IN THE FINANCIAL SERVICES TRIBUNAL

Case No: FAB154/2021

In the matter between:

JOHANNES CHRISTIAN MOSTERT **Applicant**

and

LEONIE LE ROUX (PREVIOUSLY LANDMAN) **First Respondent**

OMBUD FOR FINANCIAL SERVICES PROVIDERS **Second Respondent**

Tribunal: Christopher Woodrow SC (Chair), Sandhya Mahabeer SC and Gift Mashaba SC

Appearance for Applicant:	Mr P Bielderman
Appearance for First Respondent:	In person (Mrs L Le Roux, previously Landman)
Appearance for Second Respondent:	No appearance

Date of Hearing:	9 September 2022
Date of Decision:	28 November 2022

Summary: Application for reconsideration in terms of section 230 of the FSR Act - property syndication matter - material disputes of fact - causation

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DECISION

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[1]. This is an application in terms of section 230 of the Financial Sector Regulation Act, Act 9 of 2017 (the "**FSR Act**") for reconsideration of a determination made by the Second Respondent in favour of the First Respondent (the "**determination**"). The determination was delivered on 6 September 2021 pursuant to a complaint brought against the Applicant by the First Respondent.

[2]. In terms of the determination, the Second Respondent granted an order *inter alia* upholding the complaint and directing the Applicant to make payment to the First Respondent in the sum of R650,000.00 plus interest thereon.

[3]. Before proceeding to deal with the reconsideration application, we deal with the participation of the Second Respondent in these proceedings. The parties were directed to file heads of argument before the hearing of this matter. The Second Respondent failed to meet the stipulated deadline for filing of heads of argument and requested an extension of time to do so. Notwithstanding such extension being granted, the Second Respondent did not file its heads, and at the hearing of this matter indicated that it would not be making any submissions and withdrew its application to participate. The matter proceeded with the participation of the Applicant and the First Respondent only.

[4]. The history of this matter is long and unfortunate. It includes two prior decisions setting aside prior determinations made by the Second Respondent, the first by the then Appeal Board in 2018 and the second by a different panel of this Tribunal in 2019.

[5]. The First Respondent's husband passed away in 2003, and the proceeds of his pension became available to the First Respondent. On the advice of the First

Respondent, the funds were initially invested in Momentum. After a five year term, the First Respondent received an amount of approximately R750,000 when the Momentum investment matured. The First Respondent discussed with the Applicant that she wished to invest R650,000 (the balance to be kept in a money market account as emergency funds). At that time, in 2008, the Applicant gave the First respondent advice regarding an investment in Zambesi Retail Park Ltd ("**Zambesi**"), a property syndication scheme managed by Sharemax Investments (Pty) Ltd ("**Sharemax**"). The First Respondent invested an amount of R650,000 (via the purchase of 650 units in Zambesi). (The balance of R100,000 was invested in a Sanlam money market account).

[6]. The First Respondent received monthly amounts from the Zambesi investment from 1 May 2008 to 30 July 2010 in the sum of R5,416 per month (totaling R146,232). At that time, Sharemax stopped paying 'interest' to its 'investors'. In order to assist the First Respondent financially, the Applicant made contributions to the financial needs of the First Respondent over a period of 18 months (in the total sum of R79,000).

[7]. Sharemax and the Zambesi investment collapsed.

[8]. The First Respondent lost her investment, and apart from those amounts referred to already received no further payments.

