THE FINANCIAL SERVICES TRIBUNAL

CASE NO: FAB 45/2021

In the matter of:

CHARLES MALHERBE trading as CHARLES MALHERBE BROKERS	**Applicant**
and	
ALIDA CHRISTINA WILKEN	**1ST Respondent**
LOUIS PHILLIPUS WILKEN	**2nd Respondent**
THE OMBUD FOR FINANCIAL SERVICES PROVIDERS	**3rd Respondent**

DECISION

Tribunal: Adv A.T. Ncongwane, SC (Chairperson),
Mr P.J. Veldhuizen, and
Adv SM Maritz (members)

Date of Virtual Hearing: 02 March 2022

Date of Decision : 29 April 2022

Appearances:

On behalf of the applicant: Mr Bielderman of Bielderman Inc

On behalf of the first and second respondents: No appearance

Summary: Application for Reconsideration in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 ("FSR Act"):

Compensation for loss suffered: Non-compliance with Code of Conduct.

INTRODUCTION

[1] The applicant seeks the reconsideration of the determination by the Ombud for Financial Services Providers ("the Ombud") made in favour of the first and the second respondents, Mr and Mrs Wilken ("the Wilkens"), in terms of which, the applicant was found through his investment advice to the Wilkens, to have caused them financial loss on the investment.

[2] At the outset of the hearing it was stated that the Ombud has no right of appearance in the Tribunal unless invited by the Tribunal to present argument on identified issues. For this reason, the Ombud's application to present argument to the Tribunal was dismissed.

[3] Mr Bielderman, in his heads of argument contends that the nature of the hearing before this Tribunal is one of an appeal *"in the fullest sense"*, almost commonly referred to as *a "wide appeal"* and not a review. The principle relating to an appeal, as per his submissions, should be applicable. This means in short that the Appeal Board (referring to this Tribunal) must establish if the determination is justified on the facts and legal principles applied. If not, it meant that the decision should be set aside for one or all of the following reasons: lack of evidence for a finding and/or error of fact and/or error of law, and failure in the process.

[4] The FSR Act abolished the appeal board that was established by section 26 (1) of the Financial Service Board Act of 1990 ("the FSB Act") which provided for the conducting of an appeal in the fullest sense. Its jurisdiction was however amended by the introduction of section 26B to the FSB Act, such that an appeal board no longer have an appeal jurisdiction in the fullest sense.[1]

[5] With the advent of the FSR Act, the right to appeal against the determination of the Ombud was removed by amending section 39 of the Financial Advisory and Intermediary Services Act 37 of 2002 ("FAIS Act")[2]. The FSR Act established this Tribunal and introduced a right of reconsideration of the decision of the Ombud by the Tribunal. Section 281 of FSR Act states that the function of the Tribunal is *"to reconsider, in terms of this chapter, decisions as defined in section 218 and to perform the other functions conferred on it by this Act and specific financial sector laws."* Section 219 *(2) (d)* of the FSR Act states that *'the Tribunal must perform its functions in accordance with this Act and the specific financial sector laws'* The Tribunal is evidently bound to reconsider decisions in accordance with the FSR Act and other *'financial sector laws'*. No reference is made to an appeal process.

[6] Section 234 (1) of the FSR Act provides that:

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1 Sharemax Investment (Pty) Ltd and Others v Sigrist and Bekker

2 Section 39 of the FAIS Act provides that any person who feels aggrieved by any decision of the Ombud under the Act which affected that person may appeal to the board of appeal established by sec 26 (1) of the Financial Services Board Act 97 of 1990 ("the FSB Act")

"In proceedings on an application for reconsideration of a decision the Tribunal may, by order -

(a) set the decision aside and remit the matter to the decision maker for further reconsideration."

