

THE FINANCIAL SERVICES TRIBUNAL

Case No: **FAB145/2020**

In the matter between:

GAWIE EN ADRI DU TOIT MAKELAARS CC First Applicant

GAWIE DU TOIT Second Applicant

and

JOHANNES STEFANUS PHILLIPPUS NAUDE First Respondent

THE OMBUD FOR FINANCIAL SERVICES PROVIDERS Second Respondent

Tribunal Members: H Kooverjie (chair); PJ Veldhuizen; KE Moloto Stofile

Summary: The Ombud is required to apply appropriate processes when disputes of fact become evident as envisaged in section 28 of the Financial Advisory and Intermediary Services Act.

DECISION

A INTRODUCTION:

1. This application for reconsideration appears before us against the Office of the Ombud for Financial Services Provider's ("Second Respondent") determination dated 14 October 2020.

2. The determination was issued after the First Respondent, Mr Naude, laid a complaint with the Second Respondent. The salient facts regarding the complainant's issue are as follows:
 - 2.1 After First Respondent retired, he invested his pension fund in certain policies such as Liberty Life and Sanlam. His investment goal was to receive a monthly income and capital growth. He was not satisfied with the investment growth and upon the advice of his broker, Mr Du Toit, ("Second Applicant"), he invested in the Sharemax Scheme.
 - 2.2 The money the complainant received in respect of his pension funds was paid out to him after 28 years of service with the Ermelo Town Council. First Respondent retired in February 2003 from his job as head of the electrical department.
 - 2.3 At the time that he invested in Sharemax, he was unemployed.
3. The Applicants raised specific grounds for reconsideration in this application. Before we proceed to deal with them, we deem it appropriate to reaffirm that this Tribunal is a specialist Tribunal that considers applications before it afresh. It is not restricted by the Second Respondent's decisions and has the power to conduct or complete rehearing and reconsider the matter.
4. Time and again, Mr Bielderman refers to these applications as "*appeals*". This may be understandable as an anomaly exists in the FAIS Act , in that, it makes reference to the "*right to appeal*". An amendment in the FAIS Act is required so

that it is aligned with the Financial Sector Regulator Act (“*FSR Act*”).¹

B GROUND FOR RECONSIDERATION:

5. The core issue raised was that the Second Respondent’s record of decision was defective and as a result, the Tribunal would not be able to reconsider this matter appropriately.

6. It was brought to our attention that the two extensive responses of the Applicants dated 1 December 2016 and 22 December 2018 did not form part of the Second Respondent’s records. They were material as the Second Respondent’s in the determination made, considered same. Under these circumstances, it was argued that this Tribunal was not in a position to adjudicate the matter. It was imperative for the Applicants to have ensured that the responses formed part of the record. The Tribunal did however raise this issue with the Applicants, as nothing precluded them from furnishing the said responses.

7. It was further argued that the incomplete record was compounded by material disputes of fact. The Second Respondent ignored documentation which was submitted by the Applicants in response to the complaint, which showed that the risk associated with the investment was fully disclosed to the First Respondent. The First Respondent was thus in a position to independently make an informed decision as to whether he wanted to invest in Sharemax in order to obtain high interest and capital growth.

¹ D Risk Insurance Consultants, Deeb Risk and LJ Wigmore and Others FAB96/2019 dated 27 February 2020.

C ANALYSIS:

8. In our deliberations, we considered Part B of the record furnished by the Second Respondent. We note that the complaint was signed on 30 November 2012, and that the genesis of the First Respondent's complaint was that he did not receive the interest accruing to him. The issue for determination centred on the interest issue.

9. We reiterate an extract from the complaint:

“Vanaf datum van staking van rente is verskeie oproepe, besoeke en sms'e aan die makelaar gestuur. Ongelukkig is dit nie moontlik om alles presies volgens datums te lys nie. Makelaar het ons ook besoek maar kan geen idee gee van wat die uiteinde van die saak sal wees nie.”

