THE FINANCIAL SERVICES TRIBUNAL

Case No: FAB130/2020
FAIS 07507/11-12/FS1

In the matter of:

ERNEST LEHAINE t/a ERNEST VENTER MAAKELAARS **Applicant**

and

JOHANNES FREDERICK KRUGER **First Respondent**
THE OMBUD FOR FINANCIAL SERVICES PROVIDERS **Second Respondent**

DECISION

Tribunal:	Adv A.T. Ncongwane SC (Chairperson), Mr J. Damons, and Adv S. Maritz, (members)
Date of hearing:	06 May 2021
Date of decision:	21 June 2021

Appearances:

On behalf of the applicant:	Mr P. Bielderman (from Bieldermans Incorporated)
On behalf of respondents:	No appearance

Summary: Application for reconsideration in terms of S. 230 of FSR Act 9 of 2017. FSP breached contractual mandate as regulated by the Code. Legal requirement of causation - loss not foreseeable.

INTRODUCTION

[1] This is an application for reconsideration of the decision of the Ombud for Financial Services Providers ("the Ombud"), in terms of s. 230 of the Financial Sector Regulation Act No 9 of 2017 ("FSR Act"). In his application, the applicant submits that " the application for reconsideration is in effect the noting of an appeal as envisaged in s. 28 (5) of the FAIS Act. The proceedings are appositely dealt with in terms of the powers the Tribunal can competently exercise under s. 232 of the FSR Act. The Ombud sought to submit a document in which she seeks to indirectly defend her own decision. To this end, the Tribunal does not have the authority to allow and consider such a document. The documents flouts proper procedures and is in conflict with the proper conduct of the proceedings under s. 230 applications. It will therefore, not be taken into account and does not form part of this decision.

[2] The applicant is aggrieved by the determination issued by the Ombud on the 28th January 2019[1], in terms s. 28 (1) of the FAIS Act and accordingly seeks reconsideration of that decision. The applicant received the decision on the 6th of March 2019 and the application was launched on the 4th of November 2020. For the late submission of the application, applicant seeks

[1] See page 44 of the record, determination in terms of S. 28 (1) of the FAIS Act.

condonation in terms of s. 230 (2)(b) of the FSRA, read with Rule 30 of the Rules of the Services Financial Tribunal ("Tribunal Rules"). The applicant acted immediately on becoming aware of the determination by instructing attorneys on the 7th of March 2019 to proceed with an application for reconsideration.

[3] In his application for condonation, applicant relies on the remissness of his erstwhile attorney, who after receiving instructions from the applicant, failed to lodge the application. The applicant believed that his matter was attended to by the attorney and constantly received assurances from his attorney, Mr van der Merwe, that the matter was *"in order and up to date".* An affidavit deposed to by Mr van der Merwe[2], where he confirms his laxity by giving a full account of his repeated failures to assist the applicant within a period of six months is used to support the application. The applicant submits that he relied on the professional services of his attorney to deal with the matter and to prepare the application. He held various meetings with the attorney and counsel, and was assured by his attorney that the matter is being attended to. Applicant further submits that he did not leave the matter exclusively in the hands of his attorney. He eventually lost all his confidence to his erstwhile attorney and on the 1st of October 2020, the current attorneys on record, formally took over the matter and discovered that applicant's previous attorneys had not lodged the application. We are satisfied that good cause exists for the granting of the applicant's application for condonation. It is quite evident that in the interest of justice

---

2 Affidavit by Mr van der Merwe, page 51 of the record, Annexure "E".

that condonation should be granted and we are satisfied that reasonable explanation has been proffered.

POINT IN LIMINE

[4] The applicant raised a point *in limine* as follows: [3]

[4.1] In terms of s. 27 (5)(c) of the FAIS Act, the Ombud together with the Deputy Ombud is empowered to issue a recommendation.

[4.2] In this matter, the recommendation[4] was neither issued by the the Ombud nor by the Deputy Ombud in compliance with the requirements of s. 27 (5)(c) of the FAIS Act, but rather issued by an official within the office of the Ombud, Mr Marc Julio Alves ("Mr Alves"), who is described, as a *"team resolution manager".*

[4.3] That the Ombud's determination[5] is entirely based on the purported recommendation by Mr Alves, who is not the Ombud or the Deputy Ombud. Accordingly the Ombud simply confirmed the recommendation by Mr Alves.

