THE FINANCIAL SERVICES TRIBUNAL

Case №: FAB62/2021

In the matter between:

PIETER CRONJE MAKELAARS	Applicant
and	
CAREL JACOBUS VAN ZYL	First Respondent
HESTER DORETHEA VAN ZYL	Second Respondent
OMBUD FOR FINANCIAL SERVICES PROVIDERS	Third Respondent

Tribunal: Adv William Ndinisa (chair), Mr PJ Veldhuizen and Adv SM Maritz

Appearance for Applicant	P Bielderman from Bielderman Inc
Appearing for 1st Respondent	In person
Appearance for 2nd Respondent	In person
Appearance for 3rd Respondent	No Appearance
Date of Hearing:	30 March 2022
Date of Decision:	31 May 2022

Summary: Reconsideration in terms of section 234(1)(a) of the Financial Sector Regulation Act 9 of 2017 – further reconsideration and investigation – Appeal and Review – procedural fairness – negligence and causation.

DECISION

INTRODUCTION

1. The Applicant in this matter is Pieter Cronje, an adult financial services provider. The Applicant trades under the name and style of Pieter Cronje Makelaars, hence the citation. The Applicant lodged this application for reconsideration in terms of section 230 of the Financial Sector Regulation

Act 9 of 2017 ("the FSR Act"), challenging the Determination of the Third Respondent, the Ombud for the Financial Services Providers ("the Ombud") dated 20 August 2020.

2. The First and Second Respondents, who will be referred to as Respondents, unless otherwise specified, appeared in persons during the virtual hearing of the matter and opposed the application for reconsideration. The Respondents were clients of the Applicant.

BACKGROUND

The Second Determination

3. This matter was previously before this Tribunal on 25 June 2019, and the Tribunal delivered a decision on 9 August 2019 ("the First Decision"). The First Decision ordered that the Determination of the Ombud dated 6 August 2018 be set aside and remitted the matter back to the Ombud for further consideration in terms of section 234(1)(a) of the FSR Act.

4. On 20 August 2020, the Ombud issued a Reconsideration in terms of section 234(1)(a) of the FSR Act, which in essence, raised technical points ("the Second Determination"). The Ombud highlighted, amongst other things, that: -

4.1 The term "reconsideration" is not defined in the FSR Act, and it should be given its ordinary meaning within the context of the FSR Act;

4.2 Whatever the term "reconsideration" may mean, it was certainly not an appeal; and

4.3 It appears that what was intended by the by the legislator was for the Tribunal to treat an application for reconsideration similar to a review.

5. The Ombud states that precisely what was intended by the legislature is not clear and has led to some confusion between the Ombud and the Tribunal.

6. Further, the Ombud highlighted difficulties she faces in relation to the Tribunal within the context of the FSR Act, and in that regard, the following is stated:

> "*[12] Perhaps it was never intended that the Tribunal would make findings regarding the merits of the complaint and then remit the matter back to the office for further consideration. What was intended was for the Tribunal to deal with the matter as a review and having found that the process in this office was, in some way flawed or unfair to one of the parties, refer the matter back for consideration. The difficulty however remains as to why the statute provides for reconsideration of the matter by the Tribunal instead of providing for a review as would by a forum that is not expected to consider the merits of the matter.*"

7. After having considered the First Decision, of the Tribunal, the Ombud concluded that the findings of law and fact made by the Tribunal were not made in exercise of their limited powers in terms of the legislation, and therefore those findings could not stand.

8. Further, the Ombud, after having stated, amongst other things, that extended delays will be inevitable while matters go back and forth between the Tribunal and the decision-maker, her office recommends that an amendment to the legislation be made as soon as possible.

9. Lastly, the Ombud repeats her order stated in the First Determination dated 6 August 2018. In essence, the Ombud upheld the complaint of the First and Second Respondents and ordered the Applicant to, amongst other things, make payments of the stated amounts together with interest.

Factual Matrix

10. In 2008, the Respondents approached the Applicant, indicating that the income they were receiving from their Sanlam Glacier investment was no longer sustaining them. The Applicant invited the Respondents to a presentation about Sharemax investments.

11. After attending the Sharemax presentation, the Respondents invested their available funds in Zambesi Retail Park Holdings and Villa Retail Park Holdings ("the Sharemax Investments"). These Sharemax investments are property syndications. The investments by Respondents in the Sharemax products occurred from March 2008 to January 2010. There were seven (7) Sharemax Investments that were made over almost two years.