Under section C of his complaint, he stated:

“My klagte is dat ek sedert Augustus 2011 geen rente van Sharemax ontvang het nie.”²

10. In correspondence to the Second Respondent dated 14 December 2012, First Respondent explained that he had contacted the Second Applicant regarding the issue. The Second Applicant advised him that he will investigate and let him know. He was also advised that the situation would go back to normal, and that First Respondent should not be concerned. Thereafter First Respondent claimed that he never received any further response.

² Page 68, part A of the record.

11. He further stated that Second Applicant advised him that his investment is guaranteed:

“Alles het goed verloop tot en met einde Julie 2010 toe die rente nie uitbetaal is nie. Soos voorheen genome is daar verskeie kere deur Mnr Du Toit onderhandel en het hy my elke keer verseker dat my kapitaal wat belê is, gewaarborg is maar hy kon nog geen antwoorde gee met betrekking tot die rente nie. Duidelik trek hy net sy skouers op as ek met hom oor die aangeleentheid wil praat en vertel my dat hy geen inligting kry nie.”³

12. In a more recent letter dated 28 October 2016, First Respondent communicated with Ms Myeni⁴ as follows:

“With reference to your email dated 14 October 2016 I hereby reply to your questions as follows:

- 1. I contacted Mr Gawie Du Toit, my broker, as I became aware that my investment at Liberty was dwindling. He suggested that they would withdraw the money from Liberty and invest in a more profitable investment like Sharemax.*
- 2. Mr Du Toit suggested that I invest in Sharemax for, according to him this was the best investment at the time. He said that numerous investments are changing to Sharemax. The interest rate was the highest possible, much higher than what was paid by the banks. He also stated that there was no financial risk and my capital was*

³ Page 18, Part B

⁴ Page 37, Part B

guaranteed to be safe.

3. *Mr Du Toit said there is no risk whatsoever.*

4. *The money invested was my pension fund pay-out after 28 years of service at the Ermelo Town Council, neither Ms Msikailagwa Town Council, which I invested with Liberty and was later withdrawn to be invested with Sharemax as instructed by Mr Du Toit...Mr Du Toit failed to explain the high risk of the Sharemax Investment to me..."*

13. From the determination it is evident that the Second Respondent considered both First Respondent's and the Applicants' versions. However, it was contended that these versions are conflicting and gave rise to disputes of fact.
14. During the course of the hearing, Mr Bielderman attempted to demonstrate that the First Respondent was aware that it was a high-risk investment and made reference to the responses. As alluded to above, such responses were not in the bundle.
15. At this juncture, it must be noted that the Tribunal found it hard to follow these arguments as the said responses to the Second Respondent were not placed before the Tribunal.
16. From our observation, *ex facie*, the evidence before us, the versions of both Second Applicant and First Respondent are conflicting. By virtue of the Second Respondent's statutory powers in terms of the FAIS Act, the Second Respondent was required to address the said disputes in the appropriate manner.

17. The Second Respondent in her findings noted that the Second Applicant explained the investment to the First Respondent and that he kept a proper record of advice.
18. From such version and the evidence, it illustrated that the risk associated with the investment was fully disclosed to the First Respondent and that he was in a position to make an informed decision on his investment with Sharemax.
19. The Applicants argued that the Second Respondent accepted the First Respondent's allegations without acknowledging the fact that there were material disputes of fact which she was required to investigate.
20. It was argued that this was a fundamental procedural failure by the Second Respondent in carrying out her statutory obligations in that she should have acknowledged that a dispute existed on the versions and should have ventilated same in an appropriate manner by for instance, conducting an oral hearing.
21. We find it appropriate to refer to the recent decision of the Supreme Court of Appeal in **Ombud for Financial Services Providers v CS Brokers CC and Others** (781/2020) [2021] ZASCA 117 (17 September 2021). The Supreme Court of Appeal confirmed the findings of Fabricius J in the Court *a quo*. The decision is pertinent to this matter and to the consideration before the Tribunal as to the manner in which the Ombud considered this matter.
22. The Court therein recognised that by virtue of section 20 of the FAIS Act, more particularly section 20(3)(4), the Second Respondent's role is to consider and dispose of complaints in a procedurally fair, informal, economic and expeditious

manner, and by reference to what is equitable in all circumstances with due regard to:

- “(a) The contractual arrangement or other legal relationship between the complainant and any other party to the complaint; and*
- (a) The provisions of this Act;*
- (4) when dealing with complaints in terms of section 27 and 28, the Ombud is independent and must be impartial.”*

23. The Second Respondent, by virtue of section 27(3)(c) of the FAIS Act is also empowered in circumstances it deems appropriate, to refer the matter to Court. The provision records:

“(c) The Ombud may on reasonable grounds determine that it is more appropriate that the complaint be dealt with by a Court or through any other available dispute resolution process, and decline to entertain the complaint. Section 27(5)(a) also provides

24. Section 27(5)(a) also provides:

“(5) The Ombud-
(a) May, in investigating or determining and officially receive a complaint, follow and implement any procedure (including mediation) which the Ombud deems appropriate and may allow any party the right of legal representation).”

25. The matter in **CS Brokers** turned on the issue as to whether the Second

Respondent properly exercised her discretion in dealing with the matter in terms of section 27(3). The Court acknowledged that the Ombud is granted extensive substantive powers. The Second Respondent's powers are akin to quasi-judicial powers rather than purely administrative ones. A determination is regarded as a civil judgment of a Court.⁵

26. The Second Respondent is accorded with a discretion as to the appropriate procedure. This includes a discretion under section 27(3)(c) to decline to entertain the complaint on the basis that a Court, or some other dispute resolution forum, is a more appropriate forum to decide the complaint. In addition, the procedural discretion allows the Second Respondent to receive oral evidence, among other options.⁶

27. The Court also took a dim view on the Second Respondent's response that she did not hold a hearing with oral evidence. The Court stated at paragraph 16:

"The response is one which clearly indicates that no discretion at all was exercised on the application."

28. Instead, a predetermined policy was applied, without reference to specific issues in a matter before her. As alluded to above, the Second Respondent is vested with a wide range of procedural options which can be tailored to different situations and complaints. It was argued that this does not constitute an improper exercise of a discretion but an approach which, as the Board put it in its appeal determination "*disregards a statutory obligation to exercise a*

⁵ Paragraph 12-C5 Brokers judgment, SCA

⁶ Paragraph 12 of CS Brokers CC SCA decision

discretion.”

29. At this juncture it is necessary for the Second Respondent to take heed of our concerns set out below.
30. Time and again procedural criticisms have been raised against the Second Respondent similar to those which have been raised in this matter namely that: the Second Respondent did not follow proper process in investigating and determining the manner; the Second Respondent did not act fairly and impartially; the Second Respondent accepted the complainant’s version and despite there being evidence to the contrary and in where material dispute of fact⁷ are prevalent. The fact that such matters come before the Tribunal and for the Tribunal to make a finding that the Second Respondent failed to deal with the matter appropriately is concerning. Such an approach is contrary to the very purpose for which the Second Respondent’s office was established which includes the expeditious and effective resolution of matters.
31. Moreover, it was difficult for the Tribunal to prepare properly for the hearing as the record was not only replete with irrelevant documents but incomplete. The said responses were material and should have been before this Tribunal.
32. The points in *limine* raised which included whether the Second Respondent applied her mind appropriately in light of the fact that there was a dispute of fact between the parties,⁸ had to be dealt with by the Tribunal. The Court a

⁷ Ernest Venter t/a Ernest Venter Makelaars and Hendrik Everhardus Grrundling Du Preez FAB116 2020 dated 30 September 2021

⁸ Midcoast Financial Services (Pty) Ltd and Bruse O Griffiths v Estate Late John Michael O’ Grady and the Ombud for Financial Services FAB121/2020 dated 22 June 2021.

quo in the **CS Brokers** matter, at paragraph 30 held:

“The discretion to retain jurisdiction of a complaint must however be exercised on reasonable grounds, having regard to the particular facts of the matter including material disputes of facts and where contextually justified, the question of causation both factual and legal.”