[4.4] That there is no indication whether the *"findings"* are those of the Ombud or the Deputy Ombud applying its *"independent mind"* as required by s. 27 of the FAIS Act, alternatively that the Ombud simply

---

3 Applicant's application for reconsideration, Record Part A, para 4.1 to 4.3, pp8 to 9. See also applicant's heads of argument, para 30, pp 6.

4 See the Record Part A, Annexure "A", pp 31 to 43.

5 Ombud's determination: Record Part A. Annexure B, pp44 to 46.

adopted the *"findings of Mr Alves"* and as such the recommendation is not a recommendation in terms of s. 27 (5)(c) of the FAIS Act and cannot inform the determination.

[4.5] That there is no indication that the Ombud obtained any personal knowledge of the factual circumstances to determine whether the Ombud agreed with the *"findings"* or views of Mr Alves.

[5] This point calls for close scrutiny of the relevant provisions of s. 27 (5)(c) of the FAIS Act and the principle obtainable from the provision of the section. Prior to doing so, the record shows that the Ombud signed a determination *"based on the findings"* set out in the recommendation by Mr Alves.[6]In essence the applicants point *in limine* boils down to the following, namely,

[5.1] Whether Mr Alves was competent to conduct the investigation into the matter on behalf of the Ombud and thereafter prepare a recommendation in terms of s. 27 (5)(c) of the FAIS Act or whether it is only the Ombud and/or the Deputy Ombud who are competent to conduct such investigations and make findings.

[5.2] Whether the Ombud and/or Deputy Ombud should have regard to further information / documentation submitted by the applicant and should have conducted an independent investigation after the recommendation was issued by Mr Alves and only thereafter applied

---

6 See the Record Annexure B, page 45, para Conclusion.

its mind before issuing a determination and not only relying on the *"findings"* of Mr Alves.

[6] The applicant contends that in terms of s. 27 (5)(c) of the FAIS Act only the Ombud or the Deputy Ombud is empowered to issue a recommendation. It is therefore necessary to quote the section *verbatim.*

"5(c) The Ombud – may, in order to resolve a complaint speedily by conciliation, make a recommendation to the parties, requiring them to confirm whether or not they accept the recommendation and, where the recommendation is not accepted by a party, requiring that party to give reasons for not accepting it: provided that the parties accept that the recommendation, such recommendation has the effect of a final determination by the Ombud, contemplated in s. 28 (1)."

[7] In addition to what is stated in s. 27 (5)(c) of the FAIS Act, s. 27 (5)(d) of the Act reads as follows:

[7.1] "5 The Ombud –

(d) may, in a manner that the Ombud deems appropriate, delineate the functions of the investigation and determination between the various functionaries of the office."

[7.2] Furthermore, s. 27 (5)(e) of the FAIS Act states that the Ombud may, on terms specified by the Ombud, mandate any person or tribunal to perform any of the functions referred to in paragraph (d).

[9] It is clear, from the above that the Ombud is empowered to perform the investigation and recommendation itself alternatively it is empowered to delineate the functions of investigation and determination to the various

functionaries of the office and/or to mandate any person to perform any of the functions referred to in sub-section (d). It is common cause that Mr Alves is and was an official within the office of the Ombud, who is described as a *"team resolution manager"* and as such he is at all relevant times a "functionary" within the office of the Ombud.

[10] It is therefore possible that the statutory powers that vest in the Ombud can of necessity be exercised by delineating the functions of conducting an investigation into the matter and to write a subsequent recommendation thereon by Mr Alves. It was not necessary for the Ombud and the Deputy Ombud to conduct such an investigation and write the recommendation prior to issuing its determination and that office could rely on *"findings"* made by Mr Alves in his recommendation.

[11] As the result, this Tribunal finds no merit in the applicant's point in limine.

GROUNDS OF APPEAL

[12] The applicant contends that the Ombud, in investigating an issuing her determination did not act independently, impartially and objectively, thus resulting in issuing a determination that is unfair, unlawful and breach of applicant's rights. The Ombud erred by allowing her desire for disposing of the matter in an *"economical and expeditious manner"* as required by s. 23 and 24 of the FAIS Act to triumph the applicant's s. 34 constitutional right.

[13] It is argued that the Ombud had proceeded to issue a determination against the applicant without the necessary factual or experts' evidence to hold the applicant liable for the loss of the first defendant or to establish in law, the elements of liability.