[9]. The First Respondent filed a complaint against the Applicant with the Second Respondent. In terms of the complaint, the First Respondent, in a letter dated 12 February 2012, averred *inter alia* that the Applicant told the First Respondent that "*… he wants to invest the money [that the First Respondent had received*

from her Momentum investment] at Sharemax." The First Respondent states that she was scared to do so as she did not know it [Sharemax] and "*… said she should rather re-invest at Momentum, but he said that Sharemax has better benefits and give a higher monthly income.*" The First Respondent had concerns, spoke to friends and thought about it for some time. The Applicant *inter alia* promised the First Respondent that her money would be safe and that it would grow, and that she would get more out than what she put in after 5 years even after she withdraws the interest. After a long time thinking about this advice, the First Respondent agreed to invest the money at Sharemax as she trusted the Applicant's opinion as an "*expert*".[1]

[10]. The Applicant replied to the allegations leveled against him by the First Respondent through a lengthy letter.[2] It is not necessary to deal here with each and every averment or argument made by the Applicant in his statement rebutting the First Respondent's allegations save to mention that according to him the First Respondent was fully aware of the potential risks when she invested in Sharemax because (*inter alia*) the prospectus, in plain and clear language, set forth information warning potential investors of the risks. The Applicant contended that he had complied with all obligations as a Financial Services Provider in terms of FAIS Act and Conduct Rules when assisting the First Respondent to enter into the investment. According to him, the First Respondent was fully aware of the investment she was entering into.

[1] Page 9 of Part B of Financial Tribunal Record.

[2] Page 64-107 of Part B of Financial Tribunal Record.

[11]. Subsequent to Applicant's replying letter, the Second Respondent sent him another letter dated 29 June 2015 requiring him to answer other issues which had not been addressed in his original letter. The Applicant replied to the queries of the Second Respondent through a statement (sent under cover of a letter from the attorney of the Applicant dated 27 July 2015),[3] with attachments thereto. The supplementary response of the Applicant succeeded in creating further disputes of fact.

[12]. The Applicant engaged three (3) expert witnesses in support of his case: Mr Anton Swanepoel, Mr Derek Cohen and a Mr Schussler. Anton Swanepoel is an expert on the FAIS Act, Regulations and General Code of Conduct with particular knowledge of compliance, financial and investment planning information and risk profiling. Derek Cohen is a Merchant Banker, financier and economist. Mr Schussler is a Macro Economist.[4] We point out that that set out below constitutes but a small part of the expert evidence presented by the Applicant.

[13]. According to Anton Swanepoel, although item 3(1)(a)(ii) of the General Code of Conduct for authorised FSP requires representations made and information provided to the investor to be in plain language and avoid uncertainty or confusion, item 7 of the Code requires a significant number of matters to be provided to a potential investor. In Mr Swanepoel's opinion, item 7 of the General Code placed an onerous obligation on providers from a product disclosure point of view as it contains very wide disclosure requirements,

[3] Page 131-181 of Part B of Financial Tribunal Record.

[4] Page 149, paragraph 43 of Part B of Financial Tribunal Record.

requiring disclosure of “all material financial product information” to potential investors to enable them to make an informed decision. According to him, providing a prospectus complies with *inter alia* the aforesaid obligations. Further, the Sharemax prospectus is part of the record of advice and should thus be considered not only in the context of item 3(1) of the Code, but also in the context of item 7 and Government Gazette Notice 28690, Notice No. 459 of 2006 issued by the Department of Trade and Industry.[5]

[14]. According to Mr Schussler, whilst in his view the relevant investments ought to be classified as high risk, this is clearly set out in the prospectus. The Sharemax prospectus informed investors that the investment is in an unlisted public company developing property and there was a possibility that their capital would be lost. Mr Schussler is of the view that, depending on the specific personal circumstances, investors should not invest more than 5% to 20% of their capital investment in the venture. In Mr Schussler’s opinion, the nature and structure of the investment model as set out in the Sharemax prospectus did not constitute a ‘Ponzi’ scheme.

[15]. Mr Derek Cohen’s opinion is that the information contained in the Sharemax prospectus allows a person to make an informed decision relating to the business model therein. The Sharemax model is similar to that used by most property loan stock companies relating to new developments. Usually, a property loan stock company will acquire [immovable] property for development and transfer it into a shelf company which will be 100% owned by the listed

[5] Page 154, paragraph 63 of Part B of Financial Tribunal Record.

property loan stock company or the property loan stock company will acquire the property and house the property in a shelf company.