12. In September 2009, the Applicant informed the Second Respondent of an opportunity to invest in Pacific Coast Investments. This investment was

promoted as a short-term, six months investment. It is stated that despite the maturity of the investment, the Second Respondent never received her capital of R15 000.00.

13. On 19 February 2011, the Respondents approached the offices of the Ombud to lodge their complaints. The thrust of the complaints was that the Applicant assured them that their funds were safe, there was no risk, and that he failed to propose a distribution of the investments.

14. The Applicant was provided with the Respondent's complaints. He thereafter responded stating, amongst other things, that he did not act wrongfully in any way by placing these investments with Sharemax and Propspec. The Applicant further submitted that the problems of Sharemax and Prospect could not have been caused in any way by the Applicant's doing, nor could he have foreseen, with the information available to the public in general and to the financial advisors in particular, at the time of placing the investments, that the desired outcome would not be achieved.[1]

15. Further, the Ombud noted the Applicant's submission regarding the signing of the necessary documentation, including a record of advice which confirmed that the Respondents were investing in unlisted shares.[2]

16. On or about 13 April 2018, the Ombud prepared and sent the Applicant a recommendation in terms of section 27(5)(c) of the Financial Intermediary

---

[1] Record B131
[2] Record A73

and Advisory Services Act 37 of 2002 ("the FAIS Act") ("the Recommendation"). The Recommendation indicates that the Ombud invited the Applicant to submit his responses to the complaints. After having considered the legislative framework applicable, the Ombuds made findings, which were: -

16.1 The Applicant was out of his depth when he recommended the Sharemax and the Prospect investments to his clients. In this regard, the Ombud noted that there are warnings contained in the prospectus and stated that the Applicant did not understand the intricacies of the products;

16.2 In this regard, the Applicant's advice was negligent and violated section 2 of the Code. The Applicant could not have advised his clients appropriately, in contravention of sections 3(1)(a) and 8(1)(a) to (c) of the Code;

16.3 It does not assist the Applicant that the Respondents wanted higher returns. According to the Ombud, if the Respondents then insisted on wanting to invest in Sharemax and Propspec investments, the Applicant should have complied with section 8(4)(b) of the Code and informed the Respondents that the investments were contrary to his advice in respect of suitability; and

16.4 In light of the above, the Ombuds concluded that the Applicant failed to appropriately advise the Respondents and apprise them of the risk in the respective investments. This violates section 7(1) of the Code; and

16.5 According to the Ombud, as a consequence of the breach of the Code, the Applicant committed a breach of his agreement to the Respondents in that he failed to provide appropriate advice.

17. On or about 26 April 2018, the Applicant responded to the Recommendation from the offices of the Ombud and raised several issues for the Ombud's attention. In summary, the Applicant submitted that:

17.1 The Ombud is obliged to recognise his constitutional rights to a fair process, and she is obliged to investigate a complaint objectively and impartially and to ensure that facts are established following a fair, independent, and an impartial process;

17.2 The Ombud, in disregard of the Applicant's rights, reached conclusions and made a Recommendation where his version was rejected out of hand where no cogent reasons or basis exist;

17.3 The Recommendation is based on a series of factual findings and legal findings. He submits that he had no particularisation as to the process adopted by the Ombud in this regard.

17.4 There are material and fundamental factual disputes between the Respondents and the Applicant that go to the heart of the matter and which negate any finding of negligence and further negate both factual and legal causation; and

17.5 The allegations made by the Respondents are directly contradicted by the documentation they have signed.

18. The Ombuds noted the responses of the Applicant and delivered her First Determination on 6 August 2018.

19. This panel considered it necessary to summarise the historical background of the matter because the Applicant, in his application for reconsideration dated 11 May 2021, raised procedural and substantive issues that now seize its attention.

CONDONATION

20. The Applicant lodged an application for condonation for late filing of the application for reconsideration in terms of section 230 of the FSR Act. The basis of the application for condonation is that the Applicant only became aware of the Second Determination of 20 August 2020 on 14 April 2021. It was only when his attorneys of record were made aware by the offices of the Ombud.

21. The attorneys of the Applicant enquired from him on whether he was aware of the Second Determination. He responded that he was not aware. According to the Applicant, the Ombud did not contend that the Applicant was aware of the Second Determination. It appears to be common cause between the parties that the Applicant had no knowledge of the existence of the Second Determination. The Applicant submitted that since it was no fault of his that he became aware of the Determination only on 14 April 2021, the time period provided for in section 230 of the FSR Act, only commenced on 14 April 2021.