[14] It is argued that the Ombud should not have determined the matter where there are material factual disputes between the parties and should have used the well-established principle to make a determination where there are factual disputes or alternatively should have declined to investigate the dispute as she was obliged to exercise her discretion in terms of s. 27 (3) (c) and referred the dispute to court.

[15] Applicant submits that the Ombud failed to apply - *audi alteram* partem – by not providing the applicant with all the information or responses the Ombud received from the respondent.

[15.1] The Ombud is said to have failed to determine the standard to be expected of the applicant and to test his conduct accordingly.

[15.2] According to the applicant, the Ombud should have obtained expert evidence in this regard, as the Ombud is not an expert, and

[15.3] Lastly, the Ombud erred by concluding that the investment scheme was unlawful and illegal.

THE OMBUD'S DETERMINATION

[16] The Ombud conducted her investigation, gathered all the evidential material and produced the impugned determination.[7] The applicant's version was also considered by the Ombud and the determination was premised from the common cause fact that the investor or the first respondent was a pensioner on a state sponsored pension and he had limited funds that he could not afford to lose.

[17] The Ombud made a finding that there was no justifiable reason for the applicant to have recommended this extra-ordinary high risk investment to the investor, when she should have known that the investor had no capacity to absorb the risk.

[18] The Ombud further noted that *"the prospectus made provision for disbursing investors' funds to pay for the entire shareholding of The Villa Retail Shopping Investments (Pty) Ltd ("The Villa (Pty) Ltd)"), from Sharemax. There is no detail of the concomitant benefit for investors, neither is the full purchase price noted anywhere in the prospectus."*[8]

[19] In paragraph 23, of the recommendation ("the determination") it is stated that, *"the prospectus disclosed (in paragraph 4.3) that investor funds will be lent to the developer, Capicol 1 via the Villa (Pty) Ltd, a subsidiary of the group Sharemax, well before registration of transfer of the immovable*

---

7 See the Record, Annexure B, pages 44 to 48.
8 See the Record, page 37 para 21 and 22 of the Determination.

property into the name of the syndication vehicle." A finding is further made by the Ombud by pointing to the conflicting significant provisions of paragraphs 19.10 and 4.3 of the prospectus. Firstly, paragraph 19.10 of the prospectus states that the funds collected from the investors would remain in the trust account in terms of s. 78 (2A) of the Attorneys Act. Investors' returns would be paid from the interest generated by the trust account.

[20] Secondly, paragraph 4.3 however, conveys that the funds would not stay long enough in the trust account with 10% being released after the cooling off period of 7 days to pay commissions. This statement is also made in the application form that investor had to complete in applying for the investment. This was correctly found by the Ombud to be in violation of Notice 459. The prospectus is unequivocal that the funds will not stay long enough in the trust account to accumulate any interest that could have been of benefit to the investor. Therefore the interest purportedly to have been payable on the investment in line with s. 78 (2)(A) of the Attorneys Act would not have materialised, as the funds were to be withdrawn from the trust account after ten days to fund commissions and subsequently, to fund the acquisition of the immovable property.

[21] According to the Ombud, the investors' funds, as per the agreement, were moved from The Villa Ltd to The Villa (Pty) Ltd in advance to the development of the shopping mall. The payments were made well before transfer of immovable property, and thus were in violation of the provision of Notice 459. At the time of the releasing of the prospectus of The Villa Ltd,

Sharemax had already advanced substantial amounts to the developer in line with this agreement. These pertinent findings have not been challenged by the applicant in this application.

ISSUES AND THE LAW

[22] The primary issue in this application is to be addressed from a dichotomy of two distinct, but related questions, namely:

[22.1] Did the conduct of the applicant, when writing the investors' investment, comply with the requirements of the FAIS Act, the Rules and the Code of Conduct for Authorised Financial Services Providers and Representatives?

[22.2] If not, what would a reasonable FSP have done when proffering advice to the investor? Did the applicant meet this test?

[23] The fundamental purpose of the FAIS Act, the Rules and the Code is to regulate the rendering of financial advisory and intermediary services to consumers and to ensure that a potential investor can make an informed decision.