33. It is only once the material disputes of facts are addressed, can one conduct an enquiry into the negligence, causation and damages aspects. Same requires a factual enquiry and seeing the facts to support the finding of negligence, causation and damages on a balance of probabilities.
34. Time and again it has been pronounced that when there is a material dispute of fact, there should be a hearing of oral evidence.⁹
35. The Second Respondent is required to apply the appropriate procedure and to ensure the proper ventilation of all the issues between the parties and consider that each party’s response before arriving at a finding.
36. To illustrate that the Second Respondent should been alerted to the fact that a dispute exists, we note the following:
 - 36.1 The Second Respondent considered the Applicant’s responses to First Respondent’s complaint, which this Tribunal has not had the benefit of.

⁹ Atwealth (Pty) Ltd and two Others v A Kernick and two Others at paragraph 9

36.2 The Second Respondent made a finding regarding the suitability of the product and found that the First Respondent failed to study the prospectus:

“The respondent did not care to study the Sharemax, Zambesi and Villa models and failed to realise that this was a high-risk investment not suitable for pensioners.”

36.3 At paragraph 26 the Second Respondent stated that the Second Applicant realised from the prospectus that the product was a high risk:

“What is required of a reasonable competent FSP is to obtain information about the product that is factually correct and informs him of the advantages and risks in the product so that the FSP is in a position to provide his client with appropriate financial advice. The respondent failed to do this but what makes his conduct worse, is that he advised his client to invest in Sharemax after reading and understanding the prospectus which informed him that this was a highly risky investment not suitable for pensioners.”

36.4 At paragraph 29 the Second Respondent acknowledged that there is a dispute between the parties when she states:

“The respondent denies not having explained the risks in this investment to the complainant.”

36.5 The Second Respondent further acknowledged the Second

Applicant's version that he worked through the prospectus with the complainant¹⁰ before the investment was made. The Second Respondent then goes on to state that:

"The respondent provided no details as to what he really did in working through the prospectus. He is vague about it."

37. Furthermore, it is clearly in dispute - that First Respondent maintained that he would not have invested had he known that his own funds were to be used to fund the building development and to pay other investors their monthly returns, and the fact that the applicant did not work through and explain the prospectus to the first respondent.
38. Under these circumstances and in the premises, we find that the Second Respondent should have appropriately exercised her discretion in terms of section 27(3) of the FAIS Act. In our view from the record (albeit incomplete) material disputes of fact seem to exist that should be properly ventilated.
39. The Applicant seeks that the determination of the Second Respondent be set aside and that the complaint be dismissed due to the conduct of the Second Respondent as the Ombud demonstrated no intention to carry out its statutory obligations.
40. Moreover this dismissal of the complaint is warranted as not only is the record incomplete but that the Second Respondent failed to investigate the matter and consider the evidence appropriately.

¹⁰ See paragraph 31

41. This approach in our view is unenviable. The complaint together with the responses should be ventilated appropriately. It would be a miscarriage of justice for this Tribunal to make any finding in light of the incomplete evidence before us.
42. We therefore deem it appropriate to refer the matter to the Second Respondent on the understanding that the proper and appropriate processes would be followed by its office.
43. In the premises therefore we make the following order:
- (1) the application for reconsideration is upheld;
 - (2) the decision of the Second Respondent is set aside and the matter is referred back to the Second Respondent for further reconsideration.

SIGNED at **PRETORIA** on this **23rd** day of **NOVEMBER 2021** on behalf of the Panel.



H KOOVERJIE

With the Panel consisting also of:

PJ Veldhuizen

KE Moloto Stofile