

THE FINANCIAL SERVICES TRIBUNAL

Case No.: **FAB59/2019**

In the matter between:

DFF PROPERTY AND INVESTMENTS CC

1ST APPLICANT

T/A BERGSMA & VAN HEERDEN BROKERS

HENDRIK LODEWYK ERWEE

2ND APPLICANT

and

DELORUS KIES

1ST RESPONDENT

OMBUD FOR FINANCIAL SERVICES

2ND RESPONDENT

PROVIDERS

Tribunal: HMS Msimang

J Damons

Z Mabhoza

Summary: Application for reconsideration of the Ombuds determination in terms of section 230 of the Financial Sector Regulation Act, Act no. 9 of 2017.

DECISION

1. This is an Application for the reconsideration of the Second Respondent's determination made on the 28th January 2019 in terms of Section 28(1) of the Financial Sector Advisory and Intermediary Services Act, Act No. 37 of 2002 ("FIAS" Act) in favour of the First Respondent.
2. The First Applicant is DFF Property and Investments CC t/a Bergsma and Van Heerden Brokers is an authorised Financial Services Provider "**FSP**". The Second Applicant is Mr Hendrik Lodewyk Erwee, "Mr Erwee", a key individual and at all material times a representative of the First Applicant who rendered services to the First Respondent.
3. The First Respondent is Mrs Doleres Kies "Mrs Kies" an adult female pensioner and the Second Respondent is The Ombud for Financial Services Providers.

FACTS

4. In summary during 2008 Mrs Kies approached Mr Erwee to invest the sum of **R700 000.00 (Seven Hundred Thousand Rand)** from the proceeds of her deceased sons' pension and her own Pension into **two property syndication schemes** as follows:-

4.1 **R500 000.00 (Five Hundred Thousand Rand)** was invested in the **Highveld Syndication (Pty) Limited "PIC"** which started on the 3rd November 2009 and was premised on the fact that it provided good returns and that the full capital together with interest would be accessible in 5 years.

4.2 **R200 000.00 (Two Hundred Thousand Rand)** was invested in the **Zambezi Retail Park Holdings Limited promoted by Sharemax Investment (Pty) Limited (“sharemax”)** which started on the 19th November 2009 with a monthly income of R2000.00

5. The Property Syndication started having problems during August 2010 when the income from Zambezi ceased. According to paragraph 11 of **The Recommendation** Mrs Kies is currently receiving a monthly income of R1 514.20 from investment of R500 000.00 with the **“PIC”**.
6. Mrs Kies filed a complaint with the Ombud on the 26th November 2011. The Ombud referred the complaint to the Applicants for their attention and response. The latter drew the attention of the Ombud to the requirements that the parties must first attempt to settle the matter on their own before the Ombud could accept the complaint officially.
7. In response the Ombud referred the matter to the parties to try and resolve same before officially accepting the complaint.
8. On the 12th March 2012 Mrs Kies sent a fax to the Ombud wherein she stated, *inter alia*, the following:

“The Sharemax-Zambezi is still a problem

The **PIC** investment of R500 000.00 is no longer a problem. I have signed an HS22 Option Forms from PIC. This will give me an income of R2 881.00 per month for

five years and then the R500 000.00 capital (R576 216.00) will be paid out in December 2016 (see copy attached)".

9. The HS22 option form is attached at page 97 of part B of the bundle. It indicates that she elected to invest R576 216.00 and opted for option 1 to receive monthly interest. The form does not indicate how much interest she was supposed to receive.
10. According to Mrs Kies she was to receive an income of R2 881.00 monthly and according to the ruling of the Ombud she is receiving R1 514.20.
11. There were exchanges of e-mails which culminated with the e-mail from the Ombud of the 21st September 2012 which confirmed that the period to resolve the complaint had expired without the complaint been resolved and that in terms of Section 27(4) of the Financial Advisory and Intermediary Services Act 37 of 2002 ("FAIS Act") the matter had now been formally accepted for investigation.
12. On the 6th March 2018 the office of the Ombud made recommendation in terms of Section 27(5) of the FAIS Act 37 of 2002 which recommended that the Applicants pay the loss of R700 000.00.

13. The Applicants did not respond to the recommendation and on the 28th January 2019, the Ombud made a Determination in terms of Section 28(1) of the FIAS Act. The Applicants were ordered to pay Mrs Kies the sum of R500 000.00 in respect of HS22 and R200 000.00 in respect of Zambesi Retail Limited.

THE ISSUES

14. The Applicant raised the following issues for consideration:

- 14.1 Prescription;
- 14.2 Licensing;
- 14.3 Negligence;
- 14.4 Double compensation and;
- 14.5 Causation.

PRESCRIPTION:

15. The Applicants allege that the Ombud had no jurisdiction to adjudicate this matter as it had prescribed in terms of Section 27(1) which provides 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 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.

16. The crux of the Applicants argument is that :

16.1 The conduct complained of occurred at the time of the investments which occurred on 16th October 2008 and 5th November 2008 respectively.

16.2 The 3-year period lapsed on 5th November 2011; and

16.3 The complaint was only received on 21st September 2012.

17. In the light of the above it was argued by Ms Vorster, who appeared for the Applicants that the complaint has become prescribed and the Ombud was obligated to decline the investigation of the complaint and could not have made a determination.

18. A question was put to Ms Vorster when does she allege that prescription started running in this matter. She responded that as Mrs Kies alleged in her complaint that she would have cancelled the contract during the cooling off period had she been properly advised that prescription should have started running from the inception of the policies and the matters would have prescribed at least on the 5 November 2011.