[23.1] Section 16 of the FAIS Act read with Items 2,3,7, 8 and 9 of the Code were designed to ensure that an investor is in fact placed in a position to make an informed decision and in particular, that this very purpose

is in practice achieved. The prescripts of these provisions enjoin the FSP to deal with the prescribed issues, which if complied with, should result in an investor being in a position to make an informed decision. All the available information and records must in this context be taken into account.

[23.2] Item 2, part II of the Code states that a provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interest of clients and the integrity of the financial services industry.

[23.3] There can be no compliance with Item 2, if an FSP does not know the product that he recommended. An FSP will therefore need to gather relevant facts about the product and product provider, so that the FSP is in a better informed position to assess the suitability and appropriateness of the product for the client. Such an assessment will alert an FSP to the risks inherent to the product. .

[23.4] Item 7 (1) of the Code provides that a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction be given to a client, and that a FSP must generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision. In particular, Item 7 (1)(c)(xiii) provides that any material investment or other risk associated with the product be disclosed.

[23.5] Item 8 (1) of the Code provides that the recommended products be appropriate to the client's risk profile and financial needs. The steps contemplated by this provision of this item of the Code can only be achieved by obtaining relevant information from the potential investor.

[24] Item 3 (1) (a)(ii) of the Code required representations made and information provided to the investor to be in plain language and avoid uncertainty of confusion. Item 7 of the Code (dealing with product information) requires significant information to be provided to a potential investor. Item 7 of the Code places an onerous obligation on providers of a product on a duty to disclose 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. Item 7 (1)(a) requires *"full and frank disclosure"* of *"any information"* that would be reasonably expected to enable an investor to make an informed decision. Importantly, Item 8 of the Code deals with the suitability of the advice given, provides *inter alia*, that an FSP, must prior to providing a client with advice:

[24.1] take reasonable steps to seek from the client appropriate and available information regarding the client's financial situation, financial product, experience and objectives to enable the FSP to provide the client with appropriate advice;

[24.2] conduct any analysis, for purposes of the advice, based on the information obtained; and

[24.3] identify the financial product or products that will be appropriate to the client's risks profile and financial needs subject to the limitations imposed on the FSP under the Act or any contractual arrangement.

[25] It is startling, to note that when the applicant was requested by the Ombud in a letter of the 16th November 2017[9] to state what information the applicant relied on to conclude that the investment is appropriate for the investor's risk profile and financial needs. The applicant's attention was drawn to the provision of Item 3 (2), (8) and (9) of the Code and the record evidencing that information was elicited from the investor including his financial circumstances was requested. The applicant failed to furnish this information and simply informed the Ombud in his response that his matter is the same as complaint no 06317/11-12/FS1 where an FSP was found not to have been liable.[10] Neither has the applicant produced any documents that shows that he has complied with s. 16 read with the Items or provisions of the Code that are referred to above, as support of his version in this application, but submits that by being required by the Ombud to answer these pertinent matters that are raised during the investigations the Ombud has flashed out the first respondent's complaint.

---

9 See the Record, pages 35 to 40, para 11.8.

10 See: applicant's letter dated the 16th November 2017, Record, page 45, para 3 *"Ek wil van die geleentheid gebruik maak om te verwys na klagte nr 06317/11-12/FS1 waarin my werkwyse dieselfde was en onaanspreeklil beslis is ".*

[26] We are of the view that there is no foundational basis for the applicant to cry foul for his failure to adhere to the FAIS Act and the Code. The Ombud has a statutory peremptory obligation to investigate the complaint received, to establish the facts in a legally fair, respectable manner and to make a rational quasi-judicial decision. In his heads of argument, notwithstanding that the applicant failed to furnish the information required, he contends that the Ombud failed to inform him of the issues that were relevant to the Ombud to determine the matter and which the Ombud intended to take into account in making the decision. The Ombud made repeated requests in the letters of the 17th June 2016 where the applicant was required to revert to the office of the Ombud with statements together with all documents that support his version and serve as evidence that he complied with the FAIS Act and the Code and was guided to deal with specific questions for purposes of the investigations conducted by the office of the Ombud.[11]And also the letter of the 16th November 2017 which has been referred to above and the applicant simply elected not to respond to the issues raised in these letters.