[7] Although the Tribunal is vested with the power to set aside some decisions, section 234 (1)(b) prescribes which decisions may be set aside and does not make provision for the Tribunal to set aside '*a decision of a statutory Ombud in terms of a financial sector law in relation to a specific complaint by a person.*' The Tribunal may only set aside the '*(i) decision in terms of chapter 13, (ii) a decision referred to in paragraph b or c of the definition of 'decision' in section 218, and (iii) a decision of a kind prescribed by a regulation for purposes of this section'.*

[8] When dealing with an application for reconsideration of a decision, this Tribunal may only set the decision aside and remit the matter to the decision maker for further reconsideration or dismiss the application. Further the Tribunal has the power to conduct a complete re-hearing, reconsideration and fresh determination of the entire matter with or without new evidence or information. In essence, the position as it was pursuant to an amendment of section 26B of the repealed FSB Act is retained, namely: that the Tribunal is again *'a specialist'* Tribunal that *'conducts an appeal in the fullest sense'* – but cannot vary/replace the decision of the decision maker with its own. Although the Tribunal may make orders in the applications for reconsiderations, its powers are limited. It does not have the liberality of the erstwhile appeal board in the appeal *'in the fullest sense'.*

For these reasons the above contentions made by the applicant are dismissed.

THE FIRST AND SECOND RESPONDENTS' COMPLAINT

[9] Mr and Mrs Wilken lodged a complaint against the applicant which complaint entails that the applicant rendered financial advice to them during 2009 relating to the investment of their funds in The Villa Retail Park Holdings Limited ("the Villa") property syndication scheme managed by Sharemax Investments (Pty) Ltd ("Sharemax"). They invested a composite amount of R345 000.00 (Three Hundred and Forty Five Thousand Rand).

[10] Initially the Wilkens received payment returns from their investment but from July 2010 the Villa defaulted on the interest payable to its investors and failed to produce any positive investment returns resulting into a complete loss of their investment. It is known that the Sharemax scheme faltered. However, as pointed out hereunder, it has been established that the Sharemax scheme including The Villa did not falter due to the eventual eruption of the intrinsic risks of the investment, but it was due to the intervention by the South African Reserve Bank ("SARB") that caused its demise.

GROUNDS FOR RECONSIDERATION

[11] In support of his application for reconsideration, the applicant has raised forty one (41) grounds under four headings identified to be on procedure, law, bias and specific errors of the Ombud. These grounds are as follows:

[11.1] That the Ombud does not have the jurisdiction to deal with the complaint by the Wilkens as she could not *'officially receive'* the complaint in terms of section 27 (1)(a) and (b) of the FAIS Act since the provisions of section 27 (1) (a) to (c) read with section 26 (1)(a) to (iv) of the FAIS Act have not been complied with.

[11.2] The Ombud should have resolved the material factual disputes (which were raised by the applicant on a number of occasions) which needed to be resolved before a finding of liability could be made against the applicant.

[11.3] The Ombud's finding that the Wilkens did not understand the contents of the documentation they signed (the prospectus) is unsustainable as it is contradicted by the documentation signed by the Wilkens and the Ombud's record of decision does not show any slightest suggestion by the Wilkens denying their signatures to the documentation or disputing that they did not understand the contents of the documentation.

[11.4] That the factual and the legal findings by the Ombud are not sustainable in light of the applicable legal principles required to make a finding of civil liability against the applicant.

[11.5] That the Ombud had a predetermined approach to property syndicate matters and the investigation and determination of this matter was not with an independent, open and objective mind. In this regard, the approach illustrates that the applicant was unfavourably disposed to the Ombud and this caused a real apprehension of bias from the applicant.

[11.6] Lastly, the applicant makes a submission that the determination should be set aside and the complaints should be dismissed.

[12] It is common cause that the Wilkens consulted the applicant and they were advised by him to invest in Sharemax. They were not advised about any risk whatsoever that could be associated with the Sharemax Investment. From the record, and apart from the common cause fact that the Wilkens were assured by the applicant that Sharemax owned property and was financially stable, and that their investment was safe, there is no indication that these assurances proved to be sound and reasonable for the Wilkens.

[13] These grounds for reconsideration represent the salient arguments of the applicant in support of his claim for the unfairness in the process as adopted by the Ombud.