22. After having considered the submissions of the parties, we are of the view that there is no need for condonation because the time period only commenced on 14 April 2021. Therefore, the application for consideration was lodged in time.

GROUNDS FOR RECONSIDERATION

23. The panel notes that the Applicant is raising similar grounds that were in

the initial application for reconsideration dated 12 February 2019. It is apparent from the First Decision of the Tribunal that procedural aspect of the grounds was noted but not assessed and determined.

24. The Applicant refers to succinct grounds of appeal and proceeded to list at least twenty (20) grounds which touches on different aspects of the matter. We shall proceed to consider those aspects in this Decision.

LEGAL FRAMEWORK AND ANALYSIS

Procedural fairness

25. Section 20(3) and (4) of the FAIS Act captures the objective of the office of the Ombud, same states that: -

26. *"(3) The objective of the Ombud 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 the 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 this Act.

(4) When dealing with complaints in terms of sections 27 and 28 the Ombud is independent and must be impartial."

27. The aforementioned provisions of the FAIS Act are important in how the

Ombuds executes her functions. Independence and impartiality are basic tenets of our law which are part of what constitute a fair process.[3] Further, the Ombud is constrained by the law when exercising her function.

28. Although the Ombud is required to dispose of complaint in an informal and expeditious manner, everyone has a right to have any dispute that can be resolved by application of the law decided in a fair public hearing before, where appropriate, an independent and impartial form.[4]

29. Mr Bielderman who appeared for the Applicant submitted the Ombud failed to inform the Applicant of issues that were relevant to the Ombud to determine the matter and which the Ombud intended to take into account. On perusal of the record before us, it does not appear that the Applicant was invited to make representations on the detailed information contained in the Recommendation dated 13 April 2018, before same was issued as such to the Applicant. The Ombud stated, amongst other things, in its Notice in terms of section 27(4) of the FAIS Act, that:

"*The Office will after investigating the matter, make a determination, based on the information in its possession. The Office will not revert to you prior doing so.*

Should you fail to respond, the matter will be investigated and determined without your version."

---

[3] National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at par 287(i) – 288(b)
[4] Constitution of the Republic of South Africa Act 108 of 1996, sec 34

30. The record shows that the Applicant did not respond to last the sec 27(4) Notice dated 20 November 2017 and the Ombud's offices commenced with their investigation which resulted to the Recommendation, containing findings. It appears that after the Ombud had completed her investigation and fleshed out or recorded more details to the allegations, the Applicant never had an opportunity put forward his version. For instance, the Ombud refers to inappropriate advice and found that a sufficient link between the alleged inappropriate advice and alleged loss suffered by Respondents existed.[5] This approach does not appear to embrace the tenets of independence and impartiality. Therefore, the procedure in this instance is unfair.[6]

31. Further, the Applicant submitted that the Ombud failed to disclose all information she had obtained in her investigation of the matter and which she intended to hold against the Applicant and allow the Applicant to comment on those issued. According to the Applicant, this is not in line with the *audi alteram partem* rule. Furthermore, the Applicant submitted that Ombud failed to inform him of the issues that concerned the Ombud and which may lead to liability against the him. The record supports the Applicant's submission in this regard because, after her investigation, the Ombud issued her recommendations and eventually the First Determination without the Applicant being informed of the details of the allegations. Our view is that this process does not assist the Ombud in

---

[5] Record B351

[6] **Sharemax Investments (Pty) Ltd & 4 Others (appellants) v GEJ Siegrist and J Bekker (respondents)** at par 17

complying with sections 20(3) and (4) of the FAIS Act.

Ordinary common law principles: Negligence

32. The ordinary common law principles apply where a determination is based on a breach of statutory duty. Further, the appropriate common law rules apply where a determination is based on breach of contract or delict.[7]

33. In the case of ***Atwealth (Pty) Ltd & 2 Others v A Kernick & 2 Others,*** *("Atwealth")*[8] the Supreme Court of Appeal did not agree with the approach that was followed in the court aquo. The court noted that the trial court adjudicated largely on the issue whether the provisions of FAIS Act applied and whether Ms Moolman's advice/conduct amounted to "financial advice" as defined in the FAIS Act. Further, the court noted that it was considered whether she complied with various duties imposed on her by the codes. According to the Supreme Court, this proceeded from the misconception that, if Moolman's conduct could be so classified, liability to compensate Kernicks for their losses follows automatically. The Supreme Court stated that this was wrong as a matter of law.[9]