[27] Mr Bielderman argues that the prospectus evidences compliance and should serve as documentation envisaged in the FAIS Act and the Code. It is common cause that Sharemax was controversial. The applicant's expert Mr Swanepoel concedes to this statement. A reasonable FSP therefore would, in the face of the controversy, make it his or her business to determine whether such investment risk as indicated by the controversy,

---

11 See: letter of the 17th June 2016, Record pages 41 to 43.

could reasonably be offered as an option to a potential investor. In our view, the information elicited from the investor by the prospectus alone is deficient in detail and inadequate to meet the requirements of the FAIS Act and the Code. A reasonable FSP would still go further than the information called for by the prospectus and would have satisfied himself that the requirements of the Act and the Code are fulfilled. As it will further be made more explicit infra, the applicant has clearly not met this test.

THE SHAREMAX SCHEME

[28] From the record, the difference between the Villa scheme and the Sharemax as is dealt with in the opinion obtained from Mr Swanepoel,[12] who states that the Villa scheme (also applying to Zambezi) is set to be standard Sharemax scheme. The Sharemax is set to be a non-standard scheme. As appears from the prospectus, the Villa scheme differed from the standard Sharemax scheme in this important respect: whereas existing commercial properties with existing income streams were purchased in the ordinary Sharemax scheme, the Villa and Zambezi concerned the construction of new buildings. On the practical level, the important difference between the types of scheme, is that in the former, the investor pays for his or her investment into an attorney's trust account where the money is held until the special purpose vehicle receives transfer of the property. Only then is the payment made. In the latter, the funds invested by the investor would be used as funding for the construction of the building

12 See: the Record, Expert Opinion of Mr Swanepoel, page 61 para 24.

prior to the special purpose vehicle taking ownership of the completed building. Prospectus 16 explains that the investor would pay his or her funds into an attorney's trust account. The attorney would then control the payments to the developer ("Capicol") and will use these funds to construct the building. The scheme effectively cuts the bank out as the borrower and lender and allow the investors to lend directly to Capicol at the rate higher than what they would have received on deposit, but lower than what capital it would have to pay to its lender, the bank.

[29] As pointed our above, the Ombud made a finding that there was no evidence that the developer had independent funds from which it was paid interest, besides which, if the developer had a financial standing to borrow such large sums of money at 14% per annum, it would have gone to mainstream commercial sources. The conclusion, according to the Ombud, is ineluctable that the interest paid to investors was from their own capital.[13] This finding is not challenged by the applicant. Mr Swanepoel states in his opinion that there is a clear discrepancy between clause 19.10 which, on the one hand the prospectus propagates that monies received from the investors will be held in a separate interest bearing account opened and controlled by the attorneys in terms of s. 78 (2A) of the Attorneys Act of 1979, and on the other hand provides that the monies received from the investors will be advanced to the budget in the tune of R2.9 billion for property development and the transfer of such monies would take place even before the transfer of the property to a relevant syndicate vehicle. And

---

13 See: Record page 40, para 29 of the recommendation.

these payments were described as loans. Whilst the prospectus provides that the money would be retained in the attorneys trust account until the property had been transferred, on the other hand, it is clear from the very same prospectus, that the overall scheme of the prospectus is that the monies paid by the investors would be used and earn interest prior to transfer.

[30] The provisions of Notice 459 list the information that had to be contained in property syndication disclosure document. This included the disclosure that *"funds shall only be withdrawn from the trust account in the event of registration of transfer of the property into the syndication vehicle"*. This contradictory provision in the prospectus, in our view, is another indication that the applicant had no regard in ensuring that the Code and Notice 459 are complied with. The Investor should have been made aware that the amounts paid would be transferred to a syndication vehicle even prior to transfer of the property in the name of the syndication company that was meant to protect and control the investment. The provisions of the Notice 459 clearly appear not to have been applied. The Villa scheme was clearly far too risky and there were sufficient alarm bells that the Sharemax scheme in general and the Villa scheme in particular could not have been economically viable.

[31] The third part of the enquiry concerns the question whether the applicant objectively met the test of a reasonable FSP. This question should be looked into against the backdrop of the information of the FSP, that should

have been provided to the investor about the Villa scheme and what steps a reasonable FSP should have taken to ensure that such investor understood the risks involved. In this regard, the core question is whether the applicant would rely on the contents of prospectus in concluding that the investor could make an informed decision.

