act 37 of 2002), and unless the context indicates otherwise, words and expressions used in these Rules bear the same meaning as that of similar words and expressions used in the Act.

(b) These Rules apply in particular to the proceedings of the Ombud conducted in terms of Part I of Chapter VI of the Act, and must be read in conjunction with the provisions of the Act.

(c) These Rules mean the Rules on Proceedings of the Office of the Ombud for Financial Services Providers made under section 26 of the Act, as amended or re-enacted from time to time.

[Para. (c) substituted by BN 100 of 29 September 2004.]

2 Fundamental principles

(a) In disposing of a complaint the Ombud acts independently and objectively and takes no instructions from any person regarding the exercise of authority.

(b) The complainant and any other party to the complaint are expected to give their fullest co-operation to the disposal of the complaint within a reasonable time.

(c) The services rendered by the Ombud are not to be construed as being similar to those of a professional legal adviser and are confined to the investigation and determination of complaints in terms of the Act and these Rules.

3 Category of persons qualifying as complainants

Where appropriate, a complainant includes the complainant's lawful successor in title or a person nominated as beneficiary in terms of the financial product which is the subject of the relevant complaint.

[Rule 3 substituted by BN 100 of 29 September 2004.]

* GN 270 in GG 26080 of 5 March 2004

4 Type of complaint justiciable by Ombud

- (a) For a complaint to be submitted to the Office—
- (i) the complaint must fall within the ambit of the Act and these Rules;
 - (ii) the person against whom the complaint is made must be subject to the provisions of the Act (hereinafter referred to as 'the respondent');
 - (iii) the act or omission complained of must have occurred at a time when these Rules were in force; and
 - (iv) the respondent must have failed to address the complaint satisfactorily within six weeks of its receipt.

[Para. (a) substituted by BN 100 of 29 September 2004.]

(b) A complainant may seek any relief relating to the subject matter of the complaint, but a complaint constituting a claim for a monetary award, must relate to the redress of financial prejudice or damage suffered or likely to be suffered by the complainant.

(c) The complaint must not constitute a monetary claim in excess of R800 000.00 for a particular kind of financial prejudice or damage, unless the respondent has agreed in writing to this limitation being exceeded, or the complainant has abandoned the amount in excess of R800 000.00.

(d) The Ombud may also entertain a complaint relating to a financial service rendered by a person not authorised as a financial services provider or by a person acting on behalf of such person.

(e) When the Ombud receives a referral from the Registrar as contemplated in section 4(4)(c) of the Act, the Ombud must in writing notify the client concerned thereof and require the client to inform the Ombud whether the client wishes to pursue the complaint in accordance with the provisions of Part I of Chapter VI of the Act.

(f) The complaint must not relate to the investment performance of a financial product which is the subject of the complaint, unless such performance was guaranteed expressly or implicitly or such performance appears to the Ombud to be so deficient as to raise a *prima facie* presumption of misrepresentation, negligence or maladministration on the part of the person against whom the complaint is brought, or that person's representative.

5 Rights of complainants in connection with complaints

(a) The complainant must qualify as such in terms of the Act and these Rules.

(b) Before submitting a complaint to the office, the complainant must endeavour to resolve the complaint with the respondent.

(c) The complainant has six months after receipt of the final response of the respondent, or after such response was due, to submit a complaint to the office.

(d) On submitting a complaint to the office, the complainant must satisfy the Ombud of having endeavoured to resolve the complaint with the respondent, and must produce the final response (if any) of the respondent as well as the complainant's reasons for disagreeing with the final response.

(e) A complaint must be submitted to the office in writing or, in circumstances deemed appropriate, the Ombud may receive a complaint in any other manner which conveys the complaint in comprehensible form.

(f) A complaint must, where necessary, be accompanied by available documentation in the complainant's possession.

(g) The complainant must be advised by the Ombud of the response of the respondent to the extent necessary to react to such response and to decide whether the complaint should be proceeded with, and must thereafter within two weeks advise the Ombud of such reaction and decision.

(h) Subsequent to lodging a complaint with the Ombud, the complainant is entitled to submit further facts, information or documentation in connection with the complaint and must do so, to the extent possible, if requested by the Ombud.

6 Rights and duties of respondent

(a) Where a complaint cannot within three weeks be addressed by the respondent, the respondent must as soon as reasonably possible after receipt of the complaint send to the complainant a written acknowledgment of the complaint with contact references of the respondent.

(b) If within six weeks of receipt of a complaint the respondent has been unable to resolve the complaint to the satisfaction of the complainant, the respondent must inform the complainant that—

(i) the complaint may be referred to the office if the complainant wishes to pursue the matter; and

(ii) the complainant should do so within six months of receipt of such notification.

(c) Any respondent must be informed of the complaint submitted to the office to the extent necessary to respond thereto fully.

(d) The respondent is entitled to submit any fact, information or documentation in relation to the complaint and must disclose relevant information or documentation to the Ombud.

(e) If deemed necessary by the Ombud, the respondent must discuss the complaint with the Ombud and furnish such further relevant information as the Ombud may require.

(f) A respondent is required to act professionally and reasonably and to cooperate with a view to ensuring the efficient resolution of the complaint.

7 Summary dismissal of complaints

(a) Subject to Rule 4, the Ombud has the power to determine whether or not a complaint falls within the ambit of the Act and these Rules and must reject a complaint which falls outside such ambit.