34. The *Atwealth* case provides guidance on what approach a party must adopt in a matter of this nature to succeed on the requirement of negligence. The learned judge stated that: -

---

[7] **The Ombud for Financial Services Providers v CS Brokers CC & Others (781/2020) [2021] ZASCA 117 (17 September 2021)** at para 19

[8] **(Case no. 116/2018) 2019 ZASCA (28 March 2019)**

[9] Atwealth case, par 19

"[41] In order to lay a foundation for an attack on Ms Moolman's abilities as a financial advisor and on the advice she gave it was essential in the first instance to establish as clearly as possible ***what she told the Kernicks in regard to these investments.*** *That was not done and the topic was not explored with Ms Moolman because of the cross-examiner's exclusive reliance on the FAIS Act and the Codes. Secondly, it called for evidence on behalf of the Kernicks to* ***identify what a reasonably skilled financial service provider would know about products in the market place****; what due diligence they would have done before making a presentation to a prospective client and what sources of information they would have consulted."* (own emphasis)

35. In the final analysis, the true criterion for determining negligence is whether, in particular circumstances, the conduct complained of falls short of the standard of the reasonable person.[10]

36. Further, the learned judge in the *Atwealth* referred to sections 2 and 3 of the Code and noted that these provisions are clearly congruent with the common law duties of a professional investment provider.[11]

37. The *Durr v Absa Bank Ltd & another*[12] , which dealt with a financial services advisor, was considered and referred to in the *Atwealth* case. The learned judge in the *Atwealth* case commented that the difference between *the Atwealth* case and *the Durr* case is striking in that in *the Durr*

---

[10] Sea Harvest Corporation v Duncan Dock Cold Storage (Pty) Ltd 2000 (1) SA 827 (SCA) at 837
[11] Atwealth case, par 35 and 36
[12] Durr v Absa Bank Ltd & another 1997 (3) SA 448 (SCA)

case, the plaintiff called two experts while the defendant called another expert. In *the Atwealth* case, the court stated that it follows that the Kernicks did not discharge the requisite onus of proving that any negligence Ms Moolman may have displayed, by making a presentation without adequate knowledge of the proposed investments, resulted in advice materially different from that which a reasonably competent advisor would have given.[13] In other words, the complainant was found not negligent.

38. Mr Biederman submitted on behalf of the Applicant that the latter denies that the advice was negligent. Further, the Applicant submitted that the Ombud erred by failing to determine the standards to be expected of the Applicant and to test his conduct accordingly.[14] This panel takes guidance from the numerous cases of our courts, and note that no evidence was led by the Respondents regarding what a reasonable financial advisor, possessed of the requisite skills, would have advised them.[15] We are of the view that the Ombud must consider the issue of negligence as applied in cases of this nature.

Ordinary common law principles: Causation

39. The First Determination of the Ombud dated 6 August 2018 stated, amongst other things, that had the Applicant truly appreciated what he was advising the Respondents to invest in, he would have steered them

[13] Atwealth case, par 54 and 55
[14] Record A24 -25
[15] *Atwealth* case at par 53, *Durr* case, *Sea Harvest Corporation* case at 837

in a different direction. According to the Ombud, not only was the loss to investors reasonably foreseeable, it was inevitable. The Applicant denied that the loss was caused (factual and legal causation) due to the alleged negligent advice.

40. In a recent case of ***Symons N.O. & Another v Rob Roy Investments CC t/a Assetsure*** *("Symons N.O),*[16] in a matter that deals with Sharemax investments, the learned Judge Ploos van Amstel stated the following in respect of causation:

"[59] If it can be said that on a factual level Griffin's failure to explain the risks adequately was a conditio sine qua non of the plaintiffs' loss (which I do not consider to be the case) then the question of legal causation arises, as factual causation on its own is not enough. In Standard Chartered Bank of Canada Corbett CJ said in order to determine legal causation one has to consider whether the act was linked sufficiently closely or directly to the loss for legal liability to ensue, or whether the loss is too remote. He said the test to be applied is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a novus actus interveniens, legal policy, reasonability, fairness and justice all play their part." (own emphasis)

41. The risks raised in *the Symons N.O* case appear to be similar to the risk raised in this matter. The learned judge considered the risks and expressed the view that: -

[16] 2019 (4) SA 112 (KZP)

"[60] The loss suffered by the plaintiffs does not seem to me to be linked sufficiently closely or directly to any failure on Griffin's part to explain the risks of the investment to Symons. Those risks had nothing to do with the intervention by the Reserve Bank, which the plaintiffs do not contend should have been foreseen by Griffin.