THE DETERMINATION

[14] The Ombud's determination was handed down in terms of section 281 of the FAIS Act. In her determination, the Ombud exercised her discretion not to refer the matter to court as argued by the applicant and pointed to the fact that this will defeat the whole purpose of the FAIS Act if parties to a complaint can, without reasonable grounds elect to seek that the matter be referred to court. Therefore the Ombud dismissed the applicant's application in terms of section 27 (3)(c). For reasons appearing hereunder, we agree with the Ombud in this regard, that the Ombud can after considering all the facts put before her easy make a determination in terms of the rules, the Code as well as the applicable financial sector law without having these matters referred to court. Accordingly, the Ombud should be slow to issue such a directive by too readily dilute the statutory objective of the Ombud – *"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 ..."*

[15] It was found by the Ombud that the Wilkens were not knowledgeable about investing and that they solely relied on the skill and competence of the applicant. The Ombud identified two risks in Sharemax which a reasonable and competent FSP in similar circumstances should have known and should have explained the risk to the Wilkens and that such advice should have been recorded in a record of advice. The first being the risk that the

investors' capital investment and the funds could easily be lost. This is informed by the fact that the prospectus warns that this is a *'risk capital'* investment and that the monthly income is not guaranteed. In addition thereto it appeared from the prospectus that the investors' funds will be held in an Attorneys' Trust Account and that their funds will be paid out to Sharemax who intends to use the funds to make an unsecured loan to the developer, Capicol.

[16] In this regard, the applicant is held by the Ombud to have created the impression that the Wilkens were investing in property although he was aware that Sharemax did not own any property. He further created a false impression that the complainants will be paid from rental income while he was aware that Sharemax did not own any rental income producing property.

[17] It was found by the Ombud that there was a duty on the applicant to disclose what was to become of the complainants' funds and this was a high risk investment. The Ombud's finding is that the applicant deliberately mislead the Wilkens to believing that their funds will be safe. He did not make a full and frank disclosure of all information about the investment so that the Wilkens could make an informed decision. These findings are not disputed/challenged by the applicant and thus this Tribunal see no reason to depart from the Ombud's findings in this regard.

[18] Secondly it was not proven to the Ombud neither to us that the applicant had kept a proper record of advice documenting the risks brought to the Wilkens attention and confirming that the Wilkens appreciate these risks and were willing to accept them. The applicant also failed to prove to the Ombud that the complainants read and understood the prospectus received from him. The applicant's allegation that he explained the prospectus to his clients does not suffice in the absence of a detailed explanation and/or record thereto. In this regards the Ombud was certainly correct in finding that Sharemax was not a suitable investment for the Wilkens as the high risks of the investment were made clear in the prospectus. The Ombud further found that a competent FSP who has studied and understood the prospectus would have been aware that the statement in the prospectus that the investors' funds would be deposited into the Attorneys' Trust Account of Weavind and Weavind and preserved until the monies are cleared with the bank and the property transfer and registration is finalised, was completely misleading. By not explaining this position and disclosing the truth to the Wilkens, the Ombud concluded that the applicant actively deceived/misled the Wilkens.

[19] The Ombud narrowed her determination to the issue whether or not the applicant's advice to invest in Sharemax was appropriate. The applicant's negligence, as found by the Ombud, relates to his conduct in presenting Sharemax as a suitable investment to the Wilkens, bearing in mind the latter's financial risks and profile. In this regard, the applicant was found to have flouted the code. The Ombud concluded further that the applicant, as

a financial service provider (FSP) breached his legal duty of care by advising the Wilkens to invest in a Sharemax / Villa Property Syndicate and the resultant loss of their investment was caused by the FSP's negligent advice. The Ombud found that the reasonable competent FSP at the time of providing advice should reasonably be expected to foresee that in the event of a breach of the aforementioned legal duty of care, client would suffer harm and the harm would be a possible loss of client's capital. The applicant's conduct was found to have fallen short of that of a reasonably competent FSP and it was both legally and factually the cause of the applicant's loss.