(b) The Ombud may dismiss a complaint without referral to any other party if on the facts provided by the complainant it appears to the Ombud that—

(i) the complaint does not have any reasonable prospect of success;

(ii) the respondent has made an offer which is fair and reasonable and which is still open for acceptance by the complainant;

(iii) the matter has previously been considered by the Ombud;

(iv) the essential subject of the complaint has been decided in court proceedings;

(v) the subject of the complaint is pending in court proceedings; or

(vi) the complaint or relief sought is of the nature that the Ombud can be of no assistance to the complainant.

(c) A complaint received officially may thereafter be dismissed if the complainant fails to co-operate in the pursuance or resolution of the complaint.

(d) If in the discretion of the Ombud a complaint is being pursued in a frivolous, vexatious or abusive manner, it may be dismissed summarily.

(e) The Ombud must in a manner deemed appropriate, inform parties of any dismissal of a complaint referred to in this Rule.

8 Time limits

(a) Time limits for any aspect of the proceedings in connection with a complaint may be fixed by the Ombud and must be honoured by the parties to the complaint.

(b) Extensions of time limits imposed by the Act or these Rules or fixed by the Ombud, may in the discretion of the Ombud be granted, and the parties involved notified accordingly.

(c) If in the discretion of the Ombud a party has in a particular case not responded within a reasonable time, the Ombud may proceed to dispose of a complaint on the available facts and information.

9 Case fees, costs and interest

(a) The Ombud may, when accepting a complaint in terms of section 27(5) of the Act, require the respondent to pay a case fee to the office not exceeding R1 000.00.

(b) The case fee referred to in paragraph (a) is non-refundable irrespective of the outcome of the matter.

(c) Payment of a case fee raised in terms of paragraph (a) may be enforced by the office as a final determination by the Ombud.

(d) When making a final determination in terms of section 28 of the Act, the Ombud may grant costs against the respondent or, in the circumstances contemplated by section 28(2)(b)(iii), against the complainant, in either case in favour of the other party to the complaint or in favour of the office.

(e) Any costs award by the Ombud must be quantified by the Ombud with due regard to the nature of the complaint, the time spent on the complaint, the expense and inconvenience caused to a party, the conduct of a party in resolving the complaint and any other factor deemed by the Ombud to be appropriate.

(f) Any award of interest and costs forms part of the relevant final determination of the Ombud.

10 Liaison between Ombud and Registrar

(a) The Ombud must report to the Registrar such facts or information arising from complaints as may be capable of prompting the Registrar to consider action under the Act, either generally or in relation to a particular matter.

(b) Notwithstanding confidentiality constraints applicable to the Registrar's office, the Ombud is entitled to information or sight of documentation in the Registrar's possession which may be relevant in the consideration of a complaint.

(c) The Ombud and the Registrar must in addition regularly liaise and consult with one another as regards any matter relating to mutual administrative support and avoidance of overlapping of their respective functions.

11 Administrative and procedural matters

(a) The Ombud may decline to investigate a complaint, or may suspend the investigation, when to the knowledge of the Ombud the complainant intends proceeding to or has already embarked on litigation.

(b) Information provided to the Ombud is confidential and may only be disclosed by the Ombud to the Registrar or to another party to the complaint to the extent necessary to resolve the complaint, or where required under the Act or any other law.

(c) The Ombud is not liable to be subpoenaed to give evidence on the subject of a complaint in any proceedings.

(d) The Ombud may take such steps as deemed expedient to advise the public on the existence of the office, the procedure for submitting a complaint to the office, or on any other aspect concerning the office in order to facilitate the submission or disposal of complaints.

12 Appeals

(a) A party against whom the Ombud has made a determination may apply to the Ombud for leave to appeal against the determination.

(b) Such application must be in writing, must be submitted to the Ombud within one month of the date of the determination, and must set out the grounds on which the application is made.

(c) In weighing the application the Ombud must consider the factors set out in section 28(5) (b) of the Act, and may request and consider submissions by any other party to the complaint concerning the merits of the application.

(d) If the Ombud refuses leave to appeal, the applicant must be advised in writing and given reasons for such refusal.

(e) The applicant may within one month of such refusal apply to the chairperson of the board of appeal for leave to appeal against the determination, and advise the Ombud in writing accordingly.

(f) The application referred to in paragraph (e) must be submitted to the secretary of the board of appeal and must thereafter be dealt with as directed by the chairperson of that board.

(g) On receipt of the written advice referred to in paragraph (e), the Ombud must transmit to the secretary of the board of appeal all the records concerning the complaint together with a copy of the determination and the Ombud's reasons therefor, and the Ombud's reasons for refusing leave to appeal.

(h) If the Ombud grants leave to appeal, the applicant must be advised accordingly and the provisions of paragraph (g) apply with the necessary amendments, in which case the Ombud must also transmit the reasons for granting leave to appeal (if any).

(i) When granting or refusing leave to appeal, the Ombud must advise the other party to the proceedings of the outcome of the application for leave to appeal.

(j) If the board of appeal becomes seized with the appeal, the appeal must be dealt with in terms of the rules applicable to that board, with the necessary amendments, and, unless requested by the board of appeal, the Ombud shall not take part in the appeal proceedings and the appeal will continue between the parties to the complaint.

(k) On receipt of the final decision of the board of appeal the Ombud must forward the decision to the clerk or Registrar of the court as contemplated in section 28(4) of the Act.

13 Short title

These Rules are called the Rules on Proceedings of the Office of the Ombud for Financial Services Providers, 2003.

[Rule 13 substituted by BN 100 of 29 September 2004.]