19. It was pointed out to Ms Vorster that according to the complaint Mrs Kies only realised that there were problems in August 2010. Ms Vorster conceded that a complaint could only have been made once the problem has arisen. Prescription

only started to run in August 2010 once the problem had been realised. However, she insisted that the matter had prescribed.

20. One must look at the complaint holistically and not cherry pick clauses that seem to suggest only one aspect. Prescription in this matter could have only started to run in August 2010 and the matter could not have prescribed on the 21st October 2012 as suggested by the Applicants. There is no substance in the Plea of Prescription and it is dismissed

LICENSING

21. The issue whether Mr Erwee had the necessary licence to render the services was discussed and the necessary licence was provided. We are satisfied that he was authorised to provide the financial services rendered. The decision of the Ombuds on the issue of licensing is set aside.

DOUBLE COMPENSATION

22. The Applicants raised the issue of double compensation in respect of the **PIC** investment of R500 000.00 (Five Hundred Thousand Rand). The Applicants relied on the fax sent by Ms Kies on the 12th March 2012 to Ilne Potgieter wherein she stated the following:

*“The PIC Investment of R500 000.00 is no longer a problem. I have signed on **HS22 Option Form** from **PIC**. This will give me an income of R2881.00 per month for five years and then the R500 000.00 capital (**R576 216.00**) will be paid out in December 2016 (copy attached)”.*

23. The Applicants could not provide any information that Ms Kies had indeed settled the matter with **PIC** and that she had in fact received her capital back. We were informed at the hearing that **PIC** is still in Business. There is uncertainty as to exactly what happened with this investment. According to the **Recommendation** Mrs Kies is currently receiving an income of R1 514.00. However, Mrs Kies denies ever having received any income or her capital.

24. The Status of this investment is unclear. At the hearing of this matter Counsel for the Applicant alleged that the **PIC** investment is still intact. Attempts were made to contact **PIC** to establish the true position to no avail. The Tribunal was advised that the position would be ascertained and an e-mail to explain the position would be forth coming. No e-mail has since been received. It appears that this issue has to be cleared by the office of the Ombud and that on this basis alone this matter should be remitted to the office of the Ombud for reconsideration.

25. An e-mail has just been received from the Applicants attorneys which states the following:

“My client confirmed that they were able to confirm telephonically that Mrs Kies’ shares in the PIC investment are being transferred/changed to shares listed on the JSE which will be marketable for sale once the transfer/change is complete”

This confirms that this matter must be remitted to the office of the Ombud for further investigation.

NEGLIGENCE

26. It was argued on behalf of the Applicants that the Ombud erred in finding that Mr Erwee was negligent in investing the funds in the property syndication. The main argument for the Applicant was that products were sold at the instance and request of Ms Kies. It was argued that Ms Kies was introduced by his previous broker Mr Botha to Mr Erwee as a very satisfied and successful sharemax client.
27. The fact that the previous sharemax investments were successful does not mean that all the sharemax investments would be successful. The previous investments were made at the advise of Mr Botha. The Applicants could not say what advise was provided and what considerations were taken by Mr Botha. It cannot be said that the nature and the circumstance of all investment were the same.
28. In terms of paragraph 3(1)(a)(iii) of the General Code of Conduct for Authorised Financial Services Providers and their Representatives provides that:

“when a provider renders a financial service, representations made and information provided to a client by the provider must be adequate and appropriate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed level of knowledge of the client”

29. It is clear from the code that the product must be adequate and appropriate in the circumstances of the particular financial service. The Financial Services provider should give appropriate advice and not sell products off the shelf. **See CS Brokers and Others V Wallace at paragraph 23 and 24 Mr Justice Harms** states the following:

*“ 23 - We repeat that the liability of the **FSP** to a client is usually based on a breach of contract. The contract requires of an **FSP** to give advice with appropriate degree of skills 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. And 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 members of the branch of the profession to which the practitioner belongs.*

*24 - The provisions of the General Code of Conduct for Authorised **FSPs**, apart from anything else, can be considered to be implied terms of the mandate. The Code obliges an **FSP** to advise clients about “any material investment risk associated with the product” and must identify the appropriate financial products that fit the client’s risk profile and financial needs and the FSP must take reasonable steps to ensure that the client understands the advice and is in a position to make an informed decision”.*

30. The Second Applicant does not indicate that the advice was appropriate and Ombud was correct that there was negligence under the circumstances.

CAUSATION

31. It was argued by Ms Vorster on behalf of the Applications that even if Mr Erwee had explained to Mrs Kies the various risks of the investment she would nevertheless have made the investment. She argued further that Mrs Kies would have made the investments irrespective of whether or not Mr Erwee explained the risks to her.

32. As indicated above in paragraph 29 and the matter of CS Brokers the loss was occasioned as a result of breach of contract between the broker and the client and that the Applicants should be liable for the loss.

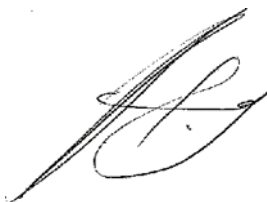
We are of the view that this matter should be referred back to the office of the Ombud.

THE ORDER

In the result, we make the following order:

The matter is referred back to the office of the Ombud.

SIGNED at **PRETORIA** on this **17th** day of **JANUARY 2020** on behalf of the Panel.



MR HMS MSIMANG