

## CONFIDENTIALITY

A summary of the main points of an address delivered by the Ombudsman, Judge P M Nienaber, at the International Conference of Financial Ombudsmen held at the Marriott Downtown Eaton Centre, September 19-21, 2005 on the topic: “Privacy and its impact on dispute resolution”

Privacy from a South African perspective has both private law and constitutional implications. One aspect of privacy is confidentiality i.e. “immunity from disclosure”. The non-disclosure can be to outsiders (i.e. those not involved in the complaint lodged with an ombudsman) of the details and identities of the parties to such a complaint (external confidentiality). “Outsiders” would include the regulator, trade associations, the media, courts, other service providers and complainants or any third party with an interest in the complaint, as for instance where a class action is contemplated. Or the non-disclosure can be of sensitive material to the one or the other of the parties to the complaint themselves (internal confidentiality).

Dealing first with external confidentiality there are two vital questions:

1. Why should there be external confidentiality – if court proceedings are not confidential, why should an ombudsman’s proceedings be secretive?
2. How is such confidentiality to be achieved?

As to the first question: the answer lies in the differences between the two processes.

- court proceedings are generally adversarial in common law countries whereas the ombudsman's process is traditionally and essentially inquisitorial in nature;
- the judge stands aloof from the process, acting solely as a final decision maker, whereas the ombudsman is personally involved in every step of the entire process of resolving the complaint. The ombudsman's traditional role is to investigate, intercede, negotiate and only, as a last resort when all else fails, to adjudicate. The right to adjudicate is a relatively late development. To fulfil these requirements the ombudsman must create an atmosphere of trust and mutual confidence. There must be a free exchange of views by both parties to the complaint without fear of repercussions if the dispute should be escalated to another level. There must be room for both parties to make concessions during the process, which is generally not advisable in an adversarial environment, since concessions might be held against the parties in later proceedings. The process must be flexible and free from publicity. Confidentiality thus enhances the effectiveness of the ombudsman's process.

Ombudsmen are sometimes criticised on this score by the media who suspect that where the scheme is a voluntary one ombudsmen rely on confidentiality

as a cover to protect their subscribing members. The media believe that the ombudsman's processes should be more transparent and that delinquent firms and habitual offenders in particular should be exposed in order to punish them publicly and caution potential customers not to deal with them. Our response has been that we are not regulators and that we achieve more by treating all information as privileged and confidential. The ombudsman does not act as a "whistle-blower" although he provides statistics on request and regularly meets with the regulator to report on and discuss systemic problems in the industry.

As to the second question, how is confidentiality achieved? In the case of a voluntary scheme by means of rules which constitute the contract between the ombudsman and the complainant on the one hand and the ombudsman and the subscribing members on the other. In terms of our own rules all exchanges are treated as privileged and confidential.

Internal confidentiality relates, first, to information which the one party asks the ombudsman not to disclose to the other and secondly, to improperly or illegally obtained material.

This problem, whether to receive and consider such information, demonstrates a tension between two aspects of fairness:

- that every complaint should be decided on its true merits taking into account all relevant and reliable information and

- transparency: that a party should be informed of all adverse points made against him or her.

Our approach is that we have a discretion to receive such material, even if under embargo, but that we will not come to a conclusion on the basis of material we are not permitted or able to disclose to the other side or mention in the reasons for our ruling. At best such material can enable us, as part of the inquisitorial process, to ask the right questions. The approach, in short, is pragmatic and not dogmatic.