ANALYSIS

[20] The issues in this matter revolve around negligence and causation. We have to consider whether the Ombud disposed of the matter with due application of the law ("the financial sector law") on the facts presented to her or whether the applicant's submissions warrant that the determination of the Ombud be set aside. The critical question before the Ombud, for purposes of awarding the capital amount as damages in favour of the Wilkens, was to establish whether a reasonable FSP could have foreseen the intervention by the South African Reserve Bank ("the SARB"), which resulted in the collapsing of the Sharemax scheme and the subsequent loss suffered by the complainants. Furthermore, whether it was appropriate for the FSP to advise the Wilkens to invest in the high risk investment where the risk is apparent from the terms of the prospectus. The fundamental

purpose of the FAIS Act (see: section 16), the rules and the code is to regulate the rendering of financial advisory and intermediary services to consumers to ensure that a potential investor can make an informed decision. If the available evidence can show that the client was in fact in the position to have made an informed decision, then the key purpose and requirements of the Act and the code shall have been met.

[21] Item 3 (1)(a)(xi) of the Code requires that representations made and information provided to the investor should be in plain language and avoid uncertainty of confusion.

[22] Item 7 of the Code requires significant information to be provided to a potential investor and it places an onerous obligation on providers from a product disclosure point of view because it contains very wide requirements such as disclosure of *'all material financial product information'* to a potential investor to enable an investor to make an informed decision. It requires a full and frank disclosure of any information that would be reasonably expected to enable an investor to make an informed decision. In our view, providing a prospectus to a prospective client without proof that the client has read the prospectus and understood it or that an explanation was made to the potential investor about the content of the prospectus and that the explanation was understood, cannot be considered to have complied with the obligations or requirements of Item 7.

[23] Item 9 of the Code requires an FSP to maintain a Record of Advice ("ROA"). Section 3 (2) of the Code prescribes the method, systems and procedures relating to record keeping. The ROA required by item 9 of the Code relate to the issues referred to in Item 8 of the Code which relates to *"suitability"* of advice provided by an FSP to a client. Item 9 prescribes what the ROA must contain a *"brief summary"*. It is therefore clear that the provisions of Item 9 of the Code are there to ensure that there are some form of document or proof to indicate what the investors' needs were, the options considered to enable the potential investor to make an informed decision, and the research for recommending a particular product or products. Most importantly, for purposes of this matter, the record of advice should also contain information with regards to the financial product recommended to the potential investor with an explanation of why that product has been selected. Or is likely to satisfy the client's identified needs and objectives.

[24] It is common cause that the applicant has failed to maintain a record of advice and has therefore failed to comply with Item 8 and 9 of the Code as he was unable to produce the record of the information in respect of what was supplied to the potential investor, what was discussed in order to assist and lead the investor to make an informed decision. Accordingly, the applicant is evidently at fault to have recommended a product that appears to have carried high risk without having satisfied himself by way of producing evidence before the Ombud or this Tribunal that the product was suitable to the Wilkens' risk profile taking into account their financial needs.

[25] The prospectus does not in itself conclusively constitute a recordal of actual discussions between the applicant and the Wilkens. Furthermore, it does not clearly show the purport and the nature of the questions raised by the Wilkens and how they were addressed and as such the process conducted did not satisfy important compliance issues. In the matter of **JC Mostert v L. Landman and the Ombud**[3], this Tribunal stated that it maintains the view that the provision of the code or conduct, apart from anything else, can be considered to be an implied term of the mandate or conduct between the FSP and the client. In this regard a reference was made to the decision of **CS Brokers CC and Others v Ian Mare and Another (CS Brokers)**, where Harms J, stated the following with regards to the contract between an FSP and the client: *"the contract requires of the FSP to give advice with appropriate degree of skill and care, i.e., not negligently. Failure to do so, i.e., giving negligent investment advice, gives rise to liability if the advice was accepted and acted upon, that it was bad advice, and that it caused loss. In deciding what is reasonable the court will have regard to the general level of skill and diligence possessed and exercised at the time by the member of the branch of the profession to which the practitioner belongs".*[4]

[26] For reasons stated above this Tribunal finds that the applicant has not complied with Item 9.1 and 9.2 of the code of conduct as the summary referred to in the said items that form part of the record of advice did not meet the requirements as envisaged in the above items of the code of

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3 Case Number: FAB 127/2018.