[32] We reiterate that s.16 of the Act confirms a key purpose of the Act, which is to ensure that the clients to whom the financial services are rendered are able to make an informed decision. If the available evidence can show the client was in fact in a position to have made an informed decision, then the key purpose of the Act and the Code has been met. The applicant contends that the Act and the Code however, do not prescribe or provide templates on how the objectives of Item 9 (the format of the Record of Advice ("ROA") can be achieved. He is of the view that the prospectus contains all material facts and relevant information that is required to allow a person to make an informed decision relating to the business model contained therein. We do not agree with the applicant in this regard.

[33] From the record, there is no independent record of advice that was produced by the applicant, which could serve as evidence that the applicant made a full disclosure to the investor about the investment and its risks, enabling the latter to make an informed decision. Apart from the signatures that were obtained from the investor on the prospectus documentation. The applicant has produced no other document or record of advice that the risks were explained to the investor.

[34] In his heads of argument[14], Mr Bielderman argues that the prospectus and the client mandate clearly sets out risks associated with the investment, the nature and the structure of the investment. By placing his signature on the document, the first respondent confirmed that he received, read and understood the prospectus. The applicant also relies on the certificate signed by the first respondent and the expert opinion expressed by Mr Swanepoel.[15]

[35] We are not satisfied by the fact that the applicant signed the client mandate and was handed a copy of the prospectus is sufficient evidence that he was put in a position to make an informed decision. Items 3, 7, 8 and 9 (1) (a) and (c) of the Code require more than the answers to the questions directed to the potential investor by the prospectus. Item 9(1)(a) to (c) require from the applicant, a brief summary of all information and material on which the advice is based, the financial products which were considered and the financial products recommended with full explanation why the product was selected. Item 9 (2) of the Code orders that the said summary should be provided to the investor.

[36] The applicant has not filed any summary of information compiled as foreshadowed in Item 8 and 9 of the Code. Failure to produce the summary leaves us with no other conclusion but to infer that there was no compliance with Item 8 and Item 9 (2) of the Code. The record is devoid of any

---

14 See: Applicant's heads of argument page 15 to 16, para 51.8 to 51.9
15 See: Applicant's heads of argument page 16, para 51.11.

evidence that indicates that the first respondent's attention was specifically drawn to the aspects that communicates the risks associated with Sharemax and the Villa investment and the implication of the contradictions that appear in the prospectus with the direct impact on the investment. Consequently, we are of the view that the applicant failed to comply with the peremptory provisions of Items 7 (1), 8, 9 (1) and (2) of the Code and in fact, breached the Code.

[37] The applicant submits that the risks were explained to the first respondent, not only by him but also by Sharemax consultant during a joint meeting.[16] The applicant does not avail to the tribunal any version about the assessment of financial needs and risk profiling of the first respondent. We do not know for instance, not only how was the risk profile determined but also the grounds or reasons relied on for being satisfied that the risk profile was consistent with the high risk investment. What was explained to the first respondent by Sharemax consultant is neither reflected in a document or confirmed under oath. We therefore agree with the Ombud's finding that the applicant failed to ensure that the first respondent invested in a product that was appropriate for his needs and appreciated the magnitude of the risk involved in the investment. The applicant went ahead with his recommendation, despite that the investment violated Item 8 (1)(c) of the Code. It is indeed correct that the applicant breached his duty to act with skill, care and diligence provided for by Item 2 of the Code.

---

16 Record page 18 para 5.21.3.

[38] Had the applicant discharged his duties as contemplated by the Act and imposed on the FSP by the Code in his dealings with the first respondent, the latter would have become aware of all the risks, thus would have made an informed decision. He might not have invested in the product if, due to the extraordinary high risk of the investment, he stood to lose his capital as a pensioner.

CAUSATION

[39] The Ombud found the applicant to be liable to the first respondent on the basis that the applicant did not adhere to the Code and if he had, the investment would not have been made in Sharemax by the first respondent.[17]

[40] The applicant contends that a breach of the Code does not constitute liability on the part of the FSP. According to the applicant, the standard against which the conduct of the FSP must be tested, must be established by way of expert's evidence.

[40.1] The applicant further contends that the Ombud erred by deciding, without any evidence, that factual and legal causation existed. The Ombud, so the argument goes, should have investigated the cause of the collapse of the Sharemax property syndication as to whether this

17 See: The Record page 42 para 39.

was reasonably foreseeable to the applicant, before the Ombud can form a conclusion to hold the applicant liable.