[16]. According to Mr Cohen, the Sharemax structure resembles the model commonly used by property loan stock companies and the property industry in general. Should one substitute the investors with a bank as a source of funding, then there is very little difference between the Sharemax model, and the method commonly used in the property industry as the Sharemax model has similar features. Mr Cohen, based on a financial model, is of the opinion that the Villa would be a viable development.

[17]. The Second Respondent, subsequent to the Applicant's detailed response, sent a letter dated 13 August 2020 to the Applicant and to the expert witnesses requesting further clarity from them.[6] In reply to the Second Respondent's questions, the Applicant claimed that, amongst other things, the First Respondent had an appetite for risk as she was still earning an income and could replace lost funds. Furthermore, she made an informed decision, taking into account her investment objectives and needs, and balancing the two. The Applicant based this argument on the strength of Annexure "V2", which is the application form that the First Respondent signed. The form contained a clause wherein the First Respondent confirmed that she was comfortable that this type of investment, that it fitted her investment objectives and needs, and that she wished to invest in a property syndication structure. Given the type of investment and the risk associated with it, the First Respondent indicated that

[6] Page 466- 473 of Part B of Financial Tribunal Record.

she could afford to make the investment as she could wait for a resale to be effected, which could take 6 to 8 weeks and even longer.[7]

[18]. Mr Louis Pautz from the Second Respondent, in paragraph 6 (j) of his letter addressed to the Applicant, asked the following relevant question:

> *"Do you believe that, in giving your client advice to invest in this product, you complied with section 8 of the Code of Conduct for FSPs?"*[8]

[19]. In reply to the question posed, the Applicant said the following:

> *"Yes. This was a single need. Mrs Landman made an informed decision. She was aware that we had not conducted a full needs analysis and accordingly the advice may not properly suit her circumstances or may not be appropriate. As required by Section 8(4), I brought this to her attention in the writing, which she signed for. See annexure V2 to my original response."* [9]

[20]. The Second Respondent thereafter afforded the First Respondent an opportunity to respond to the Applicant's answers to the aforegoing questions.

[21]. In her letter dated 9 April 2021, the First Respondent denied having an appetite for taking risks and further claimed that if the contents of a warning were pointed

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[7] Page 499 of Part B of Financial Tribunal Record.

[8] Page 468.

[9] Page 499.

out and explained to her she would under the circumstances not have taken the risk. According to the First Respondent, she told the Applicant that she felt more secure to put her money back in the Momentum scheme where it had been invested for the previous 5 years; however, the Applicant's advice was that through an investment in Sharemax it would be possible to double her money in five years. According to the First Respondent, the Applicant was negligent in his capacity as a FSP in advising her to invest in Sharemax.

[22]. The First Respondent deposed to another statement dated 17 August 2022. What is patently clear from the First Respondent's statements is that she consistently and persistently contends that she was not advised by the Applicant that Sharemax was a high-risk investment. According to her, it was foreseeable for a person in the Applicant's position that she did not have the risk profile to invest all her money in one place. This is taking into account that she was about 59 years of age when the investment was made, had no other permanent income and had a grandson to support and to put through school.

[23]. It is clear from the facts of this matter that there are material factual disputes between the Applicant and the First Respondent. On a conspectus of the evidence such disputes are wide ranging, and also impact on essential questions that are required to be answered in order to arrive at a proper determination including the elements of negligence and causation. We deal with but a few such material disputes. On one hand, the Applicant is adamant that he explained the Sharemax prospectus to the First Respondent and that he advised her that Sharemax was a high-risk investment. The other pressing, disputed question is whose decision was it to invest in Sharemax. According to the First Respondent, the decision to invest in Sharemax was Applicant's as he

did not mention any other investment alternatives which were open to her. The Applicant, in his written representations, is adamant that he discharged his duties diligently as required of a FSP. He relied on the application form (Annexure “V1”) and a disclosure document (Annexure “V2”), both of which set out the nature of the investment including the risks involved in such investment. He claimed that the prospectus was left with the First Respondent for long enough to allow her to familiarize herself fully with the investment structure and risks. The First Respondent knew or ought to have known what she was doing.