4 CS Brokers CC and Others v Ian Mare and Others, case number: FAB 5/2016.

conduct. Neither can the fact that the applicant handed a copy of the prospectus to a client absolve him from explaining the risk to the client, that are pertinent to the investment to the client. The applicant breached the implied terms of his mandate as contained in Items 7.1, 9.1 and 9.2 of the code of conduct.

[27] Further, Item 8 of the code requires that the applicant should, prior to advising a client, take a number of steps in order to arrive at the appropriate financial product. Those steps, *inter alia*, involved the risk profiling of the clients and their financial needs assessment required to be done. The record before us does not reflect that such risk profiling and financial needs assessment was made by the applicant. In this regard, we are in agreement with the Ombud's finding that the applicant has failed to ensure that the Wilkens invested in a product that was appropriate for their needs and is consistent with their tolerance for the risk. In our view, the applicant has failed to give advice with the appropriate degree of skill and care and has therefore acted negligently with his advice to the Wilkens.

[28] Primarily the general code of conduct requires that the applicant places the interests of the Wilkens as first and foremost when rendering financial advice. There is no proof that the applicant has discharged this duty. The duty to render financial service in the interest of the Wilkens should go beyond the applicant's averment that a copy of the prospectus was received by the applicant. The applicant needed to prove that these duties have

been discharged by complying with the various provisions of the general code and the applicant has clearly failed to show such compliance.

[29] This Tribunal found in the matter of **Johan Nel CC and Another v Heloise Aletta Stephina Jackson and Two Others**, that in determining liability for loss occasioned by the party who follows the advice of a financial service provider, regard must be had to the duties borne by such a financial service provider[5]. The Tribunal considered the duties imposed on FSB by Item 2, Item 7 and Item 8 of the general code. Accordingly, we are satisfied that the finding by the Ombud in this matter against the applicant is justified.

[30] It is evident from the determination that the Ombud considered what a competent FSP should have done in ensuring that the complainants understood the investment and appreciated the risks involved. These considerations simply accord with the duties borne by the applicant in terms of the general code.

CAUSATION

[31] Having established that factual causation existed with regards to the finding on the applicant's failure to comply with the general code and the rules, legal causation remains an aspect that should be decided in this matter. The applicant alleges that the issue of causation was not extensively dealt

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5 FAB: 38/2020 at para 16.

with in the determination and that the Ombud made material mistakes with the finding that legal causation existed.

[32] In terms of the Ombud's determination, it is held that legal and factual causation was established as the Ombud maintained that the applicant's advice that led to the loss suffered by the Wilkens is sufficiently linked to the applicant's failure to render proper financial services and as such that failure should attract legal liability. The Ombud concluded that the financial loss of the Wilkens as investors was not caused by the intervention of the South African Reserve Bank but it was caused by the applicant's advice to the Wilkens and also the fact that the funds received from the investors were withdrawn from the Trust account resulted in the inability of the property syndication scheme to return to the investors their capital when directed to do so by the Reserve Bank.

[33] The Ombud made a finding that the applicant further contravened Notice 459 which required that the property syndication scheme should hold funds received from investors in a Trust account and only to be withdrawn from the Trust account in the event of registration of the transfer of the property in the name of the syndication vehicle. Applicant contended that Notice 459 does not apply to the property syndication scheme. The Ombud relied on the decision in **Oosthuizen v Castro and Another 2018 (2) SA 529 (FS)** for ordering the applicant to pay the amount of loss suffered by the complainants. The applicant challenged the applicability of **Oosthuizen v Castro** and contended that the facts in that matter are distinguishable from

the facts in the present matter. In our view, to the extent that in the Oosthuizen matter, the FSP did not contest the evidence against him, and the plaintiff gave evidence and presented expert evidence uncontested makes the facts of that matter distinguishable from this matter. In particular, the FSP referred his claim to his professional indemnity insurers who were also a party to the proceedings but did not challenge the evidence on the facts. Its defence was on enforcing an exclusion clause contained in the professional indemnity insurance policy. In the result, we find merit in the applicant's submission that Oosthuizen case with its distinguishable facts cannot serve as authority on the aspect of causation.