[40.2] We were referred to the often quoted court decision, in these matters, namely; the **Symons N.O. and Another v The Rob Roy Investment CC t/a Assetsure, 2019 (4) SA 112 KZP**, delivered by the honourable Ploos van Amstel J, where the court concluded that the loss suffered by the plaintiff does not seem to be linked sufficiently closely or directly to any failure on the FSP's part to explain the risk of the investment to Symons. The court stated that the risk had nothing to do with the intervention by the South African Reserve Bank.[18]It follows that, so it was further held by Ploos van Amstel J, that even if it can be said that Griffin failed in his duty to understand the scheme better and to explain the potential risk to Symons, any such breach was not causally connected to the plaintiff's loss. Leave to appeal in the Symons matter was refused by both the court *a quo* and by the Supreme Court of Appeal.

[40.3] The Symons case therefore appears to be a guiding light on the aspect of legal causation which issue appears not to have received much attention in the **Oosthuizen v/s Castro**[19] matter. Similarly in this matter, the fact that the applicant failed to adhere to the provisions of the Code, and breached his statutory duty, may not be a condition *sine qua non* of the respondent's loss. With the Reserve bank introducing a

---

18 Symons supra, pg 124 para G and H.

19 Oosthuizen v Castro and Another 2018 (2) SA 529 (FB). This case was upheld on appeal in Centriq Insurance Co Ltd v/s Oosthuizen and Another 2019 (3) SA 387 (SCA).

novus actus interventions, causing the breach of the mandate to be remotely connected to the loss. The breach does not *ipso facto* prove that the failure to explain the potential risk was causally connected or closely linked to the first respondent's loss.

CONCLUSION

[41] We conclude by restating that the applicant did not make a frank and full disclosure of the information about the investment, that in all likelihood could expose the first respondent to a high risk that could cause him loss of his money. In this regard, the applicant breached the implied term on the mandate and acted negligently.[20] The Ombud should not be oblivious of the applicant's fitness and properness to continue to provide financial services where his conduct has demonstrated to be an affront to the provisions of the FAIS Act and the Code of Conduct. There is deafening silence in the determination about this important aspect of the matter. Having been satisfied that the breach of the Code has been established, for legal causation to follow, a determination on the *"reasonable foreseeability"* of the loss must be established and must be supported by evidence, to hold the applicant liable.

[42] We have nothing before us that suggests that applicant should reasonably have foreseen the intervention by the Reserve Bank, at the time of the mandate. There is also no evidence that the act of breach of the Code of

---

20 See: CS Brokers CC and Others vs IN Mare and Another case no: FAB 5/2016, para 24.

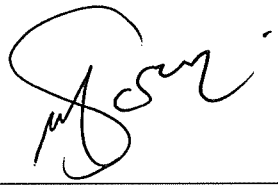
Conduct was sufficiently linked closely to the loss for legal liability to follow. For the applicant's liability to ensue, the Ombud will have to pursue investigations and unearth evidence pointing that, on the balance of probabilities, the investment would have been lost even if the Reserve Bank's intervention had not caused the collapse of the Sharemax property syndication scheme and whether these other probabilities were reasonably foreseeable to the FSP.

[43] It may be so that the Symons case concluded that the cause of collapse of the Sharemax property syndication was the intervention by the Reserve Bank, but more investigation by the Ombud, will assist to provide answers as to whether the extent of the first respondent's loss was connected or linked to the high risk of the Sharemax investment and whether from the process followed by the applicant in obtaining and writing out the investment, the risk should *"reasonably"* have been *"foreseeable"* or not by a diligent FSP. Some of the answers to these pertinent questions may be obtained through the assistance of an independent relevant expert on investments.

[44] We do not have to deal with the issue of determination of fair compensation as raised by the applicant. Our finding that legal causation as a legal requirement was not proven to hold applicant liable, disposes the application in its entirety and the fairness of the compensation remains an issue before the Ombud.

[45] In the result, we make an order to the effect that:

[45.1] The determination by the Ombud dated 28th January 2019 (based on the recommendation dated 20th March 2018) is set aside and the matter is remitted to the Ombud in terms of s. 234 (1)(a) of the FSRA Act, for further reconsideration.



AT NCONGWANE SC, CHAIRPERSON

With the panel consisting of:

Mr J. Damons, and

Adv S. Maritz

Date: 21 June 2021