[24]. It is worth noting that in terms of section 20(3) of the FAIS Act, the objective of the Second Respondent is to consider and dispose of complaints in a procedurally fair, informal, economical 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 (b) the provisions of the FSR Act. One would also expect that the Second Respondent would act expeditiously in finalizing matters. Unfortunately, this matter was dealt with by the Second Respondent in an inefficient, time consuming and confused manner. The First Respondent, a lay person, and the Applicant, as the FSP, have both been prejudiced as a result of the delays.

[25]. In any event, the Second Respondent determined the complaint in favour of the First Respondent.

[26]. The Second Respondent is empowered, in terms of section 27(3)(c) of the FAIS Act, on reasonable grounds to 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. In the case of **Ombud for Financial Services Providers v CS Brokers CC and Others**[10] the issue was whether the Ombud 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 Ombud's powers are akin to quasi-judicial powers other than purely administrative ones. A determination is regarded as a civil judgement of the Court.

[27]. The current matter is littered with factual disputes which, in the Tribunal's view, would require oral evidence, and probably also expert evidence, to resolve. It is the Tribunal's view that only once the material disputes of fact have been ventilated can the enquiry into the issue of negligence and causation be addressed and resolved. This would most appropriately be done through expert evidence.

[28]. It is worth noting that the Applicant had engaged the services of three expert witnesses whose evidence is uncontroverted. This Tribunal cannot simply reject the evidence and/or opinions of such experts unless there was expert evidence in rebuttal of their evidence or for some other valid reason. (Neither can the Second Respondent, but she has). For example, according to Mr Schussler, the Sharemax scheme does not constitute a 'Ponzi scheme'. This is in contrast with the views of the Second Respondent that the Zambezi and Villa syndications were 'Ponzi schemes'.

[10] (781/2020) [2021] ZASCA

[29]. We point out that a panel of this Tribunal in the previous reconsideration application in this very matter has expressed the view that expert evidence ought to be obtained by the Second Respondent in order to resolve the material disputes. In the Tribunal decision of **Mostert v Landman and another : FAB127/2018**, (the "**2019 Tribunal decision**") handed down on 21 October 2019, a panel of this Tribunal decided that neither factual nor legal causation had been proven in the present matter. (We agree that as at date of the present decision, this remains the case and we shall deal with this aspect briefly later herein). The aforesaid Tribunal panel in the 2019 Tribunal decision found in this regard as follows *inter alia*: (our emphasis)

> *"57. The record in this matter does not show that the Ombud has countered or dispelled the above submission either* ***by evidence, including expert evidence, where possible****. Such a move may* ***assist in throwing some light on the factual and legal causation aspect.***
>
> *58. … In short, no factual causation or causal link has been established."*
>
> And:
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> *"60. In light of the Standard Chartered Bank case and the Symons case, we hold the view that* ***the loss suffered by the First Respondent does not seem to be linked sufficiently closely or directly to any failure of the Applicant to explain the risks or to render appropriate advice to the First Respondent****.*

61. Lastly, even though the Applicant has, in our view, failed to comply with the provisions of the Code of Conduct, that is, he did not appropriately advise the First Respondent, and explain the potential risk to the First Respondent, ***any such breach was not causally connected to the First Respondent's loss****."*

And:

"65. There is no evidence which points to a direction that the Applicant should have reasonably foreseen the loss at the time of the mandate in April 2008.[11] Further, there is ***no evidence to the effect that the act of breach of the Code of Conduct was linked sufficiently closely or directly to the loss for legal liability to ensue****."*

[30]. In paragraph 66 of the 2019 Tribunal decision, the aforesaid panel of the Tribunal recommends that the Second Respondent obtain evidence in order to determine the causation question:

"66. ***We recommend*** *that the Ombud to consider, where necessary like in this case,* ***investigating the aspect of causation*** *and where possible to* ***procure expert evidence on property syndication of this nature****, which may throw light in matters of this nature."*

