

THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: FAB118/2019

In the matter between:

P D & P J SWANEPOEL NNO

APPLICANTS

and

LSI MAKELAARS CC

FIRST RESPONDENT

STONEVEST PROPERTY INCOME FUND LTD

SECOND RESPONDENT

OMBUD FOR FINANCIAL SERVICES PROVIDERS

THIRD RESPONDENT

Application for reconsideration of FAIS Ombud determination

DECISION

[1] The Ombud for Financial Service Providers' statutory mandate is to consider and dispose of complaints under the Financial Advisory and Intermediary Service Act, 2002, (the FAIS Act) and complaints for which the Adjudicator is designated in terms of section 211 of the Financial Sector Regulation Act, in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances.

[2] The office of the Ombud did not in this case live up to its statutory promise and mandate. The file contains documents that relate to other cases and the decision was

based on information about an unrelated matter. And then there is the unexplained delay.

[3] The complaint underlying the present application for reconsideration under sec 230 of the FSR Act, was registered with the Ombud on 1 February 2011. The complainant was MRS Jacobus Swanepoel, a widow born during 1931, and at the time a few months shy of her 80th birthday. I stress this because the Ombud assumed that she was of another sex, but it was not uncommon for females to be given conventionally male names in some communities.

[4] The Ombud wrote a few letters consequent on the complaint during 2011 and again during 2015, and on 17 July 2019 dismissed the complaint because, it was said, the matter had been settled between the complainant and the respondent, LSI Makelaars CC. The settlement letter is dated 15 May 2014 and is between LSI Makelaars CC and Mr PD and Mrs MM Swanepoel – hardly Mrs Jacobus Swanepoel. The Ombud patently misunderstood the context of the submission of the letter.

[5] Assisted by her son, PJ Swanepoel, the complainant applied for reconsideration of the dismissal on 17 September 2019. She was then already 88. A few months later, on 1 January 2020, she died. Her two sons, PD Swanepoel and PJ Swanepoel were appointed as her executors on 2 December 2020.

[6] The executors appointed a firm of attorneys, Faure and Faure, to attend to the administration of the estate excepting the prosecution of this reconsideration application, which they themselves are prosecuting. That puts an end to the lack of locus

standi raised by the respondent and the rather uncalled for question as to why the complainant herself did not act and explains why the case name now reflects the names and capacities of the applicants correctly.

[7] The second respondent is in default and the applicants and the first respondent have waived their right to a formal hearing.

[8] That brings one to the nature of the complaint and the identity of the FSP or FSR against whom the complaint was laid.

[9] The facts are these. The complainant had sold her house and, if regard is had to her then address, lived in a room at some old age home or something similar. She had R690 000 available. Her daughter, on her behalf, sought the advice of Mr MG Roux, a member of LSI Makelaars CC. The other member at the time was Mr Deon Smith.

[10] Roux responded on 14 April 2009 in writing on the letterhead of LSI Makelaars CC. LSI Makelaars CC, an authorised financial service provider in terms of the FAIS Act. Roux's advice was that she should invest the money in Stonevest Property Income Fund because it is a safe investment. (The company behind the fund is Stonevest Property Income Fund Ltd.) Roux listed a few advantages of the fund without giving any idea of its nature or structure.

[9] The second bullet point stated that the money is liquid and repayable within seven days into her account.

[10] On 3 June 2009, Roux conducted a risk assessment of the complainant which indicated that she was a conservative investor. And acting on his advice, she signed the required documentation of some 30 pages in terms of which her money was invested in the fund.

[11] Roux passed away during September 2010, and the complainant sought to withdraw her capital during December 2010 but was unable to do so. It is apparent that there was at the time a “run on the bank” because of the bad press property syndications received. The fund’s answer to her request was that although the company repurchased shares in the syndication, and that it had done so in other instances, it could not until the building had been sold and the purchase price received because of a lack of liquidity. It was said that the building had indeed already been sold. See B45.

[12] Her inability to obtain repayment of her capital led to the filing of her complaint of 1 February 2011. She listed as respondents LSI Brokers CC and Stonevest Property Income Fund and she relied on the misrepresentation in the letter of Roux that her capital was refundable within seven days, which it was not if regard is had to the terms of the disclosure document of Stonevest, which she had signed.

[13] The problem with sizeable disclosure documents is that they are intended for the sophisticated investor and are meaningless for the small investor and often not understood by financial service representatives. The directors of Stonevest recognised that the investment was best suited to investors such as self-managed superannuation funds, companies and private investors who prefer income plus capital in the medium to

long term – something that could by no strength of the imagination apply to the complainant. What the large print gave her, the small print took away.

[14] The response of 20 April 2011 of LSI's erstwhile attorneys to the complaint was, to say the least, in part disingenuous. In the first instance, it queried the genuineness of Roux's letter. In the second instance, it attached a warped interpretation to the liquidity representation. Thirdly, it denied that the CC could have been liable because Roux had died, that the CC was not authorised to market the product, that the CC did not receive any commission, and that the contract concluded by Roux with the complainant was in his capacity as representative of Stonevest. As to the last point, the fact that a representative exceeds the limits of his licence does not excuse him.

[15] Stonevest relied exclusively on the terms of the investment as signed by the complainant.

[16] The statement in Roux's letter was false. The misrepresentation was not isolated, and it was not as if he was acting on a frolic of his own. In the published pamphlet on p 26 of the record Stonevest made the same representation. Stonevest is vicariously liable for the wrongs of its representatives.

[17] That brings one to the position of Smith and Roux. They were both representatives of Stonevest. That is not only apparent from the text of the letter but also from the pamphlet on p 26 and the disclosure document. But that does not matter. The misrepresentation was made by a member of the CC on behalf of the CC, which

means that the CC is liable. The possible liability of Smith is an incident of membership of the CC and is not the concern of the Tribunal.

[18] The CC submits that the complaint must have become prescribed but failed to have regard to the provisions of sec 27(2) of the FAIS Act.

[19] The CC further submits that the complainant had waived her claim for repayment because she accepted interest payments. The submission has no merit. She persisted, albeit to no avail, for the rest of her life and acceptance of interest is not inconsistent with a claim for a refund of the capital amount.

The following order is made:

- (a) The application for reconsideration succeeds.
- (b) The second respondent must repay the capital amount of R690 000 to the applicant executors together with accrued interest within two months of this determination.
- (c) Should the second respondent fail to comply, the first respondent must pay the said sum within one further month against cession of the estate's claim against the second respondent.
- (d) Late payment under (b) or (c) carries interest at the statutory rate.

Signed on behalf of the Tribunal on 17 March 2021.

A handwritten signature in black ink, appearing to read "LTC Harms", enclosed within a thin black rectangular border.

LTC Harms (deputy chair)