[61] It follows that even if it can be said that Griffin failed in his duty to understand the scheme better and to explain the potential risks to Symons, any such breach was not causally connected to the plaintiffs' loss" (own emphasis)

42. We are of the view that the Ombud should consider the issue of causation, more particularly the impact of the *Symons N.O* case on the current case. In other words, the Ombud should consider investigating the aspect of causation as it is relevant.[17]

RECONSIDERATION IN TERMS OF SECTION 234(1)(a)

Applicant's submissions

43. The Ombuds delivered reasons for her findings after further consideration of the matter. These reasons and findings are considered herein as Second Determination.

44. The Applicant has approached this Tribunal and submitted what he had considered succinct grounds, which were considered hereinabove. Further, the Applicant approached this Tribunal to challenge the Second

[17] *Atwealth* at par 50

Determination. It is the submission of the Applicant that the Decision of the Tribunal dated 9 August 2019 is decisive and dispositive of the matter.

45. Further, the Applicant submitted that the Second Determination is fatally flawed as it simply attacks the jurisdiction of the Tribunal.

46. Further, the Applicant states that the Ombud concludes that the Tribunal cannot deal with the matter as an appeal forum or in any manner that allows the Tribunal to challenge the factual findings of the of the Ombud or the legal principles as applied by the Ombud.

47. Furthermore, the Applicant submitted that the Ombud has not reconsidered the complaint in light of the findings of the Tribunal in terms of section 234 of the FSR Act. According to the Applicant, the Ombud is obliged to do so. It has failed to exercise its statutory duty.

48. The Ombud had not considered or reconsidered or interfered with the Tribunal's factual and legal findings in the Decision. Further, the Applicant submitted that the Ombud implied that the Decision is wrong in so far as the Tribunal differed from her findings and was not bound by the findings.

49. Further, the Applicant submits that this Tribunal has the power under section 28 of the of the FAIS Act, read with section 230 of the FSR Act, to consider factual, legal, and procedural issues in the Ombud's First Determination.

Legislative framework

50. The Tribunal derives its authority to deal with determinations of Ombud

from section 28 of the FAIS Act, read with section 230 of the FSR Act. Although the FAIS Act refers to the notice of appeal to the Board of Appeal, the latter has been abolished and the Tribunal is now in place in terms of the FSR Act.

51. Section 232 of the FSR Act provides a framework for proceedings for reconsideration of decisions. The same provisions, more specifically section 232(4), states that in the proceedings for reconsideration of a decision, the panel is not bound by the rules of evidence, but may, subject this section, inform itself of any relevant matter in any appropriate may.

52. Section 234 of the FSR Act provides for the kind of orders that could be made by the Tribunal. The Tribunal can only make decisions that falls within the provisions of this section.

53. Section 235 provides for review of Tribunal orders. In other word, any party to the proceedings of reconsideration of a decision who is dissatisfied with an order of the Tribunal, may institute proceedings for a review of the order in terms of the Promotion of Administrative Justice Act or any applicable law.

54. On consideration of the Second Determination, it does not appear that the Ombud had further considered or investigate the issues raised in her First Determination in light of the First Decision of the Tribunal.

55. It is our view that the Ombud must consider the issues raised in this Decision, which include aspects of procedural fairness, the consideration

of negligence and causation.

56. Further, it is a great concern that this matter has been pending for a period of not less than ten years and the parties involved are senior citizens. It is in the interest of all parties to bring finality to the matter.

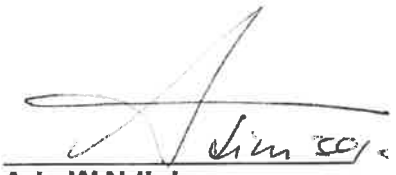
57. It is our view that it is necessary to consider the provisions of 235 of the FSR Act, should any parties feel aggrieved by the decision of this Tribunal.

58. For reasons stated above the application for reconsideration is successful.

ORDER

(a) The reconsideration in terms of section 234(1)(a) of the FSR Act dated 20 August 2020 is set aside and the matter is remitted to the decision-maker for further consideration.

Signed on behalf of the Tribunal



Adv W Ndinisa

With the Panel consisting also of:

Mr PJ Veldhuizen

Adv SM Maritz