[11] We point out that this finding of the prior panel of the Tribunal impacts negligence also. The evidence supports this - An ordinary FSP licenced to sell Sharemax investments would never have forseen the intervention of the Reserve Bank. (see *Inter alia* Page 482) See further: **Mukheiber v Raath and Another** 1999 (3) SA 1065 (SCA) par [31]

[31]. The Second Respondent failed to heed the aforesaid recommendation,[12] and instead makes submissions in the determination with reference to *inter alia* the decisions of **Oosthuizen v Castro and another** 2018 (2) SA 529 (FB) and **Centriq Insurance Company Limited v Oosthuizen and Another** [2019] ZASCA 11. In our view, the Second Respondent misses the important point that the legal conclusions reached depend on the facts of each matter. **Castro** (and accordingly **Centriq**) are distinguishable on the facts (namely the evidence provided to the court) from the matter of **Symons NO and Another v Rob Roy Investments CC t/a Assetsure** 2019 (4) SA 112 (KZP) ("**Symons**") (and from the facts contained in the record in the present matter). As held in **Symons**: (our emphasis)

> *"[66] It would appear that* ***there was no expert evidence in Oosthuizen*** *[the* ***Castro*** *matter] that* ***the scheme would probably have been successful if the Reserve Bank had not intervened****. The reason why the scheme collapsed and the existence of a causal link (both factual and legal) between the breach and the loss does not appear to have received much attention. The reason for this may well be that on* ***the evidence in that case the defendant had been aware that the Reserve Bank had expressed concern about the legality of the funding model, which was not the case before me****.*

[12] This despite the recommendation and despite the Applicant pointing this out to the Second Respondent in his supplementary response - Page 490 - 491.

*[67] Oosthuizen [the **Castro** matter] does not assist the plaintiffs in the present matter. **The evidence in that case differed materially from the evidence before me** – not only in relation to the circumstances of the investor, but **also with regard to the prospects of the scheme**, the **reason why it collapsed**, and **the real cause of the plaintiffs' loss**."*

[32]. We point out that **Centriq** was also an appeal to the SCA (from the **Castro** High Court decision) based principally on insurance principles.

[33]. It also appears that the approach of the Second Respondent is such as not to heed the statement made in the first two sentences of **Durr v Absa Bank Ltd and Another** 1997 (3) SA 448 (SCA) that: "*Hindsight is not vouchsafed the common man as he picks his course through life. This must be kept constantly in mind in a case like this one, where all is so obvious now...*". (In the present matter, however, all is not so obvious now but the Second Respondent appears set in her view regarding the reason for the failure of Sharemax despite evidence presented to the contrary.)

[34]. The Applicant set out evidence supported by expert evidence that the cause of the failure of the Sharemax schemes was the directive of the Reserve Bank dated 14 September 2010, that but for the intervention of the Reserve Bank the schemes would have survived and continued to thrive, and that the cause of the loss suffered by the First Respondent was the conduct of the Reserve Bank.[13] On the facts presented in the record in the present matter, including the expert evidence presented on behalf of the Applicant and which is uncontested,

[13] *Inter alia* Page 482.

the following applies *in casu* - **Symons** par [58]: "… *The cause of the loss was the intervention by the Reserve Bank and not any breach on the part of the defendant [read 'Applicant' in casu]. The question of legal causation does therefore not arise.*"

[35]. It is unnecessary for us to deal with all of the further points raised. For the reasons that we have addressed, the determination ought to be set aside.

[36]. In the premises, we make the following order:

(a) The application for reconsideration is upheld;

(b) The decision of the Ombud is set aside; and

(c) The matter is remitted to the Ombud for further reconsideration.

SIGNED at PRETORIA on this 29th day of NOVEMBER 2022 on behalf of the Panel.

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MG MASHABA SC

With the Panel consisting also of:
S Mahabeer SC
C Woodrow SC