[34] In **Symons NO v Robroy Investments CC t/a Assetsure 2019 (4) SA 111 (KZN)** the court found that the collapse of the property syndication scheme was caused by the intervention of the SA Reserve Bank and was not due to negligent advice of the FSP. This Tribunal has in many cases followed the conclusion that the FSP could not have foreseen at the time of rendering his advice that the SA Reserve Bank would intervene and caused the collapse of the scheme. This was due to the fact that Symons held that the cause of the collapse of the scheme was the intervention of the SARB. The court further held that Sharemax was receiving deposits from investors in contravention of the Bank Act and ordered it to refrain from receiving further payments and to return all payments received to the investors. The court further held that this was not a foreseeable risk and as such the requirement of legal causation had not been established.

[35] The evidential material presented to this Tribunal as to the reasons for the collapse of the scheme, according to the applicant, have remained the same and those facts and the contentions remain uncontroverted. We are therefore not in a position from these similar facts about the collapse of the scheme, to make a conclusion that the risk was reasonably foreseeable and that the applicant should have appreciated that. This conclusion would not be legally sustainable.

[36] Although we make the finding that the code was not adhered to resulting in rendering of inappropriate advice by the applicant, this does not mean that the applicant's wrongful act (breaching the code of conduct) is sufficient to establish liability. For liability to be present, the applicant must also have acted negligently, in other words, he must have acted differently from the way in which a reasonable FSP would have acted under the same circumstances.

[37] We are however, of the view that the provision for the award of compensation in terms of section 28 of the FAIS Act did not contemplate an award for damages which follows upon the presence of evidence establishing liability in delict or contract. The applicant's failure to comply with the general code and the rules by which a competent FSP is obligated to comply should lead to an award of compensation, the quantum of which should be at the discretion of the Ombud.

[38] It should however be borne in mind, that the legislature has anticipated that a strait jacket remedial approach may not be suitable in all cases to provide relief for the prejudiced complainant. For this reason, a provision in section 28 (1)(b)(i) should not in our view, be interpreted to be a reference to the competence to award repayment of the amount of the investment. The section states:

> *"the complainant may be awarded an amount as a fair compensation for any financial prejudice or damages suffered."*

[39] Where the FSP like the applicant has not complied with the code and the non-compliance has caused prejudice to the complainants (the Wilkens), we see no reason that precludes the Ombud to impose an appropriate and just monetary award that serves the interest of justice and fulfils a *"fair compensation"* for a financial prejudice suffered.

[40] It seems to us, the moment the Ombud considers to make a determination that she may have to make an award of damages, then in that instance she will have to follow an applicable court procedure or if she formulates a view that it is more appropriate to refer the complaint to court, decline to deal with the complaint and refer it to court.[6]

[41] In this regard, the application for reconsideration must succeed and the decision of the Ombud is accordingly set aside. The matter is referred back

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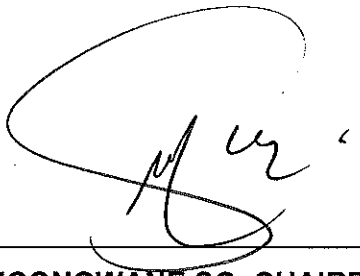
[6] FAIS Act, Section 27 (3)(c).

to the Ombud with the proposition that the Ombud considers the applicability of section 28 of the FAIS Act, in relation to the award of discretionary compensation payable by the FSP due to grounds of non-compliance with the FAIS Act, general code and the rules.

[42] The order:

[42.1] The application for reconsideration is granted and the decision of the Ombud is set aside and the matter is referred back to the Ombud for further consideration.



AT NCONGWANE SC, CHAIRPERSON

With the panel consisting of:
Mr PJ Veldhuizen and
Adv